President's Message

Sanctions and the Rule of Law

Once upon a time, there was a proud Imperial State. It was mostly known for tending to have Supreme Rulers who were at least 80 years old and ailing. It was also known for indiscriminately attacking foreign countries, like Desertmountainstan, occasionally putting down quarrelsome brethren states, and sending its mercenaries and agents all over the world on killing missions. It also traded goods, including liquid fuel and grainy food, with the Rest of the World (some of the states of which called themselves the Best of the World). And, if they had a dispute about trade, they resorted to Grand Old Men[1] for wise solutions, and they all convened in the City of the High Rises to promise eternal adherence to the decisions of the Grand Old Men.

No prizes for guessing that I just described arbitration during the Cold War. As a young lawyer and academic, I witnessed those times. Fast forward to today – comparing the Cold War with today's world, one difference is striking: back then, nobody questioned that Soviet (state) companies would have access to arbitration, could sue a Western company and could be sued by a Western company. That was, after all, what the 1958 New York Convention was designed for and largely why it was so successful.

Today, Russia is emulating Soviet politics, but the Western states are reacting differently, not just by imposing sanctions – and there were assorted sanctions during the Cold War, too – but by essentially shutting down access to justice between Russia and the West. All over the Western world, with its proud tradition of the rule of law and access to justice as a human right, law firms have been forced to renounce Russian clients, banks have refused to pay advances of fees to arbitral institutions when there is a Russian party – and don't even try to find a major bank to make a payment to a state court if you want to challenge an award and your client happens to be Iranian.

Not all of this is due to legal restrictions, but the current sanction regimes at least create grey areas where few lawyers (and their banks) dare to tread. Yes, governments might provide clearance for certain engagements on request (as the Swiss SECO indicated) or issue vague statements about a carve-out under article 6 of the European Convention on Human Rights (as the EU did), but these amount to little more than political fig leaves.

It was only after a few months and because of a (very polite and respectful) outcry from major European arbitration institutions, including

[1] YVES DEZALAY & BRYANT G. GARTH, Dealing in Virtue, 1998.

the Swiss Arbitration Centre, that the EU, and in its wake, Switzerland, backpedaled and amended the Russian sanctions regime to carve out "*transactions which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State and if such transactions are consistent with the objectives of this Regulation and Regulation (EU) No 269/2014*".[2] The Swiss version is at least slightly clearer and more generous by omitting (i) the qualifier "strictly" and (ii) the requirement of consistency with some "objectives".[3] Good luck in explaining these carve-outs to your managing partner or to your over-cautious bank. And, tough luck if you are retained to enforce an award rendered in London or Singapore.

It is a shame that today's European legislators need months even to realize that they are riding roughshod over the rule of law and then, after they have realized, they embrace it only half-heartedly. It ties in with a broader disregard of the rule of law in the EU. A case in point is the notorious *Achmea* decision of the ECJ, which, in effect, forces foreign EU investors to file claims against a foreign EU state with the courts of that very state.[4] Ironically, for the Dutch company Achmea that would be Slovakia, which at the time came in last place in the EU Justice Scoreboard for perceived independence and impartiality of its courts.[5]

By the time you read this, ASA will have held its topical September conference on sanctions, and we will hopefully be wiser after that. Will we all be happy with what we will have learnt? I hope so, but I doubt it.

And the underlying problem is global: "*More countries declined than improved in overall rule of law performance for the fourth consecutive year.*"[6]

Not good.

FELIX DASSER

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2 Council Regulation (EU) 2022/1269 of 21 July 2022, Article 1(10), amending Article 5aa(3)(a)(iii)(g) of the Council Regulation (EU) 2014/833.

3 Regulation on Measures in Connection with the Situation in Ukraine, Article 24a(2)(g) as amended on 3 August 2022 (SR 946.231.176.72).

4 ECJ, C-284/16, 6 March 2018.

5 EU Justice Scoreboard 2018, figure 57: 0% (!) of Slovak companies perceived their judges as very independent and a mere 13% as fairly independent, while about 65% perceived them as fairly or even very dependent or partial (22% expressed no opinion) (https://ec.europa.eu/info/sites/default/files/justice_scoreboard_2018_en.pdf).

6 https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2021.

SAVE THE DATE

ASA Conference and General Assembly
16 September 2022, Bern

Swiss Arbitration Conferences and Gala Dinner 2023
2-3 February 2023, Zurich

For more information see www.swissarbitration.org