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Insights

SANCTIONS: IMPACT ON ARBITRATION AND THE ENFORCEABILITY OF ARBITRAL AWARDS

Nov 26, 2026

Summary

In advance of London Arbitration Week we shine the spotlight on Sanctions and their impact on the conduct of arbitration and the enforcement of awards.

Sanctions are often treated as complications to be addressed after an award has been obtained. However, recent decisions in England, Russia and other major enforcement jurisdictions show that the same award may be enforceable in one forum, blocked in another and practically unrecoverable in a third. For businesses dealing with sanctioned, sovereign or state-linked counterparties, this means understanding how sanctions may influence decisions about the nature of claims, relief sought and enforcement options.

In this insight, we look at the impact of sanctions on arbitration and the practical steps parties can take to develop the best possible enforcement strategy.

Sanctions do not answer a single question

“Are sanctions a barrier to enforcement?” is too blunt a question to be useful. Sanctions regimes touch an arbitration at several distinct stages, and the answer at one stage says little about the others. The relevant question changes at each stage:

Commencing proceedings: Can institutional fees, counsel and experts lawfully be paid, and by whom?

Interim protection: Can assets be preserved without dealing with frozen funds?

Award: Can the tribunal order payment or performance without requiring an unlawful act?

Recognition: Does sanctions law engage public policy or procedural fairness before the enforcing court?

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Payment: Is a licence required before award proceeds can be received or transferred?

Execution: Are the identified assets frozen, immune, protected or commercially usable?

Four propositions follow:

1. A statutory sanctions provision is not necessarily a bar to recognising an award.
2. Execution is distinct from receipt of payment.
3. Where a designated person or a frozen account is involved, a licence may be needed even after a court has ordered payment, and a licence that solves one stage does not solve the others.
4. The theoretical availability of a licence does not eliminate enforcement risk: timing, conditions and the interaction of several sanctions regimes may materially affect the value of the recovery.

The practical consequence is that a sanctions analysis has to be run stage by stage, for each jurisdiction in which recovery is contemplated, before proceedings are commenced. A claimant who discovers only at the payment stage that the reachable assets are frozen may already have spent years and substantial sums obtaining an award that cannot readily be enforced.

Designing the claim for recovery

1. Map the assets and the restrictions before filing

For each candidate asset, assess its legal and beneficial ownership; its location; whether it is in commercial or sovereign use; whether it is frozen and under which regime; whether a licence would be required to receive the proceeds; whether interim relief is available; and how likely the asset is to move once proceedings become known.

The likely value and timing of recovery should also be assessed against the cost of the arbitration, licensing applications, recognition proceedings and execution measures. Asset tracing must track changes in legal ownership, not merely the location of operating assets or the identity of the ultimate controller. An intra-group transfer can leave both unchanged while placing an additional company between the award debtor and the shares against which execution is sought. Monitoring share registers, intra-group receivables and proposed redomiciliation is key. This is investigative and legal work in equal measure. It begins before the request for arbitration is filed, continues during the arbitration and into the enforcement stage.

2. Identify the correct respondent

Test whether the entity that signed the contract, the entity that holds the assets and the entity against which the merits case is strongest are the same. If they are not, consider whether a guarantor, a parent, a state organ or a controlled entity of a designated person can properly be

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pursued as an additional or alternative respondent, and whether the arbitration agreement reaches it. Any additional respondent must be brought within the arbitration on a proper contractual, jurisdictional or attributional basis; but within those limits, the most recoverable award is not always the award against the most obviously liable party.

3. Frame relief that can be executed

Consider whether damages or performance is sought, and whether performance would itself require an act that sanctions prohibit; the currency and payment mechanism, including whether payment to a particular account is lawful; the treatment of interest; declarations that may assist recognition or parallel proceedings; and, where substantive liability and jurisdiction permit, relief against multiple obligors with different asset profiles.

4. Coordinate proceedings across jurisdictions

Decide where protective relief and recognition should first be sought and whether parallel applications in several jurisdictions are advantageous or merely expensive; whether anti-suit or anti-enforcement relief should be sought at an early stage; which applications, in which jurisdictions, require sanctions licences; and whether publicity is likely to trigger asset movement or political intervention. Investigate local corporate and regulatory remedies that may help restore an enforcement opportunity without treating every group company as an award debtor.

5. Build enforcement options into the contract

Several of the most important enforcement options are fixed when the contract is signed. Review arbitration clauses for seat and institution; governing law; guarantees and security from entities with reachable assets; waivers of immunity that expressly extend to execution and identify the assets covered; sanctions, illegality and alternative-payment provisions; obligations on the counterparty to pursue licences; and service and appointment mechanisms that will work if the counterparty becomes designated mid-dispute.

The enforcement architecture comes first

In sanctions-affected disputes, enforcement is not the final procedural stage. It is part of the architecture within which every earlier decision should be taken. A favourable award remains valuable, but only if the claim, the relief and the forum strategy have been designed around the assets and the legal regimes through which recovery must ultimately occur.

Five questions test whether a strategy has been designed that way:

1. Where are the realistically attachable assets?

2. Who owns or controls them?

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3. Are they immune, frozen or subject to a licensing regime?

4. Which courts can protect the arbitration and recognise the award?

5. Will the relief sought remain lawful and executable when the award is made?

If those questions cannot be answered before proceedings are commenced, the claimant does not yet have a complete recovery strategy.

Related capabilities

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