THE WORLD IN SANCTIONS: CHALLENGES FOR PRIVATE INTERNATIONAL LAW ON THE EXAMPLE OF INTELLECTUAL PROPERTY

E. B. Leanovich

Belarusian State University,
Niezaliežnasci Avenue, 4, 220030, Minsk, Belarus, (9042@rambler.ru)

The article shows the normative and practical contradictions caused by sanctions from the standpoint of in private international law. The author refers to the example of intellectual property relations and analyzes the features of the application of norms and mechanisms of conflict of law and material regulation in conditions of sanctions, taking into account the territoriality of intellectual property rights. Conclusions are drawn about the certain patterns as constantly reoccurring outcomes of sanctions affecting intellectual property. The preferred legal techniques for overcoming the corresponding consequences are outlined.

Keywords: sanctions; intellectual property; private international law; conflict of laws; territoriality of intellectual property rights.

Private law relations with a foreign element, including intellectual property, are very sensitive to strict public law regulations even in a period of stable and sustainable development of international economic relations. When deciding on the choice of applicable law, the court or other body, that considers cross-border relations, is always under the demand of a balanced and cautious decision in order not to violate the primary principle of protecting the interests of its own state. A positive answer when examining the possibility of applying the law of another state within the framework of domestic jurisdiction is framed by restricting constrictions of private international law: evasion of law, public policy clause, imperative norms, retorsions. The relevant norms are enshrined in the Chapter 74, Section VII of the Civil Code of the Republic of Belarus: Articles 1097, 1099, 1100, 1109 [1].

Private law relations with a foreign element, including intellectual property, are very sensitive to strict public law regulation even in a period of stable and sustainable development of international economic relations. When deciding on the choice of applicable law, a court or other body considering cross-border relations is always under the requirement of a balanced and balanced decision so as not to violate the paramount principle of protecting the interests of one's own state. A positive answer when considering the possibility of applying the law of another state within the framework of domestic jurisdiction is framed by the restrictive restrictions of private international law: evasion of law, public policy clause, peremptory norms, retorsions. The relevant norms are enshrined in Chapter 74, Section VII of the Civil Code of the Republic of Belarus: Articles 1097, 1099, 1100, 1109 [1].

In a period of worsening of international political relations and escalation of interstate conflicts, the already difficult work on choosing the applicable law and resolving the essential merits of cross-border relations connected with several jurisdictions, becomes even more complicated. First, it is not so obvious on which legal norms to rely in order to follow an appropriate and decent way of ruling. Judgments

must meet the requirements of legality, validity, certainty, unconditionality, completeness, however the regime of sanctions as an extraordinary situation is often characterized by some level of uncertainty and a set of acts which can be used. Second, sanctions should allow derogations from the general regime only to the extent of their goal and limits since the application of sanctions is not a matter of a political decision, but of following the requirements of regulatory legal acts. The boundaries that determine the purpose and scope of sanctions (in particular individual, sectoral, aspects) must be taken into account. Restrictions should not close the prospects for settling the conflict and returning to a stable mode of existence of private relations, on which well-being, health and life, business, cultural and social ties in all affected countries are dependent. A certain clearance as a prospect of movement for the better should be left, or at least a profound explanation should be given. A complete and indefinite deprivation of private rights can be dangerous not only from the point of view of the liquidation of relations that are international in nature, but also because of the risk of instability and a bad example for national relations.

The purpose of the article is to show the normative and practical contradictions that may arise in the field of private international law in connection with sanctions on the example of intellectual property in the combination of the two abovementioned factors.

Intellectual property demands a specific solution in private international law in view of the problem of territoriality of intellectual property rights. Intellectual property rights are private in nature, but the basis of legal regulation in this field assumes the use of imperative prescriptions, especially regarding law-setting actions for industrial property rights. Dispositive variants of behavior are rarely allowed and the very existence of intellectual property of foreigners is mainly provided by the material norms on national treatment in a wide range of international conventions and treaties.

In comparison with other relations in private international law intellectual property is more vulnerable. In order to overcome the territorial character of intellectual property rights and foreign law regulating them a complex combination of material, conflict of law and jurisdictional norms must be considered and applied. Even in normal course of the development of the international society foreigners are at high risk of being deprived of their intellectual property rights or of placement on less favorable treatment of enforcement than national persons. The principle of territoriality of intellectual property significantly distinguishes it from material property. Property rights are much less susceptible to cross-border peculiarities of protection in different jurisdictions than intellectual property [2]. Thus, in any case, foreign intellectual property rights are questioned and rightsholders from abroad can be easily affected. So, when a specific situation of tension in interstate relations arises and national courts deal with a specific regime in relation to unfriendly states, the territoriality of intellectual property can turn from a cross-border threshold into a total ban on the essence of intellectual property.

In the situation of sanctions, it is necessary to take into account two completely different situations. First, sanctions are applied to meet special demand due to an emergency. For example, when it is necessary to fill the shortage of strategic goods: medicines, spare parts for sophisticated foreign equipment, etc., or to prevent activities

that weaken or threaten state security (military and dual-use inventions). Second, intellectual property concerns ordinary civil circulation. The first situation is out of discussion. Actually and legally, it goes beyond the domain of private international law. Private international law exists until a rigid rejection is encountered for the interaction between jurisdictions and legal systems of different states. It occurs by moving into the area of public prescriptions by special material (substantive) rules of law concerning precisely those type of relations which are specially distinguished and detailed for the regime of sanctions (in contrast to the general type of relationship, highlighted only by their territorial connection for sanctions). The second situation challenges precisely international private law and requires the search for flexible solutions and leaving a space for maneuvers with the help of private international law mechanisms (for example, through the mentioned provisions of the Civil Code of the Republic of Belarus). Whereas in the first situation there is no special need to resort to private international law, it generally ceases to operate due to special instructions, rather of administrative, than civil law.

This legal and technical distinction is necessary in order to understand the boundaries of sanctions and the inevitable task to prevent the negative (destructive) consequences of an extraordinary regime. Under the conditions of sanctions, the restrictive mechanisms of private international law to a certain extent change their traditional mode of operation and are able to provide scope for the judicial discretion regarding general instructions for sanctions. Appeal to these mechanisms allows taking into account the meaning and consequences of the impact of sanctions on the relations considered in the case. So, if within the framework of the first approach, the ban on issuing licenses in or from unfriendly countries is not subject to discussion, then in the second approach, namely, without a direct indication of the refusal to enforce the intellectual property rights of foreigners, the court may refer to conflict of laws rules that do not prevent taking into account the possible negative consequences. In a fairly well-known case on the demand of enforcement of the intellectual property rights to Peppa Pig, the issues of private law are not clearly indicated. However, this case is illustrative on risks of negative consequences for the state of the court [3]. By the decision of the Arbitration Court of the Kirov Region dated 03.03.2022 in case No. A28-11930/2021, the claim of a legal entity registered in the UK against a Russian individual entrepreneur was denied [3].

Quite a laconic judicial act does not contain a detailed assessment of the actual circumstances of the dispute, evidence, motives that guided the court not to enforce the intellectual property rights of a person from an unfriendly state (meanwhile without any special establishment of the affiliation of the plaintiff with the unfriendly state leading to sanctions). The court just relied on the construction of abuse of the right in civil law. At the same time, the danger that can be caused to the local consumers by the counterfeited goods is underestimated. In particular, goods for children were at stake, and the contested intellectual property objects (images of a cartoon character) are not of a high value for human necessities. Conversely, the goods themselves with which such violators are connected are notorious for poor quality and suspicious production conditions. As a result, the court gave dubious support to infringers.

Careless use of the possibility to restrict the intellectual property rights of foreigners in the sanctions regime should not undermine the foundations of own legal system, creating the illusion of waiving the rights themselves.

Another example of negative consequences for intellectual property is when the world in sanctions is gradually being formed. A very unfortunate outcome of the sanctions could result in the destruction of the institutional infrastructure providing services and support to intellectual property of creators and rightsholders. National system of that kind cannot function in an appropriate secure and transparently way without links with foreign and international counterparts.

Sanctions can undermine teamwork, mutual exchanges between patent offices, in particular affecting practical issues of patent cooperation. It is precious that World Intellectual property organization (WIPO) is making efforts to prevent the damaging impact of sanctions on the infrastructural aspects of patent systems, which, of course, negatively affect not only the state that is under sanction, but also jeopardize the whole structure of the international protection of intellectual property. Thus, WIPO substantiated that its technical assistance to the intellectual property infrastructure of the Democratic People's Republic of Korea did not contradict the UN sanctions [4].

The accumulation of historical background provides the necessary empirical basis for identifying certain patterns as constantly reoccurring outcomes. One of them is a pattern of mutual losses of the conflicting parties in the sanctions regime relating to intellectual property. Deprivation of intellectual property right or neglecting them do not necessarily help to achieve the goal of sanctions, but such an approach to intellectual property will definitely lead to a setback in building a world order for the legal use of intellectual property assets. The multiplication of channels and schemes for parallel imports, the use of intellectual property without remuneration, cannot affect the interests of only one country. Just as international protection of intellectual property is not possible by the efforts of only several countries or a region, the global coverage is still needed. So, sanctions against one country or in one country are reflected on a global scale.

It is not a coincidence that over time the policy of sanction is moving towards a very cautious and measured approach to intellectual property. The United States is an example of states actively applying the sanctions regime in interstate conflicts and extends them also on intellectual property. In the structure of state bodies, one of the key positions is occupied by the Office of Foreign Assets Control (OFAK) [5].

Experienced excesses and unwanted consequences of sanctions in the form of restricting intellectual property rights, including creation of obstacles to obtaining international protection, for example by restricting the transfer of fees and payments to organizations and individuals (patent attorneys) in unfriendly countries (as was the case in the US embargo against Yugoslavia) led to the understanding of OFAC and American rightsholders that intellectual property, like no other area of international relations, is under the threat of destructive influence by sanctions. The main conclusion is that sanctions in no case can give rise for counterfeiters and pirates, so called "counterfeit paradize" [6, p. 47].

Summarizing the analysis of the normative and practical contradictions that characterize the application of sanctions to the intellectual property relations with a foreign element, we note the main argument in favor of making every effort to preserve the legitimacy of these relations. It is the almost equal vulnerability of both parties, namely the state applying sanctions and the state being subjected to them. The example of Brexit shows that the achievements in overcoming the territorial character of intellectual property are so significant that the rejection of them not only deprives some of the benefits, but practically destroys the foundation on which the intellectual property right themselves and the corresponding intangible assets in commercial circulation, are based. Therefore, despite the withdrawal of the United Kingdom from the European Union, the country is still making every effort to stay in the system of European intellectual property rights, adheres to the regional principle of exhaustion and lays down background to participate in the unitary patent system [7].

For an industry that is heavily dependent on intellectual property, the absence of a legal protection regime is much more detrimental than the absence of raw materials and fuel energy resources, because time in sanctions will easily result in loss of innovative skills, striving for the world level and the most up-to-date knowledge.

The current state of national and international law fully allows the establishment of sanctions in the form of derogations from the general regime for the protection and enforcement of intellectual property rights, including the suspension of the national and the most favored nation regimes. These actions are the sovereign right of the state, and the legal support of the corresponding political steps does not involve any particular difficulties and can be implemented through the adoption of new legislative acts. At the same time, commitment to the achievements of international protection of intellectual property is more difficult to discard. In this regard, conflict of law rules and mechanisms of private international law applied in conjunction with substantive rules on general sanction restrictions are preferable, than those acts with direct and detailed prohibitions. This differentiation of legal techniques presents flexible tools when considering cases by the court and providing the balanced assessment of the negative consequences of the sanctions regime by state officials.

REFERENCES

1. Civil Code of the Republic of Belarus. Code of the Republic of Belarus of 07.12.1998 № 218-Z // National Legal Internet Portal of the Republic of Belarus [Electronic resource]. URL: http:// law.by/document/?guid=3871&p0=Hk9800218e (accessed: 27.05.2022).

2. Leanovich, E. B. (2009). Territorial'nost' intellektual'noj sobstvennosti v sovremennom mire [Territoriality of Intellectual property in the modern World]. In: *Moscow Journal of International Law*. No. 4. P. 133–148. (In Russ.).

3. Arbitrazhnyj sud otkazal v iske britanskoj kompanii v svjazi s antirossijskimi sankcijami [The Arbitration Court rejected the claim of the British company in connection with anti-Russian sanctions] // Advokatskaja gazeta. Organ Federal'noj palaty advokatov Rossijskoj Federacii. March 14, 2022. [Electronic resource]. URL: https://www.advgazeta.ru/novosti/arbitrazhnyy-sud-otkazal -v-iske-britanskoy-kompanii-v-svyazi-s-antirossiyskimi-sanktsiyami/ (accessed: 28.04.2022). (In Russ.).

4. Decision of UN Sanctions Committee on WIPO's Technical Assistance to DPRK, 2012PR/2012/720 // WIPO, Geneva, September 24. [Electronic resource]. URL: https://www.wipo.int/pressroom/en/articles/2012/article_0019.html (accessed: 28.04.2022).

5. Office of Foreign Assets Control – Sanctions Programs and Information // U.S. Department of the Treasury. [Electronic resource]. URL: https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information (accessed: 27.05.2022).

6. Stolte, K. (1996). OFAC: Hands Off Intellectual Property Rights. In: *Journal of Intellectual Property Law*. Vol. 4. Iss. 1. P. 25-47.

7. Brexit and IP: 4 Things You Should Know // The national law review. [Electronic resource]. 2019. URL: https://www.natlawreview.com/article/brexit-and-ip-4-things-you-should-know (accessed: 27.05.2022).