

**Palicki University in Olomouc**

Faculty of Law

Hisham Alsarraj

Effects of EU Sanctions Against Russia on Contracts for the International Sale  
of Goods (CISG)

Thesis

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“I declare that this master’s thesis on the topic of Effects of EU Sanctions on Contracts for the International Sale of Goods (CISG), was prepared and elaborated on my own and I quoted all sources used.”

Olomouc, 01 May 2024

Hisham Alsarraj

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## List of Abbreviations

<b>TEU</b>	Treaty on European Union
<b>EU</b>	European Union
<b>UN</b>	United Nations
<b>UNSC</b>	United Nations Security Council
<b>Sanctioner</b>	The country which is mainly applying the sanctions
<b>Targeted Country</b>	The country object of the sanctions
<b>TFEU</b>	Treaty on the Function of the European Union
<b>CISG</b>	United Nations Convention on Contracts for the International Sales of Goods
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>GDP</b>	Gross Domestic Product
<b>UN Charter</b>	United Nations Charter
<b>Charter</b>	United Nations Charter
<b>Council</b>	European Council or as also known the Council of Ministers
<b>CFSP</b>	Common Foreign and Security Policy
<b>ISC</b>	International Sales Contract

## Introduction

Since Russia have invaded Ukraine, the EU as well as other countries have participated through different measures in support of Ukraine including sanctions against Russia. The sanctions against Russia were very wide in their nature and lead to different types of impacts such as on imports, exports, access to capital, access to services, ability to travel and some other impacts as this thesis will later analyse. In my view those implications may result on obstacles on performing International Sales Contracts. International sales contracts and the international relation between the parties where multiple layers of law apply or may apply can a single contractual relation very complex, including the determination of applicable law. This thesis will deal only with an international sales contract were the CISG rules are applicable. Although such application does not exclude the application of other elements of law such as, international law, EU law, certain parts of domestic law as this thesis will later on deal with.

Peace a corner stone in international law and international relations, following the United Nations Article 1. International conflicts such as the ongoing conflict in Ukraine occurs. Although the UN charter usually stresses on peace making and the improvement of relations through peaceful means such as cooperations, collaborations, and understandings. However, instances where the opposite have taken place are many for example the tensions between the EU and Russia due to Russia's actions in Ukraine. Which due to relations between the EU and Russia have witnessed and still witnessing interruptions on many levels such as diplomatic representation, import and export, movement of people, and movement of capitals as well as many other areas of interruptions as this thesis will show.

According to some historian's sanctions have been in existence since 432 B.C as they claim<sup>1</sup>, it still exists till our current days, which in my view, the sanctions in our current days have significantly evolved and transformed to be more effective as this work will present. What remains similar is that sanctions could happen unilaterally, or multilaterally<sup>2</sup>. Today International Organizations have taken a key role in imposing and implementing sanctions such as: the United Nations, and the European Union as this thesis will show.

In brief this thesis will view those evolutions to briefly view the effects of the evolvment of international law on the implementation of sanctions. Also, this thesis will only look at the

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<sup>1</sup> NOURA ABUGHRIS, 'A Brief History of Economic Sanctions' (*Carter-Ruck*) <<https://www.carter-ruck.com/insight/a-brief-history-of-economic-sanctions/>> accessed 14 April 2023.

<sup>2</sup> Geoff Simons, *Imposing Economic Sanctions: Legal Remedy or Genocidal Tool?* vol 1st (Pluto Press 1999).

United Nations and the European Union sanctions only and only with regard to sanctions against Russia since the Russian invasion on Ukraine dated on 24<sup>th</sup> of February 2022. The thesis main questions going to assess i) the legality of sanctions, ii) the legality of the EU imposing sanctions against Russia. Then the thesis will move to the international sales contracts part, which will be focused on contracts governed by the CISG rules. The part will look at questions such as, iii) can EU sanctions be recognized as a force majeure/ hardship in all jurisdictions, iv) and finally, which party breaches a CISG contract due to sanctions.

The thesis questions will be dealt with through three chapters each dealing with different aspect. In the first, the thesis will look at International Sanctions from the diverse overview and the evolution of sanctions and how sanctions were applied and developed through the history. The second chapter will focus on the EU sanctions against Russia, in which at first it will look at EU sanctions, its legality and its effects as documented on Russia, which mostly will be looked at from the available statistics. Finally, the last chapter will look at the CISG rules in relation with the sanctions. Through the chapters the thesis will use the literature, case laws and comparisons which relates to the topic. For example, a mention of similar situations that occurred before in regard to sanctions against Iran and its effects. The thesis will also include the UN sanctions as well, as due to the importance of the UN in international law and the important consideration of its charter while introducing sanctions. In the CISG part a theoretical approach will be taken to assess the impacts of the sanctions on international sales contracts, however in the instance where it is illegal to comply with foreign sanctions.

The main outcomes of this thesis will first of all help the reader to develop an overall understanding of sanctions, and their development. Will summarise the sanctions which EU imposed on Russia and finally, it will provide analysis of CISG rules that may be triggered due to non-performance of an existing agreement, which such non-performance is due to sanctions. In my view the topic is very recent and still evolving and changing, and there are many more topics which can be researched and looked at which may be a great topic for a PhD degree such as, the effects under the CISG rules of EU sanctions on international sales contracts for reselling dual-use products where it is prohibited. In the end of this introduction, I wish the reader to enjoy reading this thesis and to be able to take away at least few new outcomes that were not known prior to reading this thesis. In addition, I thank my professor for the time she gave to make this thesis happen and to everyone who contributed to supporting this thesis journey and its final form.

# Chapter 1. International Sanctions

While friendly international relations between states and mutual cooperation have a huge positive impact on a state development and growth especially economically and commercially. Sanctions on the other hand achieves the complete opposite, which may get the reader wonder, why would states resort to sanctions if improving relations is more fruitful and beneficial, what does the word “sanctions” refer to, is it legal, who can apply sanctions against who, and other questions which this chapter will try to answer and examine.

## 1.1. Definition and legality

### 1.1.1. Definition

Sanctions can be best described as a “unilateral or collective action taken against another state violating international law<sup>3</sup>” and aims to force a state to refrain from its violation(s) and to revert back to international law<sup>4</sup>. it also can be viewed from a more economic aspect as a tool that a government can use, which would directly impact the profitability of business of a state<sup>5</sup>.

The sanctions gained popularity after the second world war and the cold war, they started to be seen as an alternative of using military force due to the severe destruction and human suffering the world witnessed. Nikolay Anguelov views sanctions as a withdrawal or a threat of withdrawal of trade or financial relations which is made by a Sanctioner on purpose. Sanctions have a main aim in common which is to force a Targeted Country to use a different policy or in some instances they are designed to oppose the Targeted Country government. Sanctions are used as a diplomatic tool to negotiate and to even negatively affect a Targeted Country to force it into a more desirable policy. Sanctions can be categorised into various categories and different types of restrictions such as on goods, services, access to finances and its flow, also access to trade markets. The author continues by demonstrating different views on sanctions. He describes that some scholars view sanctions as a political tool from a Sanctioner aiming to influence and lead other smaller nations, and to show a strong leadership and strength in the political sphere, not to specifically resolve an international law breach. Another opinion he

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<sup>3</sup> Lance Davis and Stanley Engerman, ‘History Lessons: Sanctions - Neither War nor Peace’ (2003) 17 Journal of Economic Perspectives 187, 1.

<sup>4</sup> *ibid.*

<sup>5</sup> Anna Nikolaeva and others, ‘Commoning Mobility: Towards a New Politics of Mobility Transitions’ (2019) 44 Transactions of the Institute of British Geographers 346, 11.



presented shows that Sanctioners aim for political gains domestically to get more public support and election voting<sup>6</sup>.

### 1.1.2. Legality

While a majority of sanctions happens unilaterally, or multilateral as will be presented in section 2.2 History, where stronger nations sanctioned and blockaded weaker ones. It is indicated by Davis and Engerman<sup>7</sup>, that till the twentieth century a legal framework for sanctions did not exist, it was solely a domination power, however this changed when the League of Nations was established and later succeeded by the United Nations. Article 16 of the League of Nations Covenant dealt with the deployment of sanctions, and later articles 2(4), 39, 41, 42, 43 and 46 of the Charter of its successor the United Nations dealt with that<sup>8</sup>. Similarly, the European Union uses sanctions or “restrictive measures” through arm embargoes, restriction of traveling or ban, freezing of assets, and also economic restrictions for example on imports and exports<sup>9</sup>, and articles 215 of the TFEU, and Article 24 of the Treaty on European Union deals with that.

Sanctions on the other hand can have a very several effects and may cause violations of Humanitarian law. For example, the United Nations in 1990, against Iraq, which was imposed due to Iraq violations of the Charter through its invasion to Kuwait using military force<sup>10</sup>. Drezner one of many critics who views that the long-term effects of the sanctions on Iraq were very sever that lead to humanitarian crisis, he identified an increase of infant’s mortality rates which he estimated at 7 times more the pre-sanctions period as well as a 4,000 percent of inflation every year. The United Nations sanctions lasted for eight years, and he notes that they left Iraq with damages worth half of its national production pre-war<sup>11</sup>. In other writer’s opinion they think the United Nations became more active on making sanction decisions after the 90’s, in their opinion the collapse of the Soviet Union and the formation of a totally different world power’s ideology allowed this improvement to happen. They note that the sanctions against Iraq is considered to be the most successful and could even be considered as the most brutal as the UNSC did manage to agree, they describe that prior to the Iraqi sanctions it was very difficult for the UNSC to agree and impose sanctions as Targeted Countries used to ally with

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<sup>6</sup> N Anguelov, *Economic Sanctions vs. Soft Power: Lessons from North Korea, Myanmar, and the Middle East* (1st edn, Palgrave Macmillan 2015) 3–6.

<sup>7</sup> Davis and Engerman (n 2).

<sup>8</sup> *ibid.*

<sup>9</sup> European Commission, ‘Restrictive Measures Explained’ (*European Commission - European Commission*) <[https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_22\\_1401](https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_1401)> accessed 28 March 2023.

<sup>10</sup> Daniel W Drezner, *The Sanctions Paradox: Economic Statecraft and International Relations* (Cambridge University Press 1999) 1–10.

<sup>11</sup> *ibid.*

either the United States or the Soviet Union to gain support and be protected through the veto power<sup>12</sup>. This leads in my opinion to a concern over the limitations of sanctions and if sanctions can be severely brutal leading to humanitarian crisis as the case of Iraq or is there some limits the UNSC powers. On that I first note that the powers of the UNSC to introduce sanctions are born from the UN Charter, Article 41 of the UN Charter stated this right and gave the UNSC the power of deciding on sanctions matters, the Article used an indirect terminology at first “measures not involving the use of armed force<sup>13</sup>”, but then it explicitly included economic sanctions as the article describes from the examples of these measures the "complete or partial interruption of economic relations<sup>14</sup>" also "means of communications<sup>15</sup>" which the Article included a list of, and finally disruption of diplomatic relations<sup>16</sup>. Secondly, I note that Article 39 included the conditions when the UNSC may interfere or be involved, the article recognizes "threats to peace, breach of the peace, or acts of aggression<sup>17</sup>" as the situations that may give the UNSC the authority to make decisions and interfere. In the end of Article 39 it indicated the purpose of the UNSC measures must be to "maintain or restore international peace and security<sup>18</sup>". Finally, and going back to Article 41 of the UN Charter, the article also considers an approach to make effect of the UNSC decision, the UNSC “may call upon the Members of the United Nations to apply such measures<sup>19</sup>”.

The legality of the Sanctions of the UNSC have been challenged by lawyers and scholars on multiple occasions. For example, O'Connell describes the debates which occurred in relation to Sanctions against Iraq in 1990, he described that due to the sever impact of the sanctions on Iraq, which affected civilians basic Humanitarian rights. The sanctions as he concluded were at first targeted at Iraqi government assets worldwide by freezing them (UNSC Resolution 661<sup>20</sup>), however the sanctions later on further expanded, they included a wider range of restrictions on various economic activities (UNSC Resolution 666<sup>21</sup>). The UNSC through the sanctions against Iraq had a very narrow considerations of humanitarian laws and was mostly related to providing necessary medical instruments, which was later on viewed as not enough and inconvenient to

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<sup>12</sup> Davis and Engerman (n 3) 187–190.

<sup>13</sup> ‘United Nations Charter’ art 41 <<https://www.un.org/en/about-us/un-charter>> accessed 7 February 2022.

<sup>14</sup> *ibid.*

<sup>15</sup> *ibid.*

<sup>16</sup> *ibid.*

<sup>17</sup> *ibid* 39.

<sup>18</sup> *ibid.*

<sup>19</sup> *ibid* 41.

<sup>20</sup> UN Security Council (2933rd nmeeting), ‘UNSC Resolution 661 (1990) /: Adopted by the Security Council at Its 2933rd Meeting, on 6 August 1990.’ <<https://digitallibrary.un.org/record/94221>> accessed 17 April 2023.

<sup>21</sup> ‘UNSC Resolution 666 (1990)/: Adopted by the Security Council at Its 2040th Meeting’.

maintain the population humanitarian rights<sup>22</sup>. Onwards, the sanctions increased further and included an air zone prohibition (UNSC 670<sup>23</sup>). The author notes that a brief increase in the humanitarian consideration and the exemptions were finally expanded, however continuing to impose the sanctions (UNSC 687<sup>24</sup>), but with a condition for the Iraqi government at the time to allow a UN observing committee to determine if Iraq is in position of weapons of mass destruction or not. The author continues his view on the series of sanctions and their lack of a wider consideration to include necessary humanitarian aid and support which in his view raised the debates against the overall legality of the sanction. As I can concluded from the author, he views that Scholars and international lawyers, reached an agreed conclusion on the matter, they view that the UNSC can be held liable for violations of Humanitarian law, and it must abide to humanitarian law. Also, another conclusion I made from the author, that since these events in regard to sanctions against Iraq, the sanctions became smarter and more proportionate, the author gave the example of sanctions against Afghanistan that aimed to stop narcotics and illegal drugs, there were inclusions to Humanitarian law and its application as well as human rights inclusions, side by side with suppressing terrorism aims. The author noted that according to reports it was presented that in 2001 sanctions on Afghanistan did not cause humanitarian crisis<sup>25</sup>.

## 1.2. History

The first recorded sanction was from 1827<sup>26</sup>. Davis and Engerman<sup>27</sup> describes that sanction during that period occurred when the alliance of Britain, France, and Russia participated in a naval blockade of the coasts of Greece to prevent Turkish and Egyptians re-enforcing their forces on the Greek coasts with the aim to weaken their already present forces, this coalition and blockade lead to the battle of Navarino. The authors continue describing the situation with sanctions during the nineteenth century, when it was mostly focused on a pacific blockades approach, where nation(s) with a stronger naval force blockading other weaker nation(s). In other words, the Sanctioner(s) back then had to be with strong capabilities to fulfil the aim against the Targeted Country. The writers estimate that a round 21 pacific blockades appeared

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<sup>22</sup> Mary Ellen O'Connell, 'Debating the Law of Sanctions' (2002) 13 *European Journal of International Law* 63, 1–10.

<sup>23</sup> UN Security Council (45th Year: 1990), 'Resolution 670 (1990) /: Adopted by the Security Council at Its 2943rd Meeting, on 25 September 1990.' <<https://digitallibrary.un.org/record/97522>> accessed 15 April 2024.

<sup>24</sup> 'UNSC Resolution 687 (1991) /: Adopted by the Security Council at Its 2981st Meeting' <<https://peacemaker.un.org/iraqkoweit-resolution687>> accessed 15 April 2024.

<sup>25</sup> O'Connell (n 22) 1–10.

<sup>26</sup> Davis and Engerman (n 3).

<sup>27</sup> *ibid.*

between 1827 till the beginning of World War 1, countries like Britain, France, Italy, Germany, Russia, Austria, and Chile were the main Sanctioners of that time with Britain (12 times) and France (11 times) on top of the list<sup>28</sup>.

According to Robert McGee the Embargo Act of 1807 targeted or sanctioned the colonial America and had a wide negative affect due to the British restrictions on trade from India. The author presented the details of that embargo, in which the Brits prevented trade with foreigners from outside India, except through British corporations, this led to affecting the colonial's ability to trade with India directly. In the author's view the Brits at that time, had the monopoly on trades coming from India through their company the East Indian Company which made the embargo possible, as a result very expensive prices occurred and in parallel increase of smuggling occurred, giving more advantages to the Canadian ports. In the recent years sanctions were used more as a punishment tool, he names the example of sanctions against Iraq which aimed to punish the regime for their aggression against their neighbour Kuwait in 1990<sup>29</sup>.

### **1.3.Sanctions Effectiveness: Example of Iran**

In this part this thesis will include an overview and summaries of some opinions on the effectiveness of sanctions and if they do work as they intend to, or if there are some draw backs. This aims to provide a complete analysis on modern sanctions, before moving and observing the sanctions which have been introduced to Russia since its invasion on Ukraine on 2022.

The authors Navin Bapat and Bo Ram Kwon view in their article that sanctions can go as far as the Sanctioners take them. In other words, sanctions are as effective as the Sanctioners go. The writers demonstrate from economical/ international trade prospectives some examples which together could give the reader an idea and own view of the effectiveness of sanctions. First, they used the United States of America sanctions against China which happened in 1989. They provided that following the Tiananmen Square massacre which took place in China, the American government decided to respond to this event. The American government decided to sanction China restricting "investments, exports and military equipment transfer"<sup>30</sup>. However, the authors noted that the American government later on feared to lose its trading competitiveness with China, and as a result those sanctions never been enforced. In the second example they used Israel sanctions against Iran on June 2011. The Israeli government decided

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<sup>28</sup> ibid 187 to 189.

<sup>29</sup> Robert McGee, 'Trade Sanctions as a Tool of International Relations' 1-4.

<sup>30</sup> Navin A Bapat and Bo Ram Kwon, 'When Are Sanctions Effective? A Bargaining and Enforcement Framework' (2015) 69 International Organization 131, 132.

to make sanctions against trade with Iran aiming to prevent the later from further developing its nuclear technology. However, and according to reports the authors presented, they demonstrated that the economical actors themselves did not abide by the sanctions and continued their trade by finding other legitimate means to continue their economic transactions with the Targeted Country. The economical actors made their own firm's profitability as the priority<sup>31</sup>.

The previous examples demonstrate an intra-state point of view on sanctions effectivity, and the some of the many draw backs on sanctions. Scholars don't seem to agree on one opinion in regard to sanctions effectiveness, however, the purpose of sanctions at least in our current era is to prevent the escalations into armed conflicts but maintain a counter position<sup>32</sup>. On that Michael Eisenstadt is one of the authors who have a relatively moderate opinion on sanctions, he still thinks that the effectiveness of sanctions is not a very clear matter, but he used the example of sanctions against Iran which aimed to stop Iran's nuclear program. He recognises the huge impacts and effects sanctions had on Iran and its economy, yet he questions the effectiveness of the sanctions as Iran's nuclear program still continues. In his view sanctions are not an enough to stop the Iranian regime as the regime demonstrated a capability to continue its program regardless of the economic sanctions. Iran not only has income from oil, but also gold reserves and massive amounts of cash, which aids its nuclear enrichment programs and economy. The author recognizes the various efforts the United States of America as an example took against Iran militarily, or cyber-attacks or other means that have been used to stop or at the least slow down Iran's program. He called the Iranian response to the threats against its nuclear program as a "threats with threats<sup>33</sup>" approach, which he mentioned few instances when Iran responded to the economical threats by supporting Iraqi militias, causing disturbance in the gulf region or other means. In his view Iran does not respond to pressure, but only to overwhelming pressure. although it was noticeable according to him that there have been instances were Iran backed off, due to the threat of increase of sanctions such as on 2011 Iran stopped its threat to block the Strait of Hormuz. also, in 2008 Iran stopped from supporting militias in Iraq who were planning an attack against the American Embassy in Baghdad. He mentions other examples where the threat of further imposing sanctions did in fact prevent Iran

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<sup>31</sup> Navin A Bapat and Bo Ram Kwon, 'When Are Sanctions Effective? A Bargaining and Enforcement Framework' (2015) 69 *International Organization* 131, 131–136.

<sup>32</sup> McGee (n 29) 54–80.

<sup>33</sup> Michael Eisenstadt, *Not by Sanctions Alone: Using Military and Other Means to Bolster Nuclear Diplomacy with Iran* (Washington Institute for Near East Policy 2013) 15.

from acting in certain manners which were against the United States interests and its allies. In his opinion, Iran would not stop its nuclear program if the United States of America or its allies initiated a military attack as that would be in the advantage of the religious government of Iran, instead he views that a longer-term sanctions with the appearance and increase of number of people who are not falling for these ideologies can have a much better effect<sup>34</sup>.

Another view on the same example presented by Walterskirchen and others, where they describe at first, that there is a collective agreement between scholars and analyst, about reasons drove Iran to enter into negotiations in 2015 for the Joint Comprehensive Plan of Action (JCPOA) or the Iran nuclear deal, which in their view was due to the increased pressure of the sanctions. The authors present sanctions strong effect on Iran between 2010 - 2015, the sanctions affected mostly the Iranian economy overall and especially Iran's oil industry. They give an example were the total GDP fall 20% during that period. The authors similarly review the effects when the USA later on 2018 decided to withdraw from the JCPOA and re-introduced sanctions. Such a move which had similar effect on Iran economy, they estimated the USA sanctions unilaterally had caused an estimated 8% drop in the Iranian GDP between 2019 to 2020. The authors give a reason for those declines, being due to the reduction of Iran oil sales caused due to the sanctions<sup>35</sup>.

Keeping the previous opinions in mind, Sanctions which were imposed on Iran prior the 2015 JCPOA negotiations and their conclusion, had a similar approach to the USA sanctions against Russia on 2022 which will be demonstrated in section 2.4. The sanctions on Iran also focused on financial restrictions, ships and ship building industry, energy and petrochemical sectors, visa restrictions, freeze of assets, restrictions on buying oil from Iran, restrictions on automotive sector<sup>36</sup>.

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<sup>34</sup> *ibid* 6–22.

<sup>35</sup> Julian Walterskirchen, Gerhard Mangott and Clara Wend, *Sanction Dynamics in the Cases of North Korea, Iran, and Russia: Objectives, Measures and Effects* (1st ed. 2022 edition, Springer 2022) 34–36.

<sup>36</sup> 'Timeline of U.S. Sanctions' (*The Iran Primer*, 1 June 2023) <<https://iranprimer.usip.org/resource/timeline-us-sanctions>> accessed 5 June 2023.

## Chapter 2. EU Sanctions Against Russia

The European Union and its member states were and are still highly active in introducing sanctions against Russia. In summary the EU sanctions against Russia can be found under 4 main sources: i) Council Regulation 833/2014, ii) Council Regulation 269/2014, iii) Council Regulation 692/2014, and iv) Council Regulation 2022/263. Those sanctions have been introduced as the EU views Russia's invasion of Ukraine as a serious violation of international law, and a threat to international peace and security of the region and therefore it took these measures to stop Russia or at the least slow it. The EU also views the Russian government lead by Vladimir Putin as accountable and responsible for the war calling it "the war of choice". Individuals or corporations that stood behind them or supported the war or continue to do so in any way are also considered accountable. With this view the EU sanctions aims to impact Russia and its economy<sup>37</sup>.

EU sanctions or restrictive measures are not different from the traditional modern approach of sanctions as described in Chapter 2 before. However, the history of the EU restrictive measures is much more recent in comparison. According to a report, the first restrictive measure adopted by the EU was on December 2001, with the aim to apply the UNSC sanctions from resolution 1373 of the year 2001. The UNSC sanctions were directed against persons and entities identified to be involved in terrorism and terroristic activities<sup>38</sup>. according to the Council common position terrorism can be defined as:

*"Intentional acts which, given their nature or context, may seriously damage a country or international organisation and which are defined as an offence under national law."*<sup>39</sup>

The European Union was one but not only Sanctioners who directly and proactively imposed restrictive measures on Russia immediately after its decision to invade Ukraine in 2022. Those restrictive measures among other things prohibited, restricted, and banned trade in certain products and industries and with certain individuals and corporations. While this thesis will not address the implementation of restrictive measures and the role of member states matter, but it

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<sup>37</sup> 'EU Sanctions against Russia Explained' (14 April 2023)

<<https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/>> accessed 19 April 2023.

<sup>38</sup> 'Fact Sheet: The EU List of Persons, Groups and Entities Subject to Specific Measures to Combat Terrorism' (Council of the European Union 2015)

<<https://www.government.se/contentassets/b4d21079300549febd39a14f62b83e35/eu-fact-sheet-on-terrorism.pdf>>.

<sup>39</sup> Council Common Position 2001/931/CFSP 2001.

is worth mention that as Knill and others view. One of the most important steps regarding restrictive measures is that each member state local authorities implements these measures as they are responsible for such implementation of the restrictive measures within that member state. The authors state that EU restrictive measures just like the EU law, once adopted it needs to be enforced to have its effect. While the EU role is generally limited to certain matters including legislation, member states generally have the enforcement role. Knill and others' views enforcement as:

*“The supervision of the application of the law by public authorities and foremost of the member states but not directly over whether citizens as such obey it<sup>40</sup>”*

Also, it can be concluded from Stefano and others, that in the case of restrictive measures each member state has the duty to appoint public authority to monitor the enforcement of the measures and prevent violations to from happening in the first place otherwise it shall have the duty to respond to violations, through for example fines either administrative or criminal<sup>41</sup>.

## **2.1.Sanctions Against Russia Summarised**

The acts of Russia in Ukraine since Crimea and more recently in 2022 did violate the UN Charter and its principles, such as a violation of article 2(4), on the threat of use of force and the use of force by Russia<sup>42</sup>. The UNSC has been given the authority of intervention in the event of occurrence of such a violation as stated in article 41 and 42<sup>43</sup>, however the Security Council did but was not successful to impose any sanctions against Russia, although many attempts have been made<sup>44</sup>. The UN Charter authorized the UNSC to take steps once it recognizes the existence of a threat on the international peace and security or the existence of an act of aggression to apply sanctions. However, and due to Russia's membership of the Security Council with veto power, a power derived from the Charter's article 27(2)<sup>45</sup>. Russia managed to block this recognition by using the veto during the Security Council voting on draft resolutions<sup>46</sup>. The first UNSC draft resolution S/2022/155, which was drafted after the recent

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<sup>40</sup> Christoph Knill and Jale Tosun, *Public Policy: A New Introduction* (Macmillan Education UK 2012) 50–67.

<sup>41</sup> Stefano Montaldo, Francesco Costamagna and Alberto Miglio, *EU Law Enforcement- The Evolution of Sanctioning Powers Stefano Montaldo, Francesco Costamagna, Alberto Miglio* (First, Routledge 2021) 1–11 <[https://www.google.cz/books/edition/EU\\_Law\\_Enforcement/KFsXEAAAQBAJ?hl=en&gbpv=1&dq=member+states+role+with+sanctions&printsec=frontcover](https://www.google.cz/books/edition/EU_Law_Enforcement/KFsXEAAAQBAJ?hl=en&gbpv=1&dq=member+states+role+with+sanctions&printsec=frontcover)> accessed 15 April 2024.

<sup>42</sup> ‘United Nations Charter’ (n 13) art 2(4).

<sup>43</sup> *ibid* 41 and 42.

<sup>44</sup> ‘Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto’ <<https://press.un.org/en/2022/sc14808.doc.htm>> accessed 16 April 2024.

<sup>45</sup> ‘United Nations Charter’ (n 13) art 27(2).

<sup>46</sup> ‘Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto’ (n 44).



events in Ukraine during 2022, which however Russia vetoed. The draft resolution was aiming to recognize Russia's violation of the charter and to recognize the invasion on Ukraine to be illegal, it demanded Russia's immediate withdrawal from the legally recognized Ukrainian territories including the eastern regions and to abide by Minsk agreement<sup>47</sup>. The second UNSC draft resolution S/2022/720 which Russia also vetoed. It was drafted to recognize the referendum in Ukraine regarding Ukraine's eastern region as illegal on the basis that the referendum was not organized by the recognized Ukrainian government, and did not fulfil the international law requirements, it called on Russia to cease its invasion in Ukraine and to withdraw<sup>48</sup>.

The European Union on the other hand was more of a successful Sanctioner and imposed a wide range of restrictive measures against Russia. For example, the Council's Regulation 833/2014 in summary focused on prohibitions across many sectors such as, i) prohibitions on trade, in areas such as, dual use goods and technologies, goods and technologies that may be used for Russian military, firearms and anything to do with it, goods and technologies for use in oil refining and liquefaction of natural gas, goods and technologies for use in aviation or space, jet fuel, fuel additives, maritime navigation goods and technologies, luxury goods and many other. In addition, a prohibition on ii) prohibitions on certain services such as, broadcasting, brokering, accounting auditing, technical services in certain prohibited industries, maintenance services in certain prohibited industries, insurance, and reinsurance, repairing services in certain industries and others. Further a prohibition of iii) prohibitions on financing and financial services, including loaning, equity, investment services, joint ventures arrangements, business arrangements such as acquiring or participation in legal entities, aircraft financial lease, and other areas<sup>49</sup>.

Overall, The EU restrictive measures against Russia can be put into three main categories: i) individual sanctions, ii) economic sanctions and iii) visa measures. Since the beginning of the war and the EU was very active in this regard to encounter Russia's violations. In March 2022, the Council decision 2022/351 listed the main Russian disinformation outlets such as sputnik

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<sup>47</sup> 'UNSC Draft Resolution S/2022/155' <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/271/07/PDF/N2227107.pdf?OpenElement>> accessed 1 June 2023.

<sup>48</sup> 'UNSC Draft Resolution S/2022/720' <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/608/91/PDF/N2260891.pdf?OpenElement>> accessed 1 June 2023.

<sup>49</sup> Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's activities destabilizing the situation in Ukraine 2014 (OJ L) arts 1–8.

and Russia today<sup>50</sup>. Also, during the same month the Council decision 2022/346 which targeted Russian banks and financial institutes within the EU<sup>51</sup>. Decision 2022/2512 of the European parliament and of the council dated on 14 of December 2022, for example decided to not to recognize Russian international passports issued in Ukrainian occupied territories and regions<sup>52</sup>. As a result, holders of this passport issued in these regions and territories will not be issued visas or allowed to cross borders to the countries of the EU (human rights exceptions were included to the decision)<sup>53</sup>. Similarly, regulation 2021/821 imposed special export controls, restrictions and rules which included small and mid-size companies, aiming to improve intrastate measures and the effects of sanctions<sup>54</sup>. The council regulation 2022/38 which amended regulation 2014/833, prohibits companies dealing with goods and technologies which can be used for military use or users to be provided to Russia or Russian entities including certain persons that are listed. The regulation includes restrictions on the oil industry equipment's which shall not be provided to Russia<sup>55</sup>. The council decision (CFSP) 2022/327 imposed sanctions on sectors such as aviation, finance, defence and energy<sup>56</sup>. The council regulation 2022/2474 which also amended regulation 2014/833 which expanded the list of imposed sanctions on Russia to include, drone engines, certain gases used in riots (riot control agents), certain chemical and biological equipment's as well as electronic components. The decision also included a new list of sanctioned individuals and entities that were assisting Russia in its war or supplying and dealing with Russia for that purpose. it also extended the prohibition on broadcasting licenses to Russian affiliated media outlets, or under its government control, in efforts of the council to fight against propaganda and misinformation. further the regulation expanded the prohibition on exports and included aircraft engines and relevant parts, it also included a general prohibition for aviation from Russia to "land, take off from, or overfly" the

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<sup>50</sup> Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine 2022 (OJ L).

<sup>51</sup> Council Decision (CFSP) 2022/346 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine 2022 (OJ L).

<sup>52</sup> Decision (EU) 2022/2512 of the European Parliament and of the Council on the non-acceptance of travel documents of the Russian Federation issued in Ukraine and Georgia 2022 (OJ L).

<sup>53</sup> *ibid.*

<sup>54</sup> Regulation (EU) 2022/821 of the European Parliament and of the Council setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast) 2021.

<sup>55</sup> Commission Implementing Regulation (EU) 2022/38 of 12 January 2022 amending Annexes V and XIV to Implementing Regulation (EU) 2021/404 as regards the entries for the United Kingdom in the lists of third countries authorised for the entry into the Union of consignments of poultry, germinal products of poultry and fresh meat of poultry and game birds (Text with EEA relevance) 2022 (OJ L).

<sup>56</sup> 'European Union Council Decision (CFSP) 2022/327 of 25 February 2022 Amending Decision 2014/512/CFSP Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine' <<https://eur-lex.europa.eu/eli/dec/2022/327>> accessed 8 June 2023.

EU territory. Space industry and other sectors as well were targeted as well by the regulation; however, it maintained very specific exemptions relates to in some sectors for various reasons including humanitarian exemption. Annex I of the regulation did include an extensive list of sanctioned entities and persons which included government entities, natural and legal persons<sup>57</sup>.

The aim of the sanctions as the Council of the European Union describes it was to undermine Russia's ability to continue its war in Ukraine, which in my view did not really stop the war to date. The individual sanctions targeted individuals who were behind or are supporting the war in Ukraine or keeping it going, those sanctions targeted persons such as the President, Foreign Minister, parliament members, national security council, other ministers, and governors of Russia, as well as businessmen and propaganda makers<sup>58</sup>. As also included in the previous paragraph, the economic sanctions targeted main areas which Russia used or could use to finance the war, banks were on the top of the list since the beginning of the war, followed by companies in the military sector, aviation and shipbuilding sector, media companies or outlets, private military or security companies. When it comes to economic sectors the sanctions targeted technology industries, transportation industry, oil refining, energy industry, aviation industry, maritime industry, space industry, luxury goods, firearms and army material industry. The EU sanctions also included specific products which are no longer allowed to be imported from Russia such as crude oil (since December 2022)<sup>59</sup>, refined oil products (since February 2023 few exceptions made), coal, solid fossil fuels, steel, steel products and iron, gold, cement, asphalt, wood, paper, synthetic rubber, plastics, seafood, liquor, cigarettes and cosmetics<sup>60</sup>. Services were also on the list and the sanctions banned to provide services to Russian government and legal persons established in Russia since June 2022 to directly or indirectly provide accounting, auditing, bookkeeping, tax consultation, lobbying, IT, legal services and the list goes on, all of which is aiming to undermine Russia ability to continue the war, it's interesting to note that after the hike of prices in 2022 due to the hike of energy prices the EU

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<sup>57</sup> Council Regulation (EU) 2022/2474 of 16 December 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine 2022 (OJ L).

<sup>58</sup> Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine 2014.

<sup>59</sup> Council Regulation (EU) 2022/2474 of 16 December 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

<sup>60</sup> Council Regulation (EU) 2023/427 of 25 February 2023 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine 2023 (OJ L); Council Decision (CFSP) 2022/1909 of 6 October 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine 2022 (OJ L); Council Regulation (EU) 2022/2474 of 16 December 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

introduced price cap on the prices of seaborne crude oil which also aims to reduce Russian revenues. Restrictions on transportation to, through and from Russia have been introduced as well which introduced restrictions on air, road and sea transportation<sup>61</sup>. When it comes to visa measures travel bans for natural persons who are identified to support the war in Ukraine was made, also the EU suspended the visa facilitation agreement with Russia resulting in longer and more expensive visa process and generally the visa can be granted for essential purposes only such as family of EU citizen, journalists, individuals opposing Russian government and certain civil representatives<sup>62</sup>.

In addition, the EU Sanctions are targeting the re-exportation of goods to Russia, in an attempt to minimize it. For example, the EU Regulation 833/2014, which in addition to restricting the exportation of certain goods to Russia, it also added a prohibition of re-exportation requirement which exporters are required to incorporate such prohibition into the contracts with their prospective buyers located in third countries. This additional requirement for example is in effect since March 2024<sup>63</sup>.

### **2.1.1. Effects of Sanctions Against Russia**

To date, Russia continues to undermine Ukraine independence and territorial integrity which makes the sanctions yet to achieve their aim which they were made to achieve. The EU sanctions against Russia applies to as the European Commission described it is towards:

*“Any person inside the territory of the Union, to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State, and to any legal person, entity or body in respect of any business done in whole or in part within the Union.”<sup>64</sup>*

The Commission also recognizes that each member state shall work on monitoring and controlling Foreign direct investments to ensure that their existence does not violate the

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<sup>61</sup> ‘EU Sanctions against Russia Explained’ (n 37).

<sup>62</sup> ‘EU Sanctions against Russia Following the Invasion of Ukraine’ <[https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine\\_en](https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine_en)> accessed 26 May 2023.

<sup>63</sup> Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine 2024 art 12g.

<sup>64</sup> ‘European Union Communication- Guidance to the Member States Concerning Foreign Direct Investment from Russia and Belarus in View of the Military Aggression against Ukraine and the Restrictive Measures Laid down in Recent Council Regulations on Sanctions (Council Regulation (EU) No 833/2014 Concerning Restrictive Measures in View of Russia’s Actions Destabilising the Situation in Ukraine (OJ L 229, 31.7.2014, p. 1) and Its Amendments and Council Regulation (EC) No 765/2006 of 18 May 2006 Concerning Restrictive Measures Concerning Restrictive Measures in View of the Situation in Belarus (OJ L 134, 20.5.2006, p. 1) and Its Amendments.) 2022/C 151 I/01’ 1–5 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022XC0406%2808%29&qid=1686211471478>> accessed 8 June 2023.

sanctions and does not directly or indirectly fall for the benefit of sanctioned Russia. Also does not jeopardize the union's security and public order, which must be at priority. In addition, the Commission also states that on 2020 there was within the EU around 17000 companies controlled by Russian individuals or entities, and out of that 30.4% with unavailable information about the controlling entity<sup>65</sup>.

Since sanctions increased on 2022 some effects were felt in both the Targeted Country and the EU member state countries. When it comes to the Sanctioner mainly the effects were felt through inflations and huge impact on fuel prices and its availability. In 2022 the EU overall inflation reached 9.2% compared to 2.9% in 2021<sup>66</sup>. On an EU countries level Hungary witnessed the highest inflation in 2022 with 24.5% inflation<sup>67</sup>, followed by Latvia with 22.2% inflation<sup>68</sup> and the Czech Republic with 18% in 2022<sup>69</sup>, in Germany it was estimated to reach 8.8% in 2022 and estimated to reduce partially<sup>70</sup>, in France it reached 6.2% in 2022 in reduced partially<sup>71</sup>. The EU exports to Russia witnessed more than 50% drop in 2022 when compared to 2021 with pharmaceutical products as the highest exported products from the EU<sup>72</sup>, however the EU imports from Russia have increased in 2021 the imports value was around 170 Billion USD and in 2022 it reached almost 200 Billion USD, the dominant imported products in 2022 were mineral fuels, oils and distillation products with a value of more than 155 Billion USD<sup>73</sup>. In view of the inflation data it must be also noted that the displacement of Ukrainians due to the war conditions did also contribute to the inflation rates, an estimation of about five million Ukrainians were displaced in the EU, and their unfortunate displacement did increase contribute to the inflation of the short term, however on the longer term it is predicted that the Ukrainian

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<sup>65</sup> *ibid.*

<sup>66</sup> 'Annual Inflation More than Tripled in the EU in 2022 - Products Eurostat News - Eurostat'  
<<https://ec.europa.eu/eurostat/web/products-eurostat-news/w/DDN-20230309-2>> accessed 26 May 2023.

<sup>67</sup> 'Hungary Inflation Rate - April 2023 Data - 1992-2022 Historical - May Forecast'  
<<https://tradingeconomics.com/hungary/inflation-cpi>> accessed 26 May 2023.

<sup>68</sup> 'Latvia Inflation Rate - April 2023 Data - 1998-2022 Historical - May Forecast'  
<<https://tradingeconomics.com/latvia/inflation-cpi>> accessed 26 May 2023.

<sup>69</sup> 'Czech Republic Inflation Rate - April 2023 Data - 1993-2022 Historical - May Forecast'  
<<https://tradingeconomics.com/czech-republic/inflation-cpi>> accessed 25 May 2023.

<sup>70</sup> 'Germany Inflation Rate - April 2023 Data - 1950-2022 Historical - May Forecast'  
<<https://tradingeconomics.com/germany/inflation-cpi>> accessed 25 May 2023.

<sup>71</sup> 'France Inflation Rate - April 2023 Data - 1958-2022 Historical - May Forecast'  
<<https://tradingeconomics.com/france/inflation-cpi>> accessed 25 May 2023.

<sup>72</sup> 'European Union Exports to Russia - 2023 Data 2024 Forecast 2000-2022 Historical'  
<<https://tradingeconomics.com/european-union/exports/russia>> accessed 26 May 2023.

<sup>73</sup> 'European Union Imports from Russia - 2023 Data 2024 Forecast 2000-2022 Historical'  
<<https://tradingeconomics.com/european-union/imports/russia>> accessed 26 May 2023.

immigrants will boost the EU countries economies through their participation in the labour markets<sup>74</sup>.

In Russia on the other hand the data available shows that inflation in Russia reached 17.1% in 2022 to decrease to 2.3% in 2023 however the accuracy of these statistics is not confirmed as the available data is given by the Russian government itself, and is known that it does not provide transparent accurate information<sup>75</sup>, other reports also are showing that Russian GDP decreased during 2022<sup>76</sup>, and also these information and statistics are not confirmed to be very accurate. India is reported to be currently one of the largest oil importers from Russia, its imports share increased from 2% in 2021 to 20% in 2023<sup>77</sup>. Also, according to an article, it describes that Russia became interested in alternative markets as a way to avoid sanctions. However, this had a negative consequence as the price of Russian oil and gas became cheaper than oil and gas from other sources. Another impact the article mentions is that Russia's oil refining sector was severely impacted, as those alternative markets or countries started to do the refining of the oil on their own. Those countries are such as China, India and Turkey who also used the sanctions as a pressuring tool against Russia to obtain better deals and prices. Further to that the article also notes that according to Russia central bank statistics and other sources, exports of goods and products value increased 21% during 2022 in comparison to 2021, with 63% of the total exports being for oil and gas, as this cheaper oil and gas sold to the three countries mentioned is later resold to other countries. Also, another drop of 18% was recorded in 2022 for imports of goods in comparison to 2021, which can be viewed as sanctions effects. The article views that the increase of the value of Russia's exports is mostly to the general increase in the prices of crude oil during 2022<sup>78</sup>.

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<sup>74</sup> 'How Ukrainian Migrants Affect the Economies of European Countries' (CEPR, 7 March 2023) <<https://cepr.org/voxeu/columns/how-ukrainian-migrants-affect-economies-european-countries>> accessed 26 May 2023.

<sup>75</sup> 'Timeline - EU Restrictive Measures against Russia over Ukraine' (13 April 2023) <<https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/history-restrictive-measures-against-russia-over-ukraine/>> accessed 25 May 2023.

<sup>76</sup> 'Russia GDP - 2022 Data - 2023 Forecast - 1988-2021 Historical - Chart - News' <<https://tradingeconomics.com/russia/gdp>> accessed 26 May 2023.

<sup>77</sup> France24, 'Why Is India so Thirsty for Russian Oil?' (France 24, 31 March 2023) <<https://www.france24.com/en/live-news/20230331-why-is-india-so-thirsty-for-russian-oil>> accessed 25 May 2023.

<sup>78</sup> Tania Babina and others, 'Assessing the Impact of International Sanctions on Russian Oil Exports' (23 February 2023) 1–15 <<https://papers.ssrn.com/abstract=4366337>> accessed 5 June 2023.

## 2.2.EU Restrictive Measures Legal Framework

Restrictive measures on Russia were first imposed by the EU in 2014 due to Russia's annexation of Crimea. However, a question remains, which is does the EU has competence to introduce restrictive measures on behalf of its member states. The EU restrictive measures can be summarised as a legal act or so-called regulation decided by the Council. Those legal acts are either to implement the UN sanctions decisions, or it can be also in separation of that. This can be found under the Treaty on the Function of the European Union Article 215 as well as Chapter 2 of Title V of the Treaty on European Union<sup>79</sup>. Before adopting a restrictive measure on the EU level, the Council must ensure that such a decision would not exceed the competency's member states agreed to confer to it in accordance to Article 2 of the Treaty on the Function of the European Union<sup>80</sup>. Article 215 requires a qualified majority of member states to agree on a decision for restrictive measures which requires to have a 55% of the member states in favour of the decision presenting 65% of the EU population, a possibility to block the decisions exist requiring with 4 member states as a minimum<sup>81</sup>. Article 215 also states that the restrictive measures are to be made towards third countries<sup>82</sup>. It also requires a proposal from both the Commission and the High Representative of the EU for Foreign Affairs and Security Policy. The restrictive measures accordingly may be adopted by the voting and can be directed to apply towards natural persons, legal persons, groups, or non-state actors<sup>83</sup>. The restrictive measures also reflect the Common Foreign and Security Policies, which are formulated by the Council's unanimous voting (all member states agreeing)<sup>84</sup>. The main purposes of those policies are listed and can be found through Article 21(2) of the Treaty of the European Union, which includes the whole union security, independence, supports the rule of law and international law, and to strengthen international security<sup>85</sup>.

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<sup>79</sup> Consolidated version of the Treaty on the Functioning of the European Union 2012 (OJ C) art 215; 'Treaty Establishing the European Community' ch 2.

<sup>80</sup> Consolidated version of the Treaty on the Functioning of the European Union art 2.

<sup>81</sup> 'Qualified Majority' (28 October 2022) <<https://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/>> accessed 13 July 2023; 'Treaty Establishing the European Community' (n 79) art 215.

<sup>82</sup> 'Treaty Establishing the European Community' (n 79) art 215; O'Connell (n 22) 1–10.

<sup>83</sup> Consolidated version of the Treaty on the Functioning of the European Union.

<sup>84</sup> 'Common Foreign and Security Policy' <[https://fpi.ec.europa.eu/what-we-do/common-foreign-and-security-policy\\_en](https://fpi.ec.europa.eu/what-we-do/common-foreign-and-security-policy_en)> accessed 13 July 2023; House of Lords\_The European Union Committee, 'The Legality of EU Sanctions' (House of Lords\_The European Union Committee 2017) 11th Report of Session 2016-2017.

<sup>85</sup> Consolidated version of the Treaty on European Union.

### **2.2.1. ECJ Decision on RT France**

From the case law, the European Court of Justice in its decision on RT France appeal against the Council decision to include RT France to the list of companies affiliated to Russia and the Russian government, which resulted to include restrictive measures against it through the Council decision 2022/351 dated on March 2022. The court described in brief that the Council decision stripped RT France from its broadcasting license and was reasoned through the decision to be due to RT France active participation in spreading Russian propaganda, which threatens the union public order and national security, specially that RT France was actively attempting to influence democratic elections, destabilize neighbouring countries as well as targeting asylum seekers, Russian ethnic minorities gender minorities and others. The appellant argued that the Council should not have the authority to intervene on its license conditions as its not within its authority and that it should be up to the relevant local authority to decide and requested the court to remove the decision and to be compensated. In brief the court dismissed RT France claim in this regard as due to it being correctly within the competencies of the Council, the court recalled Article 3(5) of the TEU which recognizes the union role in, protection of citizens of the union, peace, security as well as to strictly respect international law rules which included specifically the rules of the UN Charter. Also, it recalled that the Council decision that is being disputed was made based on article 29 TEU Chapter 2 title V of the TEU, which as described in the previous paragraph, it gives the competency to Council on matters related to common foreign and security policy, as well as other articles which the court recognized to be giving the Council the right to act<sup>86</sup>.

### **2.2.2. Dutch Supreme Court Decision on Sberbank Subsidiary**

A case before the Dutch supreme court of the applicant a Russian corporation (sometimes referred to as “SBK”) which is a subject to the EU restrictive measures due to being a subsidiary of the Russian Sberbank. The background of the case is that the applicant holds 41.82% of shares in a Dutch company called Fortenova group among other shareholders. Since the listing of the applicant on the list of persons under the restrictive measures, the other shareholders decided to exclude the applicant’s from among other things the shareholders meetings and voting rights reasoning their decision on the basis of compliance with the EU restrictive measures. The court explains the previously agreed voting mechanism of the board, which depending on the matter requires at least 50% or more for the board to reach a decision. The shareholders decisions first started when Sberbank itself was included to the sanctions list

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<sup>86</sup> *Case T-125/22, RT France V the Council* (European Court of Justice- Higher Chamber) 1–64.



which later on the subsidiary itself got added to the sanctions list. The shareholders decided to i) excluded sanctioned holders including voting rights, ii) change of the conditions and articles of association which included changes in the voting procedures and powers. The Russian subsidiary itself and through an appointed representative attempted to attend these meetings where these decisions were going to be voted for, however it was denied multiple times. The shareholders in their justification informed the subsidiary that it's "obliged to comply with European and American sanctions, that SBK is therefore not allowed to vote and that a vote cast by SBK may not be recognized". Not long after the applicant sent a letter to the shareholders stating that a United Arab Emirates based company have acquired its shares. The applicant's claims can be summarised among other things as follows: i) to include the applicant retroactively to all the meetings held which it was denied to do so, especially the meetings where changes on the articles of association were made, ii) to denounce and prohibit the group from amending the administrative conditions, articles of association, and to hold meetings held to date to be with no effect, iii) to prevent the group from holding any further meetings till the court's decides on the matter. It is noted from the court summary that the decisions of the courts before were inconsistent with each other. At first the court decided on preliminary relief, which granted back the applicant's voting rights as due to the courts view that voting does not violate sanctions as such voting does not constitute or lead to a transfer of funds or resources to Russia. However, this decision was annulled by the following court as due to the interpretation of the court of the European Commission statement on the frequently asked questions in regard to the council regulation 833/2014 and its update of November 2022, which stated:

*"Either way, since they can be used to obtain funds, goods or services, voting rights as such can be considered an intangible economic resource. This means they should be frozen or prevented from being used to obtain funds, goods or services in anyway. Therefore, under no circumstance nor for any purpose may listed shareholders exercise directly or indirectly their voting rights in a company or fund. Voting rights must be fully frozen."<sup>87</sup>*

The applicant who did not agree with the judgment decided to raise the matter to the following court, among other things argued that the frequently asked questions information is not a legislation source, and it cannot be relied upon.

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<sup>87</sup> European Commission, 'Commission Consolidated FAQs on the Implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014'.

The supreme court reobserved the case in its entirety, its decision was more reliant the EU regulation and the EU case law as follows. The court concludes that regulation 269/2014 views that the regulation did provide that i) “all funds economic resources belonging to, owned, held or controlled by all natural persons, entities or bodies listed in Annex I, or natural or legal persons, entities or bodies associated with them shall be frozen<sup>88</sup>”. ii) it provided that "freezing of funds" means prevention of movement, transfer, modification, use, or deployment of or handling of funds, in any way whatsoever, resulting in a change in their size amount, location, ownership, possession, distinguishing features, destination or other changes that enable the use of the said assets, including the management of an investment portfolio<sup>89</sup>. iii) it provided that "funds" means financial assets and benefits of any kinds including, but not limited to in public and privately traded securities and debt instruments, including shares, certificates representing securities, bonds, notes, warrants, debentures and derivative contracts<sup>90</sup>. The court further explains the connection between the applicant and Sberbank, which is an indirect subsidiary within the meaning of art 2(1) of regulation 269/2014. The applicant itself was added to the list at a later stage. The court indicates that the shares held by the applicant in the group company are "assets" in the meaning of regulation 269/2014, therefore under art 2 para 1 of the regulation these shares are required to be frozen. The court also observed that the EU regulation cannot depend on the national law interpretation. As in accordance with the case law of the CJEU, the interpretation of a provision of EU law must take into account not only its wording, but also the context of objectives of the legislation of which that provision forms part and where appropriate its history of it. With these observations, the court however notes that due to reasonable doubt on the applicant’s rights due to the freezing of depositary shares and due to the "great importance" of sanctions decides to submit a preliminary question to the CJEU on the matter<sup>91</sup>.

### **2.2.3. Sanctions Extra-Territorial Application Bank Meli Iran Case**

In another case on the extra-territorial application of sanctions in the EU. The applicant who is a German based branch of an Iranian bank incorporated under Iranian law, made a claim against a German telecommunication company which has branches around the world including the United States of America, with 50% of the defendant’s income coming from the USA. The

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<sup>88</sup> Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine art 2.

<sup>89</sup> *ibid* 1(f).

<sup>90</sup> *ibid* 1(g)(iii).

<sup>91</sup> *ECLI:NL:HR: 2024:642, (Re DP shareholder voting rights)*7 [2024] SUPREME COURT OF THE NETHERLANDS 23/00717.

dispute before the court occurred after the USA withdrawal from the Iran deal of 2015 (JCPA), which resulted in this Iranian branch to be listed on the USA sanctions list as of the withdrawal taking effect on November 2018. The German telecommunication company decided as a result to terminate its contracts with the applicant with immediate effect due to the sanctions. The applicant claims were against the termination by the defendant and claimed that on basis of a violation of Article 5 of the European Council regulation 2271/96 of 22 November 1996 regarding the protecting against the effects of the extra-territorial application of legislation adopted by a third country. The court held that, if the termination is made due to the US sanctions definitively, then such termination would violate the regulation. However, if such termination was made due to economic reasons, then it cannot violate the regulation and it is up to the European companies to decide their dealings<sup>92</sup>.

#### **2.2.4. GATT & GATS View on The EU Restrictive Measures Legality**

The introduction of restrictive measures does not constitute of meeting the domestic legislation only. As the impacts of restrictive measures are seen on the international relations between the countries and may constitute a violation under international law. According to Marise and others, the restrictive measures against Russia have first started after Russia's use of force against Ukraine back in 2014. The legal basis for the EU to impose the restrictive measures was driven from international law. As the Russian attack on Ukraine violated the prohibition of use of force, which is considered as an *erga omnes* obligation. However, the authors also observe how imposing the restrictive measures generally violates the world trade organization agreement (GATT) as well as the general agreement on trade in services (GATS). Those violations would occur in regard to article XI of the GATT agreement, on the obligation not to restrict exports quantities. Also, it would constitute a violation of article II of the GATS. The authors conclude that due to Russia's violation of an *erga omnes* obligation, which the EU conceives as a security threat would allow the EU's restrictive measures to fall under the GATT's article XXI(b) which gives the contracting party the right to take "any action which it considers necessary for the protection of its essential security interests" and point (iii) of the same article states "taken in time of war or other emergency in international relations..". similarly, the GATS article XIV bis (b)(iii) gives the same type of exception to a contracting party in a time of war<sup>93</sup>.

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<sup>92</sup> *Bank Melli Iran v Telekom Deutschland GmbH* [2021] ECJ Case C-124/20.

<sup>93</sup> Marise Cremona, Anne Thies and Ramses A Wessel, *The European Union and International Dispute Settlement* (Bloomsbury Publishing 2017) 60–68.

### 2.2.5. UN Charter View on The EU Restrictive Measures

To assess the EU's restrictive measures and Russia's actions towards Ukraine since 2022, an analysis of the UN Charter is required. In brief the charter was found in 1945 after the world deadliest wars (World Wars 1 and 2), with a main purpose to maintain the world peace and to prevent any future threats to the world peace<sup>94</sup>. It also indicated certain duties and obligations of each state under international law, for example maintaining the world peace<sup>95</sup>, developing friendly relations, respecting the right of self-determination for nations<sup>96</sup>. Important principles were engraved in the text of the charter, principles such as sovereign equality<sup>97</sup>, to settle disputes peacefully<sup>98</sup> and to refrain from the use of force or even just as little as the threat of use of force<sup>99</sup>. The Charter also stipulates that those principles and responsibilities of all states are also applicable to states who are not members of the United Nations<sup>100</sup>. The exemptions for use of force or threat of use of force are only two, first the Charter allowed self-defence for states either on their own, or collectively by requesting the assistance from another state<sup>101</sup>, the second exemption is for the UNSC to use force for a sole purpose of maintaining international peace and security, the UNSC may also use economic sanctions which are not considered to be a use of force, other type of measures may be adopted by the UNSC if it deemed appropriate<sup>102</sup>. The acts of Russia when at first positioned its military forces near the border with Ukraine and later invaded Ukraine during in 2022 events, did violate those obligations without having any of the recognized exemptions under the charter. Russia's violations do not only stop to that but in addition Russia did violate Minsk agreement 1 which was concluded between representatives of Russia, Ukraine and the Organization for Security and Co-operation in Europe in 2015 which did not last for long the agreement aimed to seize fire and to put a peaceful end to the conflict after the 2014 annexation of Crimea<sup>103</sup>. Later on, this agreement was replaced by Minsk agreement 2 which was concluded between Russia, Ukraine, Germany and France and was also

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<sup>94</sup> 'United Nations Charter' (n 13) art 1(1).

<sup>95</sup> *ibid.*

<sup>96</sup> *ibid* 1(2).

<sup>97</sup> *ibid* 2(1).

<sup>98</sup> *ibid* 2(3).

<sup>99</sup> *ibid* 2(4).

<sup>100</sup> *ibid* 2(6).

<sup>101</sup> *ibid* 51.

<sup>102</sup> *ibid* 39 and 42.

<sup>103</sup> 'Protocol on the Results of Consultations of the Trilateral Contact Group (Minsk Agreement) | UN Peacemaker' <<https://peacemaker.un.org/UA-ceasefire-2014>> accessed 10 June 2023.

violated<sup>104</sup>. During the current ongoing military conflict, it is reported that Russia have committed a number of other violations of international law as well as war crimes. Those violations can be highlighted from a source which looks at Russia's actions through the war and examines the violations it consists in international law. From the source I can highlight that Russia have been bombing civilian targets such as hospitals, clinics, water dams, residential areas, and other similar kinds of civilian objects. Russia destroyed civilian properties, caused serious injuries to civilians and their mental and physical health as well as committing murder. The source observes that Russia violated Geneva Convention when it attacked and killed (and still do) civilians unlawfully, also when it attacked civilian areas. The source provides many examples for those violations, I include a violation reported on the 16th of March 2022 when a theatre was bombed in Mariupol by Russian army, at the time of bombing the theatre was used as a shelter for civilians, the attack killed at least 300 civilians and injured many. Another example from the source, was on the 24th of February 2022 when Russia's army attacked a hospital in Vuhledar using cluster munition, which is reported by another source to cause more damage than regular munition not only while using but even afterwards and could prevent areas from being reconstructed<sup>105</sup>, this attack killed at least 4 civilians and injured around 10 civilians, other damages to the hospital facilities and vehicles were reported. The source continues with more examples of Russian violations, on the 28 of February 2022 it was reported that the Russian army attacked in Kharkiv a civilian residential area, also with cluster munition, it caused death to unknown number of civilians and injured unknown number as well. Other types of violations of international law have occurred, according to the source, as well such as taking hostages, unlawful detention, and illegal liberty deprivation, which combined are violations of both the Rome Statute and the Geneva Conventions. The source mentions as an example the Russian military acts when it held at least 100 civilians as hostage in Chernobyl nuclear power plant, the civilians were deprived from their freedom, from being provided with basics such as soap, water, medicine or proper food and water, they were also forced to perform labour in the power plant<sup>106</sup>.

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<sup>104</sup> Naja Bentzen, 'Ukraine: The Minsk Agreements Five Years On' (European Parliamentary Research Service 2020) 646.203  
<[https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/646203/EPRS\\_ATA\(2020\)646203\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/646203/EPRS_ATA(2020)646203_EN.pdf)>  
accessed 9 June 2023.

<sup>105</sup> 'Cluster Munitions: What Are They and What Is the Problem?' - ICRC' (07:13:40.0)  
<<https://www.icrc.org/en/doc/resources/documents/legal-fact-sheet/cluster-munitions-factsheet-230710.htm>>  
accessed 10 June 2023.

<sup>106</sup> Christopher Arima (Martz), *Russian War Crimes Against Ukraine: The Breach of International Humanitarian Law by The Russian Federation* (Global Accountability Network 2022) 35–41  
<<https://papers.ssrn.com/abstract=4106901>> accessed 10 June 2023.

## 2.2.6. Legality Of Listing Natural Persons Under the Eu Restrictive Measures

One of the requirements of the TFEU on listing a natural legal person name to restrictive measures is to provide such a person with a reasoning and justification for that, giving the legal person a chance to appeal against such a decision<sup>107</sup>. On that the European Court of Justice first chamber made a judgment on Ms. Violetta Prigozhina appeal against the Council decision to include her name to the list of legal persons included to the restrictive measures. The Council decision was dated since the 23rd of February 2022 when the Council updated its decision 2014/145 to include Ms. Violetta Prigozhina name. The Council provided her as she argues with a very generic reason without proper justification and real connection between her and the Russian President decisions on Ukraine, she also made other arguments which are not in regard to the notification requirements. The Commission decision to include Ms Prigozhina to its decision resulted to apply visa, and asset freeze restrictive measures against Prigozhina. Accordingly, she appealed the decision to include her name. The court notes that Ms. Prigozhina name was included by the commission due to her connections with her son Mr. Prigozhin who have been actively working with the Russian ministry of defence and Wagner Group in Ukraine, and that Ms. Prigozhina is managing her son's businesses, money either which is owned by him or by herself and used to be his business partner till 2019, all of which was mentioned in the Commission decision. The court rejected this argument due to first the requirement of providing clarification of reasons on including a name of a legal person to the restrictive measures by the Commission have been fulfilled when the Commission provided that her association with her son and the common business to be the basis. Further the court supported the Commission by stating that this reason is more than self-evident for the fact that Ms. Prigozhina does indeed have a clear association to her son by first being his mother and second being the owner of a company which is part of a group of companies that till 2019 used to be owned and was founded by her son. The court also stressed that Article 296 of the TFEU which requires the Commission to provide a clear and unequivocal reason for the inclusion of a name to the list of sanctions, does not require an in detail reasoning as the appellant was arguing, explanations of facts or the law is not also required or necessary for the Commission to meet as long as such a reason is clear and the link is available, and that in the case before the court the reason provided by the Commission is more than sufficient<sup>108</sup>.

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<sup>107</sup> Consolidated version of the Treaty on the Functioning of the European Union art 296.

<sup>108</sup> *Case T-212/22 Prigozhina v Council* (European Court of Justice- General Court) 1–35.

### **2.2.7. Bitcoin Mining Equipment Case**

The following case have occurred before the District Court of C.D California in the United States in January 2023. Although this thesis does not cover the United States and the sanctions it implemented against Russia, however the case is a great example on the effects of sanctions on sales contracts. The United States of America, similarly to the European Union have introduced a wide range of sanctions against Russia, Russian officials and companies, which are considered to be a bilateral sanctions event though there was a level of coordination between the different Sanctioners. The main Parties to the dispute are US companies who entered into agreement for the purpose of selling bitcoin mining servers, software, and hosting service, which are physically located in Russia, which were sold by the defendant in the case. The court notes the following definition for bitcoin mining “the process of applying computing power to solve cryptographic problems to produce or "mint" new bitcoins, a process that is energy intensive and typically located in places with low energy costs and high production capacity”. Both Parties to the dispute negotiated and entered into the agreement between the period from May 2021 and January 2022 with the aim to transfer the ownership of the aforementioned equipment’s. The defendant however who was selling the equipment’s had them physically based in the position of a Russian company with a branch in Switzerland called BitRiver, and the mining equipment located physically in Russia, the Agreements value was 1.5 million USD. The dispute raised between both the appellant who purchased the equipment’s and the defendant following the Russian violation of international law when it attacked Ukraine, just similar to the EU the United States was one of the most active Sanctioners who implemented wide range of sanctions against Russia. The United States executive order 14024 from April 2022 considered BitRiver to be on the list of sanctions including its subsidiaries, this executive order resulted in the indecision of the defendant to interrupt its business relations with them. This decision however impacted the Appellant who had it's acquired equipment’s located physically in Russia. The Appellant is noted by the court have attempted to reach out to BitRiver to either sell those equipment’s to none sanctioned company or relocate those equipment’s, however BitRiver denied such requests stating that the equipment’s are the property of the Defendant, who denied interfering as it already have interrupted its business relations with BitRiver. The current court decision was on the jurisdiction of the court and the applicable law,

in which it decided that it has jurisdiction and there was no clear agreement for arbitration although the defendant argued otherwise<sup>109</sup>.

### **2.2.8. The Russian-Luxembourgian Pilot Case**

A case occurred before the ECJ against the Council of the European Union supported by the European Commission against the applicant a dual citizen of Luxembourg and Russian. The case relates to the applicant, who prior to the sanctions against Russia, was in position of a private pilot license issued under the laws of Luxembourg and flew over multiple EU countries. The dispute arises following the Council decision number 2014/512/CFSP of 31 July 2014 as amended and the Council regulation 833/2014 of 31 July 2014 as amended, both prohibiting "Russian air carriers, Russian-registered aircraft, non-Russian registered aircraft which is owned or chartered, or otherwise controlled by any Russian natural or legal person, entity or body" to get permission to land, depart or flyover the EU territory. The court in its decision listed some exceptions stated in the council decision, however, not relevant to the case. The matter before the court occurred when both the European Commission and the European Aviation Safety Agency (EASA) stated in their websites between 21 March 2022 and 15 March 2023, that (i) the prohibition applies to individuals with dual citizenship of Russia and a member state, also stated that such prohibition shall apply towards a pilot with a Russian citizenship, if such a pilot flew privately as a pilot (having control over the aircraft), with the exception that such a person was flying the plane as an employee as in such case the person would not have the control. on those merits the Luxemburg authorities restricted the applicants as due to the publications of the mentioned institutions, and therefore the Appellant appealed the decision requesting the court or allow her to use her flying license accordingly without limitations. (1 to 13) The court in its decision stated that the applicant is "not individually concerned by the contested regulation". The court further explains that the regulation "intention was not to prohibit Russian citizens holding a private pilot's license from using that license to fly, on a private basis, a non-Russian registered aircraft which is not owned or chartered by them" the regulation "must be understood only in the sense of economic or financial control"<sup>110</sup>.

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<sup>109</sup> *Veribi, Llc v Compass Mining, Inc* [2023] United States District Court, CD California Case No. 2:22-cv-04537-MEMF-JPR.

<sup>110</sup> *Case T-233/22 Isentyeva v Council of the European Union* [2023] GC Case T-233/22.



## Chapter 3. CISG Contracts and EU Sanctions

### 3.1. Overview

The EU sanctions against Russia as previously demonstrated exists under the EU law, it applies to all member states through local authorities. It does impact among other things, the imports, and exports of goods and as previously demonstrated certain goods which can normally be traded legally, however under the EU sanctions against Russia regime it became for limited purposes or illegal. In this chapter two elements will be drawn, the first is an international sales contract and the second is on the application of EU sanctions on a multi jurisdiction level. On that basis this chapter will continue by analyzing the impact of sanctions on a contract governed by the CISG rules. The main assumption of this chapter which will be tackled in the second part mentioned above, is that the EU sanctions cannot be used as an exemption under the CISG article 79. This assumption will be on the basis which will be presented in this chapter. Instead, this chapter will present an analysis of the possible outcomes of a nonperformance of the contractual obligations due to sanctions from the prospective of no performance and breach of contract under the CISG rules.

This view is supported by many factors that makes a dispute of an international sales contract uncertain. First appears the need to determine the applicable law to a contractual dispute, which at first might seem simple but a closer look shows a whole mess and uncertainty to what should apply or should not occur. In principle the parties are allowed to choose their dispute resolution forum, yet even in the presence of such an agreement a certain degree of uncertainty still exists. For example, Burcu wrote about the case between the European Commission and AstraZeneca for the supply of Covid-19 vaccine on basis of an Advance Purchase Agreement. Even though both parties have agreed to the Belgium law as the applicable law yet the question of either to include the CISG rules which Belgium is a party under and the formal requirements of application of the CISG were present, yet the CISG rules application witness a challenge before the court<sup>111</sup>.

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<sup>111</sup> Yüksel Ripley Burcu, 'The Rome I Regulation, the CISG and the EU-AstraZeneca Dispute' (*AstraZeneca Dispute*, 8 July 2021) <<https://eapil.org/2021/07/08/the-rome-i-regulation-the-cisg-and-the-eu-astrazeneca-dispute/>> accessed 18 June 2024; 'Global Sales Law in a Global Pandemic: The CISG as the Applicable Law to the EU-AstraZeneca Advance Purchase Agreement?' (*Conflict of Laws*, 5 February 2021) <<https://conflictoflaws.net/2021/global-sales-law-in-a-global-pandemic-the-cisg-as-the-applicable-law-to-the-eu-astrazeneca-advance-purchase-agreement/>> accessed 18 June 2024.

In principle the CISG allows a buyer and a seller to choose the terms of the Convention to govern their agreement by including in their contract that disputes arising between them will be resolved under the CISG rules. Using the CISG as a uniform body of sales law in a party's contract is greatly respected and admired. While parties usually have freedom to contract, there may be limitations on their right to do so. Despite any exceptions, it would be very praiseworthy to have the CISG apply to and govern the parties' contract, considering it as a uniform law to govern contractual relations while taking into account specific circumstances and trade needs<sup>112</sup>. Dimatteo quotes, the "application, misapplication and nonapplication of the CISG" now relies on practitioner's hands. Dimatteo views that for example the non-use of the CISG rules may be attributable to the practitioner's lack of knowledge about these rules, and therefore they simply exclude them relying on the domestic law which they are more familiar with. He includes other instances where no party states have adopted certain articles of the CISG<sup>113</sup>.

### 3.2. Sanctions Impact On Concluded Agreements

Pacta sunt servanda or agreement must be upheld, is a universally agreed upon principle as many scholars agree upon as Touri states<sup>114</sup>. Shoarian justifies the importance of this legal concept as due to the fact that without keeping a contract alive as much as possible it may result in unwanted losses or difficulties on either side of a contract. He views sanctions as the equal of natural disasters, and war. His article focused on two legal concepts which sanctions, and such events could trigger, which are force majeure and hardship. He did recognize the difficulty in the application of these legal concepts as due to the different approaches each legislative system takes<sup>115</sup>. However, in my view sanctions are very unique in comparison of natural disasters and war. This uniqueness comes from sanctions being against the interest of the imposed against state, which easily could trigger legal arguments against the recognition or application of sanctions which are designed against that state interests. Which in my view would make a litigation arise due to sanctions unpredictable. the sovereign actors under their own natural laws, and although sanctions in general including the EU sanction have a universal application within certain limits as previously presented. Certain countries prohibit this

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<sup>112</sup> Gustavo Favero Vaughn and Kabir Duggal, 'On International Arbitration, Choice of Substantive Law, and the CISG: A Case Law Study' (2022) 38 *Arbitration International* 187.

<sup>113</sup> Larry A DiMatteo, *International Sales Law: A Global Challenge* (Cambridge University Press 2014) 63–66.

<sup>114</sup> Kaius Tuori, 'Pacta Sunt Servanda' [2023] *Annales Academiae Scientiarum Fennicae* 44, 48.

<sup>115</sup> Ebrahim Shoarian and Farshad Rahimi, 'Sanctions and Their Effects on Contractual Obligations: From the Perspective of International Instruments and Iranian Law' [2014] *Nordic Journal of Commercial Law* 22, 1–10.

application. The EU is one of these countries through the Council Regulation (EC) No 2271/96 of 22 November 1996 prohibits the extra territorial application of third countries sanctions<sup>116</sup>, China anti-foreign sanctions law also similarly prohibits compliance with third countries sanctions<sup>117</sup>. It is currently not clear what is the Russian legislation and courts stance on this matter. Some reports have included the DELOS dispute resolution center have shown that since June 2020 Russia have issued a new legislation making its national courts the exclusive courts looking after disputes especially where sanctions are involved. The report believes this does not refrain the parties from their agreed chosen forum for litigation, however it applies where the Russian courts believes that the sanctions have hindered a party from reaching to such a venue, or to be properly presented<sup>118</sup>. Due to many barriers, especially no available research on the area and language barriers, this thesis is not able to further assess the practical implications of such a new law or its consequences, or any other practices that the Russian courts are taking in front of the sanctions. However, I believe it's worth to point out that the EU sanctions could violate the Russian constitution, which would require more thorough research on the matter. However, in the author's view especially articles 4.2 and 8 are going to be violated. This thesis and its work on analyzing the impacts of the EU sanctions on an international sales contract governed by the CISG rules, will follow a hypothesis that the EU sanctions are illegal from a Russian legislative point of view therefore an excuse of none performance due to a party attempt to comply with the EU sanctions will not be accepted and enforced by Russian courts. As this thesis is focused on the instances where the buyer and the seller are based in an EU member state and Russia, this hypothesis is justifiable where the consequences are going to appear on the Russian side.

### **3.3.Legal Concepts (Frustration, Force Majeure And Hard Ship)**

Berger and Behn view that both force majeure and hardship are similar yet very different from each other. They describe that the first stands on the impossibility of performance while the second stands for the change of circumstances. from practical point view, they describe that

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<sup>116</sup> Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom 1996 (OJ L).

<sup>117</sup> Anti-foreign Sanctions Law of the People's Republic of China 2021.

<sup>118</sup> Noah Rubins KC and Alexey Yadykin, 'Guid to Arbitration Places (GAP) on Russia' (DELOS Dispute Resolution 2024); 'Russia Cross-Border Enforcement Baker McKenzie Resource Hub' (Baker McKenzie) <<https://resourcehub.bakermckenzie.com/en/resources/cross-border-enforcement-center/emea/russia/topics/judgments>> accessed 3 June 2024.

some contracts do include two separate clauses on this matter, however they also conclude that both legal concepts are used contractually on a very similar manner that makes it hard to differentiate one from the other, as they have similar purpose. They describe a definition for Force majeure to English as "superior force". They also describe the difficulty of promoting a certain event to qualify as a force majeure, they use the Covid-19 example. In the example they described how only courts could qualify the specific contractual breach to be a force majeure or not, as it depends on the exact legal effects Covid-19 had. Hardship the authors describe on the other hand deals with situations where the performance did not become impossible, however unfavorable anymore, due to changes in circumstances. for instance, increased material prices. Frustration on the other hand, is more of a common law concept as most common law countries did not develop a hardship concept. The concept does deal with the impossibility, frustration of a contract and its purpose <sup>119</sup>.

Schwenzer views the CISG rules, that they lack any provision on force majeure or even hardship. He describes the most relevant article 79 of the CISG, that it does not deal with the matter instead it describes a relief for an impediment beyond control. He describes the drafting history in brief and mentions how the legal concepts were neglected while drafting. Therefore, he qualifies the opinion of hardship being not applicable in the case of article 79. Schwenzer views that the CISG article 79(1) requires an impediment beyond control and unexpected situation. He describes that the impediment should not fall under the risk of the performer of the certain obligation and that it must be unexpected and unavoidable. He views that hardship could be covered under the same article, but also, he describes how under certain contract a party may already accept a risk affecting the performance, which in such case it would not be considered under article 79(1). In conclusion, Schwenzer presents the opinion that if the impediment event could not have been taken into reasonable consideration, then the affected party can be exempted from liability for both hardship and force majeure<sup>120</sup>.

As this thesis is overviewing the impact of EU sanctions against Russia, it is understood that the circumstances may dramatically change. Situations such as the sanction against Russia suddenly occurred and affected the contractual relations. According to estimates, more than 1,000 international companies closed their branches and ended their relations in Russia due to

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<sup>119</sup> Klaus Berger and Daniel Behn, 'Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study' (2020) 6 McGill law journal. *Revue de droit de McGill* 78, 1–40.

<sup>120</sup> Ingeborg Schwenzer, 'Force Majeure and Hardship in International Sales Contracts' (2008) 39 *Victoria University of Wellington Law Review* 1–18.

sanctions, as an example (Yale School of Management, 2024). As a result of the EU sanctions against Russia parties failed to meet their contractual obligations which was agreed prior to the sanctions. In my view, The CISG rules however generally recognizes what is called an “impediment beyond his control”, which in this section I will focus on analysing Article 79(1) in relation to the EU sanctions against Russia.

According to Kroll article 79(1) of the CISG does deal with an exemption of a party’s liability due to factors impacting performance, through what the CISG recognize as an “impediment beyond his control”. According to Kroll and others, a party is expected under Article 74 of the CISG to be liable for all foreseen or foreseeable damages by a reasonable person including changes in prices. The authors recognize instances that the parties either limit their liability or exclude the liability of certain matter. Article 79 does provide an exemption for events which are beyond that (Kroll et al., 2018, pp.1039–1042). Further, he indicates the exemption under Article 79(1) which provides that “A party is not liable for a failure to perform any of his obligations ... (UNCITRAL, 1991, art. 79(1))”. He describes how the article explicitly indicates the waiver of a party’s liability, that is failing to perform its obligations. Which under normal conditions such failure consequences are as those indicated in article 45 Remedies for breach of contract by the seller, and article 61 Remedies for breach of contract by the buyer (Kroll et al., 2018, pp.1107–1109).

The Higher Regional Court of Dusseldorf in its judgment, found that the seller was not obliged to compensate the buyer for damages due to the non-performance of delivering the total agreed number of bulbs to the buyer. The case occurred when the seller agreed to deliver 1 million bulbs to the buyer, which the seller prepared. However, prior to the delivery taking place a fire occurred at the seller's facility which destroyed most of the bulbs. the seller delivered what remained of around 60,000 bulbs, however the buyer claimed for damages for the missing portion which the seller was not able to re-make due to a market wide shortage in materials. In the court reasoning it stated that Article 79(1) applies to the contract under which the seller had an impediment obstacle to deliver due to the fire. Which the court stated that fire represents and impediment to deliver (ewelina, 2019).

In another case the court found the seller who made goods available for the buyer to collect, as agreed in the contract. To have met his agreed contractual obligations that the payment must be made as agreed, even if the goods went bad due to buyers related reasons. The buyer argued that it could not physically collect the goods from the seller due to the buyer's country

enforcement of UN sanctions against the seller's country, which the court found the seller at no fault (Anon, 1996a).

In my view article 79(1) may not follow the national law of Russia, or other third countries and as the thesis presented in the previous section the application of the EU sanctions may be rejected by third country courts, therefore this thesis in the following sections will focus on the failure of a party to perform its obligations under the CISG rules. In the case of the sanctions against Russia effects on an international sales contract governed by the CISG rules, Article 79(1) can be applied, however, this thesis will observe other factors such as the passing of the risk, and the delivery terms under the CISG rules that shall affect a CISG governed contract as more concrete factors that could influence the obligations and liabilities of the parties. Winship for example does criticise the CISG article 79(1) to be taking a more lenient approach. He states that the usual focus of national laws is usually either on the impossibility of the performance which can fall under a force majeure and/ or frustration, and on the other hand a focus on the economic hardship. In his view, this may lead to the court's interpretation of article 79(1) in accordance with the national law and could also lead to uncertainty of the application of the article (Winship, 2004, pp.1–10).

### **3.4.The CISG Rules at a glance**

The following subsections are going to be divided into the following order. First a brief on the establishment and development of the CISG rules from historical development perspective. Further a subsection will be made to look at different CISG articles and the possible impacts of the EU sanctions on the obligations stated in those articles. Article 79(1) will not be taken into consideration based on the hypothesis that the application of the article will be prohibited under the Russian law.

#### **3.4.1. Establishment and Development**

The United Nations Commission on International Trade Law (“UNCITRAL”), through a group of international legal practitioners and legal scholars, have managed to conclude a unification of the certain rules applicable on sale of goods, this happened through, the United Nations Convention on the International Sale of Goods (“CISG”) which is to the date of this thesis have been ratified by 97 countries. As Perillo describes in his essay, countries from completely different legal systems and economic realities have joined the treaty. The efforts of UNCITRAL

were focused mostly on the foundation the International Institute for the Unification of Private Law (“UNIDROIT”) made before<sup>121</sup>. On that the authors of CISG commentary, conclude that the CISG was first adopted in Vienna conference in 1980, and entered into force in January 1988, with currently 95 contracting states. According to the commentary the authors describe that the birth of these rules was the result of many attempts. In short, the attempts can be concluded from the authors as the initial start of the efforts around the 1930. The committee trusted with the matter decided to make two separate aspects which dealt first with the rules on formation and second the rules of performance each separately from the other. This committee worked on that basis till July 1964, when 28 states met at the Hague and approved the drafts establishing two new conventions, (i) the convention Relating to a Uniform Law on International Sale of Goods with an Annex: The Uniform Law on the International Sale of Goods (ULIS) and (ii) the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, with an Annex: the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). This attempt however as described by the authors were not very successful for which four reasons can be summarised from the authors, (i) not many states participated in the drafting, (ii) more presence of western states than developing or eastern states, (iii) the conventions focused on states with similar legal approach, and (iv) due to the small number of states which ratified the conventions (out of the 28 states which signed only 9 ratified the conventions). Further to a more recent period the authors describes the UN General Assembly attempt, through its resolution 2205 (XXI) dated in December 1966 which established a special committee on the same matter. The committee was called the United Nations Commission on International Trade Law (UNCITRAL) and had 3 main purposes, to study: “international sale of goods, payments and arbitration”<sup>122</sup>. The authors continue describing the historic events till the adoption and entry into force. They first start from the 1968 when the UNCITRAL started holding sessions to ultimately make decisions on the destiny of the previously concluded and ratified unification of law efforts. The authors notes, UNCITRAL initiated studies of the different areas of interest the UNCITRAL wanted to consider within the unified treaty to come. The UNCITRAL relayed on it’s at the time member states as well as the UN observers’ opinions and comments. The conclusion on the 1964 uniform laws was to reject it. Further to that, a group of lawyers and scholars was formed with

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<sup>121</sup> Joseph M Perillo, ‘Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review’ 66, 2–6.

<sup>122</sup> Stefan Kroll, Loukas Mistelis and Pilar Perales Viscacillas, *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary* (second edition, Verlag C H Beck oHG, Wilhelmstraße 9, 80801 Mu“nchen, Germany, 2018) 1–10.

individuals from various systems and countries. On 1976 the ULIS work was concluded, and a draft was adopted during the UNCITRAL 10th session. followed on the 1977 when the ULF was approved as a draft. The drafts were later merged by the unanimous voting of the commission and was circulated as a single document to member states and observers. Further, a total of 62 states participated with the presence of one observer state and eight other international organizations, in discussion between March and April 1980 in Vienna city. Finally, the authors describe the April 10th, 1980, events when 42 countries voted in favour of the adoption of the unified rules, and it first entered into force on January 1st 1988<sup>123</sup>.

The international efforts to improve international trade in terms of its legal aspects was not only due to the CISG and UNCITRAL efforts only. Chow and Schoenbaum describes in their book, that the end of World War 2 had a very encouraging effect on countries to meet and decide to create new institutions and legal frameworks aiming to establish as many international trade frameworks as possible. The aim primarily focused on preventing further economic tensions and escalations between nations which ultimately could lead to another world war. The authors demonstrated institutions that were found during that period such as: The International Monetary Fund (IMF), the world bank, the General Agreement on Tariffs and Trade (GATT) and others came to life. Each organization was found for different purposes which mostly aimed to free trade from political restrictions and build a legal framework for trade to exist in isolation of the past politics. The International Trade Organization for example aimed to reduced tariffs between countries and to increase free trade, which was the successor of the GATT. This however was not the same approach of developing and also eastern nations, which considered the GATT as the rich countries club and on the contrary developed stricter restrictions on trade and business<sup>124</sup>.

### **3.4.2. The Rules**

In the writer's view, commercial transactions and their practices are universal, and can simply put as an act to buy and an act to sell, either products or services and the terms and conditions that shall apply to the transaction are then decided by the parties through their offer and acceptance. On that Larry and others, jointly agree and support the same view in their book, however in their view the opinion that critics are mistaken to stand in support of uniformity of laws. In the author's view, this opinion is invalid as due to the differences in each country's

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<sup>123</sup> *ibid* 6.

<sup>124</sup> Thomas J Schoenbaum and Daniel CK Chow, *International Business Transactions: Problems, Cases, and Materials*, (Second Edition, Aspen Publishers 2010) 13–14.



practices, both culturally and legally. Therefore, the authors believe that the CISG rules are the product of a compromise, but with many reservations. The CISG is categorized as a convention and not a unification or model law, which makes it an effort of standardization of law on a higher level than domestic law, yet the interpretation and application are both left for domestic courts to determine. The authors describe the CISG as the cause of cleavage statutes. As it creates a norm conflict, due to the possibility to apply domestic sales laws, as well as the CISG rules simultaneously, due to the fact that the CISG application is transaction based<sup>125</sup>.

Further, Kroll describes in his article how the CISG rules are the result of compromise between states, and due to that the CISG rules are incomplete and do not cover all matters relating to sales law. The author gives an example of the burden of proof, which the CISG rules did not deal with and was left for the domestic laws to determine. The author highlights that the main areas that the CISG covers are found in Article 4 and Article 5, making the CISG ruling the matters of (i) formation of the contract of sale, (ii) rights and obligations of the seller and the buyer arising from such a contract. which are in the author's view, a very narrow and limited areas which excludes many relevant issues to the sales contract and leaving it up to the domestic law<sup>126</sup>.

As Kroll described and the author of this thesis further continues, the CISG is limited in its application to Articles 4 and 5, and therefore it is not a complete set of rules. On that a commentary of the CISG rules, describes the content of the CISG to be in brief that the CISG can be summarized as a set of 101 articles, which in the commentary view can be divided into 4 sections. The first part relating to the general terms and the articles relevant are from 1 to 13. where the articles deal with the following issues: (i) application of CISG, (ii) order of sources, (iii) methods of interpretation of the CISG, and (iv) requirements to form a sales agreement. The following part, which concerns articles 14 to 24, in the commentary view, deals with (i) emergence of a contract, (ii) proposal, (iii) calling of a proposal, and (iv) approval of the proposal. The third part, which the commentary considers to be the longest being from article 25 to 88, deals with the practical issues of contracting such as, the responsibilities of both parties as well as meeting the agreed terms and remedies for not meeting those responsibilities. The

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<sup>125</sup> Larry A. DiMatteo and others, *International Sales Law a Critical Analysis of CISG Jurisprudence* (Cambridge University Press 2005) 1–12.

<sup>126</sup> Stefan Kröll, 'SELECTED PROBLEMS CONCERNING THE CISG'S SCOPE OF APPLICATION' 25:39 JOURNAL OF LAW AND COMMERCE 1–19 <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/kroll.pdf>>.

last part, which the commentary from article 89 to 101 deals with issues such as, the contractual consent, effectiveness of the agreement and reservations<sup>127</sup>.

In the author of this thesis view, the CISG rules are very limited to a small fraction of matters that concern a contracting relationship. Although in the author view also, the CISG rules can be considered to be shaping the fundamental areas of contracting as described in the previous paragraph. However, it remains far from being a complete set of rules that is separation of domestic legal order can resolve a contractual dispute. Matters of public policy such as restrictions on imports, exports or even sanctions are absent from the CISG rules. The CISG rules directly look at a breach of a contract doctrine, which can be very painful for the breaching party especially in cases of contracted penalties which such a breaching party would become liable for due to no fault. In my view, the recognition of public policy and acts of government that would eventually prevent a party from fulfilling its obligations should be also recognized, especially in an international sales contract. Currently and since the introduction of sanctions a major challenge, in my view, is in place to deal with the effects of sanctions to a CISG ruled contract. While on a domestic level in a sanctioning country, the government consideration of contracts which are in violation of sanctions to be void, while both the CISG and a party who would be located in a non-sanctioning country would not share the same view. Contracts which are silent on such issues, acts of government and sanctions, create major challenges on parties obliged by domestic regulation to comply with these restrictions, a matter which this thesis will expand on in the following sections.

It is important to note a brief conclusion of this section, which is contracts that are governed by the CISG rules, are in fact not only governed by the CISG rules, and that's due to (i) the rules are in complete and (ii) does not deal with state's public policy (including sanctions) implications. It is also important to add that a result of a contract being reliant on CISG rules may trigger the applicability/ application of more than the CISG rules, which can be as follows (i) CISG rules, (ii) seller domestic law, (iii) buyer domestic law, and in the case of this thesis (iv) EU law, however this thesis will not deal with the application of law matter.

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<sup>127</sup> Kroll, Mistelis and Viscacillas (n 122) 75–76.

### 3.5. CISG Applicable Rules

The EU law restrictions on trade towards Russia through the imposed sanctions, continues to affect business ability to perform existing or in discussion agreements. This effect started since the first sanction was introduced which keep growing and changing since the Russian aggression on Ukraine. While this thesis is about the CISG rules, it is worth to mention that the CISG rules does not recognize sanctions or government decisions directly therefore a thorough analysis will be needed to first analyze the direct effects of the sanctions on CISG rules themselves and secondly on the contract itself and finally relate that to the CISG rules again. For that purpose, this section will analysis some of the CISG rules which in the author's view are going to be first triggered and will continue from there. As such this chapter will dive into the realm of the CISG rules and analyze the potential effects and articles that maybe violated or in effect due to the EU sanctions against Russia.

#### 3.5.1. Article 25

The CISG Article 25, from the General Provisions, states that "a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result<sup>128</sup>". In my view this clause is the first to be triggered in a series of other clauses that will follow. Kroll and others in their commentary of the CISG, have the conclusion that the fundamental breach concept is not derived from any domestic law, and that the concept has to be understood through the scope of international law. The authors list certain criterion that if occurred, the determination of "fundamental" breach can be supported. First, is through the concept of "detriment resulting in substantial deprivation"<sup>129</sup>. The CISG does not indicate an exact definition of detriment, the closest the authors could reach was the UNCITRAL Secretariat's commentary draft of the 1978, which stated:

"The determination whether the [determent] is substantial must be made in the light of the circumstances of each case, e.g., the monetary value of the contract, the monetary

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<sup>128</sup> UNCITRAL, 'United Nations Convention on Contracts for the International Sale of Goods (CISG)', *The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)* (1991) art 25 <[https://www.thecommonwealth-ilibrary.org/commonwealth/governance/the-united-nations-convention-on-contracts-for-the-international-sale-of-goods-vienna-1980/united-nations-convention-on-contracts-for-the-international-sale-of-goods\\_9781848594890-11-en](https://www.thecommonwealth-ilibrary.org/commonwealth/governance/the-united-nations-convention-on-contracts-for-the-international-sale-of-goods-vienna-1980/united-nations-convention-on-contracts-for-the-international-sale-of-goods_9781848594890-11-en)> accessed 7 January 2024.

<sup>129</sup> Kroll, Mistelis and Viscacillas (n 122) 337–341.

harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party"<sup>130</sup>.

In addition, another requirement was stated that is the “fundamentality distinction”, which the authors view it means "a breach of contract is fundamental when the purpose of the contract is endangered so seriously that, for the concerned party to the contract, interest in the fulfillment of the contract ceases to exist as a consequence of the breach of contract"<sup>131</sup>. As such, the breach must "concern the essential content of the contract, the goods, or the payment of the price concerned, and it must lead to serious consequences to the economic goal pursued by the parties"<sup>132</sup>. On that the authors indicate two fundamental ways to easily determine if a contracted obligation is fundamental or not, is by either (i) explicitly stating what is fundamental for the parties in the agreement itself and better to indicate the reason of this distinction, or otherwise (ii) it could be concluded through an analysis of the contractual obligations and the understanding of the scope of the contract<sup>133</sup>.

In my view, when applying Article 25 of the CISG, to the thesis question the conditions of a breach of a contract is all met, as sanctions against Russia has, (i) completely prohibited importing and exporting certain products, as well as providing certain services and performance of bank transfers, (ii) limited the performance in other areas where it is not completely prohibited, (iii) causing damages due to none performance. Which all in Article 25 meaning makes the none performing party in breach and would eventually result in the occurrence of damages.

However, the distinction of the CISG Article 25 was not only limited to the first part as described above, it also continues with an exception, which reads as “unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result<sup>134</sup>”. This second criterion of foreseeability lays to be proven by the breaching party, as article 25 states.

When applying these principles to the sanctions against Russia situation since 2022 till date. In my view, and it’s up to the breaching party to prove to a court, that the newly imposed sanctions since 2022 were unpredictable and unprecedented. Unpredictable as according to reports

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<sup>130</sup> *ibid* 340–341.

<sup>131</sup> *ibid* 341.

<sup>132</sup> *ibid*.

<sup>133</sup> *ibid* 337–343.

<sup>134</sup> UNCITRAL (n 128) art 25.

between 2014 (when Russia invaded Crimea) and till around the spring of 2021, the geopolitical situation between the EU and Russia reached some kind of stability. Although as I described in the previous section about reasons of the sanctions against Russia and their legality, Russia till the spring of 2021 was far from being innocent. However, Russian military activities stopped at that point on annexing Crimea. From the spring of 2021, according to the same reports, Russia started to move its military forces to the borders of Ukraine. Which is a sign of a possible new conflict leading to another set of harsh measures from the EU<sup>135</sup>. Therefore, I stand of the opinion that till the spring of 2021 it could have been unpredicted for a normal usual person trading with companies in Russia that new restrictions will occur against trading with Russia. After the spring of 2021, in my opinion it can be a case-by-case situation. in as demonstrated in the previous section on sanctions and sanctions against Russia, It is usually unusual to introduce sanctions against another country, which as stated before, it is a harsh means of pressuring a country to refrain from a certain act, that negatively affect the economy of both Sanctioners and Sanctioned country. In that context, Russia have witnessed some sanctions prior to the 2022 events, when Russia annexed Crimea, therefore the distinction of whether the sanctions since 2022 could have been foreseen is not an easy question. In my view this question could be divided into two separate questions, the first, was it foreseen that Russia would have lunched another attack on Ukraine after it's annexation to Crimea, and the second, was it foreseen that the EU would sanction Russia again if an escalation happens. In my view, the 2022 sanctions against Russia could have been foreseen especially if the 2014 sanction packages were taken into consideration. However, what remain unforeseen is Russia 2022 invasion, which occurred after many years of stability after the annexation of Crimea. Although, in my opinion this could be foreseen if we look at the intensions of Russia acts in 2014, which were solely for political influence, which in my view remained an open topic since then. In my view, EU companies doing business with Russia were at the risk of additional political tensions, however it was not possibly foreseen for a usual businessperson if (i) sanctions in the specific business area will happen or not, and (ii) Russia will again invade Ukraine.

On 1997 February, the Oberlandesgericht Hamburg made a decision on a case between an English buyer the plaintiff and a German seller the defendant, where they both entered into a contract for the supply of materials originating from China. The delivery was supposed to happen in October 1994, but never did as the seller never received the materials from its own

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<sup>135</sup> 'The European Union and the Russian Federation | EEAS' <[https://www.eeas.europa.eu/russia/european-union-and-russian-federation\\_en?s=177](https://www.eeas.europa.eu/russia/european-union-and-russian-federation_en?s=177)> accessed 12 January 2024.

supplier. The English buyer secured the materials from a different supplier and sued the German seller for damages. In the court judgment it considered the seller failure to deliver on the specified time, which proven that it was of an importance to the buyer to be a fundamental breach in the meaning of Article 25<sup>136</sup>.

In another case in January 1997, the Oberlandesgericht Koblenz made a decision on a case between a Dutch seller plaintiff and a German buyer the defendant, where they contract on the sale of acrylic blankets. The buyer made a claim against the quality of the blankets as well as the missing number of blankets in the delivery. On Article 25 the court found that as the seller tried to remedy the quality issue by delivering a replacement, which the buyer rejected, that the quality matter does not qualify as a fundamental breach<sup>137</sup>.

The Ljubljana High Court of Slovenia made a decision on a case between a German buyer plaintiff, and a Slovenian seller defendant. where both entered into an agreement for the sale of doors and door frames. The court notes that the parties had a long relationship where the buyer was buying the doors and door frames in bulk from the seller to resell it individually. The dispute arises when the seller sent the buyer 174 frames and 22 doors, where the seller previously knew from the buyer's orders that the buyer requires almost the same number of doors and door frames as the buyer sells them together. On Article 25 the court also noted that the buyer had a confirmed order of 123 door frames and 119 doors which instead the 174 door frames and 22 doors were delivered. The court held that this act resulted in depriving the buyer from what it was entitled and expected under the contract therefore it considered it a fundamental breach under article 25. Therefore, the entitlement of the buyer to avoid the contract under article 49(1)(a)<sup>138</sup>.

### **3.5.2. Articles 30, 31 and Article 32 Obligations of the Seller**

In my view these articles have a very crucial determination on the faulty party in a sales contract, if not the most critical. Article 30 of the CISG does state that “The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.”. The Article recognizes two instances in regard to the delivery, the first which is left up to the parties to agree on, and the second if the parties remained silent or did not agree contractually on a delivery obligation. The recognition of the party at fault in this instance is critical in my view,

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<sup>136</sup> *CLOUT case 277* [1997] Oberlandesgerichts-Rechtsprechungsreport Hamburg 1 U 167/95 277.

<sup>137</sup> *UNICITRAL CLOUT case 282* [1997] Oberlandesgericht München 7 U 2070/97.

<sup>138</sup> *CLOUT case 1153* [2005] Ljubljana High Court VSL sodba I Cpg 1305/2003.

as it would determine the party which is not meeting its obligation due to EU sanctions in an international sales contract, not only, but this determination would clarify the responsible party for damages. Regarding the CISG rules itself, in my view articles 31 and 32 make the only obligation of a seller to make the goods available to either the buyer or its carrier. Article 31(a) to (C) does indicate that the seller's obligation ends once the goods are placed with the first carrier, and not at the buyer's location. Article 32 (2) which states "**if** the seller is to arrange for shipment...", which in my view suggests that the shipping is an agreeable matter and not a mandatory portion of the sale.

If this applied to the fulfillment of a sales contract, in my view two typical scenarios would occur, i) where the seller is a company restricted by the EU sanction laws, and a subject of EU sanctions; ii) where the buyer is a company restricted by the EU sanction laws, and a subject of EU sanctions. In such two scenarios the ability to fulfil the contract will be affected, however, on the buyer or its carrier's side and not on the seller's side. In my view, regardless of the position of the seller in the aforementioned two examples, or if the seller is subject to EU sanctions, or is a company based in Russia, or even a sanctioned person under the EU sanctions, in both examples the seller will not be in violation of its contractual obligation if it made the goods available for the buyer or its carrier. In the example i above, the seller's obligation will come to an end once the seller makes the goods available to the buyer or the buyer's carrier. In my view this can be concluded from both Article 32 (2) which states "**if** the seller is to arrange for shipment...", which suggest that it's not an obligation, and also from Articles 31(a) to (c) which makes the seller obligation ends once it makes the goods available for the first carrier. This would essentially lead to the carrier/buyer's own breach of contract and failure to meet contractual obligations. A contractual breach would result in the raise of liability and damages on the seller side, especially if the contractual agreement was set for many years with the obligation of buyer to buy certain quantities over time. The buyer could attempt to excuse itself under force majeure, as its breach of contract is due to government decisions and local authorities' enforcement of the EU sanctions.

From the court's decisions on Article 31 interpretation. A case appeared before the court between a seller who is a publishing house for art books and a buyer. Where the buyer made multiple orders for printing, binding and finally delivery of certain art books. The dispute before the court which was raised by the seller to claim the value of unpaid invoices. However, the buyer, who does not dispute the outstanding invoices, counter claimed a set-off due to damages which occurred to the buyer. The buyer claims the damage happened due to the seller's failure

to deliver the art books on time to meet certain deadlines for exhibitions or other events. Accordingly, the buyer claims for damages which was suffered. The court in its judgment looks first at the agreement between the parties. it notes that "in principle, the liability for damages is a liability for the guaranteed performance of the seller's obligations, which is independent of the seller's fault"<sup>139</sup>. The court notes that the agreement between the parties did not include an obligation on the seller to perform the carriage of the goods, it only included which party to bear the risk. The seller argued that the agreed delivery was ex-works and when the seller organized the forwarder, it was solely as a favor not as an obligation. On the other hand, the buyer argued that the contracting with the forwarding agency as well as the consequences of its actions is the seller's. The court further observes article 31 of the CISG, it notes that the article assumes the delivery to be done through the buyer himself or a carrier, it does not include the instance of the seller by itself having to do the delivery. Therefore, the court views that "such obligation cannot be assumed"<sup>140</sup>, and the obligation that definitely exist is the obligation to dispatch, or in other cases to place the goods at the buyer's disposal at the seller's place of business. The court also notes that the seller's obligation is deemed fulfilled once the goods are handed over to the carrier. Therefore, the buyer cannot claim damages to the seller due to delays in the shipping. In the end of the judgment the court observed the seller was not in delay in regard to keeping its own contractual commitment, of which the buyer did indeed acknowledge that the seller was on time to make the goods ready<sup>141</sup>. Similarly, a different court ruled that the seller's obligation in regard to delivery, once considered fulfilled the seller responsibility ends. Consequently, the risk of loss, damages or any other risks moves to the buyer, the court only makes two exemptions for negligence or intentional acts leading to loss or damages<sup>142</sup>.

In Brand view, Article 31 can be divided into 3 separate obligations of which a buyer and a seller may agree to one of them in an agreement which involves the sales of goods. First, consider the seller's obligation completed by handing over the goods to the first carrier. Second, consider the seller's factory or place of production as the place to keep the goods available or at the disposal of the buyer, where at this place the seller's obligation is over. The third which is almost very similar to the second, considers all other cases where the seller's usual place of business that was known to the buyer at the time of concluding the agreement, as the place

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<sup>139</sup> *CISG-online* 488 [1999] Handelsgericht Zurich (Switzerland) HG 970238.1.

<sup>140</sup> *ibid.*

<sup>141</sup> *ibid.*

<sup>142</sup> *CLOUT case* 247 [1997] Audiencia Provincial de Córdoba, Spain 648, 12077.



where the obligation of the seller ends by making the goods at the disposal of the buyer<sup>143</sup>. Similarly, Kroll and others in their commentary view that this clause regulates the modalities of delivery obligations between a buyer and a seller. They similarly state that the article requires the seller to either (i) make the goods available to the buyer, or (ii) allocate the goods to the first carrier<sup>144</sup>.

### 3.5.3. Article 60 Taking Delivery

The CISG through Article 60 obliges the buyer to take delivery. The clause describes the obligation in two points, which can be summarized as i) doing all acts reasonable to enable the seller to deliver, and ii) to actually receive the goods<sup>145</sup>. According to Popov on point a) of the clause, the expectation on the buyer is divided into two elements first, that the buyer's acts are deemed necessary for the seller to complete its part, and such acts are limited to what is reasonably expected from a buyer. In this essence Popov provides case law examples on what is a usual expectations from a buyer such as, the (27/2001 case<sup>146</sup>) which makes it the buyer's obligation to obtain import license, the (Clout case 987<sup>147</sup>) which requires the buyer to conclude a contract for the purpose of carriage and to inform the seller of the details on the mood of transport, the (Clout case 732<sup>148</sup>) where the court decided allowing the seller access to the place of delivery for instance the buyers premises is the obligation of the buyer. The author also describes the reasonable expectation from the buyer, that such expectations are usually expressly agreed upon by a contract or otherwise, or what could be assumed in the usual performance. He states that the buyer's failure to meet its obligation under this clause may result in the breach of the contract<sup>149</sup>. On point b) of the article which requires the buyer to "taking the goods<sup>150</sup>" the author views this obligation as one which could constitute to a breach of the agreement if not met by the buyer. As this clause requires the buyer or it's carrier to physically receive the goods, this can be also concluded from (Clout case 591)<sup>151</sup>. In the (Clout case 943<sup>152</sup>)

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<sup>143</sup> Ronald Brand, 'CISG Article 31: When Substantive Law Rules Affect Jurisdictional Results' (2006) 25 *Journal of Law and Commerce* 181, 1–4.

<sup>144</sup> Kroll, Mistelis and Viscacillas (n 122) 478.

<sup>145</sup> UNCITRAL (n 128) art 60.

<sup>146</sup> Popov Ruslan, 'Buyer's Obligations under the UN Convention on Contracts for the International Sale of Goods (CISG)' (Palacky University Olomouc 2014) n 336 <[https://library.upol.cz/ar1-upol/en/detail-upol\\_us\\_cat-0168495-Buyers-obligations-under-the-UN-Convention-on-Contracts-for-the-International-Sale-of-Goods-CISG/](https://library.upol.cz/ar1-upol/en/detail-upol_us_cat-0168495-Buyers-obligations-under-the-UN-Convention-on-Contracts-for-the-International-Sale-of-Goods-CISG/)> accessed 11 April 2024.

<sup>147</sup> 'CLOUT Case 987' <[https://www.uncitral.org/clout/clout/data/chn/clout\\_case\\_987\\_leg-2304.html](https://www.uncitral.org/clout/clout/data/chn/clout_case_987_leg-2304.html)> accessed 11 April 2024.

<sup>148</sup> *CLOUT case 732*.

<sup>149</sup> Ruslan (n 146) 69–71.

<sup>150</sup> UNCITRAL (n 128) art 60 (b).

<sup>151</sup> *CLOUT case 591*.

<sup>152</sup> *CLOUT case 943*.

also, the court determined that the buyer who did not collect the contracted goods on the agreed time to be in a nonperformance situation, even if it was due to the buyer's customers reasons. Finally, the author includes that if the place of delivery is not already agreed upon between the party's article 31 as indicated above in section 4.2.2 would take control of the obligations<sup>153</sup>.

According to Allison Butler the passing of risk is one of the most fundamental matters which must not be overlooked. In Allison view the Passing of risk is usually determined by either the incoterms chosen or by Article 66 of the CISG which states "loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller<sup>154</sup>". This is consistent with articles 31 to 36 on the obligations of the seller and article 60 of the CISG on the obligations of the buyer as previously mentioned. The end of the seller's risk and its transfer goes hand in hand with the end of the seller's obligations, which constitute the beginning of the buyer's obligation. In addition, the source refers to the buyer's obligation to pay as due once the seller can prove the fulfillment of their part. The parties may choose to use incoterms, which then would regulate when the risk passes depending on the agreed incoterm. Accordingly, the party's duties and obligations change. If the parties agree on the use of a carrier, the risk transfers to the buyer the moment the carrier receives the goods. The burden of proof of such delivery is upon the seller, however it does not relief the seller from a nonconformity situation<sup>155</sup>.

In my view, in the situation of sanctions against Russia this would translate to two typical scenarios, the first where the goods are to be delivered to a buyer based in Russia, which in this scenario sanctions would restrict such activity, and the buyer will be in breach. The second scenario would be in the case where the buyer is not based in Russia or the deliver is not going to be to Russia, however, the buyer is on the sanctioned list or affiliated to Russia or a sanctioned person or even in some cases where the end user will be Russia or a sanctioned person, on all such situations the party at breach would be the seller who is to follow the sanctions law, as his performance under these situations would result in the seller's own violation of the sanctions law. In these two cases the buyer and the seller might benefit from Article 79 of the CISG which will follow.

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<sup>153</sup> Ruslan (n 146) 69–73.

<sup>154</sup> UNCITRAL (n 128) art 66.

<sup>155</sup> Allison Butler, *A Practical Guide to the CISG: Negotiations Through Litigation* (Lslf edition, Aspen Pub 2006) ch 5.



## Conclusions

Sanctions are a tool of international law used against a state(s) which refrain from the fulfilment of obligations under public international law. The EU have also the power to introduce what it calls as “restrictive measures”, and it did use this power against Russia. The sanctions did prohibit certain legal persons to deal with Russia in certain areas as this work did summaries. This prohibition has resulted in interruptions of the already contracted obligations between buyers and sellers concerned. The thesis looked at potential legal outcomes due to these restrictive measures. The thesis observed that despite the legality of the EU restrictive measures under the public international law, a potential of illegality to apply these sanctions within Russia and third countries remain. Due to the lack of knowledge of the Russian legislation and the potential outcomes of the application of EU restrictive measures, this thesis took the hypothesis that the EU restrictive measures are illegal from the Russian legislation point of view. Yet the impact of these sanctions is still present and witnessed, therefore this thesis found that parties obligations, those of a buyer and a seller are mostly going to be impacted due to the restrictive measures. The thesis has found that the EU did indeed exclude legal entities from liability against claims related to EU restrictive measures, however this exclusion only applies on matters that the EU exemption shall apply, which means if parties choose a third country law this exclusion would not apply, resulting in the risk of concurring liability in third countries, especially for legal persons with branches abroad remains a potential risk. The thesis followed the hypothesis that the application of EU restrictive measures is illegal from the Russian legislation point of view as they are intended to be against the Russian government. Which as this thesis followed a hypothesis that the application of article 79(1) of the CISG would not be possible. Therefore, the thesis looked at other applicable clauses of the CISG from the performance of obligations point of view and contractual breach point of view. Through which it can be concluded that a breach may occur from the buyer who is Russian entity even though the goods are with the EU seller and the EU seller failed to deliver due to sanctions. The thesis viewed few instances where the EU based company could be at fault, however it is in very certain instances and especially in the case the contractual obligation extends beyond what the CISG rules. This thesis views that the none performing party liability continue to exist in jurisdictions where these regulations are not applicable, especially if the parties made their choice of law elsewhere than the EU. A party not performing its contractual obligations would not be able to only rely on Article 79(1) of the CISG as it might not apply due to the illegality of EU sanctions in third countries. Yet the none- performing party would still need to rely on

the CISG rules for the relief from liability. This work presented two instances which a non-performing party may benefit from. The first instance where the EU sanctions are applicable and possible to follow, which as presented a party may rely on article 79(1) of the CISG. The second where the non-performance cannot solely rely on article 79(1) due to domestic laws that prohibits foreign countries regulations in this instance the EU sanctions.

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