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Economic Sanctions, Exchange Control Regulations and the Like: Black Sheep Among the Provisions of the Lex Contractus?

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As mentioned in a prior entry (Brussels' Sanctions Against Russia and Moscow's Retaliatory Measures Through the Eyes of the Arbitrator), under certain conditions, arbitrators have the authority to give effect to economic sanctions that are external to the applicable law. These, just like exchange control regulations and antitrust laws, fit into the category of overriding mandatory rules (or "lois de police"), that is, of legal norms that proclaim themselves applicable to all situations within their purview, irrespective of the law governing these situations. Provided that such norms serve crucial interests, that they are closely connected to the disputed contract, and that the benefits of giving them effect outweigh those of a decision to disregard them, arbitrators have the authority to take them into account, even if they were enacted by a State other than the State of the applicable law.

A question seldom explored is whether the same three conditions must be examined with respect to statutes, such as economic sanctions and exchange control regulations, enacted by the State of the applicable law, or if such statutes must be applied just like any provision of the *lex contractus*, without further analysis.

Unlike those provisions of the *lex causae* that are intended to ensure a balanced protection of the interests of the contractual parties, most overriding mandatory rules – including economic sanctions, exchange control regulation, and antitrust laws – interfere with the contractual dealings of private operators, while serving primarily – if not only – public interests. Economic sanctions, for instance, are used as a means of coercion for the achievement of a political goal (for instance, inciting a target State to refrain from engaging in activities that would be in breach of its international obligations, to forgo further wrongdoings, or to redress some aspects of its domestic or foreign policy). They are also often imposed to denounce the actions or policies of their target, and sometimes to inflict punishment for an alleged breach.

According to the International Law Institute's 1975 Resolution on the Application of Foreign Public Law (§ A.I.1), *"[t]he public law character attributed to a provision of foreign law which is designated by the rule of conflict of laws shall not prevent the application of that provision, subject however to the fundamental reservation of public policy."* Considering this resolution, one may assert forthwith that provisions of public law that are intended to serve primarily, or at least also, the interests of private parties – as is the case of labor or consumer protection laws – must be applied like any other substantially relevant provision of the applicable law. What remains unsettled is whether rules of public law that serve exclusively public interests must also be applied like any provision of the *lex contractus*, and may be disregarded by arbitrators only where their application would lead to a result which would be in conflict with principles of public policy. To address this question, one ought to ponder on the notion of “applicable law.”

Rules of conflict of laws in continental private international law systems designate the applicable law through the identification of an objective factor (such as the domicile of a party, its place of business or the place of performance) which connects a given situation to a domestic law. The assumption may be that all domestic laws that are somehow objectively connected to the parties or to their contract aim at the same goal, namely the protection of the parties’ respective interests. Similarly, when the parties to a contract select the applicable law, their concern is the equitable protection of their contractual rights and competing interests, rather than the promotion of public interests.

Considering this, it is suggested that a rule enacted by the State of the applicable law but which serves exclusively public interests must be applied like any other provision of the applicable law *only* if the parties could have known for a fact that they would be subject to this rule. Thus, for instance, if an economic sanction was imposed by the State of the law *selected by the parties, prior to the moment they made that selection*, the sanction must be considered to be part of the applicable law and applied as such. It cannot reasonably be argued, in this case, that the parties are taken by surprise if the resolution of their dispute is affected by the prescriptions of the sanction. The deciding tribunal has a duty to take the sanction into account and may disregard it only if giving it effect would lead to a result that would be in conflict with principles of public policy, just like any other provision of the applicable law. A different solution may, however, have to be followed in other situations.

First, a different solution may be called for in the case of disputes heard by arbitrators, in the context of which the applicable law is designated by the arbitrators themselves. If, for instance, a rule serving exclusively public interests was imposed prior to the conclusion of the contract by the State of the law *designated by the arbitrators* as the applicable law, it may be argued that given the latitude arbitrators enjoy in the identification of the applicable law, the parties cannot reasonably be expected to have known that their contract would be affected by this rule even if it was already in force at the time of the conclusion of the contract. An economic sanction, for instance, imposed by the State of the law identified by the arbitrators, may therefore have to be treated as a sanction imposed by another State, and the parties may be able to escape the prohibitions if the sanction does not satisfy the conditions that must be met by an overriding mandatory rule external to the applicable law. That is, the sanction may have to be disregarded if its purpose does not, under international standards, justify that it be given effect, if it is not sufficiently closely connected to the disputed contract, or if the benefits of a decision to give it effect are outweighed by those of a decision to disregard it.

The same should apply to a sanction that happens to be imposed by the State of the applicable law *after the conclusion of the contract or after the moment of a choice of law by the parties, if any*, and nonetheless proclaims itself applicable to the disputed contract. Such a sanction ought to be treated like a sanction imposed by another State, as the parties have a legitimate expectation that the balance of their contractual interests will not be affected by the pursuit of public interests protected by a statute that did not even exist when they entered into their contract. Had the parties known that the applicable law would encompass provisions serving public interests, they might have selected another law, in which case the said provisions would be given effect only if they satisfied the conditions that must be met by an overriding mandatory rule external to the applicable law. Accordingly, a sanction imposed by the State of the applicable law after the conclusion of the contract or after the moment of a choice of law by the parties, if any, must be assimilated to a rule enacted by a State other than that of the applicable law, and its application ought to be subjected to the above-mentioned three conditions.

One conclusion must be drawn from these considerations: when arbitrators are called to rule on a contractual dispute, they must consider the nature of the rules that are part of the applicable law as well as the purpose these rules serve. All statutes enacted by the State of the applicable law may not have the same prerogative to be given effect.

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