

# Thoughts on the impact of international sanctions on international arbitration proceedings involving sanctioned practitioners

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## Introduction

In August 2020, the United States Treasury imposed sanctions on ten top officials from Hong Kong SAR and Mainland China, including the Chief Executive of Hong Kong SAR, Carrie Lam, which involved having all property in the US seized and financial assets frozen.<sup>1</sup> In recent times, we are increasingly hearing more about ‘sanctions’ although chiefly we are generally familiar with diplomatic sanctions which are enacted as declarations against *personae non gratae* or persons declared not welcome to enter the territory of a state.<sup>2</sup> Sanctions are not new; they could be a penalty that is imposed by a state when a person ignores or does not obey a rule or a law. They could be imposed as censures and retaliations, which can be equated to ‘shield’ and ‘sword’ so to speak. Due to recent geopolitical issues involving China and some western countries, on 26 March 2021, the Ministry of Foreign Affairs of the People’s Republic of China (‘MFA’) announced sanctions (‘263 Sanction’) on ‘Relevant UK Individuals and Entities’,<sup>3</sup> which included Essex Court Chambers (‘ECC’), a large set of English barristers’ chambers in London.

At the outset, it is imperative to state for the record that the purpose of this short commentary is not to study the international law aspects dealing with sanctions but the potential impact of the 263 Sanction on international commercial arbitration. Likewise, this commentary will not deal with the circumstances leading to the 263 Sanction, about which readers can familiarise and appraise themselves. This commentary focuses on the effect and impact of the 263 Sanction on members of ECC who may have been involved as arbitrator or counsel in ongoing international arbitration cases or may be involved in such capacities in future international cases. More broadly, the analysis in this commentary would apply to other future sanctions by other states on other arbitral professionals.

## ‘Doing business’

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<sup>1</sup> BBC News, ‘Hong Kong: US Imposes Sanctions on Chief Executive Carrie Lam’ (London, 8 August 2020) <<https://www.bbc.com/news/world-us-canada-53699084>> accessed 3 April 2021.

<sup>2</sup> Peter Cane and Joanne Conaghan (Eds), *The New Oxford Companion to Law* (OUP, 2008) 1045.

<sup>3</sup> ‘Foreign Ministry Spokesperson Announces Sanctions on Relevant UK Individuals and Entities’, <[https://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2535\\_665405/t1864366.shtml](https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1864366.shtml)> accessed 2 April 2021.

Quoting the official announcement of the MFA of the 263 Sanction dated 26 March 2021:

‘As of today, the individuals concerned and their immediate family members are prohibited from entering the mainland, Hong Kong and Macao of China, their property in China will be frozen, and Chinese citizens and institutions will be **prohibited from doing business with them.**’

*(Emphasis added)*

According to the MFA announcement, the 263 Sanction was imposed on several UK individuals and entities including ECC due to what was described as acts that ‘*maliciously spread lies and disinformation*’<sup>4</sup>. Afterwards, ECC published a statement on its website stating that they understood the sanction to be in connection to a legal opinion written by four of its members on instructions by certain organisation(s).<sup>5</sup> It was reported that ECC subsequently removed the legal opinion from its website following the sanction announcement where it has “*more than 90 barristers and Singapore Members practising full-time as members*”.<sup>6</sup> Meanwhile, *The Global Times* quoted prominent Chinese academics who warned that ‘*[t]he removal of the reference from Essex Court Chambers’ website is far from enough*’.<sup>7</sup>

The plain reading of the 263 Sanction suggests that, unless the Chinese government rescinds the sanction, it applies to any person who was a member of ECC on 26 March 2021.

The 263 Sanction imposes an unequivocal prohibition of Chinese citizens and institutions from doing business with the sanctioned persons and entities. One might ask, what constitutes ‘doing business’ in this context? According to the Oxford Dictionary, ‘business,’ *inter alia*, refers to a ‘person’s regular occupation profession, or trade’, ‘an activity that someone is engaged in’, ‘Commercial activity’ or ‘Trade considered in terms of its volume or profitability.’<sup>8</sup>

Arguably, therefore, the term ‘doing business’ is broad and seeks to encompass many activities regardless of whether there is a derivation of profits/payments or not between Chinese citizens and institutions on the one hand and persons who are/were members of ECC on 26 March 2021. The term “doing business” would clearly capture any business activity or professional relationship that is not done on a charitable/gratia basis or any relationship that is not undertaken as a friendship. It would capture the formal rendering of activities arising from a profession, vocation, trade and craft. In the context of arbitration, it would likely involve the following aspects of ‘business’ conducted between persons who are/were members of ECC on the date of the 263 Sanction where they are:

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<sup>4</sup> *Ibid.*

<sup>5</sup> See, ‘*Essex Court Chambers statement on sanctions imposed by Chinese government*’ <https://essexcourt.com/essex-court-chambers-statement-on-sanctions-imposed-by-chinese-government/>.

<sup>6</sup> Primrose Riordan and Jane Croft, ‘UK chambers removes Xinjiang genocide opinion reference after China sanctions’ *Financial Times* (London, 28 March 2021) <<https://www.ft.com/content/dc74a008-3cc5-44b8-966f-085773ba0674>> accessed on 5 April 2021.

<sup>7</sup> Xu Keyue and Li Sikun, ‘A UK chambers’ removal of a legal opinion defaming Xinjiang shows China’s counter-sanctions are an effective deterrent against rumors: experts’ *The Global Times* (Beijing, 29 March 2021) <<https://www.globaltimes.cn/page/202103/1219780.shtml>> accessed on 5 April 2021.

<sup>8</sup> <<https://www.lexico.com/definition/business>>.

- (i) Acting as an arbitrator
- (ii) Acting as a counsel/party representative in arbitration proceedings
- (iii) Acting as a legal expert in arbitration proceedings

We will in turn attempt to examine each of the above aspects and the potential impact of the 263 Sanction on ongoing/pending/future arbitration proceedings as well as the enforcement of a related award against a Chinese person or institution.

Firstly, a sanctioned person acting as an arbitrator: at the outset, the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') contains only provisions dealing with removal of arbitrators due to impartiality and independence,<sup>9</sup> or failure or impossibility<sup>10</sup> to act. In terms of defining the relationship between an arbitrator and the parties, its appointment is said to be *intuitu personae* ('because of the person') meaning to say, an arbitrator is 'appointed' because of the person due to the doctrine of party autonomy in arbitration. This is diametrically opposed to national court litigation as litigant parties before court proceedings are not able to choose judges *per se* and their dealings throughout the proceedings involve the judicial system but not with the individual judges.

Under English law and in arbitrations seated in England, an arbitrator engaged by the parties does not imply an employer-employee relationship, as held by the UK Supreme Court in the case of *Jivraj v Hashwani*<sup>11</sup> where it was established that an arbitrator is not an employee of the parties or disputants. However, in the course of arbitration proceedings in any seat of arbitration, the parties are expected to engage with the arbitral tribunal in a rather significant magnitude, such as making submissions, receiving orders/directions and its compliance, oral arguments, and be bound by the final and binding arbitral awards made by the tribunal. Moreover, in institutional administered arbitrations, the parties appoint the arbitrators through the applicable procedural framework of 'nomination' then 'confirmation' by the institution.

Nevertheless, the manner of the appointment of the arbitrator does not matter in this context, whether by the parties or institutions, since eventually, the parties are expected to be 'engaging in an activity' relating to arbitral profession or vocation, with the arbitral tribunal. Arbitrators expect to be paid for performing their services as an arbitrator. In these present circumstances, it is clear that Chinese citizens and institutions as well as any person (who was a member of ECC on 26 March 2021) would all be equally in breach of the 263 Sanction as soon as any payment is to be made to a person who was a member of ECC on 26 March 2021. The opposing party to a Chinese citizen or institution is likely to invoke its right to party autonomy in appointing any person who was a member of ECC on 26 March 2021 as party-nominated arbitrator. There is no need to deal with arbitral proceedings seated in China (including Hong Kong and Macau) since a person who was a member of ECC on 26 March 2021 would not be

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<sup>9</sup> UNCITRAL Model Law, article 12(1) & (2).

<sup>10</sup> *Ibid*, article 14.

<sup>11</sup> *Jivraj v Hashwani* [2011] UKSC 40.

even allowed to enter the country nor sit as arbitrator nor act as counsel in any Chinese seated arbitrations.

### **Potential challenge of a person who was a member of ECC on 26 March 2021 from acting as party-nominated arbitrator in seats of arbitration outside China**

It is more important to focus on the situation of what course of action arbitral institutions would be likely to take in arbitrations seated outside China. It is very likely that arbitral institutions would not be likely to confirm such a person to be an arbitrator where there is a certainty that any arbitral award that may need to be enforced in China, Hong Kong or Macau will be refused recognition and enforcement for being in direct breach of the 263 Sanction. Article V (2)(b) of the New York Convention entitles the courts of a Contracting State to refuse recognition and enforcement of an award when they find that such recognition or enforcement would be contrary to its public policy. Any award rendered by any tribunal which may compose of an arbitrator who was a member of ECC on 26 March 2021 would very likely be deemed to be in breach of both the laws of China as well as China's public policy. The 263 Sanction is a regulation or rule implemented by China and one can expect the State to uphold and implement its own decree. In the event that the arbitral institution does confirm a party nominated arbitrator who was a member of ECC on 26 March 2021, one can expect there to be challenges made against such an arbitrator under different grounds in both UNCITRAL Model Law jurisdictions as well as non-UNCITRAL Model Law jurisdiction.

For UNCITRAL Model Law jurisdictions, one can anticipate challenges to be brought in cases where the governing law is Chinese law or where there is a clear possibility that the award would need to be enforced in China. The anticipated challenge may be the premise that it would be a breach Article 34(2)(iv) (**'the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law.'**) Since it would be illegal under the 263 Sanction for any Chinese citizen and institution to conduct business with any arbitrator who was a member of ECC on 26 March 2021, one can also anticipate that Chinese citizens and institutions can legitimately boycott the arbitration proceedings and then challenge any award at the seat of the jurisdiction. Such Chinese citizens and institutions may therefore also be expected to bring another challenge premised on a breach of Article 36(1)(a)(i) (*'a party to the arbitration agreement referred to in article 7 was under some incapacity'*) if the challenged arbitrator was not removed from sitting as arbitrator in the arbitration.

It is thought likely that arbitral institutions with branches in China including the ICC, HKIAC and SIAC would have to comply with the 263 Sanction and not allow a person who was a member of ECC on 26 March 2021 to be confirmed as arbitrator or remain as arbitrator in any of their institutional administered cases in China or outside China. This is because they would also hold official permission from the Chinese government to be able to administer arbitrations or conduct marketing activities for their respective institutions in China. Those institutions who

are registered in China would themselves be likely to be considered to be deemed as a Chinese institution. If so, these institutions would themselves run the risk of having their operations in China shut down for being in breach of the 263 Sanction. One can therefore expect that arbitral institutions located outside China would also have to be careful not to allow any person who was a member of ECC on 26 March 2021 to be appointed as arbitrator or to continue as arbitrator in cases involving Chinese citizens and institutions.

The fact that ECC was highlighted as a target under the 263 Sanction may in itself give rise to an additional challenge made against a potential arbitrator who was a member of ECC on 26 March 2021. One can foresee a challenge made against an arbitrator who was a member of ECC on 26 March 2021, that he might harbour subconscious bias against a Chinese party because he felt aggrieved that he would no longer be allowed to act as arbitrator or counsel or expert witness for any Chinese citizen or institution as a result of the 263 Sanction. Arguably, it would be hard for such an arbitrator to make a statement to say that he feels nothing at all about the 263 Sanction. It would be a detrimental if he were to say that he felt aggrieved by the 263 Sanction or if he took the extreme situation to say that he considered the 263 Sanction as a ‘badge of honour’.<sup>12</sup> This is an unfortunate situation for such an arbitrator to be placed in but it would be very difficult for such an arbitrator to be able to make a declaration to say that he or she does not have any feelings whatsoever on the implementation of the 263 Sanction.

### **Potential challenge of a person who was a member of ECC on 26 March 2021 from acting as party-appointed counsel or expert in seats of arbitration outside China**

In the case of a party-appointed counsel or expert, it is evident that there is a commercial activity *inter se*, concerning counsel or expert offering services of one’s vocation, trade or profession. There is a ‘business’ dealing in this instance and insofar as arbitration proceedings are concerned, the Model Law is silent on the party appointed representative as well as their removal leaving it entirely at the discretion of the appointing parties. The situation is much clearer for cases where Chinese citizens or institutions have appointed any person who was a member of ECC on 26 March 2021 as party-appointed counsel or expert legal witness. They are not entitled to appoint any such person to be party-appointed counsel or expert witness since this would immediately be in breach of the 263 Sanction since the wording of the 263 Sanction clearly forbids Chinese citizens and institutions from doing business or paying fees to any person who was a member of ECC on the 26 March 2021.

The situation is less clear where it is the Chinese citizens or institution that is challenging a person, who was a member of ECC on 26 March 2021, from continuing to be a party-appointed counsel or expert legal witness in the arbitration proceeding. The opposing party against a Chinese citizen or institution is likely to invoke its right to party autonomy in appointing any person who was a member of ECC on 26 March 2021 as party-appointed counsel or expert

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<sup>12</sup> Christian Shepherd, Primrose Riordan and Jasmynes Cameron-Chileshe, ‘Beijing targets British MPs for ‘gross interference’ *The Financial Times* (London, 27 March 2021) <<https://www.ft.com/content/9dfb1a4b-1e83-4428-b708-c9562397a8d5>> accessed 5 April 2021.

legal witness. It would be harder to refuse recognition and enforcement of any award rendered where the opposing counsel to the Chinese party may compose of a counsel or expert witness who was a member of ECC on 26 March 2021 on the grounds that the award is in breach of the laws of China. However, there is a possibility that it may be challenged during any enforcement in China on the ground that enforcement of the award is in breach of China's public policy. Any such challenge alone is less likely to succeed but it is always possible. The chances of success in resisting enforcement under Article V (2)(b) of the New York Convention may be higher if the award also includes costs which include the costs of a counsel or expert witness who was a member of ECC on 26 March 2021. While Chinese citizens and institutions can make a clear legitimate case that they are prevented from doing business or paying counsel fees to any person who was a member of ECC on the 26 March 2021, they would have a harder case in refusing to pay for party costs that includes the fees of opposing counsel or expert who was a member of ECC on the 26 March 2021. It can be envisaged that the arguments would centre on an objection to make indirect payment via the opposing party. The Chinese courts may refuse to recognise and enforce the costs award as being contrary to the public policy of China to breach the 263 Sanction. In addition, there is always also a possibility that the entire award itself may not be enforced if arguments on severability of the main award from the costs award are not entertained by the enforcing Chinese courts. In such situations, it may be safer for the opposing party not to claim the costs of a counsel or expert witness who was a member of ECC on 26 March 2021 but to claim all other costs.

### **The possible impact of current arbitral proceedings involving sanctioned person or entity**

It is not known if there are other examples of an outright sanction of 'doing business' with an identified professional entity as in the case of the 263 Sanction. However, typically, other sanctions are a 'blanket' ban by the sanctioning State on specified natural and juridical persons. In this instance, the sanction applies to a named entity. A plain reading suggests that both the juridical persons and, natural persons i.e. the arbitrator member, barrister, clerk, employee, associate or agent of the entities would all be subjected to the sanction from 26 March 2021 onwards, of which Chinese citizens and institutions are prohibited from doing business with them. For brevity's sake and the purpose of this article, 'sanctioned party' refers to a named sanctioned persons and implied sanction person by virtue of association with the sanctioned entities.

What are the possible impacts affecting a sanctioned party in ongoing arbitral proceedings, in the case of an arbitrator or a counsel? In the case of an arbitrator, it would appear that absent any provisions within the procedural law or arbitration rules, a person who is a sanctioned party may try his or her luck in insisting on staying appointed as arbitrator, counsel or expert witness assuming if the parties do not object to it. This is extremely unlikely to happen as Chinese citizens and institutions would be too concerned of being hit hard by the 263 Sanction if they continued in the proceedings without mounting strong objections. However, even if it is theoretically possible that there is no objection, any award made against any Chinese person might attract a late challenge on grounds of being contrary to China law and/or public policy

under the New York Convention<sup>13</sup> when recognition and enforcement are sought in the sanctioning State.

However, what if a party that is a Chinese citizen or institution involved in an ongoing arbitral proceeding requested for substitution of an arbitrator who was a member of ECC on 26 March 2021, on that grounds? Depending on the applicable arbitration rules and *lex arbitri*, earlier mentioned, the Model Law is itself silent on the issue of challenge or removal of the arbitrator on grounds of sanction. However, when a challenge is mounted by a party and is unsuccessful, an application can still be made in the courts where the juridical seat of the arbitration sits. Depending on the jurisdiction, however, the local courts may find that an application for removal of arbitrators on grounds of sanctions to be novel. Nevertheless, the unsuccessful party who may be unsuccessful in its challenge to remove a sanctioned person is also entitled to boycott the arbitration proceedings and to resist the recognition and enforcement of any award made against the party. As the 263 Sanction is a fundamental law, any such challenge is not contingent upon whether the 263 Sanction had been revoked earlier on in the proceedings. However, a point for further discussions would be as follows - if an award was rendered by an arbitrator who was still sanctioned, can it still be enforced subsequently even after the sanction was lifted? To date, no further details have been provided on the breath and scope of the sanction.

In so far as the sanctioned party acting as counsel or expert in any arbitral proceedings appointed by Chinese parties or institutions, in the course of the effective period of the sanction, they are considered to be doing business *inter se*. This situation is relatively straightforward, as any parties or clients do commonly discharge their counsels or experts notwithstanding this sanction; substituting counsels in arbitral proceedings are almost always permissible under various arbitral institution rules and present no known impediments.

## **Conclusion – Circumventing or loosening the hold of the 263 Sanction?**

This 263 Sanction in its current form is thought to be unprecedented and raised some crucial questions. Would a natural person who has since left the sanctioned entity after 26 March 2021 be free to do business with Chinese individuals and institutions, effectively circumventing the 263 Sanction? While leaving a sanctioned entity or simply renaming the sanctioned entity is extremely easy to undertake, one would expect that it is not possible to circumvent the 263 Sanction since the whole point of sanctions, and indeed the spirit of all sanctions not only this present one under discussion, is to capture a group of individuals or entities and not to allow them to easily escape. If the prudent approach to be taken is not to underestimate the gravity of the sanction, then it would appear to be the case that persons who were members of ECC as of 26 March 2021 have all been sanctioned and remain sanctioned until or unless the Chinese government rescinds the 263 Sanction.

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<sup>13</sup> Article V(2)(b) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

The famous quote, ‘*Un pour tous, tous pour un*’ by Alexandre Dumas<sup>14</sup> which translates to ‘one for all, all for one’ comes to mind. The State has appeared to have taken the position that the members of ECC (members as of 26 March 2021) have collective responsibility for the hosting and promotion of the offending Opinion shared on ECC website.<sup>15</sup> As of this writing, none of the members of ECC (members as of 26 March 2021) has made any public statement to disagree with the posting of the offending Opinion on the ECC website despite the imposition of the 263 Sanction. Might the State take the position that until a current or previous member of ECC (as of the 26 March 2021) makes a statement against the posting of the opinion, they are considered to continue supporting the offending Opinion posted on the ECC website?

As a matter of introspection, considering the gravity of State sanctions, it also begs the question of whether a person ‘infected’ by the Sanction by virtue of association with a sanctioned entity would be cured by way of simply moving to another unsanctioned entity. This is thought to be quite unlikely since, if it were so easy to circumvent a sanction, there would be no place for sanctions and sanctions can be easily circumvented. Facing the reality, it is highly unlikely that any government in the world would allow their country’s sanctions to be that easily side-stepped so as to cause the sanctions to be held a mockery. Meanwhile, would it also mean that the four individuals of ECC who authored the Opinion could simply move to another chambers since they have themselves not been sanctioned in their personal names but only as members of ECC on the 26 March 2021? These also gives rise to another important question affecting the long-term picture: what does this mean for new members who may decide to join ECC in the future, vis-à-vis China-related work? Also, would there be any implications to other chambers in relation to China-related work if they take on persons who were ECC members as of 26 March 2021? It is hard to answer these hypothetical questions as it might be argued that future persons who were not responsible for the past acts of ECC, in this case, allowing the advertising of the opinion to take place on the common website of ECC, should not be sanctioned.

It remains to be seen whether further clarification would be forthcoming from China’s MFA but until such time the 263 Sanction establishes an extremely serious impact on international arbitration all over the world where cases involve Chinese citizens or institutions on the one hand and persons who were members of ECC as of 26 March 2021 on the other hand. In conclusion, it would be imperative to monitor this situation closely as to its impact on possible future sanctions on other legal or non-legal professionals by China’s MFA, but also other similar sanctions by other sovereign states in time to come, given that international arbitration has become the common method of dispute resolution in the world.

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<sup>14</sup> From the novel *The Three Musketeers* published in 1844.

<sup>15</sup> See footnotes 4 and 5.