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AMICUS CURIAE BRIEF TO THE COURT OF JUSTICE OF THE EUROPEAN UNION REGARDING THE INTERPRETATION OF ARTICLE 11 OF REGULATION 833/2014

Honorable Justices of the Court of Justice of the European Union,

The Russian Arbitration Association respectfully submits this amicus curiae brief in relation to the request for a preliminary ruling submitted by the Svea Court of Appeal (Sweden) in the case No. T 15558-21 between *NV Reibel Global Solutions Building (Belgium) and JSC VO Stankoimport (Russia)* to CJEU as Reibel Case C-802/24 ("**Request**").

As an entity with expertise in international arbitration, the Russian Arbitration Association has a strong interest in ensuring that the Court of Justice of the European Union ("**CJEU**") is fully informed of the broader legal, social, and policy implications of the issues presented in this case.

This brief is submitted to assist the CJEU in its consideration of the complex legal questions raised in the Request, particularly with regard to the application of Article 11 of the EU Regulation 833/2014.

Our submission does not seek to advocate for any party but instead aims to provide an objective perspective on the matter at hand, drawing upon our collective experience. May we assure the Court that neither the Russian Arbitration Association nor any of the drafters of this brief have any interest in the outcome of the case pending before the Svea Court of Appeal in Sweden. Consequently, we offer an impartial and independent perspective on the matter at hand.

Finally, we acknowledge the limitations set forth in the TFEU regarding third-party interventions in the preliminary ruling procedure before the CJEU. Nevertheless, we respectfully request that the Court take our perspective into consideration as it deliberates on this crucial legal issue.

Sincerely,

Russian Arbitration Association

14 March 2025

Moscow, Russia

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CONTENTS

EXECUTIVE SUMMARY

(i) Limited Application of Article 11 of Regulation 833 is Correct:

- Article 11 applies exclusively to judicial proceedings within the EU and does not extend to arbitration conducted within the EU.
- Even if Article 11 is deemed applicable to arbitration, it does not prevent arbitrators from adjudicating claims on their merits. Similarly, it does not prevent the EU courts from recognizing arbitral awards. The "satisfaction of claims" limitation is therefore confined to the enforcement stage, specifically by suspending enforcement.
- Even if Article 11 restricts arbitrators from awarding claims related to non-performance of contracts, it does not preclude restitution of money, as this serves to restore the pre-contractual *status quo*.

(ii) Broader Application of Article 11 of Regulation 833 and Its Negative Effects:

- A broader application of Article 11 would have significant negative consequences for the EU, particularly as a seat for arbitration.
- International businesses would likely avoid selecting EU Member States' national laws as the governing law for contracts.
- Parties to arbitration might refrain from choosing EU nationals as arbitrators, fearing the imposition of Article 11 as mandatory law.
- The broader application could encourage foreign parties to increasingly resort to countermeasures, such as anti-suit injunctions or demanding exclusive jurisdiction in foreign forums to disregard arbitration agreements.
- The prohibition of satisfying claims could be seen as expropriation, potentially leading to investment claims against EU Member States.

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SECTION 1. INTERPRETATION AND APPLICATION OF ARTICLE 11 OF REGULATION 833

I. Interpretation of the No-Claims Clause

A. Origins of No-Claims Provisions

1. EU Regulations 269/2014 ("**Regulation 269**") and 833/2014 ("**Regulation 833**") contain "no-claims" provisions, Article 11. The concept of "no-claims" has been used in various EU regulations since 1990[1], however without clear indication of the scope and the meaning of that provision. Since 2012 most of the no-claims clauses – including the provisions in Article 11 of Regulations 833 and 269 – have followed the guidelines[2] given by the EU Council in 2012.

2. The first time a "no-claims" provision was introduced by the EU, is through Article 2 of Regulation 3541/92 (still in force), which implemented paragraph 29 of the United Nations Security Council ("**UNSC**") Resolution 661 (1990) concerning Iraq. Its wording is as follows:

> "*1. It shall be prohibited to satisfy or to take any step to satisfy a claim made by:*
>
> *(a) a person or body in Iraq or acting through a person or body in Iraq;*
>
> *(b) any person or body acting, directly or indirectly, on behalf of or for the benefit of one or more persons or bodies in Iraq;*
>
> *(c) any person or body taking advantage of a transfer or rights of, or otherwise claiming through or under, one or more persons or bodies in Iraq;*
>
> *(d) any other person or body referred to in paragraph 29 of United Nations Security Council Resolution 687 (1991);*

[1] Article 9b of Regulation 329/2007 (inserted by Regulation 296/2013 and renumbered to 9c by Regulation 2016/41), concerning North Korea; Article 12 of Regulation 747/2014, concerning Sudan; Article 17 of Regulation 2016/44, concerning Libya; Article 10 of Regulation 2019/1890 concerning Turkey; Article 13 of Regulation 2022/2309 concerning Haiti.
[2] EU Council, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Brussels, 15 June 2012.

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> *(e) any person or body making a claim arising from or in connection with the payment of a bond or financial guarantee or indemnity to one or more of the above-mentioned persons or bodies,*
>
> *under or in connection with a contract or transaction the performance of which was affected, directly of indirectly, wholly or in part, by the measures decided on pursuant to United Nations Security Council Resolution 661 (1990) and related resolutions.*
>
> *2. This prohibition shall apply within the Community and to any national of a Member State and any body which is incorporated or constituted under the law of a Member State.*"

3. Similarly worded provisions can be found in Article 2 of Regulation 3275/93 (implementing paragraph 8 of UNSC Resolution 883 (1993) concerning Libya); Article 2 of Regulation 1733/94 (implementing paragraph 9 of UNSC Resolution 757 (1992) concerning Yugoslavia); and Article 2 of Regulation 1264/94 (implementing paragraph 11 of UNSC Resolution 917 (1994) concerning Haiti).

4. The wording of these provisions differs from Article 11 of Regulation 833 in two respects: they cover both the satisfaction of a claim, and the taking of "any steps" to satisfy it. Furthermore, they are expressly worded as prohibitions, whilst the no-claims clause in Article 11 merely sets forth the cumulative criteria in order to consider claim prohibited.

5. It is evident that the objective of these provisions adopted due to UNSC Resolutions is to prevent the "satisfaction" of claims, as this is clearly stated in the wording and written in the title of the regulations. The EU Commission, in its memorandum for Regulation 3541/92, explained the distinctive from Article 11 purpose of Article 2, quoted in *Shanning v Rasheed* [2001] UKHL 31:[3]

> "*Paragraph 29 can be interpreted either as making claims by Iraq non-enforceable, or as establishing a prohibition to honour such claims. The practical consequences of each interpretation are different. A system of NON-ENFORCEABILITY would protect banks and exporters against claims mentioned in paragraph 29 of UNSC Resolution 687, by making it impossible*

[3] *Shanning v Rasheed* [2001] UKHL 31 at [8].

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> *for any Iraqi party to obtain a judgment in its favour unless it could prove that the contract or transaction was not affected by the embargo.*
>
> *However, such a system would allow claims being settled by agreement between the parties concerned. This would considerably weaken the protection granted, as it would expose non-Iraqi operators, in particular contractors, to pressure which might be exerted by the Iraqi side. It would also create uncertainty as to whether the contracts concerned would still have to be treated as valid obligations. Finally, this system would not permit the achievement of the other objective of paragraph 29, ie the prevention of retroactive compensation in favour of Iraq.*
>
> *Therefore, the Commission proposes a system of PROHIBITION TO HONOUR CLAIMS, which would allow to meet both the objective of preventing such retroactive compensation as well as the objective of an effective protection of non-Iraqi parties, and would establish clarity as regards the treatment of the contractual obligations concerned.*
>
> *Furthermore, member states should take all steps required in order to ensure effectiveness of the prohibition, including the establishment of sanctions in case of non-respect.*"

6. Thus, the European Commission proposed a system of prohibition to honor claims rather than a system of non-enforceability of claims that would allow claims to be settled by agreement between the parties concerned. However, the "no-claims" clause in Article 11 of Regulation 833 differs from the Regulations mentioned above, and consequently, the approach to its construction shall be different.

7. First, it was adopted by the EU independently of any UNSC Resolution, as none concern Russia. Therefore, Regulation 833 is not an instrument of implementation of the UNSC Resolutions.

8. Second, its wording differs from another type of "no-claims" clauses (e.g., the one contained in Regulation 3541/92). It does not appear to act as a peremptory prohibition. Thus, one shall distinguish between two different prohibitory models, and hence, objectives of no-claims clauses adopted with or without the UNSC sanctions under Chapter VII of the UN Charter.

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9. The UNSC is a body established to maintain peace and security. It is the only body empowered to impose sanctions under Chapter VII of the UN Charter. When the EU implements UNSC sanctions regime into its legislation, it fulfills its obligations under international law, and therefore, its restrictions may cause the most negative consequences, including a total ban on certain activities. But it is not the case for Russia, as the EU's respective measures, namely Regulations 833 and 269, were adopted without any UNSC Resolution, and consequently, cannot be as far-reaching as if they had been adopted pursuant to UNSC sanctions. The opposite approach would lead to *ultra vires* actions by EU institutions and a violation of international law.

B. General Interpretation of Article 11

10. The scope of Regulation 833 is limited to certain economic sectors. Regulation 833 contains restrictive measures that aim to prohibit the provision of certain services, the supply of certain types of goods, investment (acquisition of capital) into Russian entities, and other activities (e.g., providing access to ports and locks within the territory of the EU). Therefore, Article 11 of Regulation 833 and its scope shall be construed in light of its object and purpose.

11. Regulation 833 lacks several key definitions of terms used in Article 11. However, EU Regulation 269[4], which also imposes restrictive measures against Russia, contains the definitions of the "claim" and "contract or transaction". The EU Commission in its Consolidated FAQ on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014 ("**FAQ**")[5] suggested that the EU Council uses these terms with the same meaning in both Regulations and that "*the concept of "claim" shall also be interpreted by analogy in light of the definition given to this term in Council Regulation (EU) No 269/2014 where a similar no claims clause exists*." The understanding of these terms is crucial for a correct interpretation of the "no-claims clause".

12. Article 1(a) of Regulation 269 defines a "claim" as follows:

[4] 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.
[5] https://finance.ec.europa.eu/system/files/2024-01/faqs-sanctions-russia-consolidated_en.pdf, p.390.

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> "*claim" means any claim, whether asserted by legal proceedings or not, made before or after 17 March 2014, under or in connection with a contract or transaction, and includes in particular:*
>
> *(i) a claim for performance of any obligation arising under or in connection with a contract or transaction;*
>
> *(ii) a claim for extension or payment of a bond, financial guarantee or indemnity of whatever form;*
>
> *(iii) a claim for compensation in respect of a contract or transaction;*
>
> *(iv) a counterclaim;*
>
> *(v) a claim for the recognition or enforcement, including by the procedure of exequatur, of a judgment, an arbitration award or an equivalent decision, wherever made or given.*

13. A "contract or transaction" by virtue of Article 1(b) of Regulation 269 has the following meaning:

> "*contract or transaction" means any transaction of whatever form, whatever the applicable law, and whether comprising one or more contracts or similar obligations made between the same or different parties; for this purpose "contract" includes a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, and credit, whether legally independent or not, as well as any related provision arising under, or in connection with, the transaction.*"

14. Therefore, two approaches exist for interpreting the term "claim" in Article 11 of Regulation 833:

    a) *Narrow interpretation*: The term "claim" can be narrowly construed, limiting its scope to judicial review proceedings ("**judicial review**"). Under this interpretation, Article 11 would not apply to arbitration. This approach is supported by a literal reading of Article 11, which lacks explicit mention of arbitration. Extending the scope of Article 11 to encompass arbitration could lead to unintended consequences and inconsistencies with established principles of international law governing arbitration.

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b) *Broad interpretation*:[6] Alternatively, "claim" can be broadly interpreted to encompass all "legal proceedings," including arbitration. This interpretation is close to the meaning of a "claim" in Regulation 269 and requires a significant departure from the plain language of Article 11 of Regulation 833, and could potentially undermine the autonomy of international arbitration.

15. Article 11 covers damages claims and claims for the performance of an obligation. Claims for reimbursement of advance payments and interest are not aimed to procuring the performance of the transactions prohibited under Regulation 833. Therefore, they do not fall within the scope of Article 11, and it should be construed accordingly. Extending the application of Article 11 to such claims would unduly broaden the scope of the prohibition.

16. The claims for reimbursement of advance payments are not damages claims but are claims based on unjustified enrichment. The general principles of European contract law as codified in the Principles of European Contract Law ("**PECL**") and the Draft Common Frame of Reference ("**DCFR**") – that can be applied as *lex mercatoria*[7] – confirm this understanding.

17. Under Article 9:502 of PECL, *"[t]he general measure of damages is such sum as will put the aggrieved party as nearly as possible into the position in which it would have been if the contract had been duly performed.*"[8] However, the reimbursement of advance payments aims to restitute the parties' pre-contractual position to a contract. PECL provides a separate ground to reimburse advance payments in Article 9:307: *"[o]n termination of the contract*

[6] Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014, footnote 69 on p. 389: "*Article 11 is aimed at protecting those who comply with EU sanctions against claims based on non-performance brought by their trade partners which are mentioned in Article 11. The notion of "claim" should be interpreted broadly in light of the language of Article 11, including but not limited to the types of claims mentioned in the Article. The list of claims expressly mentioned in Article 11 has general and illustrative nature (see case C-168/17, SH v TG, Judgment ECLI:EU:C:2019:36, paras. 71 et seq); the concept of "claim" shall also be interpreted by analogy in light of the definition given to this term in Council Regulation (EU) No 269/2014 where a similar no claims clause exists. According to Article 1(a) of Council Regulation (EU) No 269/2014,"claim" includes "a claim for performance of any obligation arising under or in connection with a contract or transaction". In principle, the underlying contract does not probably cease to exist when a restrictive measure precludes compliance with the contractual obligation (this may depend on the applicable national law and the relevant contractual clauses). If the restrictive measures cease to apply, the operator would have to comply with its obligation*."
[7] Lando, Ole. Some Features of the Law of Contract in the Third Millenium, ch. III 22 A.
[8] *See* https://www.trans-lex.org/400200/_/pecl/#head_139.

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a party may recover money paid for a performance which it did not receive or which it properly rejected." Thus, European contract law distinguishes between compensation for damages caused by non-performance and recovery of money paid for performance that has not been executed (recovery of advance payments).

18. DCFR further confirms this logic. Article VII. – 7:101(3) provides that the general obligation to reverse an unjustified enrichment "*does not affect any other right to recover arising under contractual or other rules of private law.*"[9] Accordingly, DCFR recognizes that the reimbursement of unjustified enrichment, including the collection of the advance payments, differs from compensation of damages.

19. Thus, reimbursement of an advance payment merely brings the parties to the *status quo ante*. Therefore, it does not fall under the prohibition of Regulation 833.

20. Furthermore, with respect to payments Regulation 833 prohibits provision of financing or financial assistance, which are defined in Article 1(o):

> "*financing or financial assistance*" *means any action, irrespective of the particular means chosen, whereby the person, entity or body concerned, conditionally or unconditionally, disburses or commits to disburse its own funds or economic resources, including but not limited to grants, loans, guarantees, suretyships, bonds, letters of credit, supplier credits, buyer credits, import or export advances and all types of insurance and reinsurance, including export credit insurance;* ***payment as well as terms and conditions of payment of the agreed price for a good or a service, made in line with normal business practice, do not constitute financing or financial assistance***" (emphasis added).

21. Since payment "*of the agreed price for a good or a service, made in line with normal business practice*" does not fall within the scope of Regulation 833, claims for reimbursement of advance payments shall not be prohibited as they are not "directly or indirectly" affected by the imposed measures.

[9] *See* https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf.

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22. Thus, Article 11 does not apply to the claims for reimbursement of advance payments and interest because they are not intended to procure the performance of the transactions prohibited under Regulation 833. Therefore, they do not fall within the scope of this Article. Extending the application of Article 11 to such claims would unduly broaden the scope of the prohibition.

C. Interpretation by EU Institutions

23. ***The EU Council***: With regard to no claims clause in general, the EU Council has opined that:[10]

> "*Any person or entity complying with the obligations under the Regulations shall not be held liable vis-à-vis a designated person or entity for any damage that may be suffered by the latter as a result. The onus of proving that satisfying such a claim for damages is not prohibited is on the person seeking the enforcement of that claim*."

24. With regard specifically to Article 11 of Regulation 833, the EU Council has similarly argued – before EU Courts – that this no-claims clause constitutes:

> "*a standard clause that has been included in all instruments imposing restrictive measures since 2012 so as to ensure that entities cannot circumvent those measures by demanding execution of the prohibited transaction or performance of the prohibited contract or service or obtain a remedy under civil law for non-performance or non-execution. As long as the restrictive measures apply, such claims are affected either by force majeure or a similar doctrine such as supervening illegality or "act of God*."[11]

25. ***The European Commission***, in its FAQ, described that the purpose of Article 11 of Regulation 833 is "*to protect EU operators from having to satisfy damage claims of any types*."[12] The European Commission then proceeds to quote Article 11 of Regulation 833 and lists examples of such restricted damages claims: "*claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, notably*

[10] EU Council, Update of the EU Best Practices for the effective implementation of restrictive measures, 27 June 2022, para. 38. URL: https://data.consilium.europa.eu/doc/document/ST-10572-2022-INIT/en/pdf.
[11] *Rosneft and Others v Council* (T-715/14) at [59].
[12] https://finance.ec.europa.eu/system/files/2024-01/faqs-sanctions-russia-consolidated_en.pdf, p. 19, emphasis added.

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a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity."[13]

26. Neither Article 11 of Regulation 833 nor the cited FAQ mentions the claims for refund of advance payments and interest as prohibited. Had the European Commission intended to include claims for refund of advance payments within the scope of Article 11, it would have expanded the already elaborate list of prohibited claims.

27. ***The Court of Justice of the EU*** in *Rosneft and Others v Council* at [206] clearly referred two distinct goals of no-claims clauses:

> "*the* ["no-claims"] *provision … is intended to prevent an entity targeted by the restrictive measures at issue from* [1] *being able to procure performance of a prohibited transaction, contract or service or from* [2] *obtaining a remedy under civil law for non-performance of such transactions, contracts or services*."

28. Thus, the common approach among the EU institutions is that damages suffered by a sanctioned person, as well as remedies for non-performance or non-execution of a contract in favor of a sanctioned person, fall within the scope of the "no-claims" clause. However, this interpretation does not encompass repayment of advanced payments (i.e. unjust enrichment). Unjust enrichment claims are not aimed on procuring contract performance or compensation for non-performance of obligation; as argued above, they have a distinct legal nature from damages, therefore falling outside the scope of Regulation 833. Literal interpretation of Regulation 833 confirms this conclusion, as its wording is aimed at prohibiting claims for compensation related to performance under a contract.

29. A similar approach should be applied in situations where a reasonable amount is paid with respect to interest by way of compensation for unauthorised use of alien funds. These types of repayments are not indemnities and penalties for non-performance or non-executions of a contract, but rather ancillary to the principal claim and contingent upon it, therefore they are merely a way for the parties to return to the *status quo ante*.

[13] https://finance.ec.europa.eu/system/files/2024-01/faqs-sanctions-russia-consolidated_en.pdf, p. 19.

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D. Interpretation by Member States

30. Below are several examples of how Member States interpret Article 11 of Regulation 833, which demonstrates the lack of uniformity on this issue.

31. German authorities have notably opined that the repayment of a down payment aimed at restoring a legal relationship to the *status quo ante* is legally inadmissible under Article 11 of Regulation 833, [14] although the regulator contented the opposite before 14 December 2022.[15]

32. The French Directorate General of the Treasury has emphasized that "no-claims" clauses cannot be invoked if the contract or transaction has not been affected by sanctions.[16]

33. In the Netherlands, the District Court of Amsterdam[17] rejected the claim of a Cypriot legal entity on the basis that: (i) the claims for repayment of amounts paid in advance, are claims within the meaning of Article 11 of Regulation 833, and (ii) the claimant acts of behalf of Russian persons, and therefore granting the claim is prohibited under Article 11.

34. The court ruled that the definition of a "claim" is non-exhaustive, citing the CJEU case *SH v TG*[18], according to which "[a "no-claims" clause] *encompasses all types of claims connected to a contract or transaction*." However, therein the CJEU analyzed a totally different law, that is, Article 12 of Regulation 204/2011, which was adopted in accordance with UNSC Resolution 1970 (2011). Contrary to that, in the case before the Dutch court there was no UNSC Resolution; and the wording of Article 12 of Regulation 204/2011 differs from Article 11 of Regulation 833. This omission in the legal analysis of the "no-

[14] BMWK, Fragen under Antworten zu Russland-Sanktionen, 4 October 2023, FAQ 51. URL: https://www.bmwk.de/Redaktion/DE/FAQ/Sanktionen-Russland/faq-russland-sanktionen.html.
[15] See, e.g., BMWK, Fragen under Antworten zu Russland-Sanktionen, 25 November 2022, FAQ 51. Access via WayBackMachine, URL: https://web.archive.org/web/20221210120516/https://www.bmwk.de/Redaktion/DE/FAQ/Sanktionen-Russland/faq-russland-sanktionen.html.
[16] French Directorate General of the Treasury, Best Practices Guide / FAQ relating to the implementation of economic and financial sanctions, 15 June 2016, FAQ 32bis. URL: https://www.tresor.economie.gouv.fr/Institutionnel/Niveau2/Pages/f3234489-26a1-48f7-8a05-f31d34551f13/files/d30c8579-086d-42e1-a43f-8b79a677dc46.
[17] See, District Court of Amsterdam, Judgement of 15 January 2025, Case No. C/13/743546 / HA ZA 23-1114.
[18] *SH v TG* (Case C-168/17) at [74].

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claims" clause by the District Court of Amsterdam led to negative consequences for the claimant, depriving it of the right to repayment of unjust enrichment (funds paid in advance).

35. Thus, the lack of uniformity and legal errors in the Member States' judicial practice emphasizes the need for interpretation of "no-claims" clauses by the CJEU. As it will be demonstrated in Part 4 of this document, overly broad interpretation of "no-claims" clauses will likely lead to negative legal and economic consequences to the EU arbitration and arbitrators.

E. Interpretation in the Context of Fundamental Rights

36. It is also essential to consider whether the interpretation of EU instruments impacts any of the fundamental rights safeguarded under EU law. The court must adopt such an interpretation that avoids disproportionate violation of such rights.[19] This becomes highly important in the context of interpretation of Article 11 with respect to its effects on different types of claims.

37. As was noted by the High Court of England and Wales in the *MODSAF* Judgement[20] at ¶ 35, both the language and purpose of EU instruments are important for interpretation. In the *Möllendorf* case brought before the CJEU, Advocate General Mengozzi observed at ¶ 68 that "*for the purposes of interpreting a provision of Community law account must be taken not only of the letter of the provision but also of its context and of the aims pursued by the legislation of which it forms part*."[21]

38. In this regard the principle of proportionality should be taken into account together with the wording of Article 11.[22] Proportionality requires that EU instruments must be construed such that the measures sought to be implemented by them are appropriate for attaining the

[19] *R v R* [2016] Fam 153 at [28], *Möllendorf* at [79].
[20] *Modsaf v IMS* [2019] EWHC 1994 (Comm).
[21] *Möllendorf and Möllendorf-Niehuus* (Case C-117/06).
[22] *Melli Bank plc v Council* (Case C-380/09 P) at [52]; *British American Tobacco (Investments) and Imperial Tobacco* (Case C-491/01) at [122]; *ABNA and Others* (joined cases C-453/03, C-11/04, C-12/04 and C-194/04) at [68]; and *Vodafone and Others* (Case C-58/08) at [51].

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legitimate objectives pursued by the instrument and do not go beyond what is necessary to achieve those objectives.[23]

39. The principle of proportionality is defined in the case law by the CJEU as "*one of the general principles of [EU] law and requires that measures implemented through provisions of [EU] law be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve confiscatory effect*." The *Shanning* case extensively discusses this fundamental principle of EU law.[24]

40. Therefore, as argued above, a proper and proportional interpretation of Article 11 is that claims for reimbursement of advance payments – as well as interest accrued thereon – do not fall within the scope of the "no-claims" clause.

41. Further, it is our position that the narrow interpretation of a "claim" should be the more appropriate approach. The narrow interpretation provides proportionality, greater clarity and consistency with existing legal frameworks and the EU principle of legal predictability. It avoids the risk of unintended consequences and respects the established principles of international arbitration.

42. Meanwhile, a broad interpretation of this clause, encompassing all conceivable claims related to contracts affected by sanctions, is legally unsound and counterproductive. It undermines fundamental legal principles, contradicts the purpose of sanctions, and creates legal uncertainty potentially infringing upon the established principles of international arbitration.

43. Broad interpretation undermines certain fundamental EU legal principles:

    a) A broad interpretation violates the principle of proportionality, a cornerstone of EU law. Sanctions must be proportionate to the objective pursued. A sweeping "no-claims" clause that prevents legitimate claims, such as those for unjust enrichment or reimbursement of advance payments, goes beyond what is necessary to achieve the sanctions' objective. It

[23] See, *Rosneft Oil Company and Others v Council* (Case T-715/14) at [202].
[24] *Shanning International Ltd and Others v. Rasheed Bank and Others* [2001] UKHL 31 at [31]-[40].

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inflicts disproportionate harm on parties who have complied with the contractual obligations.

b) Article 47 of the EU Charter of Fundamental Rights guarantees the right to an effective remedy and access to justice. A broad "no-claims" clause effectively bars access to courts and arbitration for legitimate claims, depriving individuals and entities their fundamental right to seek redress for breach of contractual obligations.

c) A broad interpretation creates legal uncertainty. The scope of the "no-claims" clause becomes unclear, making it difficult for businesses to assess their legal risks and obligations. This uncertainty chills legitimate economic activity and undermines the rule of law.

d) A broad interpretation allows EU operators to unjustly enrich themselves at the expense of sanctioned parties. For example, if an EU company receives an advance payment for goods or services but cannot deliver due to sanctions, a broad "no-claims" clause would allow them to retain the payment without providing the goods or services, resulting in unjust enrichment.

e) A broad interpretation that extends to arbitration proceedings interferes with the autonomy of international arbitration. It undermines the principle of party autonomy in dispute resolution and discourages the use of arbitration as a neutral and efficient means of resolving commercial disputes.

f) In general, the purpose of sanctions is to exert pressure on the sanctioned party, not to create windfalls for EU operators. A broad approach allows EU operators to benefit from the sanctions by retaining payments without providing goods or services, which is contrary to the purpose of sanctions.

44. In view of the above, a narrow interpretation, which limits the scope of the clause to claims directly related to non-performance or claims for damages and indemnity, and excludes claims for unjust enrichment and reimbursement of advance payments, is more consistent

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with EU law principles and the objectives of sanctions. This approach would ensure that sanctions are proportionate, respect fundamental rights, and promote legal certainty.

F. Interpretation with respect to arbitration

45. As regards arbitration, the Court may wish to consider the following.

46. *First,* Article 11(3) of Regulation 833 contains the explicit reference to judicial review and omits any mention of arbitral tribunals. Consequently, the literal interpretation indicates that Article 11 does not apply to arbitral proceedings.

47. In accordance with the CJEU's settled case law,[25] where the wording of an EU law provision is clear and precise, its contextual or teleological interpretation may not call into question the literal meaning of a provision, as this would run counter to the principle of legal certainty and to the principle of inter-institutional balance enshrined in Article 13(2) TEU. Therefore, the clear and precise wording of an EU law provision shall be construed and enforced in its literal meaning.[26]

48. The word "judicial", according to Cambridge Dictionary, means "*relating to or done by courts or judges or the part of a government responsible for the legal system*."[27]

49. Further, according to Article 47 of Charter of Fundamental Rights of the European Union the right to an effective remedy and a fair trial include access to an independent and impartial judiciary. The second subparagraph of Article 19(1) of the Treaty on the Functioning of the European Union seeks to ensure that the system of legal remedies established by each Member State guarantees effective judicial protection in the fields covered by EU law.

50. Advocate General Medina delivered his legal opinion of 20 June 2024 in case C-197/23 *S. S.A. v C. sp. z o.o.* and stated the following:

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[25] See, e.g. *BCE v Germany* (Case C-220/03) at [31]; *Carboni e derivati* (Case C-263/06) at [48]; and *Les Vergers du Vieux Tauves* (Case C-48/07) at [44].
[26] See, e.g. *Commission v United Kingdom* (Case C-582/08).
[27] The term "judicial" in English, see Cambridge Dictionary. URL: https://dictionary.cambridge.org/dictionary/english/judicial.

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> "*Member States are required to give full effect to the principle of effective judicial protection, which is a general principle of EU law. In that context, the Court has held that "the second subparagraph of Article 19(1) TEU gives concrete expression to the value of the rule of law set out in Article 2 TEU and, in that regard, obliges the Member States to establish a system of legal remedies and procedures ensuring respect for individuals for their right to effective judicial protection in all the fields covered by EU law, the principle of effective judicial protection referred to in the second subparagraph of Article 19(1) TEU being a general principle of EU law now enshrined in Article 47 of the Charter*".

51. The CJEU has interpreted and reinforced the role of the judiciary in numerous rulings. For example, it emphasized the importance of judicial independence and the obligation of Member States to ensure effective judicial protection under EU law, as well as ruled on disciplinary responsibility of judges with respect to content and political control of judicial decisions.[28]

52. In summary, while there is no single provision that exhaustively defines the judiciary in EU law, the framework is built on Article 19 TEU, Article 47 of the Charter of Fundamental Rights, and the general principles of EU law as developed by the CJEU. These elements collectively ensure the independence, impartiality, and effectiveness of the judiciary in the EU legal system.

53. Therefore, this intentional omission indicates that Article 11 of Regulation 833 does only apply to judicial but not to arbitral proceedings.

54. *Second*, neither Regulation 833, nor other EU law contain limitations on the arbitrability of disputes related to the application of the EU sanctions. Should such disputes not be arbitrable, it would be explicitly enshrined in legislation.

55. Consequently, based on the inferences above, the "no-claims" clause shall be construed restrictively and understood as applying solely to the enforcement (the stage when the factual

[28] See, e.g., *Commission v Poland (I)* (Case C-619/18 Judgment of the Court (Grand Chamber) of 24 June 2019; *Portuguese Judges* (C-64/16), Judgment of the Court (Grand Chamber) of 27 February 2018; *Commission v Poland (III)* (Case C-791/19), Judgment of the Court (Grand Chamber) of 15 July 2021.

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satisfaction takes place after a court order) of arbitral awards within the EU, but not to the arbitral proceedings and the resulting arbitral awards.

56. As follows from Article 11, "satisfaction" of certain claims is prohibited (the terms used: *"satisfied"*, *"satisfying"*). Since only the "satisfaction" of certain claims is prohibited by Article 11 it is important to understand what "satisfaction" means.

57. As it will be shown below, in the realm of international arbitration, the term "satisfaction" (also referred to as "execution") stands apart from the term "enforcement." This is further corroborated by the language of Article 11 itself where "satisfaction" (Art. 11(1), 11(2) is distinguished from enforcement or court process.

58. "Enforcement" constitutes the "*process of obtaining an order by a court or authority directing compliance in accordance with the award*".[29]

59. "Execution" ("satisfaction") goes beyond "enforcement", and, in the context of money claims, may be defined as an actual payment of a claim. Such payment may be made as the end result of the enforcement process, or it may be voluntary. Similar conclusions were reached in the English case *PJSC National Bank Trust & Anor v Mints & Ors*[30], where the court held that the sanctions regime does not impede the right of a sanctioned person to seek access to the courts and that such access should not be restricted without clear legal provisions. Furthermore, while referring to the similar case in para. 129, the Court clearly stated:

> " *... prohibited is not the making of a court order but the satisfaction of claims*".

60. Thus, a critical distinction exists between "enforcement" and "satisfaction" ("execution").

[29] See, e.g., Compliance with and Enforcement of ICSID Awards, ICSID Background Paper, June 2024, Para. 36.
[30] PJSC National Bank Trust & anor v Mints & ors [2023] EWCA Civ 1132 (Judgment of the Court of King's Bench of Alberta 2022 ABKB 711 - 25 oct. 2022). See https://www.bailii.org/ew/cases/EWCA/Civ/2023/1132.html.

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61. The term “satisfaction” ("execution") is generally employed to describe the process by which a court or an enforcement authority actively takes control of specific property, such as through the forcible attachment of assets to satisfy an award.[31]

62. In two other notable court cases, *Angophora v Andrei Ovsyankin* and *another*[32] and *Fortenova Group D.D. v LLC Shushary Holding & Ors*[33] courts emphasized that the sanctions regulations were not intended to serve as a mechanism for parties to avoid their obligations. The Canadian court noted that any person or entity involved in the satisfaction of the claim, such as banks (i.e. parties effecting the payment), must evaluate the risks of violating the sanctions regulations and assess on a case-by-case basis. For example, the payment of claim to a sanctioned person may be possible to a blocked (frozen) account of that sanctioned person or to a court deposit, as in the *Fortenova* case.

63. In light of the above, enforcement of arbitral awards is not encompassed by Article 11 of Regulation 833. Rather Article 11 focuses exclusively on the “satisfaction” ("execution") of an award (in the context of money awards, the payment of funds on the basis of the award). It does not address issues pertaining to the fundamental validity of the award itself. As a result, such an award may not be set aside, or annulled.

64. However, declaratory claims, which are not to be enforced, do not fall within the scope of Article 11 of Regulation 833 due to its objective – as argued above– to prohibit satisfaction of claims relating to damages and compensation for non-performance under a contract exclusively.

65. Further, even though Article 11 of Regulation 833 prohibits the enforcement of arbitral awards, it shall not prohibit their recognition, and hence, shall have only an "administrative

[31] Cohen Smutny A., Smith A. D., and Pitt M., ‘Enforcement of ICSID Convention Arbitral Awards in US Courts', 43 Pepp. L. Rev. 649 (2016), p. 658.
[32] Angophora Holdings Limited v. Andrei Mikhailovich Ovsyankin and Valeriy Anatolievich Kirilov (Judgment of the Court of King’s Bench of Alberta 2022 ABKB 711 - 25 oct. 2022). See : https://jusmundi.com/fr/document/decision/en-angophora-holdings-limited-v-andrei-mikhailovich-ovsyankin-and-valeriy-anatolievich-kirilov-judgment-of-the-court-of-kings-bench-of-alberta-2022-abkb-711-tuesday-25th-october-2022.
[33] *Fortenova Group D.D. v. LLC Shushary Holding & Ors* [2023] EWHC 1165 (Ch).

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effect." Therefore, arbitral awards can be rendered, recognized (because of limitation for filing for the recognition and enforcement under certain national arbitration laws[34]), but not enforced during the period when sanctions continue to remain in force. Otherwise, if to prohibit the recognition of arbitral awards it would lead to a violation of the right to an effective remedy[35] and access to justice[36] for sanctioned persons, since the period for the recognition in some jurisdiction is limited by statutes, and these persons would not be able to recognize and enforce the awarded amounts after the sanctions are lifted or abolished.

66. *Third*, Regulation 833 does not provide for the annulment of contracts that fall within its scope. The Commission confirmed in the FAQ that "*in principle, the underlying contract does not probably cease to exist when a restrictive measure precludes compliance with the contractual obligation*."[37] Consequently, only the performance of these contracts by the EU operator will be prohibited. However, this will have no effect on the validity of the parties' civil law obligations under the contracts.

67. Neither Article 11 itself, nor the CJEU nor national courts of Member States deem obligations, falling within the scope of the no-claims clause to be invalid. Obligations may only be "*affected either by force majeure or a similar doctrine such as supervening illegality or "act of God*."[38] Therefore, they are influenced by Article 11, but it does not invalidate obligations *ipso facto* due to the mere existence of the no-claims clause.

II. Application of Article 11 of Regulation 833

68. In this section we address the following: (1) conditions for application of Article 11 of Regulation 833; and (2) application of Article 11 to claims for reimbursement of advance payments and for the interest on the amount of such advance payments.

[34] See, e.g., statutory limitations in Belgium, Spain, Switzerland and Italy.
[35] See Article 47 of the EU Charter of Fundamental Rights; see also: Case 222/84 Johnston [1986] ECR 1651; see also judgment of 15 October 1987, Case 222/86 Heylens [1987] ECR 4097 and judgment of 3 December 1992, Case C-97/91 Borelli [1992] ECR I-6313.
[36] *Ibid*.
[37] https://finance.ec.europa.eu/system/files/2024-01/faqs-sanctions-russia-consolidated_en.pdf, p.289
[38] *Rosneft and Others v Council* (T-715/14) at [59].

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69. As a starting point, Article 11 of Regulation 833 only applies if the following conditions are met. There must be (i) a claim, (ii) made by a person specified in points (a)-(c) of Article 11(1) of Regulation 833 and (iii) connected with a contract or transaction, (iv) performance of which must be affected, directly or indirectly, in whole or in part, by the measures imposed under Regulation 833.

70. It follows from the text of Article 11 that the criteria are cumulative. If one of them is not met, Article 11 of Regulation 833 cannot be applied.

71. As explained in section above on the interpretation of Article 11, "no claims" provision does not bar claims for reimbursement of advance payments given the nature of such claims, as well as the nature of the prohibition in Article 11 of Regulation 833 – which was adopted without reference to an UNSC measure.

72. Indeed, the purpose of Article 11 of Regulation 833 is not to completely relieve the EU counterparties from their obligations towards Russian counterparties. Construing Article 11 of Regulation 833 otherwise would mean that the EU counterparties are generally permitted to benefit from the sanctions. If Article 11 is construed otherwise, the EU counterparty would be entitled to retain any payments it received in advance from a Russian party without providing any contractual performance.

73. The CJEU in the Rosneft case confirmed that the purpose of Article 11 of Regulation 833 is to *"prevent an entity targeted by the restrictive measures at issue from being able to procure performance of a prohibited transaction, contract or service or from obtaining a remedy under civil law for non-performance of such transactions, contracts or services."*[39] The reimbursement of an advance payment does not result in performance and is not a sufficient remedy. Thus, it is not within the scope of the no-claims clause.

[39] Court of Justice of the European Union, PAO Rosneft Oil Company and others v. Council of the European Union, Case T-715/14, Judgment of the General Court, 13 September 2018, para. 206.

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74. Further, the purpose of Article 11 is *"to protect EU operators."* Refunding advance payments and interest does not defeat this purpose. Such operators must only return the monies received without providing any reciprocal performance.

75. The same applies to claims for reimbursement of interest on advance payments.

76. The claim for interest is ancillary to the principal claim and contingent upon it. If the adjudicator concludes that a claim for the reimbursement of an advance payment falls outside the scope of Article 11 of Regulation 833, the same logic should extend to the interest claim for a party's failure to fulfill its obligation to refund the advance payment.

77. Departing from this approach would undermine fundamental principles of civil law. First, the parties would not be adequately restored to the *status quo ante*, meaning their original financial positions prior to the transaction. Second, the party that failed to fulfill its obligation to return the advance payment in a timely manner would unjustly profit from the accrued interest on the withheld amount. This outcome conflicts with the well-established principle of good faith, which prohibits a party from benefiting from its own wrong.[40]

78. Prohibiting the satisfaction of interest claim under Regulation 833 would lead to an even harsher prohibition compared to the one on making funds available to designated persons under Article 2(2) of Regulation 269: *"[n]o funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural persons or natural or legal persons, entities or bodies associated with them listed in Annex I."* Specifically, Regulation 269 provides for an exception in Article 7(2) that allows *"(b) payments due under contracts, agreements or obligations that were concluded or arose before the date on which the natural or legal person, entity or body referred to in Article 2 has been included in Annex I"* and *"(c) payments due under judicial, administrative or arbitral decisions rendered in a Member*

[40] The DCFR Study Group refers to the principles of "*not allowing people to rely on their own unlawful, dishonest or unreasonable conduct" and "no taking of undue advantage*" as aspects of the general all-pervading principle of justice, which is reflected in numerous DCFR provisions (*see* Von Bar, C., Clive, E. and Schulte-Nölke, H., 2009. Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Outline Edition, https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf. P. 84-87).

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State or enforceable in the Member State concerned" to be credited to a frozen bank account of a designated person.

79. As confirmed by High Court of Justice of England and Wales in *MODSAF* judgement, this exception allows the counterparty of the designated person to lawfully discharge its liability and avoid the accrual of default interest:

> "*It is true, as Lord Anderson stressed, that a designated person with an appropriate EU account can be credited with interest pursuant to article 29 of the 2012 Regulation. This has a rational basis in the fact that the money can be frozen once in the account. Further, where such an account exists, a counterparty can avoid liability for future interest by paying what he owes into the account. He therefore needs no protection. If, on the other hand, the designated person holds no qualifying account, the counterparty will be unable to pay and, in the absence of a provision such as article 38, could not escape accruing interest liabilities. It is therefore comprehensible that a counterparty should enjoy protection where the designated person has no relevant account but not where he does.*"[41]

80. Although in *MODSAF,* the English court considered a claim for interest in the context of sanctions imposed against Iran under EU Council Regulation 423/2007 (now Regulation 267/2012, "**Regulation 267**"), certain findings from the case may still be relevant due to the similarities between the provisions in the Iranian and Russian sanctions regimes:

Regulation 269	**Regulation 267**
Article 7	**Article 29**
1. Article 2(2) shall not prevent the crediting of the frozen accounts by financial or credit institutions that receive funds transferred by third parties onto the account of a listed natural or legal person, entity or body, provided that any additions to such accounts will also be frozen. The	1. Article 23(3) shall not prevent financial or credit institutions from crediting frozen accounts where they receive funds transferred onto the account of a listed natural or legal person, entity or body, provided that any additions to such accounts shall also be frozen. The financial or credit institution shall inform

[41] *Modsaf v IMS (II)*, Judgment of the High Court of Justice of England and Wales [2020] EWCA 145, 12 February 2020, para. 60, emphasis added.

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financial or credit institution shall inform the relevant competent authority about any such transaction without delay. 2. Article 2(2) shall not apply to the addition to frozen accounts of: (a) interest or other earnings on those accounts; (b) payments due under contracts, agreements or obligations that were concluded or arose before the date on which the natural or legal person, entity or body referred to in Article 2 has been included in Annex I; or (c) payments due under judicial, administrative or arbitral decisions rendered in a Member State or enforceable in the Member State concerned; provided that any such interest, other earnings and payments are frozen in accordance with Article 2(1).	the competent authorities about such transactions without delay. 2. Article 23(3) shall not apply to the addition to frozen accounts of: (a) interest or other earnings on those accounts; or (b) payments due under contracts, agreements or obligations that were concluded or arose before the date on which the person, entity or body referred to in Article 23 has been designated by the Sanctions Committee, the Security Council or by the Council; provided that any such interest or other earnings and payments are frozen in accordance with Article 23(1) or (2). 3. This Article shall not be construed as authorising transfers of funds referred to in Article 30.
Article 11 1. No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, particularly a claim for extension or payment of a bond, guarantee or	**Article 38** 1. No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, notably a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial

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indemnity, particularly a financial guarantee or financial indemnity, of whatever form, shall be satisfied, if they are made by: (a) designated natural or legal persons, entities or bodies listed in Annex I; (b) any natural or legal person, entity or body acting through or on behalf of one of the persons, entities or bodies referred to in point (a). 2. In any proceedings for the enforcement of a claim, the onus of proving that satisfying the claim is not prohibited by paragraph 1 shall be on the natural or legal person, entity or body seeking the enforcement of that claim. 3. This Article is without prejudice to the right of natural or legal persons, entities or bodies referred to in paragraph 1 to judicial review of the legality of the non-performance of contractual obligations in accordance with this Regulation.	guarantee or financial indemnity, of whatever form, shall be satisfied, if they are made by: (a) designated persons, entities or bodies listed in Annexes VIII and IX; (b) any other Iranian person, entity or body, including the Iranian government; (c) any person, entity or body acting through or on behalf of one of the persons, entities or bodies referred to in points (a) and (b). 2. The performance of a contract or transaction shall be regarded as having been affected by the measures imposed under this Regulation where the existence or content of the claim results directly or indirectly from those measures. 3. In any proceedings for the enforcement of a claim, the onus of proving that satisfying the claim is not prohibited by paragraph 1 shall be on the person seeking the enforcement of that claim. 4. This Article is without prejudice to the right of the persons, entities and bodies referred to in paragraph 1 to judicial review of the legality of the non-performance of contractual obligations in accordance with this Regulation.

81. As can be inferred from the quote at para. 65 above, if a party has a legitimate opportunity to perform its obligation and "*avoid liability for future interest*", it should not enjoy the protection afforded by "no-claims" clauses. A similar conclusion has been upheld by the

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Dutch Court of Appeal in *BAe Systems plc v Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran*:

> "*I should also mention a decision of the Dutch Court of Appeal, BAe Systems plc v Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran (3 September 2013), to which we were taken by Lord Anderson. In that case, BAe challenged an arbitration award on, among others, the ground that the award violated the sanctions against Iran issued by the United Nations, the EU and the Netherlands. The Court, however, concluded in paragraph 39 of its judgment that BAe could comply with the award without risking violating the 2012 Regulation. It explained:*
>
> *'If [BAe] pays into a frozen account of Modsaf's, which account is held by a financial institution within the EU or credits such account, BAe will not make any funds available to Modsaf; the funds will remain frozen for as long as Modsaf is on said list. If Modsaf proves not to have such an account, it is possible to open an interest-bearing escrow account within the EU*.'"[42]

82. In turn, Regulation 833 does not provide for an exemption equivalent to that under Article 7(2) of Regulation 269. The rationale behind this is that Regulation 833 does not contain a general "no funds available to designated persons" provision similar to that in Article 2(2) of Regulation 269 and hence an exception is not required. The logical implication is that, to the extent that a party can lawfully perform its obligations unaffected by EU sanctions, it cannot avoid paying interest on its failure to comply by invoking the defence under Article 11 of Regulation 833.

83. The issue of interest claims on advance payments under the framework of Regulation 833 has not yet been the subject of judicial review by the EU courts. However, in the above mentioned *MODSAF* case, the High Court of Justice of England and Wales addressed whether the post-award interest component of an arbitral award could be enforced during the sanctions period following the claimant's designation.

[42] *Ibid*, para. 55, emphasis added; *BAe Systems plc v Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran*, Judgment of the Hague Court of Appeal, case no. 200.095.535-01, court case/roll numbers: 324781/HA ZA 08-3870 and 372066/HA ZA 10-2649, 3 September 2013, https://www.inview.nl/document/idc912139b39d548418c591b2b647518fa/hof-den-haag-03-09-2013-nr-200-095-535-01?ctx=WKNL_CSL_10000001&tab=tekst, para. 39.

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84. The English court ruled that *MODSAF* could not enforce the interest component of the award during the sanctions period because IMS was legally prohibited from making payments to discharge its liability. The court held that a "no-claims" provision (Article 38 of Regulation 267, similar in content to Article 11 of Regulation 269, see para 66 above) could apply to an interest claim if two conditions were met:

> (1) The sanctions caused the increase in the interest component of the claim, and
>
> (2) The party was legally barred from discharging its debt due to sanctions.

85. As Lord Justice Newey explained:

> "*As noted previously, during the sanctions period IMS was precluded from making payments to MODSAF to discharge its liability under the Awards. Thus, insofar as MODSAF seeks interest from IMS in respect of the sanctions period, it is seeking to enforce a liability of IMS whose content (i.e. the quantum of interest) is conditioned by, and in that sense 'results directly or indirectly from', the sanctions*."[43]
>
> "*On that basis, article 38 will bite on MODSAF's application if, construing article 38(2) correctly, "the existence or content of the claim results directly or indirectly from" the measures*."[44]
>
> "*Suppose that a claim by a designated person for breach of contract were pending when the sanctions regime took effect and that, aside from the impact of article 38 of the 2012 Regulation, the counterparty's subsequent inability to discharge the claim has had the effect of increasing the amount of compensation payable to the designated person. Lord Anderson's contentions would seem to imply either that the designated person's claim is entirely lost or that the counterparty is wholly unprotected. Neither outcome would make sense. The true position has to be, I think, that article 38 can apply to part of a claim. More specifically, where, as in the present case,* [1] *sanctions have served to increase the interest component of a claim, it must be the case that* [2] *article 38 bars satisfaction of the claim to that extent and only to that extent*."[45]

86. Provided that the return of an advance payment does not fall within the scope of Article 11 of Regulation 833 – in contrast with the claim in *MODSAF* – the interest claim on such

[43] Judgment of the High Court of Justice of England and Wales [2020] EWCA 145, 12 February 2020, para. 51, emphasis added.
[44] *Ibid*, para. 50, emphasis added.
[45] *Ibid*, para. 53, emphasis added.

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advance payment also does not result from the sanctions. Also, unlike *MODSAF*, the rise in the interest component of the claim is not a consequence of application of the EU sanctions but is solely the result of the party's failure to repay the advance payment in time.

87. The conclusions reached in *MODSAF*, although not referred to in the judgment, were reaffirmed in *Celestial Aviation Services Ltd v UniCredit Bank GMBH* ("***Celestial v Unicredit***") in 2024. Notwithstanding the fact that in *Celestial v Unicredit* the England and Wales Court of Appeal analyzed the legality of statutory interest accrual under section 44 of Sanctions and Anti-Money Laundering Act 2018 ("**SAMLA**") [46], its findings may nevertheless be taken into account in the context of Article 11 of Regulation 833, as both of these "no claims" provisions have the same legal objective, *i.e.*, to protect national operators (either from the EU or the UK) from the consequences of good faith compliance with sanctions.

88. In particular, the English court in *Celestial v Unicredit* concluded in *obiter dictum*, first, that a claim for interest is inextricably linked to the principal debt, second, that "no-claims" provisions do not in principle bar an interest claim, and, third, that disallowing interest claim prejudices the claimant and confers an undue advantage on the defendant:

> "*It is notable that a claim for interest on a debt under s.35A* [**Note**: section 35A of Senior Courts Act 1981] *is not independent of the claim for the underlying debt. Rather, the court's power to award interest arises in proceedings "for the recovery of a debt". On the basis that proceedings for recovery of the debt itself are not barred by s.44 (as to which see above) it logically follows that a claim which is no more than an adjunct of that, and has no independent foundation, should also not be barred. Effectively, it is an aspect of the single claim for a debt. I do not consider that it makes any difference that, as with other claims for interest, it is required to be pleaded under*

[46] Section 44 of SAMLA:
"*Protection for acts done for purposes of compliance:*
(1) This section applies to an act done in the reasonable belief that the act is in compliance with—
(a) regulations under section 1, or
(b) directions given by virtue of section 6 or 7.
(2) A person is not liable to any civil proceedings to which that person would, in the absence of this section, have been liable in respect of the act.
(3) In this section "act" includes an omission."

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> *the court's rules (CPR 16.4). The court's power under s.35A arises only on a claim for the debt*."
>
> *This conclusion is consistent with the aim of an award of interest being to achieve restitutio in integrum. Without it, not only would the creditor be worse off but the debtor would obtain an unwarranted windfall. As with the principal amount of the debt, an entitlement to interest that would deprive a debtor of a windfall is not obviously within the mischief sought to be addressed by s.44*."
>
> *I would therefore conclude that s.44 does not prevent an award of interest under s.35A of the 1981 Act on a claim for debt*."[47]

89. With regard to default interest, the English court did not reach unequivocal conclusions, stating only that "*it does not follow that all claims for interest would be in the same category* […] [a] *claim for default interest is much closer both to the mischief at which s.44 is aimed and the language, because the claim is for an amount due as a result of ("in respect of") the failure to pay*."[48] This quote must be taken in the broader context of the English court's interpretation of section 44 of SAMLA: "[t]*he evident purpose of s.44 is to ensure that a person is not pressurised into doing something that risks breaching sanctions by a fear of being exposed to civil claims. The section is concerned to protect against a liability which is created as a result of something done (or not done) in the reasonable belief that it is in compliance with a sanctions regulation. It is not concerned to protect against pre-existing liabilities*."[49]

90. As can be logically concluded, to the extent that the non-payment of principal debt was not due to sanctions and was not barred by sanctions – as in the case of refund of advance payment under Regulation 833 (see para. 72 above) – there should be no prohibition on the recovery of default interest.

[47] *Celestial Aviation Services Ltd v Unicredit Bank Gmbh, London branch (formerly Unicredit Bank Ag, London branch)*, Judgment of the England and Wales Court of Appeal (Civil Division) [2024] EWCA Civ 628, 11 June 2024, paras. 93-95, emphasis added.
[48] *Ibid*, para. 96, emphasis added.
[49] *Ibid*, para. 87, emphasis added.

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SECTION 2. ARBITRAL AWARDS: RECOGNITION, ENFORCEMENT AND ANNULMENT

91. Among other contexts, Article 11 of Regulation 833 must be interpreted in the contexts of recognition, enforcement and annulment of arbitral awards. In other words, it should be clearly understood whether deviation from Article 11 of Regulation 833 by the arbitral tribunal may be a ground for:

- refusal of an EU member state court to recognize the arbitral award.
- refusal of an EU member state court to enforce the arbitral award.
- annulment / set-aside of the arbitral award by the state court in the country of the seat of arbitration (an EU member state).

92. In this chapter of this *amicus curiae*, we review those grounds from the viewpoint of:

a) Terminology of Article 11 of Regulation 833; and

b) Aims and objectives of Regulation 833.

I. Recognition, enforcement and annulment of arbitral awards from the viewpoint of terminology of Article 11 of Regulation 833

93. *Recognition and Enforcement of Arbitral Awards.* Under Art. V(2) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) ("**New York Convention**"), the recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or the recognition or enforcement of the award would be contrary to the public policy of that country.

94. *Annulment (Setting Aside)*[50] *of Arbitral Awards*. Similarly to the New York Convention, Article 34(b) of the UNCITRAL Model Law On International Commercial Arbitration (1985) ("**UNCITRAL Model Law**") provides that an arbitral award may be set aside by the respective state court if it finds that the subject-matter of the dispute is not capable of

[50] For the purposes of this amicus curiae, the terms "annulment" and "setting aside" are used interchangeably.

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settlement by arbitration under the law of this state; or the award is in conflict with the public policy of this state.

95. As follows from the above, non-arbitrability ("*dispute…not capable of settlement by arbitration…*") and public policy are the relevant grounds for (i) refusal to recognize an arbitral award, (ii) refusal to enforce an arbitral award, and (iii) annulment of an arbitral award.

96. If a dispute encompassed by Article 11 of Regulation 833 is non-arbitrable or, likewise, if the arbitral award taken within the framework of this dispute contradicts public policy (or equally, if the recognition or enforcement of the award contradict public policy), the award may be annulled, refused recognition and/or enforcement.

97. We have already touched on non-arbitrability of such disputes in Section 1 of this amicus curiae. To recap, the EU law, including Regulation 833, does not set an express limitation on the arbitrability of disputes related to application of the EU sanctions. Nor does Article 11 of Regulation 833 contain such an express limitation, as follows from the below:

> *"Article 11*
>
> *1. No claims […] shall be satisfied [….]*
>
> *2. In any proceedings for the enforcement of a claim, the onus of proving that satisfying the claim is not prohibited by paragraph 1 shall be on the natural or legal person, entity or body seeking the enforcement of that claim.*
>
> *3. This Article is without prejudice to the right of natural or legal persons, entities or bodies referred to in paragraph 1 to judicial review of the legality of the non-performance of contractual obligations in accordance with this Regulation."*

98. The key term used in Article 11 of Regulation 833 is "satisfaction" of a claim. Within the framework of recognition, enforcement and annulment of arbitral awards, "satisfaction" may be interpreted at least in one of the following three ways:

- "Satisfaction" is the issuance (making) of an arbitral award to grant the claim; or

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- "Satisfaction" is obtaining a court's order to enforce the arbitral award (exequatur) or, where no enforcement is sought, an order to recognize the award;

- "Satisfaction" is the actual fulfillment (payment) under the award.

These three possible interpretations are addressed in more detail below.

a. Interpretation # 1: "Satisfaction" of Claim = Making of Award to Grant the Claim

99. According to this interpretation, the mere issuance of an arbitral award would constitute "satisfaction" of the claim. In essence, such a stringent interpretation makes the respective claims subjectively non-arbitrable (i.e. limiting the power of EU persons to submit these claims to arbitration).[51] However, this approach would be prone to criticism. The literal meaning of Article 11 of Regulation 833 suggests that only "satisfaction" of certain claims is prohibited.[52] The dispute resolution process itself (i.e. conduct of proceedings – which, in principle, may end with the rejection of the claim, or withdrawal of the claim, or else) – is not prohibited Article 11 of Regulation 833.

100. The case of *PJSC National Bank Trust & Anor v Mints & Ors* [2023] EWHC 118 (Comm) cited earlier[53] resonates with this approach, holding that the sanctions regime does not prohibit the making of a court order.

b. Interpretation # 2: "Satisfaction" of Claim = Obtaining a Court's Order to Enforce the Arbitral Award (Exequatur) or, Where No Enforcement Is Sought, an Order to Recognize the Award

101. The second interpretation focuses on the procedural steps required to give effect to an arbitral award, such as obtaining an enforcement order (exequatur) from a local court.

102. While this approach is more nuanced than the first, it still does not fully align with the language of Article 11 of Regulation 833, which distinguishes between enforcement and

[51] Re: subjective arbitrability, see (https://jusmundi.com/en/document/publication/en-arbitrability#:~:text=Subjective%20arbitrability%20(or%20%E2%80%9Carbitrability%20ratione,see%20also%20Jurisdiction%20ratione%20personae).
[52] The terms used: "satisfied", "satisfying".
[53] See supra, Sec 2, Chapter II, para. 60

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satisfaction. The case of *Angophora Holdings Limited v. Ovsyankin and Kirilov* [2023] EWHC 611 (Comm) backs up this distinction, where the court noted that sanctions regulations do not impede the enforcement process but rather restrict the actual payment of claims.[54]

103. In any event, it may be difficult to reconcile this interpretation with the New York Convention and the UNCITRAL Model Law: it falls out of the non-arbitrability of claims in arbitration. At best, this interpretation could be seen as a type of public order requirement addressed to EU courts.[55]

c. Interpretation # 3: "Satisfaction" of Claim = Actual Fulfillment (Payment) under the Award.

104. This interpretation regards "satisfaction" as the payment of the awarded amount by the claimant as a result of the enforcement process. This interpretation does not contradict Article 11 of Regulation 833, which focuses on the prohibition of the execution of payment rather than the decision-making or enforcement process. Furthermore, this interpretation is corroborated by the cases cited earlier, including *PJSC National Bank Trust & Anor v Mints & Ors* [2023] EWHC 118 (Comm), *Angophora Holdings Limited v. Ovsyankin and Kirilov* [2023] EWHC 611 (Comm).

II. Annulment, recognition and enforcement of arbitral awards from the viewpoint of aims and objectives of Regulation 833: public policy considerations

105. As already pointed out above, under the New York Convention, the recognition and enforcement of an arbitral award may be refused if the competent authority in the country where it is sought finds that such recognition or enforcement of the award would be contrary to the public policy of that country.[56] Similarly, under the UNCITRAL Model Law, an award may be set aside by the state court if it finds the award is in conflict with the public policy

[54] See supra, Sec 2, II, para. 63
[55] For public order considerations, see Sub-Section II of this Section **below**.
[56] Art. V(2)(b) of the New York Convention.

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of this state.[57] National laws of various EU countries contain provisions similar of those in the UNCITRAL Model Law.[58]

106. Violations of an economic sanctions regime as a defense in recognition and enforcement proceedings (and, in a similar fashion, an argument in set aside proceedings) is not a novel idea. In a more general setting, the courts of various jurisdictions have been long in agreement that public order means the state's most basic notions of morality and justice, rather than just the state's national interests.[59]

107. Whether economic sanctions may be equated with the most basic notions of morality and justice is still a big question mark. In a few illustrative cases up to date, the courts of the EU member states have not taken a uniform approach on this issue. For example, in two cases involving Russia's state-owned company Rosneft (winning party in arbitration), a Lithuanian court refused the recognition and enforcement of an arbitral award, citing basic principles of the Lithuanian Constitution.[60] In another case, a Czech Republic court issued exequatur to enforce an arbitral award in favor of Rosneft, finding no violation of public policy.[61]

108. In another EU member country, France, the court distinguished between UN, EU and US sanctions, saying that UN and EU sanctions could form part of international public policy, whereas US sanctions – being unilateral – could not.[62] In any event, the judge must assess

[57] Art. 34(b)(ii) of the UNCITRAL Model Law.
[58] E.g. Austria, Germany, Italy. See further: Austrian Arbitration Act 2013, Austrian Code of Civil Procedure, SEC 611 https://www.international-arbitration-attorney.com/wp-content/uploads/2013/07/Austria-Arbitration-Law-1.pdf; German Arbitration Act, Tenth Book of the Code of Civil Procedure, Sec. 1059; Available at: https://www.international-arbitration-attorney.com/wp-content/uploads/2013/07/German-Arbitration-Law.pdf; 3. Italy Arbitration Law, Title VIII of Book IV of the Italian Code of Civil Procedure, Article 840, available at: https://www.international-arbitration-attorney.com/wp-content/uploads/2013/07/Italy-Arbitration-Law.pdf/
[59] See e.g. Parsons & Whittemore Overseas Co. Inc v. Societe Generale de l'Industrie due Papier [RAKTA]. U.S. Court of Appeals 2d Cir. Dec 23, 1974, 508 F.2d at 973-974; see also IPCO (Nigeria) Ltd v. Nigeria National Petroleum Corp. [2005] EWHC 726.
[60] Reference in (Russian): https://lt.sputniknews.ru/20231207/sud-v-litve-razreshil-kompanii-ne-platit-shtraf-rosneft-31299858.html
[61] Reference in (Czech): https://www.zakonyprolidi.cz/judikat/nscr/20-cdo-136-2023.2
[62] CA Paris, 3 June 2020, SA A. v N. (https://www.cambridge.org/core/journals/international-legal-materials/article/abs/sofregaz-v-ngsc-ca-paris/2F8FB4E0BF24B2FE8085364D4E68CBFB)

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whether the recognition and enforcement of an arbitral award violate sanctions at the time when he (the judge) issues his decision, and not at the time when the award was rendered).[63]

109. On the other hand, the US courts said that foreign policy disputes (including the application of economic sanctions) with another country are not enough to overcome the "supranational" policy of providing predictable enforcement of international arbitral awards. A public order defense with reference to sanctions was denied.[64]

110. As follows from the above, up to now, economic sanctions have not been universally accepted as a ground for a refusal to recognize and enforce an arbitral award due to public order.

111. In any event, however, the question that should be decided in the context of economic sanctions and the recognition and enforcement of arbitral awards (and similarly, set-off/annulment of awards) is whether the particular sanctions are sufficient enough to be regarded as public order. To this end, it is useful to consider the aims and objectives of Regulation 833 set out in its preamble. Those aims and objectives are the "freezing of funds and economic resources of certain natural and legal persons, entities and bodies and restrictions on certain investments" [65]

112. As opposed to confiscation, freezing has only a temporary nature. This was further corroborated by the European Commission[66], which stated:

> *"Freezing assets means temporarily retaining property, … . This means that the owner cannot dispose of their assets before the case is closed.*

[63] CA Paris, 13 April 2021, Guinee v AD Trade (https://www.dalloz-actualite.fr/flash/chronique-d-arbitrage-ou-va-controle-etatique-de-l-arbitrage-international)
[64] *AMEROPA AG v. HAVI OCEAN CO. LLC*, 10 Civ. 3240 (TPG) (S.D.N.Y. Feb. 16, 2011) (https://casetext.com/case/ameropa-ag-v-havi-ocean-co-llc)
[65] Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. See https://eur-lex.europa.eu/eli/reg/2014/833/oj/eng
[66] See https://commission.europa.eu/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/confiscation-and-freezing-assets_en#:~:text=Freezing%20assets%20means%20temporarily%20retaining,obtained%20by%20breaking%20the%20law.

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> *Confiscation is a final measure designed to stop criminals from accessing property obtained by breaking the law. The property is taken away permanently from the criminal or their accomplices."*

113. If Article 11 of Regulation 833 were to be interpreted as allowing the court or tribunal to dismiss the claim of a Russian party, this could effectively result in the confiscation of assets (funds claimed for payment) of that party. The losing Russian party may be unable to claim that payment again if the sanctions are lifted, either due to res judicata or the expiry of applicable limitation periods. Such a result would be inconsistent with the very nature of the sanctions as a temporary measure rather than confiscation. Notably, confiscation of payment is never mentioned in Regulation 833. This corroborates a possible conclusion that a national court would not have sufficient basis to annul an arbitral award on the basis of Article 11 of Regulation 833. Given the temporary nature of restrictions under Regulation 833 (i.e. asset freeze), there will be no 'fundamentality' for these restrictions to qualify as a public order.

114. Another point to consider in the context of public order would be the fact that the result of claims falling under Article 11 of Regulation 833 may be different. A claim to return to Russian party an advance payment under a contract that was never performed may hardly be viewed as a provision of technology or financial resources to the Russian military and industrial complex (rather, it has the effect of restitution of the parties to the positions that they had before entering into the contract). Other types of claims may have different consequences.

SECTION 3. THE IMPACT OF ARTICLE 11 ON INTERNATIONAL ARBITRATION

115. It is essential that arbitration upholds the principle of party autonomy, allowing the parties the freedom to determine how their disputes should be resolved in a peaceful and efficient manner. This principle is fundamental to international arbitration. Its erosion would compromise the legitimacy and effectiveness of the arbitration process.

116. When selecting the applicable law, arbitration rules, and legal seat of arbitration, the parties place significant trust in a legal system, expecting it to remain impartial, stable, consistent,

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and supportive of arbitration throughout the duration of the contract and beyond. This trust is based on the understanding that the chosen legal framework will be applied fairly and predictably, without undue interference from national courts.

117. Parties typically seek legal systems where arbitration agreements are upheld by courts, with minimal interference from state agencies in the proceedings. They favor systems where arbitration laws and rules of arbitrability are stable, liberal, and conducive to party autonomy, without the imposition of overly broad mandatory rules that restrict the party autonomy. The imposition of unpredictable or overly restrictive mandatory rules, such as a broad interpretation of Article 11, creates uncertainty and undermines the very foundation upon which parties choose a particular seat of arbitration.

118. Over the past few decades, arbitration centers in Europe, such as the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC) Arbitration Court, the Stockholm Chamber of Commerce (SCC), the Vienna International Arbitration Centre (VIAC), Swiss Chambers, the German Arbitration Institute (DIS), and others, have gained significant popularity, particularly for resolving disputes involving Russian parties. For some, this success is rooted in historical ties from the 20th century, while for others, it reflects decades of dedicated efforts to expand their caseloads.

119. Below is a chart illustrating the caseload at four leading European arbitration centers from 2017 to 2023. The figures indicate the number of requests for arbitration for each year involving Russian parties, while the percentages in parentheses represent the proportion of Russia-related cases within their total international caseload for that year.[67]

Number of cases involving Russian parties per year per arbitration centre

	2017	**2018**	**2019**	**2020**	**2021**	**2022**	**2023**
ICC	18 (2,2%)	16 (1,9%)	25 (2,9%)	21 (2,26%)	24 (2,85%)	21 (3%)	46 (5,2%)
SCC	29 (30,2%)	12 (15,7%)	26 (29,5%)	11 (10,4%)	10 (12,8%)	14 (20,8%)	15 (15,4%)
LCIA	18 (6,5%)	22 (7%)	26 (6,6%)	30 (6,8%)	9 (2,1%)	9 (2,7%)	9 (2,8%)
VIAC	6 (13,9%)	5 (7,8%)	4 (8,8%)	1 (2,5%)	4 (9%)	undisclosed	undisclosed
Total	**71**	**55**	**81**	**63**	**47**	**44**	**70**

[67] Based on the statistical data published by the ICC, SCC, LCIA, VIAC.

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120. The chart demonstrates that Russia-related cases represent a notable portion of cases in the leading European arbitration institutions. Furthermore, Russia-related cases typically involve complex legal issues and high stakes making them a lucrative part of the international arbitration market. The potential loss of this caseload, or even a significant reduction in its growth, could have a substantial economic impact on these institutions and the broader European arbitration community.

121. According to the Russian Arbitration Association 2022 survey, among the preferred legal seats for arbitration, Russian parties frequently chose London, Paris, Geneva, Stockholm, Zurich, and Vienna.[68] aligning with global trends. According to the 2021 International Arbitration Survey, four of the top ten globally preferred arbitration seats were in Europe: London, Paris, Geneva, and Stockholm.[69] This trust was earned over decades through consistent adherence to the rule of law, ensuring equal treatment and access to justice for all parties, regardless of social origin, gender, or nationality.

122. As a result, the European arbitration community — comprising arbitration institutes, legal counsel, arbitrators, experts, interpreters, and others — has significantly benefited from the influx of Russian cases. Moreover, many complex Russia-related disputes involve intricate legal issues, thereby contributing to the development and refinement of European case law. This expertise and infrastructure, built up over years, is now at risk if parties begin to avoid opting for European arbitral institutions due to concerns about legal uncertainty and application of Article 11.

123. The EU restrictions and discriminatory practices against Russian parties made them look for viable alternatives outside Europe, which can ensure access to justice and neutrality. This

[68] The 2022 Russian Arbitration Association Survey: The Impact of Sanctions On Commercial Arbitration. See: https://arbitration.ru/upload/iblock/331/m39afhgha29anlfo3hye1s3u75l5kek6/RAA-2022-Study-on-sanctions_eng.pdf

[69] The 2021 International Arbitration Survey of the School of International Arbitration, Queen Mary University of London See: https://www.qmul.ac.uk/arbitration/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf

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trend is not limited to Russian parties; other parties involved in transactions with Russian entities are also seeking alternative seats to avoid potential complications.

124. To save their Russia-related caseload, on 17 June 2015, the three leading European arbitration centers — LCIA (London), ICC (Paris), and SCC (Stockholm) — issued a joint statement affirming that EU sanctions did not impose a general prohibition on Russian parties seeking arbitration before European arbitral institutions. The statement further clarified that Russian parties were not treated differently from other parties in this regard.[70] Nevertheless, this statement has not fully addressed concerns, as the possibility of sanctions impacting arbitral proceedings remains a significant barrier and considerable deterrent.

125. In practice, Russian parties continued to be discriminated both in arbitration and in litigation in Europe – they were unable to instruct legal counsel, experts, interpreters, to appoint arbitrators, to pay arbitration and court fees, to hire hearing premises, even simply to enter Europe. Entering, lodging, and traveling in Europe for the hearings have become burdensome. There have been multiple cases when Russian legal counsel who travelled to arbitration hearings were interviewed, and confidential arbitration bundles were copied by secret services at the EU borders against parties' objections. A basic principle of access to justice, let alone confidentiality, was physically distorted. These practical difficulties, while perhaps not directly caused by Article 11, contribute to a perception that EU arbitration is no longer a neutral and reliable forum for disputes involving Russian parties.

126. On 26 July 2022, the SCC, VIAC, FAI, DIS, CAM, and Swiss Arbitration Centre issued another joint statement in which they welcomed the clarifications regarding the scope of the prohibition outlined in Article 5aa of Regulation No. 2022/428. Specifically, Regulation No. 2022/1269 exempts from the prohibition transactions that are strictly necessary to ensure access to judicial, administrative, or arbitral proceedings within a Member State, as well as for the recognition or enforcement of judgments or arbitration awards rendered in a Member State, provided such transactions align with the objectives of both this Regulation and

[70] https://www.lcia.org/News/the-potential-impact-of-the-eu-sanctions-against-russia-on-inter.aspx

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Regulation (EU) No. 269/2014.[71] However, the fact that these clarifications were deemed necessary underscores the initial uncertainty and concern surrounding the impact of sanctions on arbitration.

127. Both joint statements highlight the significant importance and value that leading European arbitration centers place on ensuring access to justice and managing the caseload arising from commercial contracts involving Russian parties and concerns related to loosing Russia-related caseload. However, these statements cannot fully address the underlying legal uncertainty created by Article 11, particularly the risk that it could be interpreted to prevent the enforcement of arbitral awards.

128. In this context, the CJEU's interpretation of Article 11 of Regulation 833 is crucial from both the legal and industry perspectives. A restrictive interpretation of Article 11 could render arbitration agreements unenforceable or even void. Such an interpretation would not only undermine fundamental legal principles like party autonomy, freedom of contract, and the sanctity of contract, but would also further negatively affect the EU's standing as a leading arbitration hub. The perception of fairness and neutrality is paramount for maintaining the EU's position as a leading arbitration hub. A broad interpretation of Article 11 risks damaging this perception.

129. The outcome of such an unfavorable interpretation is likely to be as follows:

    a) Parties to new commercial contracts will be reluctant to agree to arbitrate in the EU. This also applies to commercial contracts with no Russian connection due to the uncertainty over which countries might be subject to EU sanctions in the future and which mandatory rules therefore will apply to their contracts. This creates a chilling effect, as parties may choose non-EU seats simply to avoid the possibility of encountering the consequences entailed by application of Article 11;

[71] https://sccarbitrationinstitute.se/sites/default/files/2022-10/joint-statement-7th-sanctions-package-26-july-2022_final.pdf

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b) Parties to new commercial contracts, including non-Russian parties, may be hesitant to subject their contracts to the substantive laws of EU Member States. This is because Article 11 could be interpreted as a mandatory provision of national laws within Member States, creating potential legal uncertainties. This could lead to a decline in the use of EU law as the governing law for international contracts, further undermining the EU's influence in international commerce;

c) In newly initiated arbitral proceedings, including those outside the EU, parties may avoid appointing EU nationals as arbitrators, mediators, experts, or legal counsel, fearing that they could apply Article 11 as a mandatory and overriding provision of law. This concern stems from Article 13, which extends the application of Regulation 833 to any individual, inside or outside the EU, who is a national of an EU Member State.

d) In arbitrations already in progress with a legal seat in the EU, parties and tribunals may be inclined to relocate the legal seat to non-EU jurisdictions to avoid potential complications arising from EU regulations. Such relocations would be costly and disruptive and would further undermine the EU's reputation as a stable and predictable arbitration seat.

130. The situation with Russia-related arbitration cases in Europe is noteworthy. It serves as a test for European justice and is closely watched by global users of arbitration, including those from Asia, Africa, Middle East, Latin America and others.

SECTION 4. EXCLUSIVE COMPETENCE OF RUSSIAN COURTS AND ANTI-SUIT INJUNCTIONS

131. The CJEU decision over interpretation of Article 11 of Regulation 833 can be another play card in the growing battle of jurisdictions in disputes with Russian companies. Our brief observation on the battle of jurisdictions below aims to demonstrate that CJEU can either prevent further escalation thereof or encourage more companies to use Russian jurisdiction to seize assets of EU companies, bypassing dispute resolution mechanisms — especially

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arbitration agreements. In the latter case, both EU and Russian companies would be trapped in the situation: Russian companies would have no choice but to apply to Russian courts, circumventing arbitration clauses, while EU companies would risk losing their assets in Russia and other assets-located jurisdictions.

132. One of the battle-of-jurisdictions' wings is Articles 248.1 and 248.2 of the Russian Arbitrazh (Commercial) Procedure Code ("**APC**"). The Articles allow Russian parties to ask Russian Arbitrazh (Commercial) courts to consider disputes on merits and impose anti-suit injunctions over foreign proceedings if the dispute resolution clause agreed by the parties (e.g., arbitration agreement) is no longer enforceable. The Russian courts can recognize such dispute resolution clause unenforceable due to imposed sanctions that restrict access to justice outside Russia. The penalty for not following the injunction is usually equal to the claims submitted or expected to be claimed outside Russia.

133. Two landmark decisions of the Russian Supreme Court show the court practice tendencies on the matter. In *Uralvagonzavod v PESA*[72], the Russian Supreme Court held that the mere fact of sanctions imposed over a party is enough to presume that access to justice outside Russia is impeded. The Supreme Court expressed doubts about due process in disputes with Russian parties litigated or arbitrated in countries that have imposed sanctions. In another recent position in *NS-Bank v Lukoil*,[73] the Russian Supreme Court expanded the test: Russian courts can determine their exclusive competence regardless of a dispute resolution clause if the sanctions themselves have caused the dispute or some associated hurdles to limit access to justice outside Russia.

134. As part of the EU counter-measures, under the 14th package of sanctions, the EU has imposed a transactional ban on companies that use Articles 248.1 and 248.2 of APC.[74] Under the 15th

[72] Ruling of the Supreme Court of the Russian Federation of 9 December 2021 No. 309-ЭС21-6955 (1-3) in case No. A60-36897/2020.
[73] Ruling of the Supreme Court of the Russian Federation of 28 November 2024 No. 305-ЭС24-13398 in case No. A40-214726/2023.
[74] Council Regulation (EU) No 2024/1745 of 24 June 2024 amending Regulation 833/2014. See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401745; Council Decision (CFSP) No 2024/1744 of 24 June 2024 amending Decision No 2014/512/CFSP. See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L_202401744.

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package, the EU have forbidden enforcement in the EU of any Russian judgements rendered under the said Articles.[75]

135. Counting from *Uralvagonzavod* till the 14th package of the EU sanctions, Russian courts considered around 480 cases under Articles 248.1 and 248.2 of APC and determined their jurisdiction either on merits or to impose antisuit injunctions in 392 cases – i.e., in more than 80% of cases.[76]

136. We observe that recent trends incentivize more Russian companies to utilize Articles 248.1 and 248.2 of APC. The 14th and 15th EU sanctions packages do not discourage Russian parties lacking assets located outside Russia from pursuing this strategy. Moreover, recent Russian court practice allows piercing corporate veil to recover claimed sums from all the affiliated companies having assets in Russia, as well as bankruptcy of foreign companies in Russia, which incentivizes more Russian parties to have their disputes considered in Russia.

137. When circumstances allow, lawyers stay committed to principles of international arbitration and advise clients in favor of an agreed by the parties forum. If CJEU holds that Article 11 of Regulation 833 should be interpreted extensively to cover claims for repayment of advance amounts, and those tried in arbitration particular, it will increase the caseload under Articles 248.1 and 248.2 of APC. Eventually, the CJEU's ruling on Article 11 would backfire primarily at European companies. This scenario would damage international arbitration as a peaceful means for resolving disputes.

SECTION 5. THE "NO-CLAIMS" EXPROPRIATION WILL TRIGGER INVESTMENT CLAIMS

138. Finally, Article 11 of Regulation 833 should be interpreted in the light of the fundamental principles of international law, protection of foreign investment and the prohibition of illegal expropriation. Therefore, a broad interpretation of Article 11, particularly one that prevents

[75] Council Regulation (EU) No 2024/3192 of 16 December 2024 amending Regulation 833/2014. See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL_202403192.
[76] We have been tracking all the cases on the matter from December 2021. The statistics is taken from our last study published in September 2024. See https://www.kiap.com/upload/iblock/4eb/kv3shr3nksvl722801f2yck60n23m9rq/KIAP-Alert-ENG-with-Annex.pdf.

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the restitution of advance payments or the enforcement of contractual rights, risks violating these principles and exposing the EU and its Member States to significant investment treaty claims.

139. Under customary international law, bilateral investment treaties (BITs) and International Investment Agreements (IIAs), such as the Energy Charter Treaty, an expropriation occurs when a governmental action substantially deprives an investor of the use, enjoyment or economic value of its investment, regardless of whether formal title is transferred. Such measures, if not accompanied by adequate compensation, due process and a legitimate public purpose, violate international obligations under IIAs and BITs, and domestic investment laws.

140. International law distinguishes direct expropriation from indirect expropriation. In the first case, the investor is dispossessed of its property; in the second, the investor keeps its property, but the value of the investment is severely affected by measures adopted by the State.[77] As it has been established by the ICSID Tribunal in the *Telenor v. Hungary* case, indirect expropriation occurs when, without the taking of property, the measures of which complaint is made substantially deprive the investment of economic value. The other notable conclusion of the arbitral tribunal in this case is that there may be "creeping" expropriation involving a series of acts over a period of time none of which is itself of sufficient gravity to constitute an expropriatory act but an of which taken together produce the effects of expropriation.[78] In another notable case - *Wena Hotels v. Egypt* the Arbitral Tribunal found that even a temporary deprivation of property rights meets the criteria for expropriation.[79] The legitimate expectations of the investor at the time the investment was made are a key factor in determining whether an indirect expropriation has occurred.

141. A broad interpretation of Article 11, particularly if it is construed to prevent the enforcement of arbitral awards or the restitution of advance payments, resulting in the deprivation of

[77] Yves Derains, Introduction to Investor-State Arbitration, (© Kluwer Law International; Kluwer Law International 2018) p 115.
[78] *Telenor v. Hungary* (ICSID Case No. ARB/04/15), Award, 13 September 2006, para. 63
[79] *Wena Hotels v. Egypt* (ICSID Case No. ARB/98/4), Award, 8 December 2000, para. 99.

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assets belonging to Russian investors, could amount to at least indirect expropriation and thus trigger investment claims against EU and its Member States under ILAs and BITs. According to our position, if a Russian company invested in an EU project and paid a substantial advance, and Article 11 is interpreted to prevent the recovery of that advance due to sanctions, this could be viewed as an expropriation of the investment. The fair and equitable treatment standard, which is found in most BITs, requires states to act in a transparent, non-discriminatory, and reasonable manner. A broad interpretation of Article 11 could be seen as violating this standard and imposing discriminatory measures that unfairly target Russian investors.

142. A majority of EU Member States have entered into numerous BITs and IIAs with Russia, which include provisions protecting against unlawful expropriation, introduce full protection and security standard, and ensure investor's right to fair and equitable treatment.[80] Many of these BITs establish investor-state dispute settlement (ISDS) mechanisms, allowing Russian investors to challenge state measures before international arbitral tribunals, which are outside the reach of ECJ and national courts of the EU Member States. The broad interpretation of Article 11 is likely to result in a surge of such claims in the near future, as affected investors could argue that their property rights have been nullified or rendered inutile in violation of international investment law. It should be noted that some BITs also contain 'umbrella clauses', which require states to honour their contractual obligations with investors. An expansive interpretation of Article 11 could be construed as a breach of these clauses.

143. The "legal duel" between Russian investors and EU member states has already begun with the *Mikhail Maratovich Fridman v Luxembourg* case, where a Russian businessman Mikhail Fridman based his claim against Luxembourg on, among other things, the sanctions that deprived Mr Fridman of his assets.[81] The claim is yet to be decided by an arbitral tribunal,

[80] For instance, respective agreements were entered into between the USSR/Russia and Austria, Belgium/Luxembourg, Bulgaria, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Netherlands, Romania, Slovakia, Spain, Sweden

[81] *Fridman v, Luxembourg*. See Politico. Russian oligarch files $16B claim against Luxembourg over frozen assets. Link: https://www.politico.eu/article/mikhail-fridman-16-billion-claim-luxembourg-frozen-asset-russia-oligarch/

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however, it clearly indicates that Russian investors are ready and willing to protect their rights by means of investment arbitration.

144. The other notable recent example is a claim of Belaruskali, a sanctioned Belarusian state-owned entity against Lithuania where the amount of compensation sought by the claimant reaches US$12 billion.[82] As follows from the available sources, Belaruskali maintains that the sanctions are not a valid ground for the contract's termination.[83]

145. In addition to that, in 2024 Belgium reported being threatened with treaty claims over the billions of dollars in Russian assets that have been frozen in the country.[84]

146. It could hardly be asserted that the allegations of Russian or Belarus investors are unfounded. Thus, in several cases, the investment tribunals have already qualified the sanctions imposed by the state on the assets of the investor company as a clear case of indirect expropriation. For example, in *Occidental Petroleum v. Ecuador* the tribunal found that Ecuador's unilateral termination of a contract and subsequent actions against the investor constituted expropriation.[85] The case established that even regulatory or administrative measures could cross the threshold of expropriation if they substantially affect the economic value or control of the investment. This case is particularly relevant for the interpretation of Article 11 because it demonstrates that unilateral state actions—such as revocation of contracts, regulatory enforcement, or asset seizures—can be considered expropriation under international investment law if they are excessive and fail to provide proper compensation.

147. Another relevant example is *Bank Melli and Bank Saderat v. Bahrain*. In this case, the arbitral tribunal considered whether the imposition of unilateral economic sanctions by Bahrain, including asset freezes and banking restrictions, constituted an expropriation of Iranian banks' investments. The claimants argued that the sanctions deprived them of their ability to operate effectively and access their assets, resulting in significant financial losses.

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[82] See: Global Arbitration Review. PCA reveals size of mega-claim against Lithuania. Link: https://globalarbitrationreview.com/article/pca-reveals-size-of-mega-claim-against-lithuania
[83] Ibid.
[84] See: Global Arbitration Review. Belgium risks treaty claims over Russian asset freezes
Link: https://globalarbitrationreview.com/article/belgium-risks-treaty-claims-over-russian-asset-freezes
[85] *Occidental Petroleum Corporation v. The Republic of Ecuador* (ICSID Case No. ARB/06/11).

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The tribunal acknowledged that economic sanctions could, under certain circumstances, amount to expropriation if they substantially deprive investors of the use and benefit of their investments without adequate compensation.[86]

148. In the case of advance payments, EU member states could argue that a mere refusal to fulfil an obligation does not amount to expropriation.[87] However, even in cases where such an approach has been adopted by the investment tribunals, respective findings were based on an assumption that such qualification could be given "at least where remedies exist in respect of such refusal."[88] A broad interpretation of Article 11 by the EU public bodies clearly leaves Russian parties with no alternative remedy and therefore creates a room for discussion on whether an expropriation has taken place. The EU might argue that Article 11 is justified under the "essential security interests" exception found in many BITs. However, we argue that this exception should be narrowly construed and that Article 11, as broadly interpreted, goes beyond what is necessary to protect the EU's security interests.

149. Notably, such a construction of Article 11 would transform liability from being the contractual liability of European persons to the liability of the EU Member States under the investment treaties. In other words, should Article 11 is construed broadly, the EU Member States will assume contractual liabilities of their nationals.

150. The other important consideration that should be considered when assessing the risk of investment claims is that neither domestic European courts, nor the ECJ, would be of assistance to EU Member States in defending such claims, as most BITs allow investors to commence proceedings outside the EU under the UNCITRAL Arbitration Rules. In such cases, the arbitral tribunal itself could determine the seat and place of arbitration, effectively bypassing domestic judicial mechanisms within the EU. This underlines the urgency for EU

[86] *Bank Melli and Bank Saderat v. Bahrain*, Award dated 9 November 2021. Available at: https://jusmundi.com/en/document/decision/en-bank-melli-iran-iran-and-bank-saderat-iran-iran-v-the-kingdom-of-bahrain-final-award-tuesday-9th-november-2021.
[87] E.g. in *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) the Tribunal found that "[t]he mere non-performance of a contractual obligation is not to be equated with a taking of property... something more is required."
[88] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6).

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Member States to adopt a narrow interpretation of Article 11 to reduce their exposure to investment arbitration claims.

151. Legal certainty is a cornerstone of the rule of law and a fundamental principle of both EU and international law. Meanwhile, a broad interpretation of Article 11 creates significant legal uncertainty for investors and undermines confidence in the EU's commitment to international legal obligations assumed by itself or its Member States. A narrow interpretation, providing, *inter alia*, that claims for advance payments are not prohibited under EU Law, ensures that any restrictions on Russian assets are subject to due process, and could be at least considered consistent with the principles of legal certainty and predictability.

152. Therefore, given the serious legal and financial implications of a broad interpretation of Article 11, including the risk of indirect expropriation and subsequent investment claims against the EU or its Member States, a narrow and carefully defined application of Article 11 creates a legally sound and most rational approach. Such an interpretation ensures compliance with international investment law, upholds the principles of legal certainty and minimises the risk of costly investment proceedings. For these reasons, we believe that the Court should favour a restrictive application of Article 11, which respects the property rights of affected investors while ensuring that the objectives of the Regulation are achieved in a manner consistent with the international legal obligations of the EU and its Member States.

CONCLUSION

We believe that the outcome of this case will have significant long-term implications for the international arbitration community.

Therefore, we are grateful for the opportunity to contribute to CJEU's consideration of this matter and trust that our views will provide valuable insights and will contribute meaningfully to the CJEU's deliberations.

Should the Court require any additional information, we stand ready to assist.

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Sincerely,

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