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OVERRIDING MANDATORY PROVISIONS AND ARBITRABILITY IN INTERNATIONAL ARBITRATION: THE CASE OF MULTILATERAL AND UNILATERAL SANCTIONS

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1. Introduction[1]

The sanctions enacted by the European Union (EU), the United States of America (US) and various other States in 2014 against several Russian individuals, as well as the (reimposed) sanctions regimes put in place against Iran and Iranian nationals have sparked a debate amongst scholars and practitioners concerning the arbitration of disputes involving parties or transactions targeted by the sanctions.[2]

The issues arising from these actions, however, are not completely novel. The impact of sanctions on international arbitration has been studied and discussed for many years, notably in relation to the sanctions against Iraq,[3] Libya[4] and Iran[5]. Sanctions, of course, are a diverse and incoherent set of (economic) measures. Sanctions can emanate from a State, a group of States, and international organizations (including regional organizations). The types of sanction measures taken have also proven to be very diverse, ranging from general trade embargos to sanctions targeting specific individuals, groups of individuals and/or specific transactions.

There are many aspects to the interaction between sanctions and international arbitration, both legal and practical. On a general jurisprudential level, economic sanctions highlight various complexities within the arbitral process, viz. the operation and interaction of various laws and legal

[1] This contribution is based on research previously published as Eric De Brabandere and David Holloway, 'Sanctions and International Arbitration', in Larissa van den Herik (ed), *Research Handbook on UN Sanctions and International Law* (Edward Elgar 2017) 304-330 and; Eric De Brabandere and David Holloway, 'Unilateral sanctions through an international arbitration lens: procedural and substantive issues', in Charlotte Beaucillon (ed), *Research Handbook on Unilteral and Extrateritorial Sanctions* (Edward Elgar 2021) 676-724.

[2] See for example Irina Moutaye and Elena Billebro, 'Choice of Arbitration Venue in Light of Sanctions Against Russia' in Anton V Asoskov, Alexander I Muranov, Roman M Khodyki (eds), *New Horizons of International Arbitration [Novie gorizonti mejdunarodnogo arbitraja]* (2015) 49-70, English translation <www.sccinstitute.com/media/76670/choice-of-arbitration-venue-in-light-of-the-sanctions-against-russia.pdf> accessed 16 February 2021.

[3] See for example Geneviève Burdeau, 'Les embargos multilatéraux et unilatéraux et leur incidence sur l'arbitrage commercial international – Les états dans le contentieux économique international, I. Le contentieux arbitral' (2003) 3 Revue de l'Arbitrage 753.

[4] ibid; Elliott Geisinger and others, 'Les conséquences des sanctions économiques sur les obligations contractuelles et l'arbitrage' [2012] Int'l Bus LJ 405, 405.

[5] ibid.

systems, such as the *lex arbitri* and law governing the arbitration agreement, the substantive law of the contract and the law of the enforcing jurisdiction. These various laws may be in play throughout the process, to be applied not only by tribunals themselves during the course of proceedings, but also potentially by courts deciding or reviewing questions of jurisdiction in relation to public policy (whether at the seat or in the enforcing jurisdiction). This chapter focuses on the impact of sanctions on international arbitration viewed from the perspective of the arbitrability of disputes involving or relating to international sanctions, in light of the characterization of sanctions as overriding mandatory rules.

This contribution will discuss these questions in three separate sections. Section 2 discusses the general principles relating to the arbitrability of the dispute and overriding mandatory provisions. Section 3 applies these principles to disputes involving sanctions, while Section 4 tackles the specificity of unilateral/extraterritorial sanctions.

2. Sanctions, overriding mandatory rules and arbitrability: general principles

In domestic court proceedings, the situation of the application of a sanction regime as a matter of applicable law is comparatively more straightforward than arbitration proceedings. Notably, the entire concept of arbitrability is irrelevant in the case of domestic litigation: domestic courts are bound principally, in terms of competence, by applicable rules on exclusive jurisdiction and rules emanating from private international law in case of conflicts of jurisdiction. Secondly, in case of domestic court proceedings, regulations or legislation may exist which render the application of overriding mandatory provisions more straightforward and clear. In the EU for example, courts of member states may give effect to 'overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed insofar as those overriding mandatory provisions render the performance of the contract unlawful'.[6]

The situation is more complex in international arbitration. Provisions such as those found in the Rome I regulation do not necessarily apply to arbitration proceedings. The Rome I regulation explicitly declares not to be applicable to 'arbitration agreements'[7]. However, it has been argued that this does not imply that arbitral tribunals cannot or should not apply provisions relating to overriding mandatory rules by analogy, or at least be 'guided by their underlying principles'[8] Some authors also argue that the provisions of the Rome I Regulation being an instrument of general application, must be applied in legal proceedings within the EU, including in arbitration.[9]

Irrespective of the application of domestic law legislation or Rome I in relation to overriding mandatory, there is a general agreement that arbitrators are not in principle excluded from

[6] Article 9(2) and (3) of the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal of the European Union L (177). 04 07 2008). See for a discussion: Tamas Szabados, 'EU Economic Sanctions in Arbitration' (2018) 35 Journal of International Arbitration 439, 440.
[7] Article 1(2)(e) of the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal of the European Union L (177). 04 07 2008).
[8] Mercedeh Azeredo da Silveira, 'Economic sanctions and contractual disputes between private operators', in Larissa van den Herik (ed), *Research Handbook on UN Sanctions and International Law* (Edward Elgar 2017), 330-376, 340.
[9] For a discussion of this question, see Davor Babić, 'Rome I Regulation: binding authority for arbitral tribunals in the European Union?' 2017 13(1) Journal of Private International Law 71-90.

applying overriding mandatory provisions.[10] We can refer here to the decision of the United Sates Supreme Court in *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc,*[11] based on which one expect that domestic courts in the United States would not oppose arbitral tribunals deciding disputes involving 'public policy' issues

> the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim.[12]

If we take as a hypothesis that arbitrators can apply overriding mandatory provisions (under certain conditions)[13] , there would be no reason for the arbitrators to declare the dispute inarbitrable as a matter of principle because the dispute would involve mandatory provisions. But the question is more complex. The laws of the seat of the arbitration play an important role, in that the mandatory provisions of these laws may, despite the agreement to arbitrate, in effect prevent or hinder an arbitral tribunal from exercising its competence in certain circumstances. In the EU, for example, certain domestic courts have confirmed the invalidity of arbitration clauses because the arbitration would otherwise result in a disregard of overriding mandatory provisions. Austrian, Belgian and German courts notably, following several decisions from the Court of Justice of the EU, have considered that choice-of-court provisions and arbitration agreements which would result in avoiding the application of overriding mandatory provisions of that State's law or of EU law can be considered invalid under certain conditions.[14]

The question we will address here however, is not necessarily whether an arbitral tribunal can apply international sanctions as overriding mandatory provisions,[15] or whether it should do so. We will focus here on case-law concerning the question whether, because of the public order character of international sanctions, disputes which involve, as matter of applicable law, the application of sanctions, thus become inarbitrable.

3. The Arbitrability of Sanctions-Related Disputes

[10] See Stavros Brekoulakis, 'Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori', in Loukas A. Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009), 99 -120, 100-101.

[11] *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc*, 473 U.S. 614 S Ct 3346 (1985) (U.S. Supreme Court, 2 July 1985).

[12] *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc*, 473 U.S. 614 S Ct 3346 (1985) (U.S. Supreme Court, 2 July 1985), at 637.

[13] See *in extenso* Marc Blessing, 'Mandatory Rules of Law *versus* Party Autonomy in International Arbitration' (1997) 14(4) Journal of International Arbitration 23.

[14] For a discussion, see Jan Kleinheisterkamp, 'Overriding Mandatory Laws in International Arbitration' (2018) 67 International and Comparative Law Quarterly 903-930 and Tamas Szabados, *Economic Sanctions in EU Private International Law* (Hart, 2019), 176 ff.

[15] For a recent account of the application of mandatory rules, see Constantin Calavros, 'The application of substantive mandatory rules in International Commercial Arbitration from the perspective of an EU UNCITRAL Model Law jurisdiction' (2018) 34(2) Arbitration International 219.

There is general agreement in scholarship that the application of a sanctions regime to the dispute does not in and of itself affect the arbitrability of the dispute.[16] Although it is generally agreed that international sanctions have a public policy character, such has not generally led to findings that disputes in which sanctions are involved are *ipso facto* inarbitrable.

Frist, arbitrability can be determined directly in domestic law,[17] and 'most national arbitration laws do not regulate which law governs the question of arbitrability; rather they determine directly which disputes are arbitrable or inarbitrable.'[18] Every state thus defines which disputes can be submitted to arbitration, and which disputes are reserved to the exclusive jurisdiction of that State's domestic court, either in non-arbitration law or arbitration laws.[19] For instance, certain arbitration laws may provide that 'disputes involving economic interest' or 'disputes involving property' may be subject to arbitration.[20] In other cases, arbitration laws 'delineate inarbitrability on the basis of criteria related to public policy.'[21] The involvement of sanctions as such plays a very limited role, but domestic laws may of course explicitly reserve disputes relating to or involving sanctions to the domestic courts.

Secondly, even if certain arbitration laws still discuss arbitrability on the basis of criteria related to public policy[22], the involvement itself of public policy considerations in the dispute does not *ipso facto* result in inarbitrability. Indeed, as noted in the previous section, arbitral tribunals can themselves consider and apply overriding mandatory provisions or public policy norms. As a consequence, as we will show, practice indeed confirmed that arbitral tribunals and domestic courts often have accepted that the existence of a sanctions regime does not render a dispute relating to the sanctions inarbitrable, but rather that the sanctions regime should be taken into account by the tribunal in rendering its decision. This has moreover been the case irrespective of the origin (multilateral or unilateral) of the sanctions regime, but there is a specific implication in case of unilateral sanctions, which we will discuss in the next section.

An interesting and important case which illustrates these points is the ICC Arbitration *Fincantieri v. Ministry of Defense of Iraq*.[23] In that case, two Italian ship-building companies had each concluded

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[16] For a discussion, see Geneviève Burdeau, 'Les embargos multilatéraux et unilatéraux et leur incidence sur l'arbitrage commercial international – Les états dans le contentieux économique international, I. Le contentieux arbitral' (2003) 3 Revue de l'Arbitrage 753, 757; Elliott Geisinger and others, 'Les conséquences des sanctions économiques sur les obligations contractuelles et l'arbitrage' [2012] Int'l Bus LJ 405.

[17] Loukas A. Mistelis, 'Arbitrability –International and Comparative Perspectives', in Loukas A. Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) 1 -18, 11.

[18] Loukas A. Mistelis, 'Arbitrability –International and Comparative Perspectives', in Loukas A. Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) 1 -18, 11.

[19] See Stavros Brekoulakis, 'Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori', in Loukas A. Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009), 99 -120, 101.

[20] Loukas A. Mistelis, 'Arbitrability –International and Comparative Perspectives', in Loukas A. Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) 1 -18, 11.

[21] Stavros Brekoulakis, 'On Arbitrability: Persisting Misconceptions and New Areas of Concern', in Loukas A. Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) 19-46, 22.

[22] Stavros Brekoulakis, 'On Arbitrability: Persisting Misconceptions and New Areas of Concern', in Loukas A. Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) 19-46, 22.

[23] *Fincantieri Cantieri Navali Italiani SpA and OTO Melara Spa v ATF* (25 November 1991) ICC Award Nr 6719 (Interim Award) Journal du droit international (1994) 1071; Gary B. Born, *International Commercial Arbitration (Second Edition)* (Kluwer Law International 2014) 993.

an agency contract with a Syrian national in view of the sale of military goods to Iraq. Iraq however had fallen subject to UN sanctions following the adoption of a UN Security Council Resolution in August 1990.[24] The Syrian agent brought arbitration proceedings against the two Italian companies to obtain payment of the commissions due to him by the two companies. The two Italian companies however invoked the inarbitrability of the dispute in view of the sanctions imposed by the Security Council on Iraq, which in effect prohibited any commercial transactions with Iraq. The arbitral tribunal, in an interim decision, distinguished the application of the sanctions regime as a matter of mandatory law to the merits of the dispute from the arbitrability of the dispute, and confirmed that the occurrence of the former does not result in the inarbitrability of the dispute and that the application of the sanctions regime does not affect the competence of the arbitral tribunal, which in this case had its seat in Switzerland.[25] The two Italian companies sought nullification of the interim decision before the Swiss courts. The Swiss Federal Tribunal supported the arbitral tribunal's interim decision to confirm jurisdiction by considering the case arbitrable, basing its decision on Art. 177 of the Swiss Private International Law Act (PILA), which contains a broad definition of arbitrability, which allows parties to arbitrate 'toute cause de nature patrimoniale'[26]. The Swiss Federal Tribunal noted that, as a consequence, in principle, the dispute may be arbitrated. However, it also enquired whether the arbitrability of the dispute may nonetheless be contrary to the international public order of Switzerland. In this respect, the Tribunal opined that public order considerations do not render the dispute inarbitrable since such considerations would have this effect only to the extent that a dispute could only be submitted to domestic courts, as a result of such considerations,. In this case, in line with its earlier findings, the Swiss Federal Tribunal considered that the existence of a sanctions regime only operates at the level of the contractual commitments of the parties and does not affect the arbitrability of the dispute.[27]

The Italian shipbuilders in the *Fincantieri* case had in parallel referred the case directly to the Italian courts in order to obtain a declaratory judgement to the effect that the arbitration clause was invalid. Although the court of first instance supported the arbitrability of the dispute, the Court of Appeal of Genoa reversed this decision.[28] It decided that Italian mandatory law –including legislation relating to international sanctions- was applicable to the case. Because of the 'unavailability' of the rights in question ('la indisponibilità dell' "obligo"'),[29] which under Italian Law determines the arbitrability of the dispute (a narrower definition than the one applied by the Swiss Federal Tribunal), the dispute was, according to the Court, indeed inarbitrable.[30] The decision however was highly criticized by the French Cour d'appel de Paris, which refused to enforce the Italian Court decision in France.[31]

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[24] UN Security Council Res 661 (6 August 1990) UN Doc S/RES/661.
[25] *Fincantieri Cantieri Navali Italiani SpA and OTO Melara Spa v ATF* (25 November 1991) ICC Award Nr 6719 (Interim Award) Journal du droit international (1994) 1074.
[26] *Fincantieri Cantieri Navali Italiani SpA et OTO Melara Spa v M et Tribunal Arbitral* (23 June 1992) ATF 118 II 353 (Tribunal Fédéral Suisse) 355.
[27] ibid, 357.
[28] *Fincantieri-Cantieri Navali Italiani SpA v Iraq* (1994) Riv. Dell'arb 4 (1994) (Corte di Appello di Genova/Genoa Court of Appeal, Italy) 505; see for a discussion: Herbert Kronke, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 361.
[29] *Fincantieri-Cantieri Navali Italiani SpA v Iraq* (1994) Riv. Dell'arb 4 (1994) (Corte di Appello di Genova/Genoa Court of Appeal, Italy) 510.
[30] ibid, 505.
[31] *Legal Department of the Ministry of Justice of the Republic of Iraq v Fincantieri-Cantieri Navali Italiani* (15 June 2006) Rev Arb (2007) (Cour d'Appel de Paris/ Paris Court of Appeal, France) 87.

Recently, in November 2015, the Italian Supreme Court of Cassation issued a decision in a case relating to the suspension of the sale of helicopters to Iraq by an Italian seller. The Court argued that Italian Courts had jurisdiction to entertain the claim despite the presence of an arbitration clause, because the arbitration clause had become 'null and void' due to the imposed sanctions. The Court's reasoning was, as in the *Fincantieri* case, based on the 'unavailability' of the rights in question following the imposition of sanction.[32]

A somewhat different situation occurred in *La Compagnie Nationale Air France v. Libyan Arab Airlines*, an unpublished case, yet widely reported in scholarship.[33] Air France had a supply and maintenance contract with Libyan Arab Airlines which, because of the international embargo imposed by the UN Security Council, could no longer be performed by Air France. The difference with the former case lies in the fact that Security Council Resolution 883 of 11 November 1993 which imposed further international sanctions on Libya, specifically stated:

> [T]hat all States, and the Government of Libya, shall take the necessary measures to ensure that no claim shall lie at the instance of the Government or public authorities of Libya, or of any Libyan national, or of any Libyan undertaking as defined in paragraph 3 of this resolution, or of any person claiming through or for the benefit of any such person or undertaking, in connection with any contract or other transaction or commercial operation where its performance was affected by reason of the measures imposed by or pursuant to this resolution or related resolutions.[34]

The specific reference in Resolution 833 to *claims* related to the impossibility of performing contracts or any commercial transaction because of the sanctions presents a somewhat different scenario than the one in *Fincantieri*. Air France argued that the dispute was inarbitrable. The UNCITRAL arbitral tribunal, with its seat in Montreal, rejected this argument in its first interim award of 10 July 1998 and confirmed jurisdiction.[35] The Montréal Cour supérieure rejected an appeal by France to have this decision annulled, noting that the decision on arbitrability lay within the arbitral tribunal's exclusive competence.

The Québec Court of Appeal rejected an appeal by France against that decision in 2003, and in doing so provided interesting insights on the link between a sanctions regime and the arbitrability of a dispute.[36] The Québec Court of Appeal first confirmed that only the arbitral tribunal is competent to decide on the arbitrability of the dispute, and that neither the UNCITRAL Arbitration Rules, nor the Code of Civil Procedure applicable in Québec allow domestic courts to *intervene* in the arbitral proceedings.[37] Such is only the case in relation to claims for annulment or

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[32] Corte Suprema di Cassazione (Italy), Governo e Ministeri della Repubblica dell'Iraq v. Armamenti e Aerospazio S.p.A., Finmeccanica-S.p.A., SELEX ES. S.p.A. a Finmeccanica Company, FIAT CIEI-S.p.A. in liquidazione and Banca Intesa S.p.A., Rafidain Bank, So.Ge.Pa – Società Generale di Par, Case Nr 23893, available at https://www.camera-arbitrale.it/Documenti/Cassazione_24.11.15.pdf accessed 15 February 2021.

[33] See, amongst others: Geneviève Burdeau, 'Les embargos multilatéraux et unilatéraux et leur incidence sur l'arbitrage commercial international - Les états dans le contentieux économique international, I. Le contentieux arbitral' (2003) 3 Revue de l'Arbitrage 753, 762 ff.

[34] UNSC Res 883 (11 November 1993) UN Doc S/RES/883, para 8.

[35] See the discussions in *La Compagnie Nationale Air France v Libyan Arab Airlines* (31 March 2003) CanLII 35834 (2003) (Cour d'Appel du Québec) paras. 19 ff; Geneviève Burdeau, 'Les embargos multilatéraux et unilatéraux et leur incidence sur l'arbitrage commercial international - Les états dans le contentieux économique international, I. Le contentieux arbitral' (2003) 3 Revue de l'Arbitrage 753, 764.

[36] *La Compagnie Nationale Air France v Libyan Arab Airlines* (31 March 2003) CanLII 35834 (2003) (Cour d'Appel du Québec).

[37] ibid [44].

set aside of the final award, or in respect of proceedings seeking the recognition and enforcement of the final award.[38]

The Québec Court of Appeal then moved to consider that the applicable Security Council Resolutions did not in and of themselves result in the inability of the parties to launch arbitration proceedings.[39] After having noted that Security Council Resolutions establishing a sanctions regime apply to arbitral tribunals, the Court of Appeal further considered that the question whether the sanctions regime applies is a question that needs to be answered by the arbitral tribunal; the arbitral tribunal therefore did not violate transnational public order, nor mandatory rules of public international law, in reaching its decision.[40]

In line with the case-law mentioned above, it is thus likely that arbitral tribunals will confirm that the presence of a sanctions regime, does not *ipse facto* render the dispute inarbitrable. Yet, some caution is necessary, in view of the decision of the Court of Appeal of Genoa and the Italian Supreme Court of Cassation. The application of the law of the seat of the arbitration, the law governing the arbitration clause, or any other law which would be application to the issue of arbitrability may result in different outcomes.

4. The specific nature of unilateral sanctions

In general, the principles applied in cases in the context of multilateral sanctions, as was applied in the cases discussed in the previous section, can without much hesitation, as a matter of principle, be transposed *mutatis mutandis* to unilateral sanctions. However, the specific nature of unilateral sanctions as opposed to multilateral sanctions poses some distinct problems and may render the situation slightly more complex.

Contrary to UN sanctions which are binding on every UN member state, unilateral sanction regimes and possible blocking statutes are geographically limited in their scope of application. In the case of UN sanctions, the sanctions regime will in most cases need to be applied by the arbitral tribunal and/or a domestic court, either because it applies as the *lex contractus* to the contract and dispute, because it is part of the mandatory law to be applied by the tribunal as part of the law of the seat of the arbitration, or even because it is part of the *lex fori* when a national court is seized of the question despite the presence of an arbitration clause. However, in terms of arbitrability, we have seen in *Fincantieri* that even in the case of multilateral sanctions, the arbitrability of the dispute may still receive different answers, but at least the sanctions *regime* would apply simultaneously in all these legal orders, either directly or through implantation with domestic legislation.

In the case of unilateral sanctions however, the sanctions regime might, for example, only affect one party (for instance because certain sanctions regimes apply extraterritorially to a state entity), be applicable only through the mandatory provisions of the law of the seat of the arbitration, or even be applicable as part of the *lex fori* when a national court is seized of the question despite the presence of an arbitration clause.[41] The question undeniably may have an impact on the dispute.

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[38] ibid [56]-[86].
[39] *La Compagnie Nationale Air France v Libyan Arab Airlines* (31 March 2003) CanLII 35834 (2003) (Cour d'Appel du Québec) [47].
[40] ibid [91]-[96].
[41] Karl-Heinz Bockstiegel, 'Appliable Law in Disputes Concerning Economic Sanctions: A Procedural Framework for Arbitral Tribunals' (2014) 30(4) Arbitration International 605, 610.

Recently, the Paris Court of Appeal was confronted to the application of both multilateral and unilateral sanction in set aside proceedings in *TCM v. Natural Gas Storage Company*.[42] The case concerned a request to set aside an ICC arbitral award for breaches of Articles 1520(3) and (5) of the French Code of Civil Procedure, which cover respectively excess of mandate and the recognition or enforcement of the award would be contrary to international public policy. The reason invoked was the alleged failure by the arbitral tribunal to have taken into account the application of the sanctions against Iran, both on the UN, EU and US levels. The Court of Appeal in the end decided not to set aside the arbitral award rendered in that case, notably because the Court considered that the case fell outside of the scope of application of both the UN and EU sanctions regimes. But the Court did make some interesting statements on the application of the sanctions regime.

Notably, the Court confirmed that UN sanctions as such can be assimilated to 'des lois de police étrangères et/ou des lois de police réellement internationales, dont un tribunal arbitral ne peut faire abstraction si la situation litigieuse qu'il est amené à juger entre dans le périmètre de ces sanctions."[43] This confirms not only that an arbitral tribunal has the capacity to apply overriding mandatory provisions, but also that it should do so. Since these are part of the 'conception française de l'ordre public international', and a failure to apply these could result in an annulment under Article 1520 (5) of the French Code of Civil Procedure.[44] The Court considered that the same principles apply to the EU sanctions regime, although such was explicitly linked to the fact that the EU sanctions regime concerned a transposition of the UN sanctions regime[45]. US sanctions, although an overriding mandatory provision of foreign law, cannot be considered as part of French international public policy.[46] This not only flows from the fact that French international public policy seeks to protect 'certaines valeurs ou politiques fundamentales' of *the forum*, ie France, but also from the contestation of the extraterritorial effect of the unliteral sanctions enacted by the US, both by France and by the EU.[47]

A final specific feature of unilateral sanctions is that, as was also mentioned by the Paris Court of Appeal, blocking statutes may also apply. In this respect, we can point to the European Commission's 'Guidance Note' in relation to the Blocking Statute adopted by the EU following US extraterritorial sanctions against Cuba, Libya and Iran.[48] The Guidance note makes the explicit claim that the Statute in effect 'nullifies the effect in the EU of any foreign decision, including court rulings or arbitration awards, based on the listed extra-territorial legislation or the acts and provisions adopted pursuant to them'.[49] The Note however mentions the nullification of the 'effect' of arbitral awards, but does not on a literal interpretation render disputes as such inarbitrable. Hence, it may well be that the effect of the Blocking Statute targets more the recognition and enforcement of arbitral awards in the EU, rather than the arbitrability as such. Here again, one needs to keep in mind the principle set out above that it has been argued that arbitral tribunals can consider and apply public policy and overriding mandatory provisions under certain conditions, which includes not only sanctions regimes but also blocking statutes.

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[42] Paris Court of Appeal, *TCM v. Natural Gas Storage Company*, case nr 19/07261, Judgement of 3 June 2020.
[43] ibid, para. 54.
[44] ibid, paras. 50 and 55.
[45] ibid, para. 57.
[46] ibid, para. 61.
[47] ibid, paras. 63 ff.
[48] European Commission, 'Guidance Note — Questions and Answers: adoption of update of the Blocking Statute C/2018/5344', OJ C 277I , 7.8.2018, 4–10.
[49] ibid, p. 5.

5. Concluding remarks

This contribution has sought to examine how multilateral and unilateral l sanctions interact with and impact upon the international arbitration as overriding mandatory provisions. There are indeed many aspects to this interaction, but the focus has been on the question whether the involvement of a sanctions regime in the dispute impacts the arbitrability of the dispute.

Irrespective of which legal regime -*lex loci arbitri, lex causae, lex contractus* or *lex fori*- will govern the question of arbitrability, in general, and in line with the decision of the Swiss Federal Tribunal in *Fincantieri* and the decision of the Québec Court of Appeal in *Air France v. Libyan Arab Airlines*, arbitral tribunals and courts confronted with the question whether claims relating to sanctions are arbitrable have confirmed the presence of a sanctions regime. Generally, however, and based on the general principles set out above, domestic legislation which provides that disputes are arbitrable if they 'involve economic interests' or 'property'[50] would not necessarily hinder the arbitrability of disputes involving unilateral sanctions.

Despite this, some caution is necessary. Indeed, in view of the decision of the Court of Appeal of Genoa and the Italian Supreme Court of Cassation, the arbitrability of disputes falling under a sanctions regime largely depends on the law of the seat of the arbitration and the law governing the arbitration clause and variances in accepting the arbitrability of sanctions-related disputes exist, as seen by the decisions of Italian courts in *Fincantieri* amongst others. In case of legislation which relate arbitrability to the question of public policy[51], the situation is more uncertain. While not explicitly relying on 'public policy', the decisions of the Court of Appeal of Genoa and the Italian Supreme Court of Cassation are evidence of such a scenario.

We have also noted that in the case of unilateral sanctions, the situation is complex since the (in)arbitrability of the dispute may be decided by these three entities (the tribunal, the courts of the seat, and perhaps the courts of the state in which one of the parties has submitted the same dispute) based on a sanctions regime not similarly applicable in all three contexts.

[50] Loukas A. Mistelis, 'Arbitrability –International and Comparative Perspectives', in Loukas A. Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) 1 -18, 11.
[51] Stavros Brekoulakis, 'On Arbitrability: Persisting Misconceptions and New Areas of Concern', in Loukas A. Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) 19-46, 22.