

Trade Sanctions and International Sales

An Inquiry into International
Arbitration and Commercial
Litigation

MERCÉDEH AZEREDO DA SILVEIRA



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Law & Business

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Foreword

Over the last half century, the world has witnessed a sharp rise in the imposition of international economic sanctions. While sanctions are political tools of coercion directed essentially against States, they directly affect private operators when they prohibit the conclusion and performance of commercial agreements. The number of disputes among such operators involving the application of sanctions has similarly risen. A reflection on the effects of economic sanctions on international contracts and related disputes is thus most timely.

This book addresses the questions that arbitrators and judges face when they resolve a dispute involving a statute or regulation that paralyzes international commerce. It examines sanctions intended to prevent the flow of commodities as well as the flow of capital. It deals with collective sanctions, such as those decided by the UN or the EU, and with "unilateral sanctions" imposed by States individually. It discusses both measures imposing restrictions on trade activities conducted by individuals and entities acting within the sanctioning State and the controversial measures known as "extraterritorial sanctions." The book also explores the ramifications of secondary and tertiary sanctions, whereby operators that are foreign to the sanctioning State and are not subject to its jurisdiction are nonetheless threatened with penalties if they do not sever their ties with the sanctioned State. Despite the complex questions generated by extraterritorial, secondary, and tertiary sanctions, in particular when followed by blocking statutes, scholarly literature on the subject has remained rather scarce. This study is most welcome.

Dr. Azeredo da Silveira addresses a multitude of issues ranging from fundamental concepts to technical questions. She explains why the effects of international sanctions on contracts is not, as traditionally argued, a problem of pure contract law, but one that requires first and foremost an investigation into private international law. At the heart of her study lies the question whether a sanction ordering to withhold performance should be regarded as a legal norm, with its effects on contracts treated as a matter of private international law and of substantive law, or whether it should be regarded as a mere fact, a *datum* surrounding the performance of the contract with its effects addressed exclusively under substantive law.

To date, scholars are rather inclined to view a trade sanction as a *datum* and maintain that the factual or economic hurdle it creates may affect the parties' rights and obligations, irrespective of the prohibition's origin or purpose. While the author acknowledges the merits of this approach, she also articulates its weaknesses and demonstrates why the fate of a contract should not be made dependent solely on the external circumstances generated by a sanction. She makes an interesting case for keeping in view the *de facto* compelling power of trade sanctions without overlooking their legal nature and political purpose. Her approach affords arbitral and domestic courts sufficient latitude to elaborate solutions that take into consideration all the interests involved, i.e., the interests of the party required to withhold performance and threatened with penalties if it fails to do so, the political objectives which the measure strives to achieve, and the interests of the party against whose State the sanction is directed. No private law study known to me engages in as thorough a discussion about the legitimacy of economic sanctions and the criteria according to which arbitrators and judges should determine whether a sanction must be given effect. In particular, the study explains how considerations of public international law ought to be integrated into the resolution of a dispute arising out of a contract governed by private law.

This book makes a particularly useful contribution to the study of trade sanctions because it apprehends them in their legal globality. It seeks to resolve the issues which they raise by considering private and public international law, as well as issues pertaining to arbitration law (e.g., are disputes involving trade sanctions arbitrable? are commercial arbitrators at the exclusive service of the parties or do they also have a duty to defend public interests?) and substantive contract law. With respect to the latter, Dr. Azeredo da Silveira examines numerous questions related to the substantive impact of trade sanctions on contracts.

The result of a doctoral thesis presented at the University of Geneva, which I had the pleasure to supervise together with Prof. Luc Thévenoz, this book is remarkable for the depth of the investigation, the breadth of sources discussed (including over 280 court decisions and arbitral awards), the rigor of the analysis and the well-substantiated and in part innovative conclusions. It is hoped that it will serve as a helpful reference for academics, lawyers, judges, and arbitrators.

Geneva, 28 July 2014

Prof. Gabrielle Kaufmann-Kohler

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List of Abbreviations

AAA:	American Arbitration Association
ad:	concerning
BCCI:	Bulgarian Chamber of Commerce and Industry (Sofia)
BIS:	US Department of Commerce's Bureau of Industry and Security
c.:	<i>considérant</i> (paragraph number in Swiss judgments)
CCIRF:	Chamber of Commerce and Industry of the Russian Federation (Moscow)
CIETAC	China International Economic and Trade Arbitration Commission (Beijing)
Cir.:	Circuit
col.:	column
EC:	European Community
ECJ:	European Court of Justice (Luxembourg)
ed.:	editor, edition
EEC:	European Economic Community
<i>et seq.:</i>	<i>et sequens</i> (and the following)
EU:	European Union
EUR:	Euro
Exec. Order:	Executive Order

fn.	footnote
GA:	United Nations General Assembly
GBP:	British Pound Sterling
HCCI:	Hungarian Chamber of Commerce and Industry (Budapest)
ICC:	International Chamber of Commerce (Paris)
ICJ:	International Court of Justice (The Hague)
<i>id.</i> :	<i>idem</i>
LCIA:	London Court of International Arbitration (London)
n./nn.:	paragraph number(s) in a cited source
OAS:	Organization of American States
OAU:	Organization of African Unity
OFAC:	US Treasury Department's Office of Foreign Assets Control
para./paras:	paragraph number(s) in this book
PCIJ:	Permanent Court of International Justice (The Hague)
Pub. L.:	Public Law
Res.:	Resolution
s.:	section
SC:	United Nations Security Council
SC Res.:	United Nations Security Council Resolution
UCCT:	Ukrainian Chamber of Commerce and Trade (Kiev)
UN:	United Nations
UNCITRAL:	United Nations Commission on International Trade Law
UNITA:	National Union for the Total Independence of Angola
USD:	US Dollar
Vol.:	Volume
WTO:	World Trade Organization

Statutes, Codifications, and Arbitration Rules

AAA International Arbitration Rules:	International Arbitration Rules of the American Arbitration Association (2009)
BGB:	German <i>Bürgerliches Gesetzbuch</i> (Civil Code) (1896)
CCP:	Swiss Code of Civil Procedure (2008)
CDA:	Cuban Democracy Act (1992)
CFR:	US Code of Federal Regulations
CISG or the Convention:	United Nations Convention on Contracts for the International Sale of Goods (1980)
DCFR:	Draft Common Frame of Reference (2009)
EAA:	Export Administration Act (1979)
EAR:	Export Administration Regulations
1961 European Convention:	European Convention on International Commercial Arbitration (1961)
French CC:	French Civil Code (1804)
GATT:	General Agreement on Tariffs and Trade (1947)
Helms-Burton Act:	Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (1996)
ICC Rules of Arbitration:	Rules of Arbitration of the International Chamber of Commerce (2012)
IEEPA:	International Emergency Economic Powers Act (1977)
ILSA:	Iran and Libya Sanctions Act (1996)
Incoterms:	ICC International Commercial Terms (2010)
ISA:	Iran Sanctions Act (2006)
Law n. 57:	Law for the Protection of Iraqi Property, Interests, and Rights in and outside Iraq (1990)
LCIA Arbitration Rules:	Arbitration Rules of the London Court of International Arbitration (1998)
LEmb:	<i>Loi fédérale du 22 mars 2002 sur l'application de sanctions internationales</i> (RS 946.231)
NAFTA:	North American Free Trade Agreement (1992)

NYC or New York Convention:	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
PECL:	Principles of European Contract Law (1998/2002)
PICC:	UNIDROIT Principles of International Commercial Contracts (2010)
PTIA:	Protection of Trading Interests Act (1980)
RICO:	United States Racketeer Influenced and Corruption Organizations Act (1970)
Rome Convention:	Convention on the Law Applicable to Contractual Obligations (80/934/EEC) (1980)
Rome I Regulation:	Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (2008)
Rome Treaty:	Treaty Establishing the European Economic Community (1957)
SCC Arbitration Rules:	Rules of Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce (2010)
SCO:	Swiss Code of Obligations (1911)
SPILA:	Swiss Private International Law Act (1987)
Swiss Arbitration Rules:	Swiss Rules of International Arbitration (2012)
TWEA:	Trading with the Enemy Act (1917)
UCC:	United States Uniform Commercial Code
ULIS:	Uniform Law on the International Sale of Goods (1964)
UNC:	United Nations Charter (1945)
UNCITRAL Arbitration Rules:	Arbitration Rules of UNCITRAL (2010)
UNCITRAL Model Law:	UNCITRAL Model Law on International Commercial Arbitration (2006)
USC:	United States Code
Vienna Rules:	Vienna Rules of Arbitration and Conciliation (2006)

Law Reports and Journals

AC:	The Law Reports, Appeal Cases, House of Lords (London)
All ER:	All England Law Reports (London)
ASA Bull.:	Bulletin of the Swiss Arbitration Association (Basel)
BGHZ:	<i>Entscheidungen des Bundesgerichtshofs in Zivilsachen</i> (official decisions of the German Supreme Court)
BYIL:	British Yearbook of International Law (Oxford)
DFT:	Official decisions of the Swiss Federal Tribunal
ECR:	European Court Reports
F.:	Federal reporter
Fed. Reg.:	Federal Register
Fed. Supp.:	Federal Supplement
FF:	<i>Feuille fédérale</i> (Report from the Swiss Parliament)
GAOR:	United Nations General Assembly Official Records
Gaz. Pal.:	<i>Gazette du palais</i> (Paris)
ICC Bull.:	Bulletin of the ICC International Court of Arbitration (Paris)
ICJ Reports:	International Court of Justice Report of Judgments, Advisory Opinions and Orders (Leyden)
ILM:	International Legal Materials of the American Society of International Law (Washington, DC)
ILR:	International Law Reports (Cambridge)
IPRax:	<i>Praxis des internationalen Privat- und Verfahrensrechts</i> (Heidelberg)
Iran-US CTR:	Iran-US Claims Tribunal Report (Cambridge)
JCB:	<i>Jurisprudence commerciale de Belgique</i> (Antwerpen/Brussels)
JCPG:	<i>La semaine juridique – Edition générale</i> (JurisClasseur)
JDI:	<i>Journal du droit international</i> (Paris)

JdT:	<i>Journal des tribunaux</i> (Lausanne)
JT:	<i>Journal des tribunaux</i> (Brussels)
KB:	King's Bench Reports
Lloyd's Rep:	Lloyd's Law Reports (London)
NJW:	<i>Neue Juristische Wochenschrift</i> (Munich/Frankfurt)
OJ:	Official Journal of the European Union
OsterJurZ:	<i>Österreichische Juristen-Zeitung</i> (Vienna)
QB:	Queen's Bench Reports
RCDIP:	<i>Revue critique de droit international privé</i> (Paris)
Rev. arb.:	<i>Revue de l'arbitrage</i> (Paris)
RIW:	<i>Recht der internationalen Wirtschaft</i> (Heidelberg)
RS:	<i>Recueil systématique du droit fédéral</i> (official collection of Switzerland's federal statutes)
RSJ:	<i>Revue suisse de jurisprudence</i> (<i>Schweizerische Juristen-Zeitung</i>) (Zürich)
SJ:	<i>La Semaine judiciaire</i> (Geneva)
ULR:	Uniform Law Review (<i>Revue de droit uniforme</i>) (Rome)
UNCITRAL YB:	UNCITRAL Yearbook
US:	Supreme Court Reporter
YCA:	Yearbook of Commercial Arbitration (Deventer/Alphen aan den Rijn)
YIMEL:	Yearbook of Islamic and Middle Eastern Law (London/Boston)

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Trade Sanctions and International Sales

To my parents

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