

Economic Sanctions in EU Private International Law

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Introduction

I. Economic Sanctions in Private International Law

Economic sanctions are ‘anomalies’ in the logic of free trade. Basedow described economic sanctions as a ‘stroke of fate’ for the companies affected.¹ Racine calls embargoes the most restrictive rules for international commerce and he depicts an embargo as an islet of resistance against the liberty characterising global commerce and an attack against the freedom of economic exchange.²

In addition to their intrusive nature disturbing the free flow of commerce, economic sanctions are surrounded by general scepticism. Many authors call their effectiveness into question. Speaking about the sanctions imposed by the European Union (EU), the positions seem to be quite polarised. EU sanction policy or a particular sanction regime was found by some authors to be successful,³ effective or ‘a relevant foreign policy tool’.⁴ However, doubts also encompass the effectiveness of the economic sanctions imposed by the EU. The EU has been the subject of criticisms that its sanctions pursuing foreign policy objectives are ‘generally ineffective’⁵ and they are applied inconsistently.⁶ In 1982, the European Parliament itself found in a resolution⁷ that:

- (b) economic sanctions have a history of failure,
- (c) economic sanctions have proved to be thoroughly unsatisfactory as a means of achieving foreign policy objectives, although they may be appropriate to complement other forms of action,

¹ Jürgen Basedow, ‘Entscheidung – Das Amerikanische Pipeline-Embargo vor Gericht. Niederlande: Pres. Rb. Den Haag 17. 9. 1982. (Fall Sensor)’ (1983) 47 *RechtsZ* 141, 157.

² Jean-Baptiste Racine, ‘L’arbitrage commercial international et les mesures d’embargo. À propos de l’arrêt de la Cour d’appel du Québec du 31 mars 2003’ (2004) 134 *Journal du droit international* 89, 90.

³ Concerning the sanctions against Russia, see NATO Review Magazine, ‘Sanctions after Crimea: Have They Worked?’, www.nato.int/docu/review/2015/Russia/sanctions-after-crimea-have-they-worked/EN/index.htm.

⁴ Leander Leenders, ‘EU Sanctions: A Relevant Foreign Policy Tool?’ College of Europe, EU Diplomacy Papers 3/2014, 9 and 27, https://www.coleurope.eu/system/files_force/research-paper/edp_3_2014_leenders_0.pdf?download=1.

⁵ Clara Portela, *European Union Sanctions and Foreign Policy* (Routledge, 2010) 101.

⁶ Klaus Brummer, ‘Imposing Sanctions: The Not So “Normative Power Europe”’ (2009) 14 *European Foreign Affairs Review* 191.

⁷ Resolution on the significance of economic sanctions, particularly trade embargoes and boycotts, and their consequences for the EEC’s relations with third countries, Minutes of the sitting of Monday, 11 October 1982 [1982] OJ C292/13.

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- (d) hardly any state can be induced by economic pressure to make radical changes in its policies. Such pressure is much more likely to result in the hardening of political attitudes, while the national economies of the state imposing sanctions and of third countries not directly involved are very often as seriously affected and badly damaged as the national economy of the state on which sanctions have been imposed,
- (e) there are many ways of circumventing and undermining economic sanctions. However stringently they are policed, it is impossible to guarantee that they are implemented absolutely consistently and without exception, at least in peace-time.

Taking the above into account, the European Parliament urged 'the Commission and Council not to associate themselves with any general sanctions which are manifestly unenforceable'⁸ and to use economic sanctions only sparingly.⁹ As Gherari points out, the total success of sanctions is as rare as their complete failure.¹⁰ This also holds for the sanctions imposed by the EU.

In spite of their anomalous nature and all doubts, economic sanctions are ubiquitous. It suffices to refer here to the sanctions imposed against Russia or Iran, which feature almost every day on the front pages of newspapers. Irrespective of the question of the effectiveness of economic sanctions, they are present in international trade and affect the legal relationships between private parties. If we take a glance at the economic sanctions adopted by the EU, the multiplication of economic sanctions is remarkable. As the number of trade restrictions grows, so the number of cases involving economic sanctions increases.¹¹ The current network of economic sanctions has a widespread effect on the contractual relationship of private parties, primarily on the relationship between a private party from the target state and other private parties, but economic sanctions may also have repercussions on relationships between private entities which are not directly related to the target state.

Economic sanctions may be examined from many angles. Political science, international economics¹² and the study of international relations often examine the effectiveness of economic sanctions. Here, the focus is on whether or not the target state yields due to the economic sanction and changes its policy considered to be harmful. Public international law examines the legality of sanctions. Administrative law establishes the detailed rules of export and import, together with the possibility of exemptions. And even criminal law plays a role in establishing the penalties for violating economic sanctions. Economic sanctions are an instrument

⁸ *ibid* para 1.

⁹ *ibid* para 4.

¹⁰ Habib Gherari, 'La mise en oeuvre des sanctions' in Habib Gherari and Sandra Szurek (eds), *Sanctions unilatérales, mondialisation du commerce et ordre juridique international* (Montchrestien, 1998) 53, 74.

¹¹ See Norbert Knüppel, *Zwingendes materielles Recht und internationale Schuldverträge* (Bonn, 1988) 2.

¹² See Gary Clyde Hufbauer, Jeffrey J Schott and Kimberly Ann Elliott, *Economic Sanctions Reconsidered: History and Current Policy* (Institute for International Economics, 1985).

of foreign policy. This is also the case with the EU, where economic sanctions are an important component of the Common Foreign and Security Policy (CFSP) and the EU has competence to impose restrictive measures in pursuit of specific CFSP objectives. From a human rights point of view, a further commonly asked question is whether the economic sanctions imposed by the EU comply with human rights standards, and the Court of Justice of the European Union (CJEU) has sometimes established – as in the famous *Kadi* judgment¹³ – that certain measures did not meet these standards. It is thus obvious that economic sanctions may be found at the intersections of various branches and areas of law.

However, this book takes a different point of departure, and this is the perspective of private international law. Export and import regulation, including economic sanctions, provides a fertile ground for conflict lawyers, since commercial relations affected by economic sanctions concern more than one state by their nature.¹⁴ Economic sanctions not only interlace economic relations between states, but also those between private parties. In fact, the court seised has to decide in a legal dispute between private parties involving the application of an economic sanction, the origin of which may be traced back to a conflict between two or more states,¹⁵ usually between the state of the forum and another state, but it may equally be the case that the conflict involves two foreign states. The same issue may arise in proceedings before arbitral tribunals which do not even have a forum state.

The sanctions ordered to be applied by diplomats and the legislature must be applied to concrete cases by courts and arbitral tribunals. It may sometimes be difficult to decide whether to give effect to a sanction in a given legal relationship. For the courts of the Member States of the EU, it is unproblematic when they have to apply EU sanctions, but many times the question is whether a sanction imposed by a third country is applicable. Although EU private international law provides some rules for such cases, the courts of the Member States still have considerable leeway.

One can assert that there are only two options: to give effect or not to an economic sanction. The binarity of the logic of application/non-application of economic sanctions has an enormous significance for private parties; first, at the phase of transaction planning, when they intend to prevent the application of an economic sanction to their legal relation or conform their conduct to an economic sanction; and, later, in the event of a legal dispute. At both stages, the significance for the legal relationship of the parties of the predictability of the application or non-application of an economic sanction cannot be overstated. Behind the binarity

¹³Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351.

¹⁴Bernhard Großfeld and Abbo Junker, *Das CoCom im internationalen Wirtschaftsrecht* (Mohr Siebeck, 1991) 10.

¹⁵François Gianviti, 'Le blocage des avoirs officiels iraniens par les Etats-Unis (executive order du 14 novembre 1979)' (1980) 69 *Revue critique de droit international privé* 279, 296.

of the application/non-application of economic sanctions, various adjudicatory techniques appear. It will be demonstrated that the conduct of the parties and institutions (primarily courts and arbitral tribunals) concerned and the outcome of such cases is largely influenced by the operation and interpretation of private international law rules.

II. The Aim of this Book

This book intends to present how the courts of the Member States and arbitral tribunals decide cases involving economic sanctions along with the rules of private international law. It will be demonstrated that private international law has a decisive role in determining the impact of economic sanctions on private law relationships. Private international law norms decide to a large extent whether an economic sanction must be applied or taken into account with regard to a contract entered into by private parties. Furthermore, it will be pointed out that the parties may develop techniques by which they can avoid the application of economic sanctions.¹⁶ These include the choice of a foreign court or arbitral tribunal for the adjudication of the legal dispute in order to prevent the application of an economic sanction. Hence, it needs to be examined whether EU sanctions may be 'deactivated' by such techniques. Additionally, it will be also shown that the decisions of the courts of the Member States of the EU involving the application of economic sanctions sometimes rely on foreign policy arguments, which seems (at least at first sight) to be at odds with the traditionally apolitical nature of private international law and may give rise to a decentralised European judicial foreign policy.

Economic sanctions are a popular subject for public international law analysis. Despite the proliferation of economic sanctions and their impact on a number of planned or existing contractual relationships, their examination by private lawyers has been rather limited, usually focusing on a particular economic sanction regime or decisions rendered by courts or arbitral tribunals. The growing number of such articles and case notes on the application of economic sanctions in court and arbitration practice demonstrates that this is a rapidly evolving area. Despite its practical relevance, surprisingly few comprehensive books have been written on the private international law aspects of economic sanctions.¹⁷ On many occasions, they have been touched upon in the broader context of overriding mandatory provisions, devoting less attention to the particularities of economic sanctions.

¹⁶ Mary Keyes, 'Statutes, Choice of Law, and the Role of Forum Choice' (2008) 4 *Journal of Private International Law* 1, 9–10.

¹⁷ Mercédeh Azeredo da Silveira, *Trade Sanctions and International Sales* (Kluwer, 2014); Nicola C Neumann, *Internationale Handelsembargos und privatrechtliche Verträge* (Nomos, 2000); Francisco J Garcimartín Alférez, *Contratación internacional y medidas de coerción económica* (Beramar, 1993).

IV. Conclusions

The consistent application of economic sanctions in private law litigation is required in order to guarantee legal certainty for the contracting parties as well as a uniform, foreign policy approach at the EU level.

In private international law, economic sanctions qualify as overriding mandatory provisions. Article 9 of the Rome I Regulation is limited to the application of the overriding mandatory provisions of the forum and potentially giving effect to the overriding mandatory rules of the place of performance, provided they render the performance of the contract unlawful.

Under Article 9(2) of the Rome I Regulation, nothing restricts the application of the overriding mandatory norms of the law of the forum. This provision provides for a legal basis for the application of the economic sanctions imposed by the EU and these are applied uniformly as overriding mandatory norms of the law of the forum. By applying the rules of the forum, the relevant foreign policy objectives of the EU are enforced.

Several uncertainties arise regarding overriding mandatory provisions, and thus economic sanctions, of foreign states that may be largely traced back to the formulation of Article 9 of the Rome I Regulation. First, it is not clear whether the overriding mandatory provisions, such as economic sanctions, of the *lex causae* must be applied by the court seised. Second, based on Article 9(3) of the Rome I Regulation, effect may be given to the overriding mandatory rules of the state of the place of performance, but the factors (the nature and purpose of the overriding mandatory norm, and the consequences of its application or non-application) referred to in that paragraph leave the courts of the Member States with considerable leeway on when to do so. Third, some authors and the judicial practice of some Member States followed a restrictive interpretation of the question as to whether overriding mandatory norms other than those referred to by Article 9 can be given effect. In French judicial practice, the consideration of other economic sanctions was excluded, as demonstrated by the *Giti* judgment of the Cour d'appel de Paris. However, in the *Nikiforidis* judgment, the CJEU made it clear that national courts are free to consider a foreign overriding mandatory norm through the provisions of substantive contract law, even if the foreign provision could not be given effect under Article 9 of the Rome I Regulation. This decision confirms the previous judicial practice of some Member States, such as Germany, where economic sanctions were often considered at the level of substantive contract law. In this way, private international law rules can be overridden through substantive law that extends the circle of the economic sanctions which may be considered.

Economic sanctions belong to the inventory of foreign policy. Private international law and private law cannot entirely exclude foreign policy arguments in legal disputes concerning economic sanctions. The consideration, as well as the rejection of the consideration of foreign economic sanctions, may be justified by foreign policy arguments in a given case. The discretion granted by Article 9(3) of the Rome I Regulation permits the courts to consider the foreign policy interests

of the forum as well and, in the case of considering a foreign economic sanction, to require the correspondence of the interests of the forum and the issuing state. The same applies for the consideration of foreign economic sanctions at the level of substantive contract law. This calls into question the apolitical character of private international law.

The effect of the above-mentioned uncertainties is that the courts of the Member States approach economic sanctions imposed by third countries differently. This results in a decentralised judicial foreign policy in the EU that may be contrasted with the demand for coherence between private international law and EU foreign policy.

Parties to a contract may endeavour to 'deactivate' the application of the economic sanctions imposed by the EU by a choice-of-court or arbitration clause. The admissibility of agreements conferring jurisdiction on a court or an arbitral tribunal in a third country is assessed differently in the Member States, where these result in escaping from the application of overriding mandatory provisions. In some Member States, the courts accept such agreements, while in other Member States, they are deemed to be invalid, in particular if the overriding mandatory norm is of EU origin, because any derogation violates the *effet utile* of EU law.

Arbitral tribunals do not have a forum; therefore, even if an arbitral tribunal is seated in an EU Member State, it is not bound to apply the sanctions imposed by the EU. However, it is probable that an arbitral tribunal in an EU Member State will apply or give effect to the EU sanction, constituting the public policy of the Member States, in order to avoid the annulment of the award by the courts of the Member States. Similarly, even if the venue of arbitration is outside of the EU, when recognition and enforcement is sought in the EU, this induces arbitrators to take a sanction imposed by the EU into account.

As a consequence, it is not always predictable whether an economic sanction may be applied or considered through substantive law in a given case, particularly when it concerns a sanction imposed by a third state. Complications often arise in relation to the extensive US sanctions. These uncertainties stem first from the flexible wording of Article 9 of the Rome I Regulation and second from the differences in the judicial practice of the courts of the Member States. Uncertainties are aggravated by the divergent assessment of agreements conferring jurisdiction on a court or an arbitral tribunal in a third country. This situation promotes neither legal certainty nor a uniform EU approach concerning economic sanctions imposed by third countries.

These uncertainties may be prevented or mitigated by the intervention of public organs. This includes eliminating the divergences among sanction regimes by diplomatic means promoting international cooperation. Uncertainties stemming from the interpretation of Article 9 of the Rome I Regulation, such as the question of the application of the overriding mandatory provisions of the *lex causae*, could be partly solved by legislative intervention. Judicial practice should be reoriented in order to achieve a more consistent case law. In certain questions, we can again refer to the application of the overriding mandatory provisions of the *lex causae*,

the CJEU could provide guidance following a request for preliminary ruling. A change in the focus of national courts – shifting from purely national interests and values towards common European interests, values and policy objectives – could more comprehensively contribute to achieving a more coherent relationship between private international law and EU foreign policy. Private parties are equally in possession of certain means of reducing risks related to the intervention of economic sanctions, most notably the stipulation of contractual clauses settling the legal relationship of the parties in the event of a supervening sanction, taking out a special insurance policy or proactive cooperation with the relevant authorities of the sanctioning state.