International Economic Sanctions as a Component of Public Policy for Conflict-of-Laws Purposes

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Abstract:
This work analyses international economic sanctions from the point of view of the interaction between international law and the domestic legal systems of the States concerned. In doing so, it may prove useful to resort to the private international law tools. International economic sanctions, when observed through the lens of a municipal legal system in which they claim implementation, take the form of measures interfering in the regulation of private economic intercourse. To better understand how such measures are to be dealt with, the present work sorts out some of these measures by the form they take in their implementation at the municipal level. They can take the form of prohibitive measures directly affecting commercial transactions, seizures, measures consisting in the deprivation of rights or status, the non-recognition of juridical situations as created by non-domestic decisions. The author stresses moreover that the furtherance of the respect of existing legal rules can also be carried out by positive sanctions and measures: inducements that prove sometimes to be far more effective, as they determine the harmonization of municipal law
with the international standards and rules whose respect is at stake. To understand how measures of economic sanction become effective, it is important to face the question of their application as raised before a judge vested with the authority of settling a dispute at the municipal level. In dealing with this issue, the work follows in principle European private international law, as shaped by the Rome Convention of 1980 on the law applicable to contractual obligations. Firstly, the author deals with cases where sanctions are incorporated into the judge’s State legal system. For such cases, he analyses the three alternative situations: the least problematic one is that of the lex fori governing the relationship as a whole. Where lex causae is a foreign law which incorporates international sanctions, the authors thesis is that the lex fori should not prevail on it automatically: a functional comparison of the measures should be carried out, and only in case of violation of the core objectives of the lex fori sanctioning approach should the ordre public limit operate. If however the lex causae does not contain provisions enacting the sanctions that the lex fori wants to be applied, the latter’s provisions will be considered as internationally mandatory. The author then deals with the case in which the law of the forum does not incorporate any sanctions against the violator State, but the foreign law which is to be applied under the conflict-of-laws rules of the forum does. In such cases, the sanctioning provisions of the lex causae will normally apply, except in cases where ordre public considerations require a different outcome. The possible adoption of so-called blocking regulations will be a straightforward case of such a contrast. Soft law recommending a given sanctioning attitude, on the other end, will significantly reduce the possibility of a judge considering foreign law incorporating sanctions to be contrary to the forum’s public policy. The work then deals with the case of sanctions not incorporated in the lex fori or in the lex causae, but in the law of a third State, and considers the role of art. 7.1 of the Rome Convention, or equivalent approaches, could play: in this framework, an extensive analysis of the relevant case law is carried out. A similar analytical approach is followed when dealing with the recognition of foreign judicial decisions, and their relationship with international economic sanctions. The work then deals with the interplay between international economic sanctions and transnational commercial arbitration, in terms of arbitrability issues, of recognition and enforcement, as well as the setting aside of arbitral awards. Then, the question of the application of international economic sanctions by arbitrators is considered, in the light of the absence of a forum state in strict legal terms. Further, the author assesses the role of internal judges in evaluating the lawfulness of the adopted sanctions, at the international level, and suggests that a
non negligible role could be played by judges. Among other things, national judges should take into considerations limitations arising from jus cogens, and in particular a so-called humanitarian exception to a full scale embargo. The last part of the work is devoted to a tentative dogmatic assessment of so-called positive sanctions and measures. Their role in shaping the public policy exceptions, for conflict of law purposes, is finally outlined.