The renaissance of the Blocking Statute

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Quite a literal "conflict of laws" has recently arisen when the EU reactivated its Blocking Statute in an attempt to deflect the effects of U.S. embargo provisions against Iran. As a result, European parties doing business with Iran are now confronted with a dilemma where compliance with either regime necessitates a breach of the other. This post explores some implications of the Blocking Statute from a private international law perspective.

Past and present of the Blocking Statute

The European Blocking Statute (Regulation (EC) 2271/96) was originally enacted in 1996 as a counter-measure to the American "Helms-Burton Act" which, at the time, compromised European trade relations with Cuba. Along with WTO and NAFTA proceedings, the Blocking Statute provided sufficient leverage to strike a compromise with the Clinton administration. The controversial parts of the "Helms-Burton Act" were shelved and the few remaining pieces of legislation otherwise covered by the Blocking Statute ceased to be relevant over time. The Blocking Statute formally stayed in force but, for want of any legislation to block, remained in a legislative limbo until 8 May 2015.

On this day, President Trump announced his decision to withdraw the U.S. from the Iran nuclear deal (Joint Comprehensive Plan of Action – JCPOA) and to fully restore the U.S. trade sanctions against Iran. In particular, this entailed reinstating the so-called secondary sanctions which apply to European entities without ties to the U.S. This decision, albeit hardly unexpected, was met with sharp dissent in Europe. Not only was the JCPOA viewed by many as a remarkable diplomatic achievement, but secondary sanctions were seen as an illicit attempt to regulate European-Iranian trade relations without a genuine link to the U.S. The EU, claiming that this practice violated international law, immediately declared its intention to protect European businesses from the extraterritorial reach of the U.S. sanctions. In order to make good on this promise, an all but forgotten instrument of European private international law was swiftly dusted off

and updated: The Blocking Statute.

Protection by prohibition

The centerpiece of the Blocking Statute is its Art. 5 which prohibits affected Parties from complying with the relevant U.S. legislation. Depending on the Member State, a breach of this provision can be sanctioned with potentially unlimited criminal or administrative fines.

The disapproval enshrined in Art. 5 Blocking Statute – or, arguably, in the Blocking Statute as a whole – amounts to a specification of the European *ordre public*. Regarding the ever-present issue of overriding mandatory provisions, it rules out the possibility to give legal effect to the U.S. sanctions in question. This is either because the Blocking Statute, as *lex specialis,*supersedes Art. 9 Rome I Regulation altogether or because it has binding effect on the courts' discretion under Art. 9 (3) Rome I Regulation. However, given the narrow scope of Art. 9 (3) Rome I Regulation, this means ruling out a possibility which was hardly measurable in the first place. After all, Iran-related contracts with a place of performance located in the U.S. as required by Art. 9 (3) Rome I Regulation are, if at all realistically conceivable, extremely rare. What is more, German courts have refrained from applying U.S. sanctions under Art. 9 (3) Rome I Regulation based on the notion that they are superseded by the EU's own framework of restrictions on trade with Iran. Thus, there were plenty of reasons to deny legal effect before the recent update of the Blocking Statute.

Under the ECJ's *Nikiforidis* doctrine, the relevant sanctions are precluded from being applied as legal rules, but not from being considered as facts under substantive law. In this context, Art. 5 of the Blocking Statute will provide clear, albeit very one-sided, guidance for a number of issues. For instance, parties will not be able to contractually limit the scope of performance to what is permissible under relevant U.S. provisions, nor can they successfully claim a right to withhold performance or terminate contracts based on the justified fear of penalties imposed by U.S. authorities.

The "catch-22" situation

It does not require much number-crunching to see that to many globally operating companies, succumbing to U.S. pressure will seem like the the most, or even only, reasonable choice. The portfolio of U.S. penalties includes a denial of further

access to the U.S. market and criminal liability of the natural persons involved. U.S. authorities are not shy on using these measures either, as recently evidenced by the spectacular arrest of Huawei's CFO in Canada on charges of breaching sanctions against Iran. Thus, opting for a breach of the Blocking Statute and accepting the resulting fine under the Member State's domestic law may strike many companies as a pragmatic choice.

Nonetheless, this decision would entail an intentional breach of European law. Executives, who may also face personal liability for unlawful decisions, are thus faced with a tough compliance dilemma; whichever choice they make can be sanctioned by either U.S. or European authorities. Given this delicate situation, they may happily accept any economic pretext to quietly wind down operations in Iran without express reference to the U.S. sanctions.

Both the Blocking Statute and the U.S. regulation allow for hardship exemptions. U.S. courts may also consider foreign government pressure as grounds for exculpation under the so-called foreign sovereign compulsion doctrine. While it may, therefore, be possible to navigate between both regimes, it appears unlikely that either side will be particularly generous in granting exemptions in order not to undermine the effectiveness of their regulation. After all, the Blocking Statute is in essence designed around the idea to create counter-pressure at the expense of European companies and the U.S. will hardly be inclined to play their part in making this mechanism work.

The clawback claim

Art. 6 of the Blocking Statute contains a so-called "clawback claim". This provision enables parties to recover all damages resulting from the application of the U.S. sanctions in question from the person who caused them. What looks like a promising way to subvert the effect of the U.S. sanctions at first glance, quickly loses much of its appeal when looking more closely. In particular, the "claw back" provides no grounds to recover the most prevalent item of damages in this context, namely penalties imposed by U.S. authorities for breach of sanctions. Although the substantive requirements of Art. 6 Blocking Statute would evidently be met, any claim brought against the U.S. or its entities to remedy what is clearly an act of state would not be actionable in courts due to the doctrine of state immunity.

Thus, the claim is limited to disputes between private parties. The most realistic scenario here is that parties may hold each other liable for complying with U.S. sanctions and, in turn, violating the Blocking Statute. This means that, for instance, companies backing out of delivery chains or financing arrangements may be held liable for the resulting damages of every other party involved in the transaction. Due to the tort-like nature of the claim, this liability would even extend beyond the direct contractual relationships. Functionally, the "clawback" constitutes a private enforcement mechanism of the prohibition enshrined in Art. 5 Blocking Statute. It is, however, much less convincing as an instrument to protect all aggrieved parties from the repercussions of U.S. sanctions.

Conclusion

The renaissance of the Blocking Statute proves the difficulty of blocking the effects of foreign laws in a globalized world. The affected parties were promised protection but received an additional prohibition, arguably multiplying their compliance concerns rather than resolving them. Denying legal effects within the European legal framework is a relatively easy task and, given the narrow scope of Art. 9 Rome I Regulation, not far from the default situation. In contrast, legal instruments which can undermine the factual influence of foreign laws without unintended side effects are yet to be invented. The true purpose of the Blocking Statutes is a political one, namely serving as a bargaining chip vis-à-vis the U.S. and an attempt to assure Iran that the European Union is not jumping ship on the JCPOA. However, this largely symbolic value will hardly console the affected parties whose legal and economic difficulties remain very much real.

This blog post is a condensed version of the author's article in IPRax 2018, 573 et seqq. which explores the Blocking Statute's private law implications in more detail and contains comprehensive references to the relevant literature.