Anton Heini, Die Anwendung wirtschaftlicher Zwangsmaßnahmen im internationalen Privatrecht, in: Die Anwendung wirtschaftlicher Zwangsmaßnahmen im Völkerrecht und im Internationalen Privatrecht, Berichte DGVR Heft 22, Heidelberg 1982

Summary

The Application of Economic Means of Coercion in Private International Law

by Professor Dr. Anton Heini, Zürich

1. A seperate application of prohibitions and embargos imposed by a foreign government, and of foreign governmental regulations in general, should be rejected for both practical reasons as well as a matter of principle. Taking into consideration governmental interests of that kind outside the proper law is a matter for international treaties. It is neither a task of the judiciary nor is it qualified to assist in the enforcement of such governmental interests by means of special conflict of law rules of the forum; not to mention an incalculable jeopardizing of legal certainty in international commerce. Legislative undertakings such as article 7 of the EC-Convention (on the conflict of the laws of contract) or article 18 (now art. 17 in the final version) of the Swiss draft code on private international law are intellectual games for lawyers at best. They can certainly not be said to be based on a well settled law nor on judicial precedents. International comity, so often referred to, calls rather for a restriction in the application of foreign governmental regulations in the international field than for an extension.

2. Where governmental regulations of a third State which are not part of the proper law do affect a legal relationship as a matter of fact, in particular where they render performance impossible or make it unduly onerous, the remedies to be looked for are those of the proper law. Thereby paramount consideration shall be given to the judicial power to modify or supplement the agreement of the parties or to create specially designed rules of substantive law. Exceptionally, i.e. where applying the proper law would bring about an intolerable result for a party because such proper law does not provide for adequate relief, the judge must apply the forum's substantive law by virtue of his own public policy.

3. (a) A contract requiring or even intending an act to be done *in* a foreign State which constitutes a violation of a law of that State is contrary to the principle of law; insofar such principle may be said to claim universal recognition. From a formal point of view, the principle is part of the law of the forum and therefore calls for direct application rather than to be applied by virtue of a conflict rule. Thereby,

the violated foreign law carries with it the "présomption de la moralité". However, the violation of the foreign governmental regulation is to be disregarded if it is contrary to the forum's own public policy or to international law.

(b) A somewhat different attitude may be taken with respect to an embargo. An embargo being used as a foreign policy weapon directed against one or more States, the judge of a third State should ignore acts which are performed in an embargo State in violation of such an embargo. He would be under an obligation of international law to do so if the international status of the forum State is that of a neutral country.