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Contents

Enforcement of Foreign Arbitral Awards in Türkiye: Procedural Requirements and Common Practical Challenges

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Prevailing in an international arbitration is often the result of a demanding and, at times, protracted process. Yet, success in the arbitral proceedings alone does not guarantee recovery. Where the award debtor is domiciled in Türkiye or holds assets within its territory, the foreign arbitral award must first be recognized and enforced by the Turkish courts. Only upon such enforcement can the award have the same legal effect as a domestic court judgment and produce binding consequences under Turkish law.

The enforcement of foreign arbitral awards in Türkiye, while governed by clear statutory provisions, often involves strict procedural requirements and contentious practical issues that may significantly affect the outcome of the proceedings.

Enforcement Procedure in General

The enforcement of foreign arbitral awards in Türkiye is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") (ratified in 1992) and the International Private and Procedural Law no. 5718 dated 27 November 2007 ("IPPL"). The New York Convention provides the overarching international framework, while the IPPL contains specific procedural rules to be applied by Turkish courts. Together, they define the conditions for enforcement and confine judicial review to procedural and formal grounds. Accordingly, arbitral awards arising from commercial disputes and rendered in a New York Convention member state are enforced in Türkiye under these combined provisions.

Under Article 60 of the IPPL, the local competence of the Turkish courts is determined as follows:

- The application for enforcement of a foreign arbitral award must be filed with the court of first instance at the place of domicile or at the usual place of residence of the person against whom enforcement is requested.
- If this person is neither domiciled in, nor a resident of Türkiye, the application must be filed with the court of first instance where the assets subject to enforcement are located.

The proceedings for the enforcement of arbitral awards are conducted in an adversarial manner and typically involve a simplified exchange of petitions between the plaintiff and the defendant during the written phase, although parties may submit additional documents or arguments in practice, which can lead to 2-3 hearings before the court's decision. At the conclusion of the proceedings, the court may either dismiss or uphold the enforcement request. If upheld, the foreign arbitral award becomes legally binding and enforceable in Türkiye. Conversely, a dismissal results in the award being unenforceable in Türkiye, with implications including *res judicata* status and the effects of conclusive evidence.

The court's review is strictly limited by Article V of the New York Convention and the relevant provisions of the IPPL. Turkish courts are expressly prohibited from conducting a revision au fond, a re-examination of the merits of the dispute. Instead, they verify compliance with procedural requirements, the validity of the arbitration agreement, and whether any of the enumerated grounds for refusal (such as violation of public policy or lack of proper notice) apply.

The initial application for enforcement must be filed with the local first-instance court (*Asliye Hukuk Mahkemeleri*). The decision may then be appealed to the Regional Court of Appeal (*Bölge Adliye Mahkemesi*), and subsequently to the Court of Cassation (*Yargıtay*). This three-tier process mirrors the standard structure of civil litigation in Türkiye. Importantly, an enforcement decision does not become final and cannot be used to initiate execution proceedings until all appeal processes are concluded.

In conclusion, the enforcement procedure in Türkiye is court-driven, formal, and multi-tiered. While the scope of judicial review is narrow, the process can be time-consuming due to the mandatory two-tiered appeal stages.

Cautio Judicatum Solvi Requirements

Under Turkish procedural law, a foreign plaintiff may be required to provide security for litigation costs before initiating legal proceedings. Security for costs, known as *cautio judicatum solvi*, is a procedural safeguard designed to protect defendants from the risk of non-recovery of litigation costs. In enforcement proceedings initiated by foreign parties in Türkiye, this requirement can represent a significant preliminary consideration. Pursuant to Article 48 of the IPPL, it is also compulsory for a foreign plaintiff to deposit security when initiating the application for enforcement of a foreign arbitral award.

Cautio judicatum solvi is a procedural precondition; the judge assesses the need for security ex officio. The court gives the plaintiff an adequate period for the deposit of the designated security, and failure to do so results in dismissal of the case on procedural grounds due to the absence of a legal action condition.

Turkish law does not prescribe a fixed amount or specific form for *cautio judicatum solvi*. Judges have discretion to determine the amount and form of the security pursuant to the Code of Civil Procedure. The courts usually require a security bond ranging from 10% to 15% of the monetary value of the award to be enforced in practice.

However, Article 48 paragraph 2 of the IPPL sets forth an exemption from the security deposit obligation for foreigners. Pursuant to this paragraph, the court exempts the plaintiff from the security deposit requirement on the basis of reciprocity.

Reciprocity may be based on an international treaty, statutory provisions, or de facto practice:[1]

1. **Treaty-based reciprocity**, where Türkiye and the foreign state are parties to a bilateral or multilateral treaty waiving such requirements. For instance, Türkiye concluded bilateral judicial assistance treaties with numerous states, many of which include provisions on exemption from *cautio judicatum solvi*, and is also a contracting state to the Hague Convention on Civil Procedure, which provides exemption from security payment.
2. **Statutory reciprocity**, where the foreign state's domestic legislation grants similar exemptions to Turkish plaintiffs.

[1] ***See*** Turkish Court of Cassation, 12th Civil Chamber, Case No. 2014/28848, Decision No. 2015/4079, dated 26.02.2015; Turkish Court of Cassation, 12th Civil Chamber, Case No. 2012/16820, Decision No. 2012/23886, dated 09.07.2012.

3. **De facto reciprocity**, where, even without a formal treaty or statute, the foreign state is known to apply the exemption in practice to Turkish plaintiffs.

Identifying and evidencing a reciprocity exemption at the outset of the enforcement proceedings is crucial to avoid delays or the risk of dismissal.

Court Fees

Another practical consideration in enforcement is the calculation of court fees, as fee disputes can cause delays and additional litigation. For the enforcement of arbitral awards in Türkiye, the plaintiff must pay a certain amount of court fees for the legal action. The calculation method for these fees, whether on a fixed or proportional basis, has been a matter of considerable debate, with significant practical consequences.

Historically, there has been debate over whether court fees for the enforcement of arbitral awards should be calculated on a fixed fee basis or on a proportional basis. The different chambers of the Court of Cassation were previously split on this matter. Certain chambers adopted a **proportional fee** approach, calculating the fee as a percentage of the award's monetary value.[2] Others applied a **fixed fee** approach, treating enforcement as a procedural application rather than a substantive dispute.[3]

However, in 2019, the General Assembly of the Civil Chambers of the Court of Cassation ruled that a fixed fee, rather than proportional fees, should be charged for the enforcement of foreign arbitral awards.[4] Following this decision, the majority of the chambers of the Court of Cassation have adopted the fixed fee approach[5] endorsed by the General Assembly of the Court of Cassation.[6]

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[2] Turkish Court of Cassation, 15th Civil Chamber, Case No. 2016/935, Decision No. 2016/1312, dated 01.03.2016.

[3] Turkish Court of Cassation, 11th Civil Chamber, Case No. 2015/2117, Decision No. 2015/8206, dated 12.06.2015.

[4] General Assembly of the Civil Chambers of the Turkish Court of Cassation, Case No. 2017/930, Decision No. 2019/812, dated 27.06.2019.

[5] Turkish Court of Cassation, 11th Civil Chamber, Case No. 2022/946, Decision No. 2023/4365, dated 11.07.2023; Turkish Court of Cassation, 19th Civil Chamber, Case No. 2019/2663, Decision No. 2019/5237, dated 20.11.2019.

[6] In Turkish law, decisions issued by a chamber of the Court of Cassation are technically not binding on other chambers of the Court of Cassation or on lower courts, except for the decisions on the unification of conflicting judgments issued by the Grand General Assembly of the Court of Cassation. However, in practice, especially the decisions of the Court of Cassation are considered authoritative and are generally followed by lower courts.

Nevertheless, in practice, occasional deviations occur where some first instance courts still attempt to apply proportional fees, requiring parties to challenge such determinations on appeal. While the prevailing judicial view supports fixed fees for the enforcement of foreign arbitral awards, the possibility of encountering courts that apply proportional fees remains. Maintaining awareness of the varying practices among first-instance courts in this matter, together with thoroughly prepared submissions in an enforcement lawsuit and the diligent conduct of proceedings before the competent court, can contribute to achieving a favourable outcome in terms of the application of the fixed fee.

Interim Attachment

In many enforcement scenarios, the creditor's primary concern is the risk that the debtor may dissipate assets before the enforcement decision becomes final. Turkish law provides a protective measure known as *ihtiyati haciz* (interim attachment), which allows a creditor to secure the debtor's assets before or during enforcement proceedings. While this mechanism can be crucial in preserving the award's practical value, its availability in the context of unfinalised enforcement of foreign arbitral awards remains a contested legal issue.

Interim attachment is regulated by the Turkish Enforcement and Bankruptcy Law (No. 2004) ("EBL"). Article 257/1 of the EBL allows a creditor to request interim attachment for "due and payable receivables". The procedure can be initiated either before or alongside an enforcement application for a foreign arbitral award.

Pursuant to Article 258/1 of EBL, a request for interim attachment should be reviewed based on concrete reasoning and evidence. While a claim does not need to be proven conclusively, there is a need to prove its plausibility. This means presenting evidence enabling the creditors to demonstrate the *prima facie* validity of their claim under Turkish Law.

However, there is no unified view among Turkish scholars and the jurisprudence of the courts on whether interim attachments under Article 257/1 of the EBL can be requested for the arbitral awards whose enforcement is not yet finalized, although the most recent jurisprudence is in favour of granting interim attachments in such cases.

One viewpoint holds that a receivable cannot be considered as "due and payable" unless the enforcement is finalized.[7] Conversely, an opposing viewpoint argues that it would be more equitable to allow for interim attachment under Article 257/1 of EBL before the award's enforcement is finalized.[8]

The Court of Cassation lacks a consistent jurisprudence on the issue, with different chambers issuing divergent decisions. For instance, the 15th Civil Chamber of the Court of Cassation held that since the enforcement of the decision rendered by the foreign court had not been finalised, the receivable could not be considered due and payable.[9] On the contrary, the 6th Civil Chamber adopted a differing viewpoint in its decision, stating that:[10]

> *The purpose of the enforcement decision is to procure the execution of the decisions rendered in foreign countries and finalized under their laws. Accordingly, it is not necessary to search for the finalized enforcement decision, to decide on an interim attachment concerning a receivable ascertained by a decision of a foreign court or an arbitral tribunal. This is because the interim attachment only confiscates the assets and rights of the debtor temporarily.*

This decision implies that there are no barriers to granting interim attachments for awards where enforcement has not been finalized, as the attachment itself does not execute the award. Additionally, the 11th and 19th Civil Chambers have issued decisions that align with this perspective,[11] and more recent decisions of lower courts also favour granting an interim attachment for an arbitral decision where the enforcement proceedings are not finalized.[12]

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[7] Cemal Şanlı, Emre Esen, İnci Ataman-Figanmeşe, ***Milletlerarası Özel Hukuk***, Vedat Bookstore, 2016, pp. 486-492.

[8] Zeynep Derya Tarman, "Yabancı Mahkeme ve Hakem Kararlarının Türkiye'de Tenfizinde Karşılaşılan Sorunlara İlişkin Bazı Tespitler", Public and Private International Law Bulletin, 2017, pp. 815-817.

[9] Turkish Court of Cassation, 15th Civil Chamber, Case No. 2014/7100, Decision No. 2015/365, dated 26.01.2015.

[10] Turkish Court of Cassation, 6th Civil Chamber, Case No. 2014/3906, Decision No. 2014/4941, dated 14.04.2014.

[11] Turkish Court of Cassation, 19th Civil Chamber, Case No. 2004/9775, Decision No. 2004/13391, dated 30.12.2004; Turkish Court of Cassation, 19th Civil Chamber, Case No. 2009/7952, Decision No. 2009/9703, dated 21.10.2009; Turkish Court of Cassation, 11th Civil Chamber, Case No. 2004/4309, Decision No. 2005/4022, dated 21.04.2005.

[12] ***See***, İstanbul 14th Regional Court of Justice, Case No. 2019/2410, Decision No. 2020/158, dated 12.02.2020; İstanbul 14th Regional Court of Justice, Case No. 2023/1005, Decision No. 2023/1015, dated 08.06.2023; İstanbul 12th Regional Court of Justice, Case No. 2021/1247, Decision No. 2021/1225, dated 01.09.2021; İstanbul 12th Regional Court of Justice, Case No. 2023/269, Decision No. 2023/252, dated 28.02.2023. See also Cemre Tüysüz, "Tenfiz Edilmemiş Yabancı Hakem Kararları Açısından İlamsız İcra Takiplerine ve İhtiyati Hacze İlişkin Bazı Meseleler", Public and Private International Law Bulletin, 2021, p. 717.

Conclusion

The recognition and enforcement of foreign arbitral awards in Türkiye is governed by a clear and well-structured framework, primarily set out in the New York Convention and the IPPL. Nevertheless, practical experience shows that certain procedural issues may be approached differently by courts at various levels, especially by local or regional courts in different judicial districts.

Despite these variations, the Court of Cassation plays a central role in harmonising divergent lower-court practices. Through its decisions, the Court of Cassation provides guiding principles that help align lower-court practice, resolve conflicting interpretations among its different chambers, and promote legal certainty for both domestic and foreign parties. In conclusion, although occasional procedural differences may arise, Turkish enforcement practice is steadily evolving towards more uniform and predictable outcomes. With experience and well-informed guidance, it is in most cases possible to navigate and overcome the challenges described above.

Determination of the Law Applicable to the Merits of the Dispute in International Arbitration

Deniz Güneri

Introduction

Determining the law applicable to the merits of a dispute is one of the most critical aspects of international arbitration. It plays a key role in ensuring that disputes are resolved in a predictable and fair manner and that the arbitral award is ultimately enforceable.

Today, most international commercial agreements include choice-of-law clauses. Their inclusion has become increasingly common, particularly due to the growing popularity of arbitration as a method of dispute resolution. However, parties may occasionally neglect, or deliberately choose not, to insert such clauses into their contracts. When a dispute arises in these circumstances, the absence of a choice-of-law provision adds complexity and prolongs the dispute resolution process. This challenge can be easily avoided by selecting the applicable law at the time of contract formation.

This article first explores how parties may determine the law governing the merits of a dispute, then considers how such determinations are made in the absence of an express choice. The final section offers recommendations on how to effectively make this selection.

Determination of the Law Applicable to the Merits of the Dispute by the Parties

Arbitration, as a judicial function, requires arbitrators to issue a binding award that resolves the dispute between the parties. To do so, they must determine the substantive legal norms applicable to the merits of the case.[1] It is important to distinguish this substantive law from both the law governing the arbitration agreement and the procedural law of the arbitration (*lex arbitri*).

A well-established principle in international arbitration is that parties are free to choose the law governing the arbitration agreement, the arbitral procedure, and the substantive law that arbitrators will apply to the merits of the dispute.[2]

This choice typically refers to the law of a specific country.[3] Parties may make this designation in one of the following ways: within the arbitration clause embedded in the substantive contract[4], separately within the main contract, or through a stand-alone "choice of law agreement". Party autonomy in selecting applicable law also extends to "anational rules" (non-national rules)[5] which may be treated as binding rules of law distinct from national legislation.[6]

[1] Sibel Özel, "Tahkimde Uyuşmazlığın Esasına Uygulanan Hukuk", Tahkim ve Uygulanacak Hukuk, 2021, ("Özel") p. 194.

[2] Özel, p. 194.

[3] Ali Yeşilırmak, ***ICC Tahkim Kuralları ve Uygulaması***, 1. Baskı, On İki Levha Publishing, 2018, ("Yeşilırmak") p. 100.

[4] In the event that the parties make a choice of law in the arbitration clause, it should be clearly stated whether the law chosen is the law applicable to the arbitration procedure or the law applicable to the merits. Pursuant to Article 12/C/1 of the International Arbitration Law no. 4686 dated 21 June 2001 ("IAL"), unless otherwise specified, the competent law shall be deemed to have been chosen to apply to the merits.

[5] Nonnational rules are rules that are not incorporated into the legal system of any individual state. İbrahim Doğan Takavut, ***Milletlerarası Ticari Tahkimde Doğrudan Uygulanan Kurallar***, 1. Baskı, On İki Levha Publishing, 2018, pp. 19-20.

[6] The international community has adopted the option for parties to choose non-national substantive provisions in place of state law. See UNCITRAL Arbitration Rules (2021) ("UNCITRAL Arbitration Rules"), art. 35/1, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention") (2006), art. 42/1; UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 ("UNCITRAL Model Law"), art. 28/1 and ICC Rules of Arbitration (2021) ("ICC Rules"), art. 21/1. Article 12/C/1 of the IAL also recognizes that the parties may make such a choice by using the term "rules of law" instead of "law."

Such choice of law can be express or implied:

(a) **Express choice** means the substantive rules of the selected law apply directly. Unless agreed otherwise, conflict-of-laws principles under that law are excluded.[7]

(b) **Implied choice** must be inferred from the parties' intentions, based on a review of the contract's terms and the parties' overall conduct. Indications of an implied choice may include: use of language or legal terminology tied to a specific jurisdiction, contractual features (e.g., place of delivery or nationality of a party) pointing toward a particular country, parties referring to the same national law when asserting claims.

A recurring debate concerns whether the choice of the arbitral seat or procedure suggests an implied choice of substantive law. The predominant view is that it does not: the seat is selected for its procedural framework, not for its substantive legal rules. Therefore, the choice of arbitral seat should not be interpreted as a choice of substantive law.[8]

Finally, once the parties have made a valid choice of applicable law, the arbitral tribunal is bound by it. Arbitrators are not permitted to disregard or override the parties' chosen law based on perceived inadequacy, unfairness, or irrelevance to the dispute.

Absence of Party Agreement on Applicable Law

The parties may be unable to agree on the law applicable to the substance of the dispute due to various factors, including the potential for disagreement during the process of selecting the governing law. In such cases, the applicable law is determined through one of two primary approaches:[9] Indirect determination via conflict of laws (*voie indirecte*) and direct determination of substantive law (*voie directe*).

A. Determination of the Applicable Law through a Conflict of Laws System

Unlike judges, arbitrators are not bound to apply a single conflict of laws system. As a result, arbitrators must identify which conflict of laws rules are applicable in

[7] For example, UNCITRAL Model Law, art. 28/1; IAL, art. 12/C/1.

[8] Hatice Özdemir Kocasakal, "Doğrudan Uygulanan Kuralların Milletlerarası Tahkimde Esasa Uygulanacak Hukuk Üzerindeki Etkileri" Tahkim ve Uygulanacak Hukuk, 2021, ("Özdemir Kocasakal") pp. 231-232.

[9] Özel, p. 203 et seq.

a given case. Four of the methods by which the applicable law is determined using the conflict of laws system are as follows:[10]

(a) Application of the conflict of laws rules of the seat of arbitration

(b) Cumulative application of all conflict of laws rules relevant to the dispute

(c) Application of general principles of conflict of laws

(d) Application of the conflict of laws rules deemed appropriate by the arbitral tribunal

Modern international arbitration laws and institutional arbitration rules provide that arbitrators should directly apply the substantive law to resolve disputes, rather than resort to conflict of laws rules. The remainder of this article analyses the direct determination of the substantive law applicable to the merits of the dispute.

B. Direct Determination of Substantive Law

In this approach, arbitrators resolve the dispute by directly applying the law or rules of law they consider appropriate, without resorting to any conflict of laws rules. Arbitrators may apply the following methods:

1. Application of the Substantive Law Most Closely Connected to the Underlying Dispute

Under this method, arbitrators must identify and apply the substantive law that has the closest connection to the case.

Pursuant to IAL Art. 12/C/2[11], the arbitral tribunal shall decide in accordance with the substantive law of the state it determines to be most closely connected with the dispute.[12] The tribunal is not permitted to apply *nonnational* rules of law.

[10] Özel, pp. 204-207.

[11] IAL, art 12/C/2: ***"If the parties have not agreed on the rules of law applicable to the merits of the dispute, the arbitrator or the arbitral tribunal shall decide in accordance with the rules of substantive law of the state it determines to be most closely connected with the dispute."***

[12] Some scholars argue that art. 12/C of the IAL constitutes a special conflict of laws rule introduced for arbitration. Özdemir Kocasakal, pp. 231-232; Özel, pp. 208-209; Ziya Akıncı, ***Milletlerarası Tahkim***, 4. Baskı, Vedat Kitapçılık, 2016, ("Akıncı"), pp. 232-233.

2. Application of the Substantive Rules Deemed Appropriate by the Arbitrators

This approach, codified in Article 1511 of the French Code of Civil Procedure, has been adopted in the arbitration laws of various countries. While some jurisdictions permit the application of nonnational rules, others stipulate that arbitrators may only apply national law they deem appropriate.[13] This second approach is reflected in Article 35/1[14] of the UNCITRAL Arbitration Rules 2010, which states: "*tribunal shall apply the* **law** *which it determines to be appropriate*". Accordingly, arbitrators are authorized to apply a national law that they consider suitable, and the application of nonnational rules is not permitted.

ICC Rules Article 21/1[15] also provides that arbitrators may directly apply the law they deem appropriate, without resorting to conflict of laws rules. By using the term "rules of law", the ICC Rules authorize arbitrators to apply nonnational rules and do not require the applicable law to be a national law.[16]

An advantage of this approach is that it enables the application of the national law or rule of law most suitable to the specific dispute. However, allowing arbitrators to directly apply substantive law without conducting a conflict of laws analysis may invite criticism for its subjectivity, potentially undermining the predictability and fairness expected in arbitral decision-making.

C. Determination in Accordance with Contractual Provisions and Commercial Customs

To resolve the dispute at hand, the arbitral tribunal will primarily apply the provisions of the contract. Where those provisions are insufficient, the tribunal shall consider the usages of trade and the practices of the parties. UNCITRAL Model Law Article 28/4[17] provides that, in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account

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[13] Özel, pp. 208-209.

[14] UNCITRAL Arbitration Rules, art. 35/1: *"The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate."*

[15] ICC Rules, art. 21/1: *"The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate."*

[16] Özdemir Köseoğlu, "Uluslararası Ticari Tahkimde Uyuşmazlığın Esasına Uygulanacak Hukukun Belirlenmesinde İrade Serbestisi Sınırları", Ankara Barosu Dergisi, 2020, p. 107.

[17] UNCITRAL Model Law, art. 28/4: *"In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."*

the trade usages applicable to the transaction. Article 35/3 of the UNCITRAL Arbitration Rules reiterates the same rule.[18]

The same approach is adopted in Article 21/2 of the ICC Rules[19], which provides that the arbitral tribunal shall take account of the provisions of the main contract between the parties as well as the relevant trade usages and practices. However, one notable difference exists between the ICC Rules and the UNCITRAL Model Law and UNCITRAL Arbitration Rules. While the ICC Rules require the arbitral tribunal to "take account of" the contractual provisions between the parties, the UNCITRAL Model Law and Arbitration Rules direct the tribunal to "decide in accordance with" those provisions. This variation in the ICC rules is possibly intended to ensure that the mandatory rules of law are not circumvented by applying contractual provisions.

Turkish IAL Article 12/C/1[20] includes the provision "*In the interpretation and supplementing of the provisions of the contract, commercial traditions and trade usage relating to that law shall also be taken into account.*" The following inferences can be drawn from this:

(a) Trade usage is to be considered only for interpreting the contract and supplementing omissions. This approach ensures that trade usage does not override the applicable law. Given that trade usages are not rules of law and do not absolve the need to identify the applicable law, this provision is appropriate. However, where the parties explicitly agree to apply a specific trade usage, it shall be treated and enforced as a contractual term.

(b) Only the commercial traditions, practices and trade usage arising within the legal system applicable to the agreement shall be considered. However, in international arbitration practice, greater weight is often placed on traditions and practices stemming from international commercial practice, rather than those rooted in national legal systems.[21]

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[18] UNCITRAL Arbitration Rules, art. 35/3: ***"In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction."***

[19] ICC Rules, art. 21/2: ***"The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages."***

[20] IAL, art. 12/C/1.

[21] Akıncı, pp. 231-232.

D. Determination as Amiable Compositeur, Ex Aequo Et Bono

In international arbitration, it is recognized that the arbitral tribunal may resolve a dispute as an *amicable compositeur* or ex aequo et bono, provided the parties have expressly authorized it. This allows a tribunal to give effect to a contract that may otherwise be deemed invalid under a particular legal system. Although UNCITRAL Model Law Article 28/3, UNCITRAL Arbitration Rules Article 35/2, ICC Rules Article 21/3 and IAL Article 12/C/3 permit arbitrators to be vested with this discretionary power, it is not common in practice.

Unlike ex aequo et bono, when acting as an *amiable compositeur*, the arbitrator or the arbitral tribunal remains bound by abstract legal principles, i.e. the generally accepted norms of international law. In this context, the authority to decide ex aequo et bono may be seen as conferring broader discretion upon the arbitrator to resolve the dispute.[22]

There is ongoing legal debate regarding the extent to which arbitrators acting as *amiable compositeurs* can still engage with a law or rule of law, or are bound by contractual provisions. One perspective holds that such authority does not empower arbitrators to disregard the law/rules of law entirely; rather, it permits them to reach an equitable award by bypassing rigid provisions. Another viewpoint asserts that arbitrators are granted discretion to resolve disputes without being bound by any legal system or rule. Some scholars maintain that arbitrators cannot wholly disregard the parties' agreement.[23]

Conclusion

In international arbitration, where the parties have identified the law applicable to the merits of the dispute, the arbitral tribunal is required to apply the designated law. In the absence of such an agreement, the tribunal may resort to conflict of laws rules or directly determine the applicable substantive law. Although less common in practice, both international arbitration institutions and national arbitration laws permit arbitrators to render awards as *amiable compositeur* or *ex aequo et bono*.

The parties' determination of the law applicable to the merits of the dispute in advance, at the contractual stage, and the direct designation of the substantive law without reference to conflict of laws rules can help avoid stalemates in the

[22] Zeynep Özgenç, "Milletlerarası Ticari Tahkimde Hakemin veya Hakem Kurulunun ***Ex Aequo Et Bono*** Karar Verme Yetkisi", Public and Private International Law Bulletin, 2014, p. 50.

[23] Özel, pp. 211-213.

dispute resolution process arising from the parties' failure to reach an agreement on this issue. It also prevents the application of legal rules that were not contemplated by the parties, thereby ensuring that proceedings remain fair and aligned with the commercial agreement of the parties. In making this choice, the parties should carefully consider the practical dimensions of their relationship, including their respective positions within the commercial arrangement and the jurisdiction in which the underlying transaction is conducted. Such foresight contributes to a more efficient and coherent dispute resolution outcome.

Does Filing an Administrative Lawsuit Against the Administrative Fines Imposed by the Personal Data Protection Board Suspend Collection?

Artun Mimar & İzem Tayfur Büyüktaş

Introduction

As is known, pursuant to Article 18 of the Personal Data Protection Law No. 6698 dated 24 March 2016 ("Law"), titled "Misdemeanours", the Personal Data Protection Board ("Board") may impose administrative fines on data controllers and data processors in cases where the obligation to inform is not fulfilled, the obligations regarding data security are not complied with, the decisions rendered pursuant to Article 15 of the Law are not implemented, the obligation to register with and notify the Data Controllers Registry is violated, and the standard contracts—which must be among the appropriate safeguards required for the transfer of personal data abroad in certain circumstances—are not notified in accordance with the conditions set forth in the Law.

With the amendment to Article 18 of the Law, which entered into force as of 1 June 2024, it has been stipulated that lawsuits may be filed before administrative courts against administrative fines imposed by the Board.[1] Prior to the said amendment, since there was no specific provision in the Law regarding

[1] The amendment was introduced by Article 35 of the Law No. 7499 Amending the Code of Criminal Procedure and Certain Laws, published in the Official Gazette dated 12 March 2024, No. 32487; Personal Data Protection Authority, "Amendments to the Personal Data Protection Law" ***Personal Data Protection Authority Bulletin***, 2024, https://kvkk.gov.tr/SharedFolderServer/CMSFiles/4eba766b-7425-4cd4-97f5-cb09c4cf4ef9.pdf accessed 5 August 2025. Pursuant to Provisional Article 3/2 of the Law, applications pending before the Magistrates' Courts of Criminal Jurisdiction as of 1 June 2024 shall continue to be heard by those courts. Accordingly, the new legal remedy shall apply only to applications filed after that date, whereas the cases already initiated shall be adjudicated by the Magistrates' Courts of Criminal Jurisdiction.

the judicial remedy against administrative fines, objections to the Board's administrative fines were filed within 15 days before the Magistrates' Courts of Criminal Jurisdiction (*Sulh Ceza Hakimlikleri*) pursuant to Articles 3/1(a) and 27 of the Misdemeanours Law No. 5326 dated 30.03.2005 ("Misdemeanours Law"), which is the general procedural law on administrative sanctions.[2] If no application was filed within this period, the fine would become final; whereas in cases of objection, finalization would only occur once the judicial proceedings concluded.

As will be explained in detail below, pursuant to the provisions of the Misdemeanours Law, which serves as the general procedural law on administrative sanctions, the General Communiqué on Collection (Series: B No. 18) regarding the enforcement of the Misdemeanours Law, and the established jurisprudence of the Council of State (*Danıştay*), administrative fines must, as a rule, become final (i.e., no legal remedy is sought within the prescribed period against the administrative fine, or, in cases where a legal remedy is sought, all stages of the proceedings are completed) in order for them to be pursued and collected. Accordingly, the collection of administrative fines imposed by the Board was also subject to the condition that such fines become final. However, with the aforementioned amendment to the Law, administrative fines imposed by the Board have been brought under the jurisdiction of administrative courts, and, as is known, under the administrative judicial procedure, the filing of a lawsuit does not, as a rule, suspend the execution of the challenged administrative act. In this respect, under the administrative judicial procedure regime, it is not necessary for administrative fines, which constitute individual administrative acts of the Board,[3] to become final in order for them to be collected.

This article puts forth that, following the amendment to the Law, there exists a conflict between the Misdemeanours Law and the Administrative Procedure Law No. 2577 dated 6 January 1982 ("APL") regarding whether administrative fines imposed by the Board must become final in order to be collected. It can be considered that the most permanent solution to resolve the uncertainty arising from this conflict is a change in the law. Nevertheless, in order to clarify the practice in the shorter term, it is also possible for the matter to be elucidated through the jurisprudence of the Council of State or secondary regulations to be issued by the executive. In any event, the collection of a monetary fine, which

[2] Berk Yalçın, ***Kişisel Verilerin Korunması Hukukunda Düzenlenen İdari Yaptırımlar***, Master's Thesis, 2023, ("Yalçın"), pp. 100-101, 108-110; Court of Jurisdictional Disputes Civil Chamber, Case No. 2022/647, Decision No. 2023/59, dated 23.01.2023; Ankara Regional Administrative Court, 10th Administrative Chamber, Case No. 2024/9642, Decision No. 2024/9319, dated 31.12.2024; Plenary Session of Constitutional Court, 2020/7518, dated 12.10.2023.

[3] Yalçın, 85.

constitutes an interference with the right to property, must be carried out in conformity with the principle of legal certainty.

The Conflict Between the Misdemeanours Law Regime and the Administrative Procedure Law Regime

Pursuant to Article 3 of the Misdemeanours Law, titled "Quality as General Law";

> *(1) The provisions of this Law on: a) Legal remedies against administrative sanction decisions shall apply unless otherwise provided in other laws, b) Other general provisions shall apply to all acts requiring an administrative monetary fine or confiscation of property.*

Accordingly, unless the law regulating the relevant misdemeanour contains a specific provision regarding legal remedies, Articles 27 to 31 of the Misdemeanours Law, which set out the legal remedy procedure against administrative sanctions, shall apply to objections filed against administrative monetary fines imposed for the commission of the relevant misdemeanour, and such objections shall be resolved by the Magistrates' Courts of Criminal Jurisdiction in accordance with the procedural rules set forth in the said articles. Where the law regulating the relevant misdemeanour contains a specific provision regarding legal remedies, however, the dispute shall be resolved according to the procedural rules specified in that provision. It is further stipulated that other general provisions of the Misdemeanours Law not concerning legal remedies shall apply to all administrative monetary fines regulated under various laws.

Since the amendment to the Law explicitly provides that applications against administrative monetary fines imposed by the Board shall be filed with the administrative judiciary, the provisions of the Misdemeanours Law concerning legal remedies are no longer applicable. However, this amendment pertains solely to the determination of which court has jurisdiction. The provisions of the Misdemeanours Law other than the said provisions shall remain applicable with respect to administrative monetary fines imposed by the Board. It must be emphasized that the applicability of the Misdemeanours Law does not stem from it being a special law, but from its nature as the general law governing administrative monetary fines.

Indeed, pursuant to Article 17/4 of the Misdemeanours Law (which does not concern legal remedies):

> *Finalized decisions regarding administrative monetary fines to be recorded as revenue in the General Budget*[4] *shall be transmitted to the collection offices designated by the Ministry of Finance for collection in accordance with the provisions of the Law No. 6183 on the Procedure for the Collection of Public Receivables, dated 21/7/1953.*

In the established jurisprudence of the Council of State,[5] this provision is interpreted to mean that administrative monetary fines must be finalized in order to be collected, and therefore administrative monetary fines may only be demanded by way of a payment order under the Law on the Procedure for the Collection of Public Receivables once they have become final. The concept of finalization of administrative monetary fines is defined in Article 7/1 of the General Communiqué on Collection (Series: B No. 18) as follows: *"Finalization for administrative monetary fines means that no legal remedy has been sought against the decision on administrative sanction, or, in cases where a legal remedy has been sought, that the stages of the proceedings have been completed."*

Therefore, pursuant to Article 17/4 of the Misdemeanours Law, which stipulates its applicability to all administrative monetary fines, in order for administrative monetary fines imposed by the Board to be collected through the issuance of a payment order, either no application must be filed with the administrative judiciary within the prescribed period, or, if such an application has been filed, the legal remedies specific to administrative jurisdiction must have been exhausted.

While this is the case under the Misdemeanours Law regime, the amendment to the Law has provided that appeals against administrative monetary fines imposed by the Board shall be brought before the administrative judiciary, thereby rendering the APL applicable once recourse is taken against the Board's decision imposing an administrative monetary fine. As is known, under the administrative judicial procedure regime, administrative acts benefit from the presumption of legality. As a consequence of this, the filing of a lawsuit

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[4] Pursuant to Article 8/1(a) of the General Communiqué on Collection (Series: B No. 18) and Schedule (III) annexed to the Public Financial Management and Control Law, administrative monetary fines imposed by the Personal Data Protection Authority shall be recorded as revenue in the general budget.

[5] Council of State, 4th Chamber, Case No. 2023/10529, Decision No. 2024/3509, dated 29.05.2024; Plenary Session of the Chambers for Administrative Cases of the Council of State, Case No. 2016/1367, Decision No. 2018/2415, dated 16.05.2018; Council of State, 13th Chamber, Case No. 2015/960, Decision No. 2015/2876, dated 03.09.2015.

in the administrative judiciary does not, as a rule, suspend the execution of administrative acts.[6] Indeed, according to Article 27/1 of the APL: *"The filing of a lawsuit before the Council of State or administrative courts shall not suspend the execution of the administrative act subject to the lawsuit."* Accordingly, under the administrative judicial procedure, it may be interpreted that the filing of a lawsuit before the administrative court against administrative monetary fines imposed by the Board does not suspend their collection, and that if suspension is sought, a stay of execution order must be obtained from the administrative court. The practical implication of this interpretation is that, despite the filing of a lawsuit before the administrative court against the Board's decision imposing an administrative monetary fine, a payment order may nevertheless be issued by the administration for the purpose of collection without awaiting the finalization of the fine, on the grounds that the fine was not paid when due and that no stay of execution order had been granted in the pending lawsuit.[7]

The conflict at hand[8] essentially stems from the incompatibility between Article 17/4 of the Misdemeanours Law and Article 27 of the APL.

Resolution of the Conflict

Conflicts between statutory provisions that regulate the same subject matter differently must first be resolved according to the principles of generality–specificity and priority–posteriority. If a resolution cannot be achieved in this way, a legal gap will be deemed to exist, and such gap must be filled in compliance with the principle of legal certainty, either through legislative amendment, judicial precedent, or regulatory acts of the executive. The principle of legal certainty requires that the meaning derived from the statutory provisions forming

[6] Fatih Torun, ***İdari Yargıda Yürütmenin Durdurulması***, PhD Thesis, 2020, pp. 25-27.

[7] In the case before the Council of State, 13th Chamber, the first-instance administrative court, with the reasoning to that effect, rejected the request for annulment of the payment order issued for the collection of an administrative monetary fine imposed under the Law no. 5307 on the Liquefied Petroleum Gases (LPG) Market and the Law on the Amendment of the Electricity Market Law dated 2 March 2005. This dispute was subsequently brought before the Plenary Session of the Chambers for Administrative Cases of the Council of State and will be addressed further below. See Council of State, 13th Chamber, Case No. 2015/960, Decision No. 2015/2876, dated 03.09.2025.

[8] For the concept of the conflict of legal rules and methods of resolution, see Kemal Gözler, Yorum İlkeleri, Kamu Hukukçuları Platformu (Public Law Practitioners Platform) and Union of Turkish Bar Associations, "Yorum İlkeleri", 2012, ("Gözler") p. 64 et. seq. https://www.anayasa.gen.tr/yorum-ilkeleri.pdf accessed 8 August 2025; Sururi Aktaş, "Pozitif Hukukta Boşluk Kavramı", Erzincan University Law Faculty Journal, 2010, p. 22 et. seq.

the basis of the interference, together with the related judicial precedents and secondary regulations issued by the executive, be foreseeable.[9]

In the context of the present issue, Article 27 of the APL lays down the general rule as to whether finalization is required for the execution of all administrative acts; by contrast, Article 17/4 of the Misdemeanours Law specifically prescribes the requirement of finalization for the collection of administrative monetary fines among administrative acts. Moreover, Article 27 of the APL predates Article 17/4 of the Misdemeanours Law.[10] In this case, according to the view accepted in the doctrine[11], the Misdemeanours Law, being subsequent in time and of a special character with respect to the subject matter, should prevail. Consequently, the Board's decisions imposing administrative monetary fines should not be collected before they have become final.

On the other hand, it may be argued that, in comparison with the Misdemeanours Law, which governs all types of administrative monetary fines, the Law—by regulating only the administrative monetary fines imposed by the Board—assumes the character of a special law. The Law provides that appeals against the Board's administrative monetary fines may be brought before the administrative courts and, in this way, accepts that in the event of a dispute arising from such fines, the provisions of the APL shall apply. In that case, the initiation of proceedings does not suspend collection; if suspension is sought, an application for a stay of execution must be made.

At this point, it is useful to refer to a case that brought Article 17/4 of the Misdemeanours Law and Article 27 of the APL into conflict and that parallels the subject under discussion. Similar to Article 18/3 of the Law, Article 18/3 dated 2 July 2012 of the Law no. 5307 on the Liquefied Petroleum Gases (LPG) Market and the Law on the Amendment of the Electricity Market Law dated 2 March 2005 ("LPG Law"), also confers jurisdiction on the administrative courts for appeals against administrative sanction decisions rendered under that statute. Furthermore, this provision, just like Article 18/3 of the Law, constitutes a subsequent and special law in comparison with Article 17/4 of the Misdemeanours Law.

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[9] Constitutional Court, Second Section, 2013/4395, dated 10.06.2015, para. 109; Haşim Özpolat, "Anayasa Mahkemesi'nin Bireysel Başvuru Kararlarında Maddi Anlamda Kanun Kriteri", Journal of the Turkish Justice Academy, 2018, p. 614-615; Plenary Session of Constitutional Court, Case No. 2018/31, Decision No. 2020/38, dated 16.07.2020, para. 21.

[10] While the provisions of Article 27 of the APL, stipulating that the filing of a lawsuit in administrative jurisdiction does not, as a rule, suspend the execution of the administrative act, date back to 10 June 1994, Article 17/4 of the Misdemeanors Law is dated 6 December 2006.

[11] Gözler, 69; Adnan Güriz, ***Hukuk Başlangıcı***, 15th Edition, Siyasal Bookstore, 2013, p. 158 et. seq.

In the case reflected in the decision of the Plenary Session of the Chambers for Administrative Cases of the Council of State dated 16 May 2018 and numbered 2016/1367 E., 2018/2415 K., the first-instance administrative court, in a lawsuit seeking the annulment of a payment order issued for the collection of an administrative monetary fine imposed under the LPG Law, held that, since no stay of execution order had been granted in the administrative lawsuit filed against the said fine and the fine had not been annulled, and given that administrative acts benefit from the presumption of legality, there was no unlawfulness in the payment order issued with respect to an administrative monetary fine that had not yet become final as of the date of the payment order.

The appellate court, the 13th Chamber of the Council of State[12], and subsequently the Plenary Session of the Chambers for Administrative Cases of the Council of State, which reviewed the appeal filed against the insistence decision of the first-instance administrative court, concluded otherwise. They determined that at the time the payment order was issued, the lawsuit against the administrative fine was still pending at the appellate review stage and thus held that the payment order issued for a non-final administrative fine was unlawful.[13]

The significance of this case for our subject lies in the fact that, with respect to whether administrative monetary fines for which the administrative judiciary has been designated as the legal remedy must become final before they can be collected, two different interpretations—one based on Article 27 of the APL and the other on Article 17/4 of the Misdemeanours Law—have both been adopted in practice. This demonstrates that the conflict between these two statutory provisions has also been reflected in practice in other contexts. The Council of State has not yet developed specific jurisprudence on whether fines imposed by the Board after the amendment to the Law must become final before being collected.

On the other hand, it is observed that, unlike the Law and the LPG Law, in statutory provisions of a special character regarding certain other regulated fields, the legislature, while stipulating that appeals against administrative monetary fines may be brought before the administrative courts, has also explicitly provided that the initiation of proceedings shall not suspend the collection of the fine, thereby departing from the regime of the Misdemeanours Law with respect to those fines. Article 25/2 of the Environmental Law No. 2872 dated 9 August 1983 and Article 55/2 of the Law on the Protection of Competition No.

[12] ***See above***, footnote 7.

[13] Plenary Session of the Chambers for Administrative Cases of the Council of State, Case No. 2016/1367, Decision No. 2018/2415, dated 16.05.2018.

4054 dated 7 December 1994 may be cited as examples. By contrast, when amending the Law, the legislature remained silent on the question of whether the administrative monetary fines to be imposed by the Board must become final prior to their collection.

Finally, it should be noted that Article 7/3 of the General Communiqué on Collection (Series: B No. 18) provides as follows:

> *…in order for administrative monetary fines to be pursued under the Law No. 6183 on the Procedure for the Collection of Public Receivables dated 21/7/1953, such fines must become final. However, the provisions of laws enacted subsequent to the Law No. 5326 shall be reserved.*

Nevertheless, since the amendment to the Law did not introduce a clear provision on finalization, this communiqué provision is likewise of no assistance in resolving the conflict between the Misdemeanours Law regime and the regime established by the Law and its referral to the APL.

Conclusion

The collection of administrative fines constitutes an interference with the fundamental right to property. One of the requirements for such interference is the principle of legality, which also encompasses the principle of certainty. As explained above, the regimes of the Misdemeanours Law and of the Law (together with its referral to the APL) are incompatible as to whether the Board's administrative fines must become final before they can be collected, and this inconsistency has not been resolved through judicial precedent or secondary regulations.

This uncertainty poses problems in terms of the principles of legal security and certainty. Therefore, as in certain other regulated areas, the solution must be achieved in accordance with the principle of certainty, through legislative amendment, secondary regulation by the executive, or jurisprudence of the Council of State. In the current situation, however, when challenging monetary fines imposed by the Board before the administrative judiciary, it is advisable to request not only the annulment of the fine but also the granting of a stay of execution.

Piercing the Corporate Veil of State-Owned Enterprises: The Case of Libya's National Oil Corporation in the *Olin v. Libya* Dispute

Metehan Motugan

Introduction

The *Olin v. Libya* dispute centres on what once looked like a promising investment, a dairy and juice factory established in Libya's capital, Tripoli during a window of economic openness in Libya. But all that was only temporary optimism. With an environment of mounting political instability, the Government of Libya in 2006 saw fit to expropriate this investment. This was the prelude to a lengthy and complex legal battle spanning years and jurisdictions.

One of the turning points of this dispute came with the decision from the Paris Court of Appeal of 19 June 2025. This landmark judgment applied the "alter ego" doctrine of France, whereby arbitral awards against States can be enforced by piercing the corporate veil of State-Owned Enterprises ("SOEs"). In this case, assets of Libyan National Oil Corporation ("NOC") were the target before the French court.

The Start of the Dispute: A Broken Promise and Expropriation

The *Olin* dispute arose during Libya's push to reintegrate into the global economy in the early 2000s.[1] A Libyan national and sole shareholder of Cypriot Olin Holdings invested in a dairy and juice factory in Tripoli. This venture reflected not only entrepreneurial ambition but also optimism sparked by

[1] Alison Pargeter, "Reform in Libya: Chimera or Reality?", Mediterranean Paper Series, The German Marshall Fund of the United States, 2010 ("Pargeter, Reform in Libya").

new investment-friendly legislation and Libya's growing number of bilateral investment treaties ("BITs") at that time. The 1997 Investment Law No. 5 and its 2003 amendment offered guarantees and incentives to attract foreign capital.[2]

However, this climate of reform proved fragile. In October 2006, the Libyan authorities abruptly issued an administrative order to expropriate Olin's factory and land, claiming that the site was required for public housing. No compensation was offered, and the army began dismantling the facility.[3]

Interestingly, this move came shortly after Saif al-Islam Gaddafi, the son of then-leader Muammar Gaddafi, gave his populist "Together for Tomorrow's Libya" speech, in which he targeted wealthy elites and promised homes and vehicles to the country's youth. Although framed as anti-corruption, the campaign allegedly functioned as a tool for political targeting and for punishing those viewed as outside the favour of ruling elites.[4]

Olin's expropriation thus illustrates how rapidly investment protections can erode, highlighting the risks faced by investors when State policy shifts from reform to repression.

Domestic Legal Battles: Judicial Deadlock and Frustrated Remedies

After the expropriation, Olin sought redress within the Libyan domestic legal system from 2006 to 2014, filing several claims for compensation. The most crucial moment in the process came on 13 April 2010 when the Tripoli Court of Appeal set aside the expropriation order as being unlawful under Libyan Investment Law. However, the Libyan authorities refused to enforce this decision, which thus became ineffectual.[5]

The final domestic judgment came on 14 February 2014, when the South Tripoli Court rejected Olin's compensation claim, holding that there was no proof of damage.[6] When it was clear that the judicial system was ineffective in redressing its grievances, Olin resorted to international arbitration.

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[2] ***Olin Holdings Limited v. Libya*** ("***Olin v. Libya***"), ICC Case No. 20355/MCP, Final Award dated 25 May 2018, paras. 80-82.

[3] ***Id.***, paras. 93-95.

[4] Nader Bushnaf and Partners Law Firm, "'€24 Million – From a Dairy Factory to the Freezing of NOC Assets'", Facebook, https://www.facebook.com/ElPashaLtd/posts/our-english-version-page-/1227472515842912/, accessed 11 August 2025; Pargeter, Reform in Libya, pp. 5, 15, 17.

[5] ***Olin v. Libya***, paras. 101-110.

[6] ***Id.***, para. 120.

On 3 July 2014, the company initiated arbitration proceedings before the International Chamber of Commerce (ICC) pursuant to the 2004 Cyprus–Libya BIT, seeking nearly $148 million in compensation.[7] It alleged that Libya had breached its obligations under the BIT and Libyan foreign investment law, notably through unlawful expropriation and failure to accord fair and equitable treatment. This event clearly illustrates the conversion of a domestic legal dispute into an international investment dispute.

International Arbitration: Evolving from Domestic Politics into International Law

The ICC tribunal, seated in Paris and composed of Lebanese arbitrators Nayla Comair-Obeid (presiding), Ibrahim Fadlallah, and Roland Ziadé, examined Olin's claim under the 2004 Cyprus-Libya BIT. Finding Libya liable for acts of unlawful expropriation and violation of fair and equitable treatment, the tribunal awarded damages of € 18.225 million to Olin plus € 1.8 million in legal costs and interest on 25 May 2018.[8]

The enforcement process was extended and complex, with Olin seeking to enforce the award across several jurisdictions, confronting issues of sovereign immunity and the legal autonomy of SOEs.

In France, the target was NOC, Libya's State-owned oil company, which largely controls the Libyan economy. French courts ordered attachments on the bank accounts of NOC and its shareholder rights in Mabruk Oil Corporation, a joint venture with TotalEnergies.[9] Meanwhile, U.S. courts enforced the arbitral award, rejecting Libya's claims of immunity and objections on procedural grounds.[10]

In these circumstances, Olin's case revealed the strategic difficulties encountered in enforcing awards against States in France, especially with respect to SOEs.

[7] ***Id.***, para. 17.

[8] ***Id.***, para. 552.

[9] Paris Court of Justice, Order No. 22/1576, dated 10 November 2022.

[10] U.S. Court of Appeals for the Second Circuit, Judgement, dated 12 July 2023.

Piercing the Corporate Veil: Paris Court of Appeal Finds NOC to be an Emanation of Libya

One of the most significant aspects of Olin's enforcement strategy was whether NOC should be designated as Libya's "alter ego." While NOC is technically a separate legal entity on paper, it functions as Libya's main economic force by controlling national oil revenues. NOC had claimed that separateness of company from Libya.

But on 19 June 2025, the Paris Court of Appeal rejected this defence. Upholding a lower court ruling, the court held that NOC was an emanation of Libya and not immune.[11] This was a notable use of the "alter ego" doctrine employed to pierce the veil of corporate personality of SOEs where States have fallen short of international obligations.

The court applied a two-stage French case law test to ascertain whether NOC was functionally and financially independent. It identified unambiguous evidence of entanglement: NOC's administration is statutorily regulated, it has government-appointed leadership, and State approval is necessary for its most important financial decisions. NOC's revenues derive from State-owned hydrocarbon resources and flow to the Central Bank of Libya, and account for more than 95% of the national budget.

The court also dismissed Libya's contention that enforcement was premature. While Libya actively participated in the arbitration proceedings, it waited until 2022, four years after the award, before it petitioned to set aside the award. This delay and lack of compliance, the court held, justified enforcement.

Having determined NOC's alter ego status, the court permitted Olin to enforce the € 18.2 million arbitral award against NOC's assets, even though NOC was not a party to the arbitration. This landmark decision highlights a growing judicial trend in France and beyond: non-autonomous SOEs may be regarded as State alter egos, with their assets vulnerable to enforcement action. It establishes the enforceability of arbitration awards by preventing States from using legal fiction to evade binding awards.

Two weeks later, on 1 July 2025, the Paris Court of Appeal also rendered two more judgments further solidifying Olin's case.[12] The court confirmed the partial

[11] Paris Court of Appeal, Decision No. 24/07514, dated 19 June 2025.

[12] Paris Court of Appeal, Decision No. 22/20898, dated 1 July 2025; Paris Court of Appeal, Decision No. 22/20899, dated 1 July 2025.

award on jurisdiction and final ICC award of over € 24 million in damages, interest, and legal costs.

Cumulatively, these June and July 2025 rulings removed all the procedural barriers to enforcement in France and laid a solid groundwork for financial responsibility of Libya through NOC's assets, which are of paramount importance to the Libyan economy. This outcome comes nearly 20 years after the expropriation.

French "Alter Ego" Doctrine: Piercing the Corporate Veil

The Paris Court of Appeal's decision of 19 June 2025 reaffirmed the French application of the following principle: an SOE may be held liable for a State's debt where it may be considered an "alter ego" or "emanation" of the State.

Based on the Court of Cassation's 1987 decision in *Benvenutti et Bonfant v. Banque commerciale congolaise*,[13] the doctrine adopts a two-prong test: (1) lack of functional independence, where State has effective control over the management and decision-making of the SOE; and (2) commingling of funds, where the funds of the SOE cannot be separated from that of the State.

The test has been applied consistently by French courts.[14] In the Court of Cassation's 2007 decision in *SNPC v. Walker International*,[15] enforcement against the French accounts of the National Petroleum Company of the Congo was upheld on the basis of its use to finance State operations. The court also allowed attachment of the Congolese SOE assets on the basis of its subordination to the presidency and absence of a distinct budget.

French courts' substance-over-form approach focuses on governance structure, public service obligations, and money flows between State and SOE. Courts use a "concordant indicia" methodology, examining a combination of facts to decide whether or not an alter ego exists.

Although France's Sapin II Law dated 2016 created procedural protection for foreign State assets,[16] it did not change the substantive alter ego test applied in determining when SOE assets can be confiscated. More recently, French courts

[13] French Court of Cassation, Decision No. 85-14.843, dated 21 July 1987.

[14] Maria Kostystska, "Sovereign Immunity – France", Lexology GTDT – Sovereign Immunity, 2023, pp. 10-11.

[15] French Court of Cassation, Decision No. 04-13.108, dated 6 February 2007.

[16] French "Sapin II" Law No. 2016-1691, art. 59 introduced three new articles into the French Code of Civil Enforcement Procedures (Articles L.111-1-1, L.111-1-2 and L.111-1-3) imposing strict conditions on seizing foreign State assets.

have continued to hold[17] that SOEs, as instruments of State sovereignty, can have their assets confiscated under the same "alter ego" principle.

Therefore, the *Olin v. Libya* decision aligns with France's position on the enforcement of arbitral awards against States and their instrumentalities, where corporate forms are employed to escape legal liability.

Wider Implications

The French rulings in the *Olin v. Libya* dispute amount to a serious legal and strategic loss for Libya. Economically, Libya must confront the enforcement of more than € 24 million and legal fees. Strategically, the "alter ego" designation of NOC by the Paris Court of Appeal targets Libya's economic titan and breaks the time-trusted armor sheltering SOEs from sovereign liability.

For investors, this is a significant shift in enforcement dynamics. Courts are increasingly looking beyond corporate form in order to identify true control and financial entanglement, facilitating the enforcement of arbitration awards where States default. This shift enhances international arbitration's credibility in enforcing awards against States, particularly where they stubbornly resist compliance.

Politically, the case is a classic example of the long-term impact of domestic State action. The 2006 expropriation, rooted in Libya's own internal political evolution, has resulted in foreign court liability nearly 20 years later. Olin's decision to target NOC's assets, as opposed to assets of the Libyan Investment Authority's subsidiary Libyan Foreign Investment Company (LAFICO),[18] is a reflection of NOC's liquidity and significance to Libya's economy as well as its international financial position today.

The French courts' action in the *Olin v. Libya* case is therefore a landmark in enforcement of awards against Libya, aimed at the vast assets of NOC, a dominant force in the Libyan economy.

[17] Paris Court of Appeal, Decision No. 21/109197, dated 19 May 2022.

[18] Paris Court of Appeal, Decision No. 18/17592, dated 5 September 2019 found that LAFICO is an emanation of Libya.

Conclusion

The *Olin v. Libya* dispute perfectly illustrates how deeply intertwined politics, law, and economics are in international investment disputes. It unfolds from an investment opportunity to a politically motivated expropriation with no judicial resolution, culminating in a landmark arbitral award and enforcement litigation against Libya's assets. The dispute helps frame critical cases on sovereign immunity and the function of SOEs.

The Paris Court of Appeal's decision reveals the readiness of the courts to pierce the corporate veil and enforce liability against States through their SOEs, which serve as corporate shields. This broadens the legal protection for investors, as it allows to target NOC, Libya's treasury in corporate disguise. The decision also demonstrates that sovereign immunity, while still a significant obstacle in enforcement proceedings, is not absolute and can be overcome.

With the growing tendency to use SOEs as a means of economic and political control, the *Olin v. Libya* dispute emphasizes the necessity of applying a practical and functional evaluation of State-SOE relationships for the enforcement of arbitral awards.

The Applicability of Sanctions Imposed on Russia as Overriding Mandatory Provisions in Arbitration Proceedings

İsmet Zafer Enhoş & Mehmet Hasan Yacı

The annexation of Crimea in 2014 and the invasion of Ukraine in 2022 by Russia triggered the expansion of unilateral sanctions, particularly by the EU and the US. These sanctions, designed to exert political and economic pressure, had significant repercussions for global commerce, extending their effects beyond sanctioning and sanctioned states to third-country nationals. In a globalized economy, no actor remains immune from the disruptions caused by armed conflict and sanctions. This reality raises complex questions for arbitration, especially in third States such as Türkiye, regarding the enforceability of contracts, applicability of foreign mandatory rules, and potential enforcement challenges.

In this article, we will briefly address the notion of unilateral sanctions and, in particular, the sanctions regime imposed by the EU arising from the Russia–Ukraine conflict. Following this, we will delve into the possibility of applying sanctions rules as overriding mandatory provisions in arbitral proceedings seated in Türkiye and when Turkish law governs the merits of the dispute.

General Overview of Unilateral Sanctions

Under international law, no definition of unilateral sanctions exists. Broadly, they can be explained as the restrictive measures that are imposed by a single State or group of States acting outside the framework of the United Nations, with the stated aim of compelling another State, entity or individual to change certain policies or behaviours.[1]

[1] Matthew Happold and Paul Eden (eds.), ***Economic Sanctions and International Law***, Bloomsbury, 2016, p. 71.

Generally, the purpose of the sanctions is to compel or at least pressure a State, organization, or individual to alter their policies, or to signal the Sanctioning State's disapproval of those policies.[2] Beyond this general function, sanctions may also advance broader foreign policy and national security objectives, such as promoting human rights, deterring acts of use of force, or preventing the proliferation of weapons.[3]

There are two types of sanctions depending on the targeted entity. The first group of sanctions is 'primary' sanctions, which directly restrict trade, financial flows, or other economic transactions with the target. The second group is 'secondary' sanctions, aimed at penalizing third parties who interact with the target in ways that might undermine the primary restrictions. Sanctions may also differ in breadth: they can be selective, covering only specific sectors or transactions, or comprehensive, cutting off nearly all economic relations. Moreover, they may apply broadly at the country level or be narrowly tailored against individuals.[4]

As jurisdictional questions regarding secondary sanctions on third parties remain unsettled, States impose them broadly to enforce their sanctions regime effectively. Hence, entities worldwide closely monitor the sanctions regimes of different States to avoid becoming subject to such measures.

Recently, the interplay between sanctions and arbitration has become a highly debated topic, most recently following the EU's adoption of its 18th sanctions package against Russia on 18 July 2025. Notably, beyond targeting Russia's energy, finance, and defence sectors, the 18th package included provisions addressing international arbitration, to prevent sanctioned Russian investors from undermining EU sanctions through arbitral claims.

Broad Scope of Sanctions

In order for the provisions of the law of a third state to apply as overriding mandatory provisions despite not being part of the law applicable to the dispute or the law of the seat, first, these provisions under the national law under which

[2] Rainer Hofmann, "Sanctions", Oxford Public International Law (EPIL),2011, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1521?rskey=dmddqJ&result=3&prd=OPIL, accessed 27 August 2025.

[3] Sarah Krulikowski, "Economic Sanctions Overview", United States International Trade Commission, https://www.usitc.gov/publications/332/executive_briefings/ebot_economic_sanctions_overerview.pdfhttps://www.usitc.gov/publications/332/executive_briefings/ebot_economic_sanctions_overview.pdf, March 2024, accessed 27 August 2025.

[4] *Id.*

they are enacted shall apply to the specific condition no matter what the law is chosen by the parties.[5] Indeed, the scope of the EU and US sanctions are broad enough to satisfy these conditions. For the sake of simplicity, we will only focus on few examples from EU sanctions. For instance, "no re-export to Russia" clauses imposed by EU under the Article 12g of the Regulation 833/2014 on contracts with persons operating outside the EU indicates the intention to apply the relevant regimes even in the cases where the parties have a limited connection to EU. Indeed, the contractual provisions provided in the EU guidelines brings a contractual duty on the non-EU contractual partners to make efforts to prevent the circumvention of the sanctions and "maintaining an adequate monitoring mechanism to detect conduct by any third parties further down the commercial chain, including by possible resellers".[6]

Sanction regimes not only shape substantive obligations but also impose procedural barriers on sanctioned entities seeking to bring claims or enforce arbitral awards. Under the EU's 18th sanctions package, Member States must refuse recognition and enforcement of awards or judgments obtained by sanctioned Russian or Belarusian investors, contest such attempts on public policy grounds,[7] and refrain from assisting in related enforcement. The package affirms sanctions compliance as fundamental public policy and introduces a damages recovery mechanism allowing an EU Member State to bring a claim in its national courts to recover damages or litigation costs resulting from sanctions related arbitration initiated by Russian investors with the option to target not only the investor but also its owners or controllers,[8] thereby codifying that relief granted to sanctioned investors is incompatible with EU law. In parallel, Article 11 of Regulation 833/2014, the "no claims clause," prevents satisfaction of claims arising from contracts impeded by sanctions.

Most recently , in view of an application to set aside an arbitral award (case C-802/24, *NV Reibel v JSC VO Stankoimport*), the Svea Court of Appeal has requested preliminary ruling of the Court of Justice of European Union ("CJEU")

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[5] European Commission, "Commission proposes 15th package of sanctions against Russia", European Commission Press Corner, 18 July 2025, https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1840, accessed 27 August 2025.

[6] EU Council Regulation no. 833/2014 dated 31 July 2014, art. 12g; European Commission Directorate General for Financial Stability, Financial Services and Capital Markets Union, "No reexport to Russia clause", European Commission Finance Publications, 18 December 2024, https://finance.ec.europa.eu/publications/no-re-export-russia-clause_en, accessed 27 August 2025.

[7] Official Journal of the European Union, "Official Journal L series daily view – 19 July 2025", EUR-Lex, 19 July 2025, https://eur-lex.europa.eu/oj/daily-view/L-series/default.html?&ojDate=19072025, accessed 27 August 2025.

[8] Theodore Hanna, "Targeting Russia and Belarus Through Investment Arbitration: The EU's 18th Sanctions Package", OpinioJuris, https://opiniojuris.org/2025/08/27/targeting-russia-and-belarus-through-investment-arbitration-the-eus-18th-sanctions-package, accessed 29 August 2025.

on whether disputes affected by Article 11 remain arbitrable and whether arbitral awards inconsistent with that provision must be set aside on public policy grounds.[9] In that case, the arbitral tribunal proceeded to the merits and applied the said provisions, stating that purpose of Article 11 was to prevent the performance of prohibited transactions, and that this article did not target the refund of the money paid for the equipment that was not supplied.[10] The prospective CJEU ruling on this issue is not only significant for the set aside of the awards in EU Member States and arbitrability of the underlying disputes, but also may be relevant for the arbitral tribunals seated in third States evaluating the applicability of these rules as overriding mandatory provisions.

To sum up, national courts of third States and arbitral tribunals seated in those jurisdictions are likely to face legal questions regarding the applicability of sanction regimes as overriding mandatory provisions of foreign law even when such laws are not part of the law applicable to the merits of the dispute.

Application of Overriding Mandatory Provisions in the Arbitral Proceedings

In Turkish law, the Law No. 5718 on International Private Law and Procedural Law ("IPLPL") regulates the applicability of overriding mandatory provisions of the third states, whereas International Arbitration Law No. 4686 does not provide for the possibility to apply the overriding mandatory provisions.

However, this does not mean that application of overriding mandatory provisions is not possible in arbitral proceedings.[11] Some authors stated that applicability of overriding mandatory provisions conflicts with the principle of contractual freedom and consensual nature of the arbitration and thus a balanced approach must be followed by the tribunals when considering the interest of the regulatory discretion of the states and interests and contractual

[9] Court of Justice of the European Union, Case No. C-802/23, dated 18 July 2025.

[10] ***Joint Stock Company Foreign Trade Enterprise Stankoimport v. NV Reibel***, Ad Hoc Arbitration Case, Final Award dated 5 December 2021, paras. 179-193.

[11] İbrahim Doğan Takavut, ***Milletlerarası Ticari Tahkimde Doğrudan Uygulanan Kurallar***, 1st ed., On İki Levha Publications, 2018. According to author: ***"The vast majority of these regulations pertain to courts and contain provisions on how directly applicable rules are to be applied in disputes. The procedures and principles contained in these regulations are also used in arbitration proceedings by analogy. The reason why regulations concerning overriding mandatory rules are not included in arbitration regulations is that the regulations currently in use were mostly established before the discussion of overriding mandatory rules in the field of arbitration proceedings began."*** (Authors' translation).

freedom of the parties.[12] Other authors pointed out that arbitral tribunals also have an adjudicatory function and they must apply certain imperative norms regardless of the will of the parties.[13]

Article 31 of the IPLPL, inspired by Rome Convention (1980) Article 7, shall apply to these disputes. Article 31 reads as follows:

> *When applying the law governing the relationship arising from the contract, the overriding mandatory rules of a third country may be given effect if they are closely related to the contract. The purpose, nature, content, and consequences shall be taken into account while evaluating whether these rules shall be given effect or applied.*

Therefore, for the application of the overriding mandatory provisions, they must be closely connected to the contract, while the purpose, nature, content and consequences of such provisions must also be evaluated. This provision provides a discretion for the arbitral tribunals to adopt the most appropriate approach on a case-by-case basis.

Although sanctions are intended to have a broad scope and a purpose of affecting third parties, it is possible to argue in certain cases that these rules cannot be applied as overriding mandatory provisions of law because they are not closely connected to the dispute at hand. If not deemed closely connected, alternative would be relying on the factual situation created by these rules and bring claims and defences under the other institutions of the applicable law such as force majeure, hardship, impossibility etc. Indeed, on several occasions, arbitral tribunals adopted this approach.[14]

Additionally, the elements pertaining to the nature and content of the contractual relationship such as whether the contract is related to the ongoing war efforts or it has solely a private business relationship may be a factor to determine to which extent these rules can be given effect.

The possible places of enforcement may also play a role because it is widely accepted that arbitral tribunals have a duty to render an enforceable award.[15]

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[12] *Id.*

[13] Hatice Özdemir Kocasakal, "Doğrudan Uygulanan Kuralların Milletlerarası Tahkimde Esasa Uygulanacak Hukuk Üzerindeki Etkileri", Tahkim ve Uygulanacak Hukuk, Istanbul Arbitration Centre (ISTAC) Publications, 2021 ("Kocasakal"), p. 45.

[14] Guido Carducci, "The Impact of the EU 'Rome I' Regulation on International Litigation and Arbitration: A-National Law, Mandatory and Overriding Rules", ICC International Court of Arbitration Bulletin, 2011, p. 41. (referring to ICC Cases No. 2977, 2978, 3033 (1978), (1981)).

[15] Kocasakal, p. 237.

It has been stated that if the only possible places of enforcement are in the Sanctioning States, arbitral tribunals may be more inclined to consider the provisions of the sanctions as overriding mandatory provisions.[16]

However, this multilocal approach has also been criticized on different grounds stating that determining the possible enforcement jurisdictions prior to an arbitral decision may be burdensome and risk the predictability and efficiency of the arbitral proceedings.[17] Some authors argue that rather than embracing a multilocal approach, the arbitral tribunal must follow a transnational approach. Supporters of this approach state that when facing public policy rules, international arbitral tribunals will generally only enforce mandatory norms they deem to be truly international public policy rules, and decide on whether foreign mandatory rules are part of the truly transnational public order by assessing their 'nature and purpose', which should share universal values widely recognized by the international community.[18]

Sanctions imposed by the UN and other international organizations may arguably fit into this category;[19] however, it is less clear whether unilateral sanctions can be interpreted as reflecting the transnational public policy.[20] Indeed, the measures solely aiming to protect the interests of a particular State, rather than an international public order concern, should not be applied as overriding mandatory provision.[21] Authors argue that unilateral sanctions do not only form part of the national laws, but they also qualify as the counter-measures seeking to put an end to the Russian aggression in Ukraine, and thus

[16] Of course, if the application of overriding mandatory rules of a third state contradicts with Turkish public policy, the arbitral tribunal would not consider giving effect to these mandatory rules due to the risk of award being set aside in Türkiye.

[17] Maxime Chevalier, "International sanctions enacted against Russia as overriding mandatory rules—on which foot should international arbitrators stand?", Journal of International Dispute Settlement, 2024, Oxford University Press ("Chevalier"), p. 166.

[18] ICC Case No. 21390, Final Award dated 22 November 2017.

[19] Eric De Brabandere, David Holloway, "Overriding Mandatory Provisions and Arbitrability in International Arbitration: The Case of Multilateral and Unilateral Sanctions", Overriding Mandatory Rules and Compliance in International Arbitration, Chapter V, ICC Institute of World Business Law – Dossiers, 2018, p. 159. According to authors, the Paris Court of Appeal accepted that the UN sanctions can be assimilated to the ***loi de police internationale***.

[20] ***Id.***

[21] Chevalier, p.169. Author refers to ICC Case No. 15972 published in the ICC Bulletion of Dispute Resolution Issue 2016/1. According to the arbitral tribunal, it did ***"not need to apply foreign mandatory rules which merely serve to enforce national economic or political interests, however close the connection of the case to that country may be".***

their application as overriding mandatory provisions is necessary in the third States.[22]

However, the wide scope of comprehensive sanctions had been also criticized as not being proportionate and affecting the rights of the third parties.[23] The similar criticisms were raised against the sanctions imposed by the US to Iran.[24] The French Court of Cassation rejected the applicability of the unilateral sanctions imposed to Iran by the US, on the ground that they cannot be regarded as a manifestation of an international consensus, the lawfulness of which were disputed by both France and the EU, and held that they were not part of French international public policy.[25] Of course, the reaction of the international community to Russia is closer to the uniformity compared to the Iranian example.[26] However, the scope of the sanctions, their extraterritorial effect and proportionality is much debated from the human rights perspective. Thus, there is no single answer to the question of applicability of unilateral sanctions as overriding mandatory provisions. Arbitral tribunals may find themselves having to strike a delicate balance between several competing considerations, such as between the enforceability of arbitral awards and the parties' autonomy to make a choice of law; between regulatory powers of sovereign states and the rights of the individuals to pursue their claims.

Concluding Remarks

Although there are reasonable grounds to apply the foreign unilateral sanctions as overriding mandatory rules, especially when the dispute at hand is closely connected to these provisions, the legal questions surrounding this issue do not have a straightforward answer. Arbitral tribunals have a discretion to decide on whether the dispute is closely connected to the sanction rules and whether their application is compatible with public policy considerations. The future of the application of unilateral sanctions is likely to remain a controversial issue in near future.

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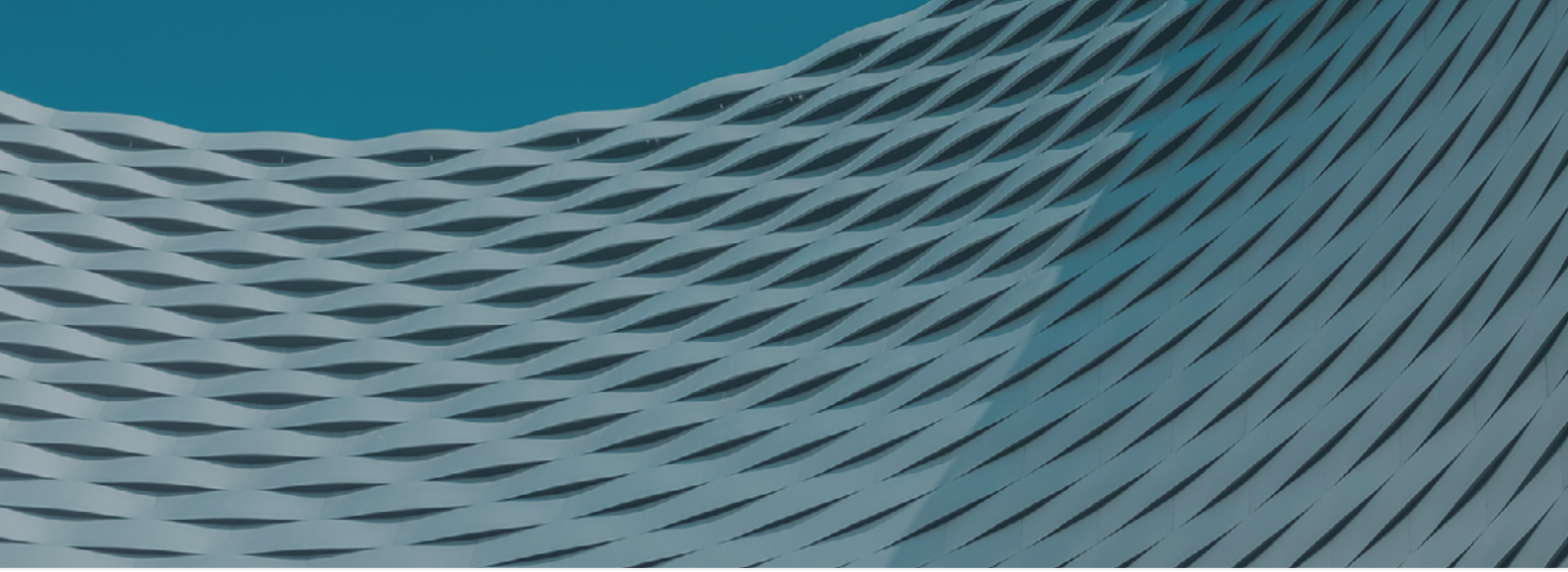
[22] Chevalier, p. 169; Andres Mazuera, "Should Arbitral Tribunals Apply Sanctions Against Russia as Overriding Mandatory Rules?", Kluwer Arbitration Blog, 9 April 2022, https://legalblogs.wolterskluwer.com/arbitration-blog/should-arbitral-tribunals-apply-sanctions-against-russia-as-overriding-mandatory-rules, accessed 27 August 2025 ("Mazuera").

[23] United Nations Human Rights Council, "Secondary sanctions, civil and criminal penalties for circumvention of sanctions regimes", Office of the United Nations High Commissioner for Human Rights, March 2023, https://www.ohchr.org/en/documents/thematic-reports/ahrc5133-secondary-sanctions-civil-and-criminal-penalties-circumvention, accessed 27 August 2025.

[24] *Id.*

[25] ***TCM v. Natural Gas Storage Company***, Paris Court of Appeal, Case No. 19/07261, dated 03.06.2020.

[26] Chevalier, p. 169; Mazuera.



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