

**U.S. Chamber of Commerce
United States Council for International Business/ICC USA
SICANA Inc.
The New York International Arbitration Center
American Arbitration Association/International Centre for Dispute Resolution
New York City Bar Association International Commercial Disputes Committee and
Arbitration Committee**

Bradley T. Smith, Director, Office of Foreign Assets Control
U.S. Department of the Treasury
Treasury Annex / Freedman's Bank Building
1500 Pennsylvania Avenue, NW
Washington, DC 20220

November 13, 2023

Re: Proposal for General License Authorizing Private Commercial Arbitration
Proceedings Involving Blocked Persons

Dear Director Smith:

We, the undersigned U.S. business organizations, arbitration institutions and bar association committees, seek a general license permitting U.S. persons to perform services related to private commercial arbitration proceedings involving parties whose property and interests in property are blocked ("**Blocked Persons**"), on the same terms as existing general licenses related to litigation involving Blocked Persons in U.S. courts and administrative agencies.

In our experience, international arbitration proceedings have increasingly involved Blocked Persons. Although certain general licenses authorize the provision of legal services related to U.S. judicial and administrative proceedings involving Blocked Persons, we understand that such authorizations do not currently extend to private commercial arbitration proceedings. Furthermore, current public guidance does not clarify the extent to which U.S. persons may act as arbitrators, counsel, and/or otherwise facilitate private commercial arbitration proceedings involving Blocked Persons in the absence of a specific license.

The absence of such authorization and/or clarification often prevents U.S. legal professionals from acting as arbitrators or counsel in international arbitration proceedings. This puts U.S. legal professionals at a disadvantage relative to their non-U.S. competitors in the global market for legal services and, as a result, dilutes the global influence of the U.S. in the field of international arbitration. Although practitioners could apply for a specific license in each case, that process is time-consuming and uncertain, and will often make participation by U.S. persons impossible as a practical matter. We respectfully submit that

international arbitral proceedings should be treated in parity with U.S. judicial and administrative proceedings, which are covered by existing general licenses. Arbitration should not be a uniquely disadvantaged form of dispute resolution. Moreover, the existing litigation general licenses are well-understood by the legal community, have proven themselves workable, and can readily be extended to arbitral proceedings.

Accordingly, we respectfully request that OFAC issue a general license authorizing U.S. persons, subject to certain conditions, to act as arbitrators or counsel, administer arbitration proceedings, and otherwise facilitate private commercial arbitration proceedings involving Blocked Persons who are respondents or otherwise made parties to such proceedings. A proposed general license is included as **Annex 1**.

In this letter, we provide (i) a summary of relevant background information and (ii) an analysis of the consequences of OFAC's current approach to private commercial arbitration proceedings and the reasons why issuing such authorization would be consistent with U.S. sanctions objectives and policy.

I. BACKGROUND

A. The Role of Arbitration in International Commercial Contracts.

For several decades, binding arbitration has been, by a wide margin, the most commonly specified dispute-resolution mechanism in significant international commercial contracts.¹ By including an agreement to arbitrate in their contract, parties generally waive their right to litigate in court, and instead agree that an arbitrator or a panel of arbitrators will render a final and binding decision.² By agreeing to arbitrate, parties are able to choose their own procedures and adjudicators, which mitigates potential concerns about judicial bias, lack of judicial expertise, and/or unpredictability that can arise if the suit is brought in the courts of the country where the opposing party is located.³

When parties agree to arbitrate, the relevant contract will typically specify a set of procedural rules to govern the arbitration, the number of arbitrators (usually one or three), a method for selecting the arbitrator or arbitrators, and the place or "seat" of the arbitration. In most cases, the contract will specify a private institution to administer the arbitration, such as the American Arbitration Association's International Center for Dispute Resolution (the "ICDR"), the International Chamber of Commerce's International Court of Arbitration (the "ICC"), and the London Court of International Arbitration (the "LCIA"). The parties to the arbitration are responsible for paying the fees and expenses of the arbitrators and of the administering institution. Once appointed, the arbitrators will hear the case in accordance with the agreed procedures and will render an award. The arbitrators' award is generally

¹ See *Scherk v. Alberto-Culver Corp.*, 417 U.S. 506 (1974) ("[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.").

² See, e.g., 9 U.S.C. §§ 2, 3, 9.

³ See, e.g., *Scherk*, 417 U.S. at 516–17.

enforceable in courts around the world pursuant to domestic laws and/or international treaties.⁴

B. The Effect of U.S. Sanctions on International Commercial Arbitration.

In recent years, difficulties have increasingly arisen because of the presence of Blocked Persons as parties to arbitrations. In part, this is because the number of Blocked Persons and their commercial significance have increased as new designations have been made. A further complication is that Blocked Persons include not only individuals and/or entities designated on OFAC's Specially Designated Nationals and Blocked Persons ("SDN") list but also entities that are 50% or more owned by one or more SDNs⁵ and entities that are either owned or controlled by the governments of certain sanctioned countries.⁶ Today, Blocked Persons include companies with widespread commercial connections in the financial services, energy, and other important sectors of the global economy.

U.S. persons, wherever they are located, are prohibited from dealing in the property of Blocked Persons absent OFAC authorization.⁷ In effect, this means that in the absence of a specific license from OFAC: (i) U.S. persons may not serve as arbitrators in private commercial arbitration proceedings involving Blocked Persons; (ii) U.S. persons may not represent Blocked Persons as legal counsel in private commercial arbitration proceedings;⁸ (iii) U.S.-based arbitration institutions are unable to administer commercial arbitration proceedings involving Blocked Persons; and (iv) non-U.S. arbitrators and arbitration institutions may not act in arbitration proceedings involving Blocked Persons if there is a U.S. nexus (such as payments of arbitral or administrative fees in USD, which involves the U.S. banking system, involvement of U.S. persons in administering the arbitration, or proceedings physically located in the U.S.). We note that the first three restrictions affect not just U.S. citizens, residents, and persons in the U.S., but also non-U.S. persons who work at foreign offices of U.S.-incorporated firms or institutions.

Moreover, as a practical matter, U.S. sanctions affect international arbitration even in the absence of a U.S. nexus. Non-U.S. arbitrators and arbitration institutions may refuse to accept cases involving claims by or against Blocked Persons because of potential sanctions compliance risks. In particular, non-U.S. persons may face liability for "caus[ing]" U.S. persons to violate sanctions restrictions.⁹ Furthermore, under some sanctions programs, even in the absence of any U.S. nexus, non-U.S. persons could risk secondary

⁴ See, e.g., United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (1958).

⁵ OFAC, Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property Are Blocked (Aug. 13, 2014).

⁶ See, e.g., Exec. Order No. 13,884, §§ 1(a), 6(d) (Aug. 5, 2019) (blocking property of the Government of Venezuela, including entities owned or controlled by it).

⁷ See 50 U.S.C. §§ 1702(a), 4303(a).

⁸ We understand that current sanctions restrictions do not prevent U.S. persons from representing a non-sanctioned person as counsel in arbitration proceeding against Blocked Persons, although a specific license would be necessary to enter into a settlement or enforce an arbitral award. See, e.g., Ex. A, Letter from Davin J. Blackborow at 1 (Mar. 1, 2016) (explaining that, although counsel would not require a specific license to represent a non-sanctioned person in an arbitration proceeding against an SDN, the non-sanctioned person would require a specific license to enter into any settlement agreement or arbitral award with the SDN).

⁹ See 50 U.S.C. § 1705(a).

sanctions liability by facilitating a “significant” transaction or providing “material” support for or to certain Blocked Persons.¹⁰

II. WHY A GENERAL LICENSE SHOULD BE ISSUED

A. **OFAC Has Already Authorized Legal Representation of Blocked Persons in Litigation Before U.S. Courts or Agencies, and Certain Related Services.**

Although various general licenses authorize the provision of certain legal services to or on behalf of Blocked Persons in the context of litigation in U.S. courts and/or agencies, we understand that OFAC takes the position that such authorizations do not extend to private commercial arbitration proceedings.¹¹ In particular, the applicable regulations for almost every OFAC sanctions program contain nearly identical language, authorizing the following:

“(1) Provision of legal advice and counseling on the requirements of and compliance with the laws of the United States or any jurisdiction within the United States, provided that such advice and counseling are not provided to facilitate transactions in violation of this part;

(2) Representation of persons named as defendants in or otherwise made parties to legal, arbitration, or administrative proceedings *before any U.S. federal, state, or local court or agency*;

(3) Initiation and conduct of legal, arbitration, or administrative proceedings *before any U.S. federal, state, or local court or agency*;

(4) Representation of persons *before any U.S. federal, state, or local court or agency* with respect to the imposition, administration, or enforcement of U.S. sanctions against such persons . . .; and

(5) Provision of legal services in any other context in which prevailing U.S. law requires access to legal counsel at public expense.”¹²

¹⁰ See, e.g., 22 U.S.C. § 8909(a)(2); Exec. Order No. 14,024, § 1(a)(vi) (Apr. 15, 2021).

¹¹ See, e.g., Ex. A, Letter from Davin J. Blackborow at 1 (Mar. 1, 2016) (“The [Ukraine] Regulations authorize certain legal services on behalf of persons whose property and interest in property are blocked under the Regulations, but that authorization does not extend to private commercial arbitration.”).

¹² See 31 C.F.R. § 510.507 (North Korea Sanctions); 31 C.F.R. § 515.512 (Cuban Assets Control Sanctions); 31 C.F.R. § 525.506 (Burma Sanctions); 31 C.F.R. § 536.506 (Narcotics Trafficking Sanctions); 31 C.F.R. § 541.507 (Zimbabwe Sanctions); 31 C.F.R. § 542.507 (Syria Sanctions); 31 C.F.R. § 544.507 (Weapons of Mass Destruction Proliferators Sanctions); 31 C.F.R. § 546.507 (Darfur Sanctions); 31 C.F.R. § 547.507 (Democratic Republic of the Congo Sanctions); 31 C.F.R. § 548.507 (Belarus Sanctions); 31 C.F.R. § 549.507 (Lebanon Sanctions); 31 C.F.R. § 550.506 (Ethiopia Sanctions); 31 C.F.R. § 551.507 (Somalia Sanctions); 31 C.F.R. § 552.507 (Yemen Sanctions); 31 C.F.R. § 553.507 (Central African Republic Sanctions); 31 C.F.R.

The express language of these authorizations has been interpreted as excluding the provision of legal services with respect to private commercial arbitration proceedings because an arbitration institution (such as the ICC, the ICDR, or the LCIA) is not a “U.S. federal, state, or local court or agency.”

In addition, U.S. persons are also generally authorized to provide services related to the provision of legal services authorized by the general licenses described above, such as making filings and providing other administrative services. OFAC has also generally authorized the payment of legal fees and reimbursement of expenses related to the provision of services authorized by the general licenses described above, subject to certain conditions, including that such funds originate from non-blocked assets outside the United States.¹³

B. Private Commercial Arbitration Should Be Treated the Same as Litigation Before U.S. Courts and Agencies.

There is a strong U.S. policy in favor of arbitration generally, and international arbitration in particular, as reflected in the Federal Arbitration Act (“FAA”),¹⁴ the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”),¹⁵ and other federal legislation. Agreements to arbitrate are binding on the parties, and U.S. courts “must ‘rigorously enforce’ arbitration agreements

§ 555.506 (Mali Sanctions); 31 C.F.R. § 558.507 (South Sudan Sanctions); 31 C.F.R. § 560.525 (Iranian Transactions and Sanctions); 31 C.F.R. § 562.506 (Iranian Sector and Human Rights Abuses Sanctions); 31 C.F.R. § 569.506 (Syria Sanctions); 31 C.F.R. § 570.507 (Libya Sanctions); 31 C.F.R. § 576.507 (Iraq Sanctions); 31 C.F.R. § 578.507 (Cyber-Related Sanctions); 31 C.F.R. § 579.506 (Foreign Interference in U.S. Elections Sanctions); 31 C.F.R. § 582.506 (Nicaragua Sanctions); 31 C.F.R. § 583.506 (Global Magnitsky Sanctions); 31 C.F.R. § 584.507 (Magnitsky Act Sanctions); 31 C.F.R. § 585.506 (Hong Kong Sanctions); 31 C.F.R. § 587.506 (Russian Harmful Foreign Activities Sanctions); 31 C.F.R. § 588.507 (Western Balkans Sanctions); 31 C.F.R. § 589.506 (Ukraine/Russia Sanctions); 31 C.F.R. § 590.507 (Transnational Criminal Organizations Sanctions); 31 C.F.R. § 591.506 (Venezuela Sanctions); 31 C.F.R. § 594.506 (Global Terrorism Sanctions); 31 C.F.R. § 598.507 (Foreign Narcotics Kingpin Sanctions); 31 C.F.R. § 599.506 (Illicit Drug Trade Sanctions) (emphasis added in each case).

¹³ See 31 C.F.R. § 510.508 (North Korea Sanctions); 31 C.F.R. § 515.512 (Cuban Assets Control Sanctions); 31 C.F.R. § 515.507 (Burma Sanctions); 31 C.F.R. § 536.507 (Narcotics Trafficking Sanctions); 31 C.F.R. § 541.508 (Zimbabwe Sanctions); 31 C.F.R. § 542.508 (Syria Sanctions); 31 C.F.R. § 544.508 (Weapons of Mass Destruction Proliferators Sanctions); 31 C.F.R. § 547.508 (Democratic Republic of the Congo Sanctions); 31 C.F.R. § 548.508 (Belarus Sanctions); 31 C.F.R. § 550.507 (Ethiopia Sanctions); 31 C.F.R. § 551.508 (Somalia Sanctions); 31 C.F.R. § 552.508 (Yemen Sanctions); 31 C.F.R. § 553.508 (Central African Republic Sanctions); 31 C.F.R. § 555.507 (Mali Sanctions); 31 C.F.R. § 558.508 (South Sudan Sanctions); 31 C.F.R. § 569.507 (Syria Sanctions); 31 C.F.R. § 570.508 (Libya Sanctions); 31 C.F.R. § 578.508 (Cyber-Related Sanctions); 31 C.F.R. § 579.507 (Foreign Interference in U.S. Elections Sanctions); 31 C.F.R. § 582.507 (Nicaragua Sanctions); 31 C.F.R. § 583.507 (Global Magnitsky Sanctions); 31 C.F.R. § 584.508 (Magnitsky Act Sanctions); 31 C.F.R. § 585.507 (Hong Kong Sanctions); 31 C.F.R. § 587.507 (Russian Harmful Foreign Activities Sanctions); 31 C.F.R. § 588.508 (Western Balkans Sanctions); 31 C.F.R. § 589.507 (Ukraine/Russia Sanctions); 31 C.F.R. § 590.508 (Transnational Criminal Organizations Sanctions); 31 C.F.R. § 591.507 (Venezuela Sanctions); 31 C.F.R. § 598.508 (Foreign Narcotics Kingpin Sanctions); 31 C.F.R. § 599.507 (Illicit Drug Trade Sanctions).

¹⁴ See, e.g., 9 U.S.C. § 2.

¹⁵ See, e.g., United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article II.

according to their terms.”¹⁶ Consequently, U.S. courts are required to stay their own proceedings if the parties have agreed to arbitrate the dispute.¹⁷

Notably, where a contract contains a mandatory international arbitration clause, arbitration is typically the only legally available forum for resolving any relevant disputes. Accordingly, if the agreement to arbitrate specifies arbitration in the U.S., administration by a U.S. institution, or with an arbitrator of U.S. nationality, the arbitration may be unable to proceed at all without a specific license from OFAC. Recourse to U.S. courts would not be possible in such cases, except to enforce a final arbitral award after the arbitration has been completed. If such disputes cannot be timely resolved through arbitration, they are unlikely to be resolved at all. Consequently, non-sanctioned third parties having claims against or involving Blocked Persons suffer the most from the lack of parity between OFAC’s general licenses for U.S. litigation and lack of similar authorization for international arbitration.

Even when non-U.S. arbitrators or institutions are willing and able to accept a case involving a blocked party, parties to an arbitration will often prefer to appoint U.S. arbitrators. U.S. legal professionals are well represented among the ranks of international arbitrators and arbitration practitioners, and the restrictions imposed on U.S. persons by the current regime hinder the creation of a diverse and unbiased arbitration panel by effectively excluding every U.S. citizen or resident and every lawyer associated with a U.S. firm. The restrictions also put U.S. arbitrators and counsel at a competitive disadvantage in the global market for legal services, leading them to lose potential income, work experience, and influence.

We understand, of course, that it is possible for U.S. persons to apply to OFAC for specific licenses authorizing transactions that would otherwise be prohibited. But obtaining such a license is often a slow and time-consuming process. By the time a license is obtained, either the initiation of proceedings will have been substantially delayed, or the parties will have decided to proceed with non-U.S. arbitrators and/or counsel.

C. OFAC’s Current Policy Related to Private Commercial Arbitration Proceedings Diminishes the Reach and Effectiveness of U.S. Sanctions, and Harms Innocent Non-Sanctioned Persons.

We understand that U.S. sanctions restrictions generally target transactions in which Blocked Persons receive a benefit. However, Blocked Persons would receive little to no benefit by permitting U.S. persons to perform services related to private commercial arbitration proceedings involving claims brought *against* Blocked Persons.¹⁸

¹⁶ See *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1644 (2020) (“In 1970, the United States acceded to the New York Convention, and Congress enacted implementing legislation in Chapter 2 of the FAA.”); *BG Group plc v. Republic of Arg.*, 572 U.S. 25, 37 (2014) (citing the New York Convention and stating, “where, as here, a federal court is asked to interpret that intent pursuant to a motion to vacate or confirm an award made in the United States under the Federal Arbitration Act, it should normally apply the presumptions supplied by American law”); *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

¹⁷ See 9 U.S.C. § 3.

¹⁸ Although the absence of harm to U.S. sanctions objectives is most evident where commercial arbitration proceedings involve claims brought against Blocked Persons, we suggest that, consistent with the current

Indeed, current sanctions restrictions indirectly benefit Blocked Persons by effectively delaying or preventing the initiation and adjudication of claims against such persons, so that Blocked Persons are able to delay payment of their legitimate, pre-sanctions debts, and continue to access and utilize non-blocked assets outside the United States which would otherwise be seized by creditors. In addition, although the purpose of blocking sanctions is to freeze assets, the inability of creditors to proceed with legal claims often means that assets outside the U.S. (which may not be “blocked” under U.S. law) are also not available as a practical matter to satisfy claims of creditors. Non-U.S. persons may also be reluctant to assist with arbitration proceedings involving claims against Blocked Persons, given potential secondary sanctions risks. As a result, Blocked Persons are perversely able to utilize their own sanctioned status as a means to delay the resolution of claims against them and to continue to use and expend their assets.

For the foregoing reasons, the undersigned signatories respectfully request that OFAC issue a general license authorizing U.S. persons to act as arbitrators and counsel, to administer arbitration proceedings, and to otherwise facilitate private commercial arbitration proceedings involving Blocked Persons who are respondents or otherwise made parties to such proceedings. Attached as **Annex 1** is a proposed general license, which is modeled after the existing general licenses authorizing certain legal services in the context of litigation in U.S. courts and/or agencies.

Respectfully submitted,

U.S. Chamber of Commerce, Daryl Joseffer, Executive Vice President and Chief Counsel,
U.S. Chamber Litigation Center

United States Council for International Business/ICC USA, Nancy M. Thevenin, General
Counsel

SICANA, Inc., Alexander Fessas, President

The New York International Arbitration Center, Louis B. Kimmelman, Chair

American Arbitration Association/International Centre for Dispute Resolution, Eric P.
Tuchmann, Executive Vice President, Chief Legal Officer & Corporate Secretary and Luis
M. Martinez, Vice President

New York City Bar Association International Commercial Disputes Committee, Stephanie
Cohen, Chair and Arbitration Committee, Lea Haber Kuck, Chair

treatment of representation in litigation (*see, e.g.*, 31 C.F.R. § 589.506(a)(3)), OFAC issue a general license which authorizes the “initiation and conduct” of private commercial arbitration proceedings involving Blocked Persons. *See* Annex 1.

ANNEX 1

Suggested Text of General License

* * *

OFFICE OF FOREIGN ASSETS CONTROL

Multiple Sanctions Programs

GENERAL LICENSE NO. X

Authorizing Certain Transactions Related to Private Commercial Arbitration Proceedings

(a) Except as provided in paragraph (f), provision of the services identified in paragraph (b) and all transactions and activities ordinarily incident and necessary to the provision of those services, if otherwise prohibited by any Part of Chapter V of Title 31 of the Code of Federal Regulations, or by any Executive Order or statute administered by the Office of Foreign Assets Control in the Department of the Treasury, are hereby authorized, provided that any receipt of payment of professional fees or reimbursement of incurred expenses for the provision of services to an individual or entity whose property or interests in property are blocked must be authorized pursuant to paragraph (d) or separately authorized by a specific license or another applicable general license.

(b) The services referred to in paragraph (a) are the following:

(1) representation of persons named as respondents in or otherwise made parties to private commercial arbitration proceedings; and

(2) initiation and conduct of private commercial arbitration proceedings, including service as an arbitrator and administration of the arbitration proceeding.

(c) U.S. persons do not need to obtain specific authorization to provide related services, such as making filings and providing other administrative services that are ordinarily incident to the provision of services authorized by this general license, or to pay arbitration costs jointly with the person on whose behalf the services authorized pursuant to paragraph (a) are to be provided. Additionally, U.S. persons who provide services authorized by this general license do not need to obtain specific authorization to contract for related services that are ordinarily incident to the provision of services authorized by this general license, such as those provided by private investigators or expert witnesses, or to pay for such services. U.S. and other financial institutions are authorized to process and transmit payments authorized by this general license.

(d) Receipt of payment of fees and reimbursement of incurred expenses for the provision of services authorized pursuant to paragraph (a) to or on behalf of any individual or entity whose property and interests in property are blocked is authorized from funds originating outside the United States, provided that the funds do not originate from:

- (1) a source within the United States;
- (2) any source, wherever located, within the possession or control of a U.S. person;
or
- (3) any individual or entity, other than the person on whose behalf the services authorized pursuant to paragraph (a) are to be provided, whose property and interests in property are blocked pursuant to any part of Chapter V, any Executive Order, or any statute.

(e) U.S. persons who receive payments pursuant to paragraph (d) must submit annual reports no later than 30 days following the end of the calendar year during which the payments were received providing information on the funds received.

(1) Such reports shall specify:

(i) the individual or entity from whom the funds originated and the amount of funds received; and

(ii) if applicable:

(A) the names of any individuals or entities providing related services to the U.S. person receiving payment in connection with authorized legal services, such as private investigators or expert witnesses;

(B) a general description of the services provided; and

(C) the amount of funds paid in connection with such services.

(2) The reports, which must reference this section, are to be submitted to OFAC using one of the following methods:

(i) Email (preferred method): OFACReport@treasury.gov; or

(ii) U.S. mail: OFAC Regulations Reports, Office of Foreign Assets Control, U.S. Department of the Treasury, 1500 Pennsylvania Avenue NW, Freedman's Bank Building, Washington, DC 20220.

(f) This general license does not authorize:

(1) Payments of fees and expenses using funds in which any person whose property and interests in property are blocked has an interest, other than the person on whose behalf the services authorized pursuant to paragraph (a) are to be provided;

(2) Entry into a settlement agreement or the enforcement of any lien, judgment, arbitral award, decree, or other order through execution, garnishment, or other judicial process purporting to transfer or otherwise alter or affect blocked property or interests in blocked property; or

(3) Any transaction otherwise prohibited by any Part of Chapter V, any Executive Order, or any statute except as specifically authorized herein.

Bradley T. Smith
Director
Office of Foreign Assets Control

Dated: