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Contracts and Economic Sanctions

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The use of economic sanctions—governmental restrictions on the economic activity of other nations, their officials, and often their general population[1]—appears to be a prevalent feature of contemporary international politics.[2] Unavoidably, sanctions may also have a significant effect on a party's rights and obligations. This article argues that a contracting party, particularly when operating in a transnational context, cannot rest upon the assumption that the imposition of sanctions is an extraordinary and unusual event that is unlikely to have an impact upon the party's rights and obligations.

Part I offers some historical context for the dramatic changes in economic sanctions practice in the contemporary business environment.[3] Part II considers the prevalence of economic sanctions programs in the current transnational business sector and argues that this feature requires attention in the negotiation and formation of contracts, particularly in light of the heightened risks that may be associated with transnational transactions. Part III considers whether traditional contract doctrines like impracticability might offer any solace to parties involved in transnational business and argues that the obvious prevalence of sanctions in international law and policy may limit the utility of such doctrines. As a result,

 This article is based upon a presentation made during a mid-2021 panel of the International Conference on Contracts (KCon) hosted by the University of the Pacific, McGeorge School of Law. Portions of this article are derived from an extended work in preparation, MICHAEL P. MALLOY, THE STRUCTURE OF ECONOMIC SANCTIONS, CAMBRIDGE UNIV. PRESS (forthcoming June 2024).

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1. This may be a useful working definition of what is meant by the term *economic sanctions*, but in fact there is considerable disagreement as to the scope of the term. "[I]n common parlance the term 'sanction' has a variety of connotations, and even within the context of international law, the term does not have an intuitive or immutable meaning." MICHAEL P. MALLOY, UNITED STATES ECONOMIC SANCTIONS: THEORY AND PRACTICE 6 (2001) (footnotes omitted).

2. For example, in the first six months of the Biden presidency, the Administration issued eight proclamations or executive orders initiating, amending, or expanding economic sanctions with respect to four broad international situations and four target nations. *See* Table, Part II *infra* (identifying recent presidential actions).

3. Because the KCon presentation occurred in mid-2021, this article does not include specific treatment of the latest U.S. economic sanctions imposed on Russia in response to the invasion of Ukraine. *But see* Table, *infra*, n.5 (citing recent U.S. sanctions imposed in response to Russian invasion of Ukraine).

Part IV concludes by urging a proactive approach to the management of risks associated with economic sanctions.

I. HISTORICAL CONTEXT

While economic sanctions may seem a very modern device responsive to an intensely transnational environment, in fact their use has deep classical roots. The earliest documented example of economic sanctions may be the Megarian import embargo imposed by Pericles in 432 B.C., one of the events prompting the Peloponnesian War.[4] In our own legal tradition, economic sanctions have common law roots in the United States[5] and Britain,[6] and trading with a declared enemy state or its nationals was prohibited. Indeed, even private commercial interaction with nationals of declared enemies was traditionally viewed as treason.[7]

In modern U.S. practice, economic sanctions are almost exclusively a matter of legislative authority and prohibition, both in times of war and during periods of declared national emergency. The first modern statute in this regard was section 5(b) of the Trading With the Enemy Act (TWEA).[8] This statute was intended to authorize the president to impose sanctions on enemy nations, their allies, and their nationals in wartime[9] and, beginning in 1933, during wartime or a declared national emergency.[10]

Since 1977, the use of the TWEA has once again been limited exclusively to wartime.[11] For situations that may be critical but without a formal declaration of war—an increasingly common situation in the post-World War II period—new

4. *See* THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR 65 (Richard Crawley trans., 2008) ("There were many who came forward and made their several accusations; among them the Megarians, in a long list of grievances, called special attention to the fact of their exclusion from the ports of the Athenian empire and the market of Athens, in defiance of the treaty."); *see also* Charles Fornara, *Plutarch and the Megarian Decree*, *in* STUDIES IN THE GREEK HISTORIANS 213–228 (Donald Kagan ed., 1975) (discussing Megarian embargo).

5. *See, e.g.*, *Trading with the Enemy: Legislative and Executive Documents Concerning Regulation of International Transactions in Time of Declared National Emergency Before the Subcomm. on Int'l Trade & Com. of the H. Comm. on Int'l Relations*, 94th Cong. 2d Sess. 45–47 (1976) (discussing cases; reproducing remarks of Rep. Montague during House debate on original Trading with the Enemy Act of 1917).

6. *See id.* at 45–46 (discussing British cases); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES 260–261, 372–373 (discussing effect of war on foreign merchants and enemy aliens); 2 WILLIAM BLACKSTONE, COMMENTARIES 401 (discussing effect of state of enmity on property of enemy aliens).

7. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES 82 (discussing aid and comfort to king's enemies as form of treason).

8. 50 U.S.C. § 4305(b) (originally 50 App. U.S.C. § 5(b)). For discussion of the TWEA and its economic sanctions authority, see MICHAEL P. MALLOY, UNITED STATES ECONOMIC SANCTIONS: THEORY AND PRACTICE 150–62 (2001).

9. Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917) (codified at 50 App. U.S.C. §§ 1–44) (current version at 50 U.S.C. § 4301).

10. Trading with the Enemy Act, ch. 1, § 2, 48 Stat. 1 (1933) (codified at 50 App. U.S.C. § 5) (current version at 50 U.S.C. § 4305).

11. Trading with the Enemy Act Amendments of 1977, Pub. L. No. 95-223, Title I, §§ 101–103, 91 Stat. 1625, 1626 (1977). On the legislative history of the TWEA, see MALLOY, *supra* note 1, at 151–157.

statutory authority was created for economic sanctions, the International Emergency Economic Powers Act ("IEEPA").[12]

Completing the range of basic sanctions authority in U.S. statutory law, we have section 5 of the United Nations Participation Act of 1945, which provides explicitly for presidential sanctions declared to carry out responsibilities as a member state of the United Nations with respect to mandatory measures imposed by the U.N. Security Council under Article 41 of the U.N. Charter.[13] However, invocation of Article 41 by the Security Council was a relatively dormant power until the beginning of the present century. In any event, this economic sanctions authority does not preempt individual state action not inconsistent with mandatory measures that the Security Council might adopt, if any.[14]

It would seem, then, that the statutory framework for sanctions assumes that declared war, or something in the nature of an "unusual and extraordinary threat," is the basis for the use of economic sanctions.[15] Yet in recent times, sanctions have become something approaching a common feature of U.S. international economic policy,[16] affecting nations, their nationals, and related persons across all continents except, arguably, Antarctica.[17] Hence, the likely impact and effects of economic sanctions may be relatively more "foreseeable" today than they might have been a century ago, when the imposition of sanctions would have been a genuinely unusual or extraordinary event.

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12. Trading with the Enemy Act Amendments of 1977, Pub. L. No. 95-223, Title II, §§ 201–208, 91 Stat. 1625 at 1626–1628. On the legislative history of the IEEPA, see MALLOY, *supra* note 1, at 172–176.

13. 22 U.S.C. § 287c.; U.N. Charter art. 41, which provides:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

14. *Cf.* U.N. Charter art. 51 (referring to "the inherent right of individual or collective self-defence").

15. 50 U.S.C. § 1701(a).

16. *See, e.g.*, *Sanctions Programs and Country Information*, U.S. DEP'T TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information (last visited Jan. 22, 2022) (on file with the *University of the Pacific Law Review*) (listing 36 sanctions programs administered by the Treasury Department's Office of Foreign Assets Control ("OFAC")).

17. *Cf. Sanctions List Search*, OFF. FOREIGN ASSETS CONTROL, https://sanctionssearch.ofac.treas.gov/ (last visited Jan. 22, 2022) (on file with the *University of the Pacific Law Review*) (providing search device identifying persons subject to economic sanctions based on, *inter alia*, location).

II. PREVALENCE OF CONTEMPORARY ECONOMIC SANCTIONS

There is such a wide array of sanctions in place—unilateral and multilateral,[18] trade and financial,[19] direct and indirect[20]—that sanctions are now almost a defining characteristic of contemporary international relations.[21] As a result, it would be misleading to view economic sanctions as "unusual" or "emergency," rather than a commonplace feature of contracting in the transnational market.[22] The potential impact of economic sanctions is therefore an increasingly pervasive risk factor in transnational contracting, as should be evident from the Table, *infra*, which identifies sanctions-related actions undertaken by the current U.S. Administration in its first six months.

The prominence of this risk factor has emerged from three distinct features of contemporary transnational practice. First, whatever their actual effectiveness, since the end of the Cold War, there has been a resurgence of U.N. mandatory sanctions practice under Article 41 of the U.N. Charter.[23]

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18. *Compare*, *e.g.*, Exec. Order No. 13,466, 73 C.F.R. 36,787 (2008) (invoking IEEPA against North Korean nuclear program), *with* Exec. Order No. 13,551, 75 C.F.R. 53,837 (2010) (invoking IEEPA and UNPA, in light of S.C. Res. 1718 (Oct. 14, 2006), https://www.un.org/securitycouncil/s/res/1718-%282006%29 and S.C. Res. 1874 (June 12, 2009), https://www.un.org/securitycouncil/s/res/1874-%282009%29.

19. *Compare*, *e.g.*, 31 C.F.R. §§ 510.205–510.206 (prohibiting importation from and exportation to North Korea) *with* 31 C.F.R. § 525.201 (blocking property of specified persons related to military coup in Myanmar).

20. *See, e.g.*, 31 C.F.R. § 510.205(a) (prohibiting importation of goods "directly or indirectly . . . from North Korea"); *see also* United States v. Broverman, 180 F. Supp. 631, 636 (S.D.N.Y. 1959) (holding that importation prohibition applied where target country had indirect interest in foreign trade in its goods, not necessarily a present interest).

21. *See* Margaret Doxey, *Reflections on the Sanctions Decade and Beyond*, 64 INT'L J. 539, 539 (2009) ("In the second half of the 20th century, continuing into the 21st, unilateral, regional and, in the post-Cold War period, United Nations sanctions have been extensively used.").

22. *See, e.g.*, Amy Deen Westbrook, *What's in Your Portfolio?: U.S. Investors Are Unknowingly Financing State Sponsors of Terrorism*, 59 DEPAUL L. REV 1151, 1152–1153 (2010):

> One might assume that if the United States has designated a country as [a state sponsor of terrorism] and has imposed sanctions, then it has isolated that country because U.S. companies may not conduct business in the embargoed nation, and U.S. investors may not invest in companies that conduct business there.
>
> The legal situation is more complex. U.S. sanctions may not apply to non-U.S. companies that sell securities in the United States or to non-U.S. subsidiaries of U.S. companies. Although U.S. companies cannot do business in most countries subject to U.S. sanctions, if a foreign country opts not to impose sanctions, then its companies may lawfully conduct business there. This creates an opportunity for regulatory arbitrage.

23. *See* Kimberly Ann Elliott, *Assessing UN Sanctions After the Cold War*, 65 INT'L J. 85, 95 (2009–10) (noting that, after the Iraq invasion of Kuwait, "the UN security council was more vigorous in its responses").

Table. Recent Presidential Action concerning Economic Sanctions

Presidential Action	Citation 86 Fed. Reg.	Date	Subject	Substantive Statutory Authority
Proclamation 10142	7225	Jan. 20, 2021	Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction	National Emergencies Act (NEA)[1]
Proclamation 10143	7467	Jan. 25, 2021	Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019	Immigration and Nationality Act, §§ 212(f), 215(a)[2]
Executive Order 14014	9429	Feb. 10, 2021	Blocking Property with Respect to the Situation in Burma	INA § 212(f) International Emergency Economic Powers Act (IEEPA)[3]
E.O. 14022	17895	April 1, 2021	Termination of Emergency with Respect to the International Criminal Court	INA, IEEPA

[1] 50 U.S.C. §§ 1601 *et seq.*
[2] 8 U.S.C. §§ 1182(f), 1185(a).
[3] 50 U.S.C. §§ 1701 *et seq.*

E.O. 14024	20249	April 15, 2021	Blocking Property with Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation[4]	INA, IEEPA
E.O. 14032	30145	June 3, 2021	Addressing the Threat from Securities Investments that Finance Certain Companies of the People's Republic of China	IEEPA
E.O. 14033	31079	June 8, 2021	Blocking Property and Suspending Entry Into the United States of Certain Persons Contributing to the Destabilizing Situation in the Western Balkans	INA, IEEPA
E.O. 14034	31423	June 9, 2021	Protecting Americans' Sensitive Data From Foreign Adversaries	IEEPA

[4] This executive order was primarily in response to Russian interference with the 2020 U.S. elections through "efforts to undermine the conduct of free and fair democratic elections and democratic institutions in the United States and its allies and partners; to engage in and facilitate malicious cyber-enabled activities against the United States and its allies and partners; to foster and use transnational corruption to influence foreign governments; to pursue extraterritorial activities targeting dissidents or journalists; to undermine security in countries and regions important to United States national security." Ex. Order No. 14024, 86 Fed. Reg. 20,249, 20,249 (2021). It would be followed later in 2021 and the following year by new executive orders imposing sanctions in response to the extended invasion of Ukraine by Russia. *See*, *e.g.*, Ex. Order No. 14065, 87 Fed. Reg. 10,293 (Feb. 21, 2022) (blocking property of certain persons and prohibiting transactions with respect to continued Russian invasion of Ukraine); Ex. Order No. 14066, 87 Fed. Reg. 13,625 (Mar. 8, 2022) (prohibiting certain imports and new investments in response to Russian invasion of Ukraine; expanding scope of national emergency declared in Ex. Order No. 14024); Ex. Order No. 14068, 87 Fed. Reg. 14,381 (Mar. 11, 2022) (prohibiting certain imports, exports, and new investment with respect to continued Russian aggression).

Before 1990, U.N. sanctions practice was limited and ineffective, a fact that U.N. trade sanctions against the break-away Southern Rhodesian regime in the1960s illustrated.[24] In response to the Iraq invasion of Kuwait in 1990, however, U.N. mandatory sanctions effectively isolated occupied Kuwait as well as the Iraqi Government, as a prelude to the first Gulf War.[25] The apparent success of this program led to frequent and pervasive application of mandatory sanctions as the primary U.N. Security Council response to many crises since then.[26] The result of this trend is that there is now a formidable array of sanctions programs in which implementation is mandatory for all U.N. member states, actively monitored by the Security Council through sanctions committees.[27] Consequently, moving contract activities off-shore—a typical maneuver in many pre-1990 sanctions programs, including the Southern Rhodesian sanctions—was no longer an easy and viable option.[28]

Of course, many states, and principally the United States, have continued to promulgate unilateral sanctions programs, often paralleling multilateral sanctions, and these programs have benefited from the newly pervasive incidence of sanctions as a risk factor in transnational contract practices. Hence, the former dissonance of the policy objectives of U.S. economic sanctions and the prevailing attitudes of U.S. trading partners, which often blunted the effectiveness of those sanctions,[29] is not necessarily as significant a factor in more complex relationships between multilaterally mandated sanctions and unilateral but parallel sanctions programs.

Second, the impact of economic sanctions as a risk factor in transnational contracting is also affected by the emergence of "smart sanctions" strategies in the design of sanctions programs. Contemporary sanctions are often more carefully targeted, and include specific and distinct sanctions against intermediaries[30]—for example, business brokers, freight forwarders, purchasing agents, banks, and other financial intermediaries—which has the effect of shifting direct and indirect costs

24. MALLOY, *supra* note 1, at 87–90.

25. *Id.* at 113–118.

26. Elliott, *supra* note 23, at 97 (providing table illustrating the growth of U.N. sanctions programs from Cold War period through 2010). *Cf.* MALLOY, *supra* note 1, at 35 and Figure 2.1 (noting "marked increase in the rate at which sanctions programs have been initiated" and illustrating history of U.S. sanctions, including multilateral sanctions, in the Twentieth Century).

27. *See generally* Joanna Wechsler, *The Evolution of Security Council Innovations in Sanctions*, 65 INT'L J. 31–43 (2009–10) (providing thorough analysis of development of Security Council practice).

28. *See* Eighth Report of the Security Council Committee, U.N. Doc. S/11927/Add. 1 (1976); *see also* MALLOY, *supra* note 1, at 89 (noting that compliance with U.N. Rhodesian sanctions "was a continuing source of concern").

29. *See, e.g.*, Jason Collins Weida, *Reaching Multinational Corporations: A New Model for Drafting Effective Economic Sanctions*, 30 VT. L. REV. 303, 347 (2006) (arguing that assertion of U.S. authority over foreign subsidiaries of U.S. firms "is unlikely to succeed in all, or perhaps even most, situations that call for the application of an economic sanction").

30. *See, e.g.*, Ex. Order No. 13,224, § 1(d)(i), 66 Fed. Reg. 49,079, 49,080 (2001) (blocking property and prohibiting transactions with, *inter alia*, persons who "provide financial, material, or technological support for, or financial or other services to or in support of" terrorist acts or persons designated as terrorists).

of sanctions avoidance and evasion to indirect and secondary contracting parties that would not otherwise be viewed traditionally as sanctions targets.[31] This has led to a significantly increased focus on prohibitions against money laundering and against the provision of resources to primary targets. However, "smart sanctions" also raise critical concerns about their conformity with significant legal norms like respect for human rights, including the right to privacy.[32]

Third, the impact of sanctions as a risk factor in transnational contracting is also shaped by the availability of licensing within sanctions programs. The existence of authority for a participating U.N. member state to license transactions otherwise affected by a sanctions program, subject to oversight by a U.N. sanctions committee, actually increases the compliance and enforcement impact of sanctions programs. If a licensing process is potentially available, this imposes greater accountability for transnational contract parties.

III. SANCTIONS AND TRADITIONAL CONTRACT DOCTRINE

If a particular contract is prohibited by pertinent economic sanctions, the provisions of the implementing regulations typically will declare the transaction void.[33] However, intervening sanctions may affect existing contracts, or they may have an indirect effect on the contract because of the collateral interest of a sanctions target. One might argue that contract doctrines like impossibility, impracticability, and frustration would ameliorate the impact of sanctions in this regard. Unfortunately, the interaction of these doctrines with current practices in transnational business may complicate the analysis. Under Restatement (Second) of Contracts § 261, for example, a party to a contract indirectly impacted by sanctions might claim that performance has been rendered "impracticable," thus discharging the party's duty to perform. However, to apply to this situation, § 261 requires the occurrence of an event 'after a contract is made' that occurs "without

31. *See generally* Michael P. Malloy, *Unfunding Terror – Perspectives on Unfunding Terror*, 17 TRANSNAT'L LAW. 97 (2004) (discussing attention to access to financial resources as a feature of modern sanction, rather than a focus on the primary targets themselves).

32. *See, e.g.*, Carla L. Reyes, *WTO-Compliant Protection of Fundamental Rights: Lessons from the EU Privacy Directive*, 12 MELB. J. OF INT'L L. 141 (2011), https://law.unimelb.edu.au/__data/assets/pdf_file/0010/1686934/Reyes.pdf (considering ways to protect fundamental rights through domestic regulation of trade in services); Maya Lukić, *The Security Council's Targeted Sanctions in the Light of Recent Developments Occurring in the EU Context*, LVII ANNALS OF THE FACULTY OF LAW IN BELGRADE – BELGRADE LAW REVIEW 239 (2009), *reprinted in* 2 MICHAEL P. MALLOY (ed.), ECONOMIC SANCTIONS ANTHOLOGY 594 (2015) (discussing right to privacy and the application of targeted sanctions).

33. *See, e.g.*, 31 C.F.R. § 510.202(a), which provides:

> Any transfer after the effective date [of the regulations] that is in violation of any provision of this part or of any regulation, order, directive, ruling, instruction, or license issued pursuant to this part, and that involves any property or interests in property blocked pursuant to § 510.201 is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power, or privilege with respect to such property or interests in property.

[the party's] fault." The pervasiveness of a wide array of sanctions programs challenges both of these premises. The sanctions may already be in place, and in the typical sanctions program the party bears the burden of demonstrating that it did not know, nor had reason to suspect, that the subject transaction was prohibited or restricted.[34] As the official commentary to Restatement (2d) of Contracts § 261 observes,

> If the event that prevents the obligor's performance is caused by the obligee, it will ordinarily amount to a breach by the latter. . . . . If the event is due to the fault of the obligor himself, this [§ 261] does not apply. As used here "fault" may include not only "willful" wrongs, but such other types of conduct as that amounting to breach of contract or to negligence.[35]

Of course, this dilemma exists quite aside from any administrative or criminal consequences that might be visited on the parties by a sanctions-enforcing state. Goods or services that are the subject of the contract may also be susceptible to being "blocked" or "frozen" by the enforcing state.[36] The same problem would

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34. *See, e.g.*, 31 C.F.R. § 510.202(d), which provides, with respect to a transactions involving an interest of North Korea or a designated person:

> (d) Transfers of property that otherwise would be null and void or unenforceable by virtue of the provisions of this section shall not be deemed to be null and void or unenforceable as to any person with whom such property is or was held or maintained (and as to such person only) in cases in which such person is able to establish to the satisfaction of OFAC each of the following:
>
> (1) Such transfer did not represent a willful violation of the provisions of this part by the person with whom such property is or was held or maintained (and as to such person only);
>
> (2) The person with whom such property is or was held or maintained did not have reasonable cause to know or suspect, in view of all the facts and circumstances known or available to such person, that such transfer required a license or authorization issued pursuant to this part and was not so licensed or authorized, or, if a license or authorization did purport to cover the transfer, that such license or authorization had been obtained by misrepresentation of a third party or withholding of material facts or was otherwise fraudulently obtained; and
>
> (3) The person with whom such property is or was held or maintained filed with OFAC a report setting forth in full the circumstances relating to such transfer promptly upon discovery that:
>
> (i) Such transfer was in violation of the provisions of this part or any regulation, ruling, instruction, license, or other directive or authorization issued pursuant to this part;
>
> (ii) Such transfer was not licensed or authorized by OFAC; or
>
> (iii) If a license did purport to cover the transfer, such license had been obtained by misrepresentation of a third party or withholding of material facts or was otherwise fraudulently obtained.

(Emphasis added.) Significantly, Note 1 to § 510.202(d) advises that "[t]he filing of a report in accordance with the provisions of paragraph (d)(3) of this section shall not be deemed evidence that the terms of paragraphs (d)(1) and (2) of this section have been satisfied." Proof of the person's lack of knowledge or reason to know that the transaction was in violation of the sanctions presumably must be derived from objective "facts and circumstance known or available to" the person, not a post facto realization.

35. RESTATEMENT (SECOND) OF CONTRACTS § 261, comment d (AM. L. INST. 1981).

36. *Cf.* 31 C.F.R. § 510.101(a)(1)–(2):

exist for a contract party who attempted to invoke the doctrine of discharge by a supervening frustration under Restatement (2d) of Contracts § 265. This may be a particular concern for indirect or intermediary parties, a point that is demonstrated by Illustration 5 under § 265:

> A contracts to sell and B to buy a machine, to be delivered to B in the United States. B, as A knows, intends to export the machine to a particular country for resale. Before delivery to B, a government regulation prohibits export of the machine to that country. B refuses to take or pay for the machine. If B can reasonably make other disposition of the machine, even though at some loss, his principal purpose of putting the machine to commercial use is not substantially frustrated. B's duty to take and pay for the machine is not discharged, and B is liable to A for breach of contract.[37]

Furthermore, given the typical licensing regime that is included in sanctions programs, 'impracticability' may be even less apparent in a particular contracting situation. As comment d to § 261 goes on to note, "'impracticability' means more than 'impracticality.' A mere change in the degree of difficulty or expense . . .. . . unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover."[38] One might argue, of course, that if performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, then the regulation or order is "an event the non-occurrence of which was a basic assumption on which the contract was made," according to Restatement (2d) of Contracts § 264.[39] However, comment a to § 264 undercuts this argument, because

> [w]ith the trend toward greater governmental regulation . . . , parties are increasingly aware of such risks, and a party may undertake a duty that is not discharged by such supervening governmental actions, as where governmental approval is required for his performance and he assumes the risk that approval will be denied. . . .. . . Such an agreement is usually interpreted as one to pay damages if performance is prevented rather than one to render a performance in violation of law.[40]

(a)(1) All property and interests in property that are in the United States, that come within the United States, or that are or come within the possession or control of any U.S. person of the Government of North Korea or the Workers' Party of Korea are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

(2) All property and interests in property of North Korea or a North Korean national that were blocked pursuant to the Trading With the Enemy Act as of June 16, 2000 and remained blocked on June 26, 2008, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

37. RESTATEMENT (SECOND) OF CONTRACTS § 261, Illus. 5 (AM. L. INST. 1981).
38. RESTATEMENT (SECOND) OF CONTRACTS § 261, comment d (AM. L. INST. 1981).
39. RESTATEMENT (SECOND) OF CONTRACTS § 264 (AM. L. INST. 1981).
40. RESTATEMENT (SECOND) OF CONTRACTS § 264, comment a (AM. L. INST. 1981).

This problem is underscored by Restatement (2d) of Contracts § 266, dealing with existing impracticability or frustration. In a situation where, at the time of contracting, the party's performance is impracticable without his fault, "no duty to render that performance arises," but only if this fact is one which it had "no reason to know," [41] which may be a difficult argument to make in an environment of pervasive sanctions programs.

IV. CONCLUSION

These considerations suggest the need for caution and active monitoring of contract activity in the transnational market. It is extremely disingenuous to assume that one can casually rely on traditional doctrines of impossibility, impracticability, and frustration in transnational commerce. Unfocused reliance on these doctrines can result in a bitter lesson in the modern environment of transnational contract practice. Alive to the possible impact of modern economic sanctions practice, one should consider whether distribution of the potential risk of intervening sanctions should be explicitly negotiated at the time of contracting.

41. RESTATEMENT (SECOND) OF CONTRACTS § 266 (AM. L. INST. 1981).