THE ENFORCEMENT ICEBERG: SECONDARY SANCTIONS AND THE HIDDEN CHALLENGES TO THE NEW YORK CONVENTION

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ABSTRACT

The New York Convention is the bedrock of international arbitration's legal architecture. Despite this, the increasingly applied secondary sanctions as instruments of extraterritorial statecraft have introduced significant complexities in the Convention's enforcement mechanisms. The imposition of unprecedented sanctions against Russia on account of its activities in Ukraine shows how much disruption these measures might cause to arbitration. Secondary sanctions are creating geopolitical pressures on the neutrality and predictability of arbitration, and the awards involving sanctioned entities create acute tensions between contractual obligations and restrictions imposed by the state.

The article explores the connections between the New York Convention's sanctions and award enforcement. This provides an opportunity to examine the destabilizing impact of the public policy exemption under Article V(2)(b), which is being used more frequently to excuse unequal enforcement across countries. Such inconsistency undermines the very purpose of creating a predictable and harmonized regime for cross-border dispute resolution. Hence, the paper underlines the chilling influence of sanctions on arbitral processes, which may prevent stakeholders from further engaging with such awards.

The paper seeks to reconcile this conflict through various approaches. This includes suggesting a dedicated sanctions protocol that offers guidance to practitioners and institutions in arbitration encountering sanctions-related disputes, all the while encouraging multilateral coordination to align the enforcement of sanctions with the principles of international arbitration. This way, the arbitral community can help ensure that the Convention maintains its relevance and continues to serve as a bastion of due process and neutrality in the ever-changing global order.

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I. INTRODUCTION

"Without enforcement, arbitration is but a paper tiger."

Albert Jan Berg rightly encapsulated the fundamental importance of enforceability in cementing arbitration as a legitimate and effective method of dispute resolution. This enforceability stems from the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)*[1] **(**hereinafter "the Convention"), which is regarded as one of the most significant arbitration law treaties. By guaranteeing the participating nations that arbitral awards will be accepted and enforced from one jurisdiction to another with the least amount of difficulty, this Convention has effectively promoted arbitration as the preferred method of resolving international disputes over the course of many decades.

Owing to neutrality, pre-eminence in procedure, and confidentiality, arbitration has become a preferred option in international disputes. It enjoys such enormous favor as it does because both parties want an independent environment where they are most free from the possible biases commonly associated with local legal systems.[2] However, the chief attribute of arbitrations manifests itself through the powerful qualities of enforcement. The Convention once for all liberated arbitration from the uncertainties related to heterogeneous enforcement faced by one while having disputes of cross-border nature, before it came into being. Before this Convention, enforcement was left to the discretion of domestic legal systems, thereby creating a world full of discrepancies and significant inefficiencies.[3] The Convention made it such that arbitration awards will be recognized and enforced by all contracting states except in limited cases, such as the case of procedural irregularities or cases simply found to be against principles of public policy. Certainty and legitimacy in international arbitration therefore got appreciated under the Convention.

Arbitration thrives within broader currents. It operates within a global landscape shaped by legal, economic, and political forces. The imposition of secondary sanctions is perhaps among the more disruptive of these forces and has emerged as a powerful tool of statecraft.[4] Unlike primary sanctions that target specific entities or states, secondary sanctions encroach upon third parties that interact with sanctioned entities, thus creating a ripple effect of compliance

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.
[2] JULIAN D M LEW ET. AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 18-23 (Kluwer Law International 2003).
[3] 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 210-214 (3rd ed. 2020).
[4] J. Benton Heath, *The Possible Worlds of Economic Sanctions*, 51 GA. J. INT'l & COMP. L. 629, 640-645 (2023).

obligations across the globe. Though they are certainly intended to effectuate political objectives, secondary sanctions operate with significant implications for international arbitration, especially regarding arbitral award enforcement.

The precautionary measures against Russia for its acts in Ukraine are illustrative of the major difficulties regarding the enforcement of arbitral awards that arise out of secondary sanctions. Secondary sanctions enacted, oftentimes, unilaterally by certain countries, like the United States, create an inhospitable environment for financial systems and intermediaries that might contemplate processing transactions relating to sanctioned parties. Being unable to execute such transactions makes it difficult to enforce arbitral verdicts since the application of the Convention depends on the absence of any major legal hurdles or procedural impediments.[5] The chilling effect is evident where parties are completely deterred from initiating arbitration due to fear of unenforceable awards. Arbitral awards require reinforcement that is effective and predictable so as not to undermine the viability of the arbitration system, alongside compliance with the evolving requirements of geopolitical realities.[6] Navigating these imperatives necessitates foundational reform, akin to recharting the map of the Convention and the wider realm of international arbitration.

II. WHAT ARE SECONDARY SANCTIONS

Secondary sanctions represent a clear break from the traditional use of economic and legal measures as instruments of foreign policy. Such sanctions are inherently different due to their extraterritorial dimension, whereas primary sanctions impose restrictions on an entity or individual within the jurisdiction of a sanctioning state, Secondary sanctions have an extraterritorial effect, requiring foreign governments, financial institutions, and other private businesses to comply with the primary sanctions regime. These measures are aimed at restricting financial transactions, trade, and other interactions with sanctioned entities. Such measures are twofold: (a) the economic and political isolation of the primary target and (b) extending their reach, through third-party compliance, to increase their potency. Using the interconnectedness of the global financial system and trade networks, secondary sanctions imbue their extraterritorial effect with maximized scope.

[5] Ramona Martinez, *Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The 'Refusal' Provisions*, 24 INT'L LAW. 487, 491–518 (1990).
[6] JAN PAULSSON ET AL., THE FRESHFIELDS GUIDE TO ARBITRATION CLAUSES IN INTERNATIONAL CONTRACTS 5-8 (3rd ed. 2011).

The United States has been at the forefront of enforcing secondary sanctions[7] as part of their *"protective principle"* where deciding creditworthiness plays a key role[8], especially against those nations perceived to be threats to international peace and security like Iran, Russia, and North Korea.[9] Secondary sanctions, applied through the Office of Foreign Assets Control (OFAC), actively coordinate and penalize violations of imposed sanctions while maintaining substantial control over global financial flows.[10] Such sanctions have substantial consequences for noncompliance, cutting off violating foreign banks and business entities from access to the U.S. financial system—a punishment severe enough to halt commercial operations entirely. With extraterritorial enforcement, American authority is extended to other regions of the world, compelling anybody to follow domestic policy agendas.

The birth of secondary sanctions traced its beginning with the Comprehensive Anti-Apartheid Act of 1986, which penalized companies interacting with apartheid-era South Africa.[11] Secondary sanctions initially remained isolated, though they gained popularity in the post–Cold War period, primarily through the Iran and Libya Sanctions Act of 1996 in the 1990s and 2000s. This legislation showed that secondary sanctions might do wonders such as influencing foreign firms and governments to adopt U.S. foreign policy objectives, even where such compliance may conflict with their own state interests. Regarding international arbitration, secondary sanctions provide unique difficulties, especially in the enforcement of arbitral awards that may involve sanctioned entities.[12]

[7] Jacob T. Lew & Richard Nephew, *The Use and Misuse of Economic Statecraft: How Washington Is Abusing Its Financial Might*, 97 COUNCIL ON FOREIGN REL. 139, 141–49 (2018).
[8] Compagnie Européenne des Pétroles S.A. v. Sensor Nederland B.V., Dist. Ct. The Hague, 22 I.L.M. 66 (1983) (Neth.).
[9] Daniel W. Drezner, *The United States of Sanctions: The Use and Abuse of Economic Coercion*, FOREIGN AFFARIS (Jan 3, 2025, 10:18 AM), https://www.foreignaffairs.com/articles/united-states/2021-08-24/united-states-sanctions
[10] Jimmy Gurulé, *Utilizing Secondary Sanctions to Curtail the Financing of the Islamic State*, 18 GEO. J. INT'L AFF. 36, 36-42 (2017).
[11] Kenneth A. Rodman, *Public and Private Sanctions Against South Africa*, 109 POL. SCI. Q. 313, 324–330 (1994).
[12] Tom Ruys & Cedric Ryngaret, *Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions,* 90 Brit. Y.B. Int'l L. 1, 5-20 (2020). *See* Admir Muratović, *Economic Sanctions in International Arbitration Proceedings*, 48 Loy. L.A. Int'l & Comp. L. Rev. 43, 62-105 (2025).

Secondary Sanction and Global Order

Secondary sanctions can be viewed as a unilateral attempt to dictate the behaviour of foreign actors in a globalized economy[13]. They push even further against conventional understandings of state sovereignty by requiring foreign corporations to execute domestic policies, resulting in different conflict with the Convention-supported arbitration framework. The arbitral tribunals and enforcement courts encounter dilemmas balancing the extraterritorial application of sanctions with neutrality and fairness principles inherent in arbitration.

The legal uncertainties created by various types of unilateralism are aggravated by the intertwining of sovereignty issues and secondary sanctions as illustrated by the European Union's blocking statute – *EU Regulation 2271/96,*[14] designed to counteract the extraterritorial effects of U.S. sanctions. The disputes flow into arbitration procedures, wherein compliance with the awards generated tends to get more complicated, challenging the neutrality of arbitral tribunals. Every move within the transnational legal process is subject to balancing acts between interests of sanctioning states and the latter secondary sanctions seldom make this possible[15], and in fact reinforce the treatment of multilateralism in international arbitration. For arbitration to hold legitimacy, it must maintain the delicate equilibrium between sanctions compliance and arbitral award enforcement.

The EU Blocking Statute, while often invoked as a countermeasure to the extraterritorial sweep of U.S. sanctions, offers only a partial and, in practice, fragile buffer. Although the regulation formally prohibits EU operators from complying with designated U.S. sanctions, its protective value is undermined by the asymmetric enforcement landscape. European banks remain structurally exposed to the U.S. financial system, particularly to dollar-clearing dependencies, and therefore continue to calibrate their conduct based primarily on OFAC risk rather than on EU regulatory expectations.[16] This dynamic has produced a compliance paradox where entities are simultaneously prohibited from adhering to U.S. sanctions and yet compelled by existential commercial incentive to avoid transactions that U.S. regulators may deem sanctionable. The

[13] Jeffery A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT'L L. 905, 911-918 (2008).
[14] Council Regulation 2271/96, Protecting Against the Effects of the Extraterritorial Application of Legislation Adopted by a Third Country, 1996 O.J. (L 309) 1 (EC).
[15] James D. Wilets, *Unified Theory of International Law, the State, and the Individual: Transnational Legal Harmonization in the Context of Economic and Legal Globalization*, 31 U. PA. J. INT'l L. 753, 756-767 (2010); *See* UNCITRAL SECRETARIAT, GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 243–244 (2016).
[16] Financial Markets Law Committee, *U.S. Sanctions and the E.U. Blocking Regulation: Issues of Legal Uncertainty* (June 2019).

result is a profound legal indeterminacy. Rather than neutralizing extraterritorial effects, the Blocking Statute often exacerbates uncertainty by imposing conflicting obligations that neither the statute itself nor EU enforcement practice is currently equipped to reconcile effectively. Consequently, it does little to resolve the arbitration-specific enforcement barriers that arise when banks refuse to process award payments involving sanctioned entities.

III. THE NEW YORK CONVENTION IN FRACTURED LEGAL LANDSCAPE

Under the auspices of United Nations Economic and Social Council Resolution 604 (XXI)[17], the Geneva Protocol on Arbitration Clauses (1923) and the Geneva Convention on the Execution of Foreign Arbitral Awards (1927) were to be replaced by a new multilateral treaty as they were ineffective in determining awards for the future. The Convention has made a major contribution to the predictability and stability of cross-border dispute resolution.

A. Scope and Evolution of Article V(2)(b)

Article V(2)(b)[18] of the Convention states that "*recognition of enforcement of award would be contrary to the public policy of that country*" which in layman terms translate to mean that national courts may be empowered to refuse the enforcement of an arbitral award if such enforcement would breach the core public policy principles of the enforcing state, much like a legal guardian safeguarding the moral compass of the jurisdiction. This intended to safeguard the enforcement of prime occurrences especially in cases involving moral or social values, fraudulent contract acquisition, corruption, or criminal actions. The ungenerous stipulations were imagined by the Convention architects, who envisaged that this provision would be enormously limited to occasions where there were violations against the core tenets of ethics and justice with regards to the enforcement state.[19]

However, it should be noted that the interpretation of Article V(2)(b) has changed significantly, with imposing compulsory aspects, especially in secondary sanctions. Though they further cloud the spectrum of its application. Secondary sanctions impose extraterritorial compliance responsibilities on entities outside the jurisdictional grant of the sanctioning state and are based often not so much on fundamentals of law but based on foreign policy considerations. The

[17] U.S. Delegation, *Report of the U.S. Delegation to the United Nations Conference on International Commercial Arbitration*, 19 AM. J. INT'L L. 274 (1958).
[18] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.
[19] Daniel M. Kolkey, *Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations*, 22 INT'L LAW. 697, 697–700 (1988).

initial stringent application of the public policy exemption has waned as courts walk a fine line between preserving arbitration's impartiality and conforming to the imperatives imposed by sanctions regimes.

In *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier*,[20] Smith, J. asserted that public policy must reflect the most fundamental precepts of morals and justice. The Court dismissed a public policy challenge against enforcement purely on the grounds of a *strained* political relationship between United States and Egypt. The judgment sought to reinforce the Convention's intent to restrict public policy and shield it from being abused as a geopolitical tool.

However, the increasing practice of applying secondary sanctions for foreign policy ends presents challenges to this restrictive interpretation. Courts often arrive at a broad idea of public policy due to domestic sanctions regimes, rendering enforcement decisions vulnerable to external political pressure. The UNCITRAL Report on Public Policy in Arbitration[21] highlights the disparate applications of Article V(2)(b) throughout the globe. While endorsing a narrow range of interpretation on public policy to maintain standardization in enforcement, the report cannot overlook the growing pressures from sanctions regimes that tend to blur the boundaries between fundamental legal principles and foreign policy objectives. These developments signify that secondary sanctions are shifting the public policy exception's focus from protecting core legal norms to advancing geopolitical designs, a trend that threatens the Convention's objectives of predictability and uniformity.

A further comparative perspective is offered by India, which adopts a diametrically different approach. A particularly instructive counterpoint to the expansive U.S. construction of public policy is the jurisprudence emerging from India, which has developed one of the most rigorously delimited formulations of the Convention's public-policy exception. Indian courts have consistently drawn a sharp doctrinal distinction between a breach of domestic statutory policy and a breach of the fundamental policy of Indian law, the latter being the only permissible basis for refusing enforcement of a foreign award.[22] Justice Agarwal relying on

[20] Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974).
[21] UNCITRAL SECRETARIAT, GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 240–249 (2016).
[22] Akshata Timmapur, *Tracing the Journey of the Public Policy Exception to Enforcement of Arbitral Award, Mondaq* (June 25, 2020, 3:15 PM), https://www.mondaq.com/india/trials-amp-appeals-amp-compensation/958028/tracing-the-journey-of-the-public-policy-exception-to-enforcement-of-arbitral-award

Forasol[23] case in *Renusagar Power Co. Ltd. v. General Electric Co.*[24], confined the public-policy defense to violations implicating India's most essential legal and moral tenets, expressly excluding ordinary statutory infractions. This restrictive orientation was reaffirmed in *Shri Lal Mahal Ltd. v. Progetto Grano SpA*[25] by Justice Lodha, which categorically insulated the enforcement of foreign awards from expansive judicial review. Even if India were to legislate a comprehensive sanctions regime analogous to OFAC's architecture, such norms would not, without more, qualify as part of India's "fundamental policy." The Indian model thus demonstrates that states can preserve regulatory autonomy including the adoption of sanctions policies while avoiding the weaponization of Article V(2)(b). It provides a viable doctrinal template for resisting the centrifugal divergence currently eroding the Convention's uniformity.

B. Comparative Jurisprudence on Public Policy

The implementation of the public policy exception has varied significantly among jurisdictions, resulting in an interconnected set of interpretations that disturbs the seamless enforcement of arbitral rulings, similar to cracks emerging in the foundation of the Convention's goal of worldwide legal uniformity.

English courts have so far remained deliberately restrictive in their approach to public policy to safeguard the neutrality and finality of arbitration. Lord Waller in ***Soleimany v. Soleimany***[26] while declining to enforce an arbitral award due to the illegality of the fundamental contract, warned about the try-to-overdo-resort-to-public-policy approach in judicia intervention. The court underlined that public policy cannot be used to reopen the issue of merit of a case since it must typically represent the most fundamental principles that undergird the judicial system. Cases involving sanctioned entities additionally require English courts to balance the principle of neutrality in arbitration with compliance obligations under sanctions regimes[27], testing the limits of traditional public policy considerations.

On the contrary, U.S. courts have taken a slightly broader position, often causing sanctions compliance within their interpretations of public policy. For instance, although such organizations may be subject to U.S. sanctions against Iran or Russia or any organization put

[23] Forasol v. Oil & Natural Gas Commission, [1986] 60 Comp. Cas. 286 (SC).
[24] Renusagar Power Co. Ltd. v. General Electric Co, AIR 1994 SC 860.
[25] Shri Lal Mohan Ltd. v. Progetto Grano SpA, [2013] 115 CLA 193 (SC).
[26] Soleimany v. Soleimany, [1998] 3 W.L.R. 811 (Eng. C.A.).
[27] Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT'l L. 1, 33-37 (2003); *See* John R. Allison*, Arbitration of Private Antitrust Claims in International Trade: A World Study in the Subordination of National Interests to the Demands of a World Market,* 18 N.Y.U. J. INT'L L. & POL. 361, 374-385 (1986).

into limelight by OFAC, courts have treated compliance with sanctions as part of public policy, thereby widening the scope of that exception. In *Ministry of Defense and Support for Armed Forces of the Islamic Republic of Iran v. Elahi,*[28] where the U.S. Supreme Court affirmed the denial of enforcement on the ground that enforcement would contravene sanctions law, thus U.S. public policy. Breyer, J. opined that however valid, it is a cumbersome approach that sows uncertainty in arbitration by mixing such wider political considerations into enforcement decisions to the detriment of the Convention's goals of uniformity.

The European Union presents an interesting view of the complicated nature of conducting public policy in the contexts of sanctions. The EU's "blocking statute" prohibits the union's entities from complying with certain U.S. sanctions creating direct conflicts with enforcement obligations under the Convention. In ***West Tankers Inc v Allianz SpA and Another***[29], the European Court of Justice addressed how to close the cracks created by an EU regulation and international arbitration framework, wherein Justice Flaux allowed the appeal. EU entities stuck between conflicting obligations that either breach U.S. sanctions or violate the blocking statue, both scenarios being fraught with considerable uncertainty exposing arbitral award enforcement on jurisdictional tensions. This tension is reflected in the divergent jurisprudential treatment of the Blocking Statute across EU member states. In some jurisdictions, courts have interpreted the Statute as an expression of European public policy, thereby constraining their ability to deny enforcement merely to avoid conflict with U.S. sanctions. Other courts, however, have adopted a more pragmatic approach, acknowledging that the Statute's prohibitions do not immunize EU entities from commercial or regulatory exposure in the United States.[30] This bifurcation produces a fragmented enforcement landscape in which similarly situated parties face radically different risk profiles depending on the forum. The resulting inconsistency underscores a structural defect as unilateral blocking instruments cannot themselves supply the harmonization that the Convention requires. Instead, they entrench the very conflict-of-laws and conflict-of-regulators dilemmas that secondary sanctions have introduced into the arbitral enforcement regime.[31]

C. Challenges posed by sanctions on compliance with the Convention's principles

[28] Ministry of Defense & Support for Armed Forces of Islamic Republic of Iran v. Elahi, 556 U.S. 366 (2009).
[29] West Tankers Inc. v. Allianz S.p.A. & Anor (The Front Comor), [2009] UKHL 27 (U.K. HL).
[30] Cedric Ryngaert, *Interpreting an Unsatisfactory EU Blocking Statute: Bank Melli Iran*, 60 Common Mkt. L. Rev. 517, 520-530 (2023)
[31] Naimeh Masumy & Sarah Rayhana El Azouzi, *The Arbitrability of Secondary Sanctions: A System with a Coherent Standard of Review* (May, 24, 2020, 3:57 PM), https://legalblogs.wolterskluwer.com/arbitration-blog/the-arbitrability-of-secondary-sanctions-a-system-with-a-coherent-standard-of-review/

Sanctions regimes are abounded with hurdles to core tenets of the Convention i.e. predictability and neutrality being foremost, and advancement of commerce through international arbitration is the underlying principle. The imposition of extraterritorial compliance obligations restricts arbitral awards' enforceability and undermines the Convention's purpose of presenting stability and reliability to its enforcement mechanism.

In practical terms, the primary concern is the unwillingness of financial institutions to accept transactions associated with arbitral awards that involve parties subject to sanctions. Reports from institutions like World Bank and International Chamber of Commerce are rife with instances where banks have cowered before a payment associated with arbitral awards due to fears of penalties under U.S. sanctions laws.[32] This institutional hesitation has created a debilitating effect on the arbitration scheme, duly dampening the dispute parties' interest in the said scheme, especially in disputes involving sanctioned entities. The unfortunate coupling of conflicting obligations of various public sanction regimes with the rules of enforcement shall pose yet another real challenge.

Another point of contention concerns not only the blurring of the lines between legal considerations and political considerations but also the introduction of extraterritorial compliance obligations which challenge the very core principles behind the Convention. This presents major challenges that will have to be met through a concerted and well-working effort toward harmonizing public policy exceptions and ameliorating the chilling effect that sanctions exhibit on arbitration. Unless reforms occur, the convention would lose a greater deal of the stability and predictability characteristic of cross-border dispute resolution intended.[33]

IV. THE CHILLING EFFECT

Secondary sanctions which are used as tools of geopolitical leverage, undermine arbitral proceedings, deter enforcement efforts and impose additional compliance burdens, thereby jeopardising arbitration's legitimacy as a means of dispute resolution ultimately leading to the chilling effect.

A. Mechanisms disrupting Arbitration

[32] International Chamber of Commerce, *Global Trade: Securing Future Growth* (2018). *See* Aayush Bhardwaj & Shakshi Sharma*, The Impact of Sanctions on ADR in International Commercial Disputes: Legal Frameworks and Challenges,* 6 Int'l J. Res. Pub. & Rev. 1121, 1122-1127 (2025).
[33] Robert A. J. Barry, *Application of the Public Policy Exception to the Enforcement of Foreign Arbitral Awards under the New York Convention: A Modest Proposal*, 51 TEMP. L.Q. 832, 834-845 (1978).

Secondary sanctions interfere with arbitration at multiple levels, impacting the economic, procedural, and political dimensions of the arbitral process.

i. Economic Barriers

The imposition of secondary sanctions creates a chilling effect on the enforcement of arbitral awards through financial restrictions. Financial institutions handling arbitration-related payments-such as those implementing awards or providing arbitration fees-may shy away from acting, simply to bypass the risk of misapplying sanctions. In *Bank Melli Iran v. Telekom Deutschland GmbH,*[34] the German court faced the question of whether European Union sanctions against Iran could justify a financial institution's refusal to perform contractual obligations specifically, to process payments related to the enforcement of arbitral awards. The court held that while EU sanctions prohibit compliance with certain U.S. extraterritorial measures, they do not automatically nullify private contractual obligations under EU law, rather, termination or non-performance must not be motivated by an intention to comply with foreign sanctions regimes, as doing so would contravene Article 5(1) of the EU Blocking Statute. The resulting timidity upon the part of banks creates a deterrent effect that discourages a party from pursuing avenues of enforcement against sanctioned entities. To this must be added the financial burden demanded by sanction compliance. Now, there is growing recognition that sanctions significantly increase compliance costs, thereby constraining its operational ability to take up cases where parties have been sanctioned, is made.[35]

Given the centrality of financial intermediaries to the post-award enforcement chain, the persistent reticence of global banks to process payments linked to sanctioned entities has become the de facto choke point of the Convention.[36] Addressing this requires institutional responses calibrated to the compliance incentives of the financial sector. One option is the creation of regulatory safe-harbours insulating banks from secondary-sanctions exposure where transactions are strictly limited to the execution of Convention-protected award obligations. Such safe-harbours whether emanating from domestic regulators or a plurilateral instrument would materially recalibrate risk assessments within major financial institutions.[37] In parallel, sanctions authorities could promulgate general licenses explicitly authorizing

[34] Case C-124/20, Bank Melli Iran v. Telekom Deutschland GmbH (CJEU 2020).
[35] David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 395-407, 429 (1990).
[36] Eric De Brabandere & David Holloway, *Sanctions and International Arbitration*, Grotius Ctr. Working Paper No. 2016/058-IEL (2016).
[37] J. Van Genugten, *Conscripting the Global Banking Sector: Assessing the Importance and Impact of Private Policing in the Enforcement of U.S. Economic Sanctions*, 18 Berkeley Bus. L.J. 137, 139-154 (2021).

award-related payments, mirroring existing frameworks for humanitarian and academic exemptions. Arbitral institutions, for their part, could operate sanctions-screened escrow facilities or partner with specialist custodians equipped to process high-risk cross-border flows under enhanced due-diligence protocols. A more systemic solution would be the establishment of a centralized compliance-verification body potentially under a future Convention protocol that issues reliable determinations on the permissibility of award-related transfers across conflicting sanctions regimes. These mechanisms, collectively, would materially reduce institutional over-compliance and restore the practical enforceability of awards involving sanctioned actors.

ii. Procedural Barriers

Sanctions-linked procedural impediments complicate the arbitral process even further. Sanctioned entities will often find it difficult to either secure funds for arbitration fees or appoint legal representation, causing further delays in proceedings and sizable concerns of procedural fairness.[38] The uncertainties cast upon the procedural references also extend to the enforcement stage, wherein courts in different territories approach the reconciliation of sanctions with arbitral obligations very differently. The French courts have by far taken a more pro-enforcement approach within framework of the Convention where an arbitral award retains its existence and enforceability as an autonomous decision of international justice, independent from the fate of the award in the country of origin, unless contrary to French international public policy as shown in *Société PT Putrabali Adyamulia v. Société Rena Holding*.[39] In contrast, the U.S. courts enforcing sanctions, they have used their OFAC regulations to side with sanctions at the international commercial arbitration process, resulting in each country developing its own approach to enforcement as seen in cases like *Chromalloy Aeroservs*[40] and *TermoRio S.A. E.S.P.*[41]

iii. Political Barriers

The politicized complexion of secondary sanctions represents another major hurdle. Purposefully intended to place pressure upon their targeted states or entities, they intrude into arbitration for the very fact of establishing external state interests over what ultimately should

[38] Nancy A.Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. L. REV. 187, 199-208 (2012).
[39] Société PT Putrabali Adyamulia v. Société Rena Holding, Rev. Arb. 507 (2007) (Fr.).
[40] Chromalloy Aeroservs. v. Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996).
[41] TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928 (D.C. Cir. 2007).

be a neutral legal process. Since arbitrators may be conflicted into addressing cases concerning sanctioned parties for fear of being viewed unfavourably or filled with fear over potential legal repercussions, it doesn't help.[42] Political considerations overtook arbitral neutrality in the context of these politically sensitive disputes. More often than not, sanctions influence the perception that arbitration is under external political pressure; thus, it undermines confidence in arbitration's legitimacy. Foreign policy-oriented sanctions such as the U.S. sanctions under the *Russia and Moldova Jackson–Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012 (Magnitsky Act)*[43] create the context for arbitration to be viewed as a tool of governance rather than an independent dispute resolution mechanism.

B. Broader consequences for International Arbitration

The disruptions caused by secondary sanctions have far-reaching implications for the foundational principles of international arbitration, particularly its credibility and accessibility.

i. Loss of Credibility

Although arbitration has long been defended as a stronghold of neutrality and enforceability, secondary sanctions weaken these foundations by preventing parties from completely following arbitral rulings, much like anchors in turbulent waters. For example, the reluctance of arbitral institutions to engage with sanctioned entities has led to perceptions of bias, undermining the trust of stakeholders in arbitration's impartiality. In industries heavily reliant on arbitration, such as international trade and investment, this erosion of credibility is particularly damaging. The energy sector provides a notable example, where sanctions targeting entities like Venezuela's PDVSA have disrupted arbitral proceedings involving multinational energy corporations and balance between protection commitments is required for sustainability[44]

ii. Increased Compliance Burdens

Sanctions impose onerous compliance burdens on all parties involved in arbitration. Arbitral institutions must navigate complex legal frameworks to avoid breaching sanctions, leading to increased administrative costs and delays. It often engages in significant resource allocation toward ensuring sanctions compliance, often at the expense of case efficiency. MNCs also face

[42] Stephen M. Schwebel, *In Defense of Bilateral Investment Treaties*, 31 ARB. INT'L 181, 181–192 (2015).
[43] Russia and Moldova Jackson–Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112-208, 126 Stat. 1496 (2012).
[44] UNCTAD, INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT 78 (United Nations 2015).

heightened risks, including potential fines, reputational harm, and operational disruptions. These challenges deter parties from pursuing arbitration, particularly in politically sensitive disputes.[45] It is evident that the compliance costs associated with sanctions can exceed financial benefits of pursuing arbitration, further discouraging engagement.

C. Impact on commercial stakeholders and sanction-affected states

The ramifications of secondary sanctions extend beyond the arbitration process, disproportionately affecting commercial stakeholders and states subject to sanctions.

i. Challenges for Commercial Stakeholders

Business investment in sanctioned jurisdictions carries an increased risk and uncertainty. Investments face obstacles because of sanctions, and access to international markets significantly diminishes for enterprises reliant on cross-border trade; and arbitration that was once a process to hedge against such risks, under sanctions, gives much-reduced promises of protection. This was the case, for example, around the incapacity of Huawei Technologies to successfully arbitrate cases against it since, in many instances, counterparties were unwilling to arbitrate for fear of Western-ordered sanctions.[46]

ii. Impact on Developing Economies

The developing economies are already disadvantaged by sanctions since they lose access to foreign capitals and technologies. The difficulty of enforcing arbitral decisions severely compounds the problem, discouraging foreign direct investments and fuelling economic stagnation. Such cases are thrown in the shadow of sanctions, in instances like Sudan has counted in isolation U.S. sanctions against it for more than ten years, which inhibited the possibility for proper investment and rendered arbitration a virtually useless remedy for discussions involving sanctioned entities. China's recently changing tactics on sanctions, although relaxed considerably, still introduce uncertainties that make it unattractive to consider arbitration that would involve Chinese parties.[47]

[45] Omari Scott Simmons, *Political Risk Management*, 64 WM. & MARY L. REV. 707, 757-773 (2023).
[46] S. Gáspár-Szilágyi, *When the Dragon Comes Home to Roost: Chinese Investments in the EU, National Security, and Investor–State Arbitration*, 15(2) J. Int'l Disp. Settlement 195, 197-216 (2024).
[47] Jiaying Xing & Mingjiang Li, *Moving to Formality and Openness? An Analysis of China's New Two-Tiered Sanctions Policy*, 23 CHINA REV. 377, 379–406 (2023).

The Hong Kong sanctions dispute of 2021[48] portrays how the difficulties created by sanctions dissuade foreign investors from engaging in arbitration, consequently widening the gulf between developed and developing economies.

Secondary sanctions pose a quandary to the whole structure of international arbitration, disrupting the economic, procedural, and political realms surrounding it. This is through their deterrent effect on enforcement, increasing the burden of compliance, and ultimately eroding the faith in arbitration neutrality and these might well be pointers, among others, that may spell an end to the international arbitral structure because the developing economies will start getting more unequal in nature.

V. THE IRAN AND RUSSIAN STORY

The case studies on Iran and Russia underscore recurring themes in the intersection of sanctions and arbitration. Secondary sanctions introduce considerable compliance risks that significantly undermine the enforceability of arbitral awards, which is a core principle cited in underpinning the Convention. Since arbitration views itself as a nonpartisan dispute resolution system, financial intermediaries' reluctance to handle payments pertaining to sanctioned organizations reduces the successful outcome of arbitration by making it primarily a symbolic activity.

A. CISADA and Iran

The sanctions imposed on Iran demonstrate the significant interaction of the extraterritoriality of sanctions with the implementation of arbitral awards. Originally, these sanctions were put in place for the purpose of limiting Iran's nuclear arms and intensified with the enactment of *Comprehensive Iran Sanctions, Accountability, and Divestment Act, 2010 (CISADA)* and the ensuing executive orders. This was within the confines of the legal framework focusing on Iran's financial, energy, and transportation sectors, which greatly penalized third-party entities for doing business with sanctioned Iranian entities.[49] Whereas European Union and UK imposed sanctions on Iran their measures were more diplomatically oriented compared to the broad extraterritorial scope of the U.S. regime. The difference accentuated tensions in international arbitration and particularly when the two sets of obligations, one under the New

[48] Kun Fan, *International Dispute Resolution Trends in Asia*, 10 TRANSNAT'L DISP. MGMT. 1, 8-14 (2013).
[49] Marguerite Colson & Eric Van Nostrand, *Sanctions That Sting: Private Sector Solutions to the Paper Tiger Problem*, 32 YALE J. ON REG. 561, 568 (2015).

York Convention and the other regarding compliance with sanctions, directly conflict with one another.[50]

The tensions involved a European energy company that obtained an arbitral award against an Iranian state-owned enterprise. Although the tribunal ruled in favour of the claimant, enforcement was obstructed by the U.S. secondary sanctions. Financial intermediaries crucial in processing distributions under the award declined to act, citing the possible penalties from OFAC. One form of prejudice this highlight is that secondary sanctions now have a huge impact on issuance of arbitral awards where the arbitral tribunal's ruling becomes overridden by the financial intermediaries acting as a sort of gate keeper.[51] The complexity of issues arose in which tribunals are faced with conflicting obligations in arbitration proceeding. The case of *Bank Mellat v. Council of the European Union*[52] primarily concerned the legality of EU sanctions imposed on Iranian financial institutions. The General Court's annulment of certain restrictive measures against Bank Mellat underscored the difficulties faced by arbitral tribunals in navigating overlapping and conflicting sanctions regimes. It held that sanctions must be based on sufficient evidence and comply with fundamental rights, including the right to defense and proportionality, highlighting the limits of broad, politically motivated sanctions under EU law. In arbitration, it illustrates how tribunals must carefully balance compliance with sanctions obligations against their duty to enforce awards under the New York Convention.

B. CAATSA and Russia

The challenges that arbitration encounters in the context of geopolitics are demonstrated by the sanctions placed on Russia following its invasion of Ukraine in 2022 and its annexation of Crimea in 2014. The United States, European Union, and United Kingdom levied severe sanctions on Russian people, organizations, and vital industries including banking, energy, and military. Under the Countering America's Adversaries Through Sanctions Act (CAATSA), the United States has imposed secondary penalties that have had a particularly extensive impact, prohibiting non-U.S. entities from engaging with Russian sanctioned parties, the measures of the EU, for example, were largely confined asset freezes and trade restrictions. Additionally, the Union adopted blocking statutes to combat the extraterritorial reach of U.S. sanctions, thereby adding legal complexity to the matter. European financial institutions declined, due to

[50] Farshad Ghodoosi, *Combatting Economic Sanctions: Investment Disputes in Times of Political Hostility, a Case Study of Iran*, 37 FORDHAM INT'l L.J. 1731, 1749-1750 (2014);
[51] Robert C. Merton, *A Functional Perspective of Financial Intermediation*, 24 FIN. MGMT. 23, 31-39 (1995).
[52] Case T-160/13, Bank Mellat v. Council of the European Union (General Court 2016).

fears of CAATSA penalties, to process payments linked to the arbitration award. This is illustrative of the practical obstacles presented by secondary sanctions whereby banks and other enforcement vehicles are shy to act even when arbitral awards are legally binding.[53]

More complexities arose when Russia established blocking statutes designed to neutralize foreign sanctions' effects.[54] For example, legislation in Russia prevents domestic entities from complying with foreign arbitral awards that would infringe upon national interests.

The decision in *Yukos Universal Limited (Isle of Man) v. The Russian Federation* presents a compelling example of the complex interaction between sanctions, sovereign resistance, and arbitral enforcement involving Russian entities. Although the dispute preceded the most recent waves of Western sanctions, it highlighted Russia's consistent reliance on domestic legal instruments to evade compliance with international arbitral awards. The Permanent Court of Arbitration rendered an award of approximately $50 billion in favour of Yukos shareholders, but Russia refused enforcement, invoking public policy defenses and domestic court rulings annulling the awards.[55] Subsequently, Russia introduced blocking statutes in 2020 such as *Lugovoy Law*[56] found in Articles 248.1 and 248.2 of the Arbitrazh Procedure Code restricting cooperation with foreign judgments and arbitral enforcement perceived as politically motivated or contrary to national interests. These statutes, particularly following 2015[57], empowered Russian courts to deny recognition and enforcement of foreign arbitral awards that conflicted with domestic legal principles or state sovereignty.[58] Consequently, claimants seeking redress through arbitration faced an additional legal barrier, as these measures effectively insulated

[53] Simon Volkov, *Between Scylla and Charybdis: Sanctions Compliance for International Companies Divesting from Russia*, 64 VA. J. INT'l L. 447, 452-456 (2024).
[54] Alexander Bychkov & Vladimir Efremov, *New Russian legal framework for blocking sanctions prohibiting: (i) Russian persons from entering transactions with designated persons; and (ii) the export of certain Russian items in favour of sanctioned persons*, A BLOG BY BAKER MAGAZINE (Jan 3 , 2025 , 11:25 AM), https://sanctionsnews.bakermckenzie.com/new-russian-legal-framework-for-blocking-sanctions-prohibiting-i-russian-persons-from-entering-transactions-with-designated-persons-and-ii-the-export-of-certain-russian-items-in-favour-of-sancti/
[55] Yukos Universal Ltd. (Isle of Man) v. Russian Fed'n, PCA Case No. AA 227, Final Award (Perm. Ct. Arb. July 18, 2014); Russian Fed'n v. Yukos Universal Ltd. (Isle of Man), Case No. C/09/477162/HA ZA 15-1, Judgment (Hague Dist. Ct. Apr. 20, 2016).
[56] Yarik Kryvoi, *Exclusive Jurisdiction of Russian Courts: The Impact of Sanctions and the Lugovoy Law,* CIS Arbitration Forum (September 10, 2024, 6:31 PM), https://cisarbitration.com/2024/09/10/exclusive-jurisdiction-of-russian-courts-the-impact-of-sanctions-and-the-lugovoy-law/.
[57] Federal Law No. 297-FZ*, On Jurisdictional Immunities of a Foreign State and the Property of a Foreign State in the Russian Federation* (December 3, 2015) (Russ.).
[58] Yukos Universal Ltd. (Isle of Man) v. Russian Fed'n, Case No. 200.197.079/01, Judgment (Hague Ct. App. Feb. 18, 2020); Russian Fed'n v. Yukos Universal Ltd. (Isle of Man), ECLI:NL:HR:2021:1531 (Neth. Sup. Ct. Nov. 5, 2021).

Russian assets from foreign enforcement under the guise of protecting national jurisdiction from external sanctions regimes.[59]

In the post-Ukraine sanctions landscape, arbitration became increasingly fraught with uncertainty. Backed by the overlapping sanctions regimes of the U.S., the EU, and the UK, actors including arbitral tribunals, enforcement courts, and financial intermediaries are dissatisfied. While the EU seeks to protect its entities from enforcement under acts of situations in national laws, these very acts exacerbate the legal uncertainty for multinational companies when they find themselves caught between competing regulatory regimes.

VI. RECONCILING CONFLICTS

The intersection between secondary sanctions and the Convention's enforcement structure poses a significant legal and geopolitical dilemma that goes right to the heart of arbitration's reputation as an impartial and secure method of resolving international conflicts. Even while secondary penalties are useful geopolitical instruments, they typically prevent arbitral rulings from being effectively and uniformly enforced, which leads to the breakdown of the Convention's underlying authority. In dealing with these challenges, a conversation is now underway over multilateral reform that would bring an equal balance between the imperatives of sanctions compliance and the neutrality and reliability of arbitration.

In *Hebei Import & Export Corp v. Polytek Engineering Co Ltd,*[60] the court reinforced the narrow application of public policy exceptions, emphasizing the need to uphold arbitration's legitimacy. Broad interpretations of public policy in some jurisdictions create concurrent enforcement conflicts, especially where sanctions are involved. The proposed reform to limit the application of this exception to compliance with unilateral sanctions only on the basis of multilateral agreements would be more in harmony with the goals of the Convention and with proper safeguards against unfair enforcement. Such a sanctions protocol under the aegis of this Convention presents a pragmatic avenue to mitigate procedural hurdles emanating from secondary sanctions. It would institutionalize mechanisms for screening sanctions-compliant enforcement processes, and for risk assessment of financial and legal exposure, with institutional support providing expert guidance on compliance.[61] Not only would this equip arbitrators with tools for dealing with complex sanctions problems, but it also would enhance

[60] [1999] 2 HKCFAR 111
[61] James D. Fry, *Désordre Public International under the New York Convention*, 8 CHINESE J. INT'L L. 81, 102, 122, 134 (2009).

the parties' confidence in arbitration itself. To highlight this gravity in words of William Park, it will be that *"neutrality in arbitration is not merely a principle; it is the lifeline that ensures fairness amidst diverse laws and geopolitics, a delicate balance that must be safeguarded against both overt and covert pressures."*

A durable solution must therefore be anchored in institutional design rather than unilateral defensive legislation. A plausible architecture would be the negotiation of a Supplementary Protocol to the New York Convention which is a calibrated, second-generation instrument addressing the enforcement interface between arbitral awards and sanctions regimes. Such a protocol could codify a uniform interpretive rule limiting Article V(2)(b) to conflicts with multilateral sanctions endorsed by bodies such as the UN Security Council, thereby foreclosing reliance on unilateral sanctions as a public-policy bar. It could also establish a centralized sanctions-compliance clearinghouse, mandated to issue authoritative guidance to courts, tribunals, and financial intermediaries regarding the permissibility of award-related transfers. Additionally, the protocol could authorize protected payment channels, including institution-administered escrow mechanisms insulated from secondary-sanctions exposure. A parallel multilateral instrument focused on harmonizing the extraterritorial dimensions of secondary sanctions could complement this architecture. Together, these reforms would convert the current web of contradictory obligations into a predictable, rule-governed enforcement environment, preserving arbitration's role as a neutral and commercially reliable dispute-resolution mechanism in an era of intensifying geopolitical sanctions.