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A Study on the Conflict of Jurisdiction Between Anti-Sanction Recovery Litigation and International Commercial Arbitration

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Abstract. Article 12 of the Anti-Foreign Sanctions Law of the People's Republic of China grants Chinese citizens and organizations the right to seek judicial remedies by initiating legal proceedings in a People's Court when their rights and interests are infringed upon by discriminatory restrictive measures imposed by foreign states. Although the law stipulates that affected parties may bring an action for recovery under anti-sanctions, the provision's general and abstract nature presents certain issues in its practical application that further analysis and discussion are needed. Moreover, such litigation is not the sole means of recourse available to the parties; in practice, they may also agree to submit their disputes to arbitration. However, given that sanction measures often implicate public interest and national sovereignty, uncertainty exists as to whether an arbitral tribunal may, according to an arbitration agreement, adjudicate such disputes. With neither current international law nor domestic legislation offering explicit guidance on this conflict, this paper argues that in instances where a conflict arises between litigation jurisdiction and an arbitration agreement, precedence should be given to litigation jurisdiction. This approach facilitates the convenient resolution of disputes in a manner consistent with the underlying objectives of anti-sanction recovery actions.

Keywords: anti-foreign sanctions law, recovery litigation, jurisdiction conflict

1. Introduction

Presently, with the frequent imposition of sanctions, parties to international commercial transactions are often confronted with infringements of their lawful rights and interests, such as the inability to continue performance of a contract or the contract being rendered invalid. In practice, multiple avenues for relief have been developed to address disputes arising from such sanction measures. Parties may agree to submit disputes stemming from sanctions to arbitration, while some may stipulate within their contracts that sanction measures constitute force majeure events to avoid extra liability [1]. Concurrently, parties may also opt to seek remedies pursuant to the relevant provisions of blocking statutes and counter-sanctions laws. For example, Article 6 of the Council Regulation (EC) No. 2271/96 EU Blocking Statute empowers EU operators to sue for the recovery of damages in the courts of the Member States for losses incurred as a result of sanction measures. Russia has

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also enacted relevant legislation granting parties the right to apply for injunctions to block the effects of foreign sanctions. In 2021, China promulgated the Anti-Foreign Sanctions Law of the People's Republic of China (hereinafter referred to as the "Anti-Sanctions Law"). Article 12 thereof explicitly stipulates that Chinese parties may initiate legal proceedings in a People's Court to protect their lawful rights and interests when subjected to discriminatory measures, thereby establishing a system for Chinese parties to seek judicial remedies in the face of such sanctions.

Although parties to a dispute may enjoy different means of relief to fully protect their lawful rights and interests, the availability of multiple remedies also gives rise to certain conflicts. When a dispute arises from sanction measures, some parties may wish to resolve it by filing an anti-sanction recovery action with a court. If the parties have not previously agreed upon a dispute resolution method, they can naturally proceed with litigation. However, if the parties face a situation where they have a pre-existing agreement to resolve sanction-related disputes through arbitration, yet one party, after fully weighing the costs and benefits, wishes to litigate, how then should the conflict between the court's litigation jurisdiction and the arbitration agreement be handled? Should the principle of parties' free will be upheld, leading to a finding that the court lacks jurisdiction, or should the mandatory nature of public policy dictate that litigation jurisdiction prevails over the arbitration clause?

While Article 12 of the Anti-Sanctions Law grants parties a right of recovery, the provision is overly general and abstract, posing difficulties in its practical application. Since the enactment of the law, the academic community has engaged in extensive discussions concerning the subjects, the connotation and extension of "discriminatory measures," and the applicable scenarios in anti-sanction litigation. The prevailing view is that anti-sanction litigation is a right held by parties of Chinese nationality to bring actions against other parties who, by complying with unilateral sanction measures, have caused harm to their lawful interests [2]. There has, however, been comparatively less discussion on the conflict between litigation jurisdiction and the jurisdiction conferred by arbitration agreements. It is against this backdrop that this paper, proceeding from China's domestic legal provisions and the practical realities of anti-sanction litigation, analyzes the basis for claims when initiating such actions, investigates the causes of the conflict between the court's litigation jurisdiction and the jurisdiction clauses in international commercial arbitration agreements, and explores the question of which form of jurisdiction should take precedence when such a conflict arises.

2. Causes of the conflict between arbitration agreements and jurisdiction in anti-sanction litigation

The fundamental cause of the conflict between arbitration clauses in international commercial contracts and jurisdiction in anti-sanction litigation is that arbitration and litigation, as two different and parallel methods for resolving disputes, operate in a manner where an arbitration clause, reached through party autonomy, confers jurisdiction upon an arbitral tribunal while simultaneously excluding the jurisdiction of the courts [3]. Sanction measures, however, are often an embodiment of national sovereignty and foreign policy, typically aimed at safeguarding international peace and security or achieving specific political and economic objectives [4]. This public policy nature allows sanction measures to transcend the purely private contractual sphere, which in turn gives rise to the debate on whether an arbitral award, by virtue of deciding on matters related to sanctions, may be rendered invalid for being contrary to public policy.

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2.1. The parallel nature of arbitral jurisdiction and litigation jurisdiction

Setting aside for the moment the conflict that arises between the two dispute resolution methods, if one were to solely discuss the specific legal issues of resolving disputes arising from sanctions under each of the two different methods, it can be observed that both paths are capable of achieving the objective of providing relief for the parties' lawful rights and interests.

2.1.1. The basis of a claim in anti-sanction litigation is tort

Article 12 of the Anti-Sanctions Law directly defines the act of infringing upon the lawful rights and interests of Chinese citizens or organizations through the compliance with or implementation of foreign discriminatory restrictive measures as an actionable tort. This provides victims with a direct path for judicial relief, bypassing legal impediments faced in a breach of contract claim that would require debating issues such as contract validity or force majeure [5].

The constituent elements of a tort typically include damage, causation, and the unlawfulness of the act. In the anti-sanction context, many unilateral sanction measures lack legitimacy at the level of international law and violate fundamental principles of international law, such as the principles of sovereign equality and non-intervention in internal affairs [6]. Their implementation thus possesses the unlawfulness required to constitute a discriminatory measure under Article 12. In international commercial transactions, the counterparty to a Chinese party can be identified as the actor assisting in the implementation of discriminatory measures. The economic losses, reputational damage, and other harms caused to the sanctioned party by the unilateral sanctions constitute direct damage. A clear causal link exists between the implementation of the sanction and the resulting damage. This therefore satisfies the constituent elements of a tortious act in the context of anti-sanction litigation.

By pursuing the liability of the private entity that assisted in implementing the discriminatory measures, it is possible to secure compensation for the aggrieved party. This approach avoids the obstacle, as mentioned previously, of the counterparty potentially claiming exemption from liability on grounds of force majeure or other reasons, thereby mitigating the losses suffered by the aggrieved party.

2.1.2. The arbitral tribunal's authority to arbitrate disputes arising from sanctions

Before discussing the arbitrability of disputes arising from sanction measures within the framework of contract disputes, it is necessary first to define the nature of such measures—that is, whether their effect on international commercial conduct is a question of fact or a question of law [7]. Two primary viewpoints have gradually emerged in practice. The first is the "matter-of-fact theory," which holds that the determination of whether a sanction constitutes a force majeure event should be based on the governing law of the contract. In the case of Fincantieri v. Ministry of Defence of Iraq, the arbitral tribunal distinguished between the impact of the sanction as a mandatory law on the substantive issues of the dispute and the arbitrability of the dispute itself. The tribunal affirmed that the former does not render the dispute non-arbitrable nor does it affect the tribunal's jurisdiction. This case was decided under the standard of the "matter-of-fact theory." The second viewpoint is the "matter-of-law theory," which argues that there is no need to consider the governing law; rather, one should analyze whether the sanction measure can directly function as a mandatory provision in the sense of private international law and thereby lead to the invalidity of the contract. The current EU Blocking Statute, for instance, adopts this approach.

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The "matter-of-fact theory" is criticized by many scholars in practice because it may lead to contradictions between the contract's governing law and the law of lex arbitri, compelling the tribunal to mechanically recognize the effect of the sanction. Conversely, the "matter-of-law theory" is widely accepted because it treats sanctions as mandatory legal provisions and applies the conflict-of-laws rules of private international law to promote consistency in arbitral outcomes. Under the "matter-of-fact theory," disputes involving overriding mandatory provisions are not considered inherently non-arbitrable. Economic sanctions are generally recognized as overriding mandatory provisions in the sense of private international law, and disputes concerning them are likewise arbitrable [8]. However, a contrary view also exists, which posits that because matters of sanctions involve public policy and national interests, they are not arbitrable [9]. Even if possessing characteristics of public policy, there is no explicit legal provision in China's current legislation that declares matters involving sanctions within a contractual dispute to be non-arbitrable. Nor has practice explicitly excluded disputes triggered by sanction measures from the scope of arbitration. The Arbitration Law of the People's Republic of China only stipulates that administrative disputes and disputes concerning personal relations are non-arbitrable. Therefore, parties may still, within an arbitration agreement, provide for the resolution of disputes arising from sanctions through arbitration.

This paper contends that for disputes arising from sanction measures, a Chinese party may initiate arbitration against another party not only on the basis of breach of contract, but also on the grounds that its lawful rights related to the contract have been infringed. As early as May 1998, the Supreme People's Court affirmed in the Jiangsu Materials case that a tort dispute arising from a contract could be submitted to arbitration [10]. This principle was gradually established as a settled theory through subsequent cases such as the Dynasty Engineering case and the Bestard case [11,12]. Returning to the subject of this paper, when a Chinese party to an international commercial contract suffers an infringement of lawful rights—such as the inability to continue contract performance due to sanction measures—this constitutes a tort dispute arising from the contract, which can be submitted to arbitration.

2.2. Uncertainty of jurisdiction when involve public interest

Although international commercial arbitration offers flexibility in handling complex disputes, and the prevailing view holds that related disputes arising from sanctions are arbitrable, the boundaries of jurisdiction become blurred when sanction measures are deeply intertwined with public interest. The legal provisions concerning public policy often lack clarity, and the previously set-aside issue of jurisdictional conflict comes to the fore. Even though a matter may be deemed arbitrable by a tribunal at the time of submission, it is highly possible that after the award has been rendered, it will face judicial review and be found to be in violation of public policy, thereby rendering the arbitral award invalid and unenforceable.

Furthermore, significant differences in the understanding and interpretation of "public policy" across various jurisdictions further exacerbate the ambiguity of legal provisions. Article V(2)(b) of the New York Convention stipulates that the recognition and enforcement of an arbitral award may be refused if it would be contrary to the public policy of the country where recognition and enforcement is sought. However, the concept of "public policy" is inconsistently defined in judicial practice. In the Bank Melli case, the arbitral tribunal held that only international sanctions implemented in accordance with fundamental principles of the rule of law fall within the scope of international public policy [13]. The 1987 Swiss Federal Act on Private International Law provides that any dispute involving a pecuniary interest can be arbitrated, reflecting a relatively broad

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standard of arbitrability. Sanctions imposed by the United Nations Security Council are regarded as a "public policy" that is generally accepted by the international community and possesses universal binding force. In the case of Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA), a United States court ruled that the "public policy" defense should be construed narrowly, holding that enforcement should be refused only when it would violate the forum's "most basic notions of morality and justice" [14]. In China's current public law provisions, although there is no detailed descriptive definition of public interest, it can be inferred that China's "public interest" encompasses fairness and justice at the individual level as well as consensus at the level of national interest [15]. The varying standards for determining public policy among nations mean that even after an arbitral tribunal renders an award, it may face different standards of public policy review in different countries. This, in turn, affects the award's enforceability and exacerbates the uncertainty in the determination of jurisdiction.

2.3. Absence of international precedent for determining jurisdiction

Although the impact of sanction measures on international arbitration has been a subject of discussion for many years, particularly concerning the sanctions against Iraq, Libya, and Iran, no clear international precedent has yet been formed for the resolution of jurisdictional conflicts in the context of sanctions [16]. This lacuna stems, firstly, from the scarcity of countries in the international community that have established an "anti-sanction recovery litigation" system. Secondly, the legal practice of such "anti-sanction recovery litigation" falls far short of the standard required to constitute international precedent. Thirdly, countries that do have such a system do not adopt a uniform approach when handling conflicts with arbitral awards. When states formulate and implement sanctions and counter-sanction measures, they are often driven primarily by factors of national security or foreign policy, rather than by purely commercial rules aimed at economic and trade matters.

Following the activation of its blocking statute, the European Union explicitly stated in a corresponding guidance document that any judgment based on the foreign laws and measures listed in the statute's annex, which are in violation of international law, is invalid for being contrary to public policy. The promulgation of China's Anti-Foreign Sanctions Law is aimed at countering foreign sanctions, safeguarding China's national sovereignty, security, and development interests, and protecting the lawful rights and interests of Chinese parties [17]. The general and abstract provisions of Article 12 seem intentionally profound, yet they do not provide parties with clear and logical guidance on how to initiate litigation based on the right of recovery granted therein. China's design of its anti-sanction recovery litigation system can be said to be comparatively milder than the EU's; although it reserves some space to achieve its legislative purpose, it severely tests the ability of judges to exercise discretionary power in practice and can easily lead to inconsistent judgments in similar cases. Therefore, in the foreseeable future, the practices of various countries in resolving such conflicts will likely remain diverse, making it difficult to form a universally applicable international precedent.

3. Analysis of the applicable path amidst jurisdictional conflict

Although Chinese parties have the right to initiate litigation to seek relief for their lawful rights harmed by sanction measures, the process of actually bringing an anti-sanction lawsuit inevitably presents numerous difficulties. In circumstances where legal provisions are not sufficiently clear, parties have multiple avenues for relief to choose from. If initiating litigation, it is necessary to

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consider the impact of other relief pathways, such as a pre-existing arbitration agreement, on the proceedings. The anti-sanction recovery litigation system confers upon Chinese parties a right of recourse; that is to say, Chinese parties may, through means of private remedy, utilize a law that has the characteristics of a state political tool against all entities that comply with foreign sanction measures. The number of such entities is vast. If Chinese parties could easily initiate anti-sanction recovery litigation, it could, on the one hand, readily lead to an abuse of process, and on the other, would also have a certain impact on China's image in its economic and trade relations. Based on this, this paper will further explore how to handle the issue of jurisdictional conflict within concrete judicial practice in order to better resolve disputes.

3.1. Parties should exhaust arbitral remedies before initiating anti-sanction recovery litigation

Arbitration should be the priority choice. As a common method for resolving international commercial disputes, various arbitral institutions have, in practice, formed simple and convenient arbitral rules. Arbitration has consistently been favored by parties in international commercial activities for its characteristics of efficiency and respect for party autonomy. Choosing arbitration to resolve such disputes keeps the resolution at the parties' level and guarantees private party autonomy to the greatest extent. If the lawful rights and interests of the parties can be protected and the award enforced through arbitration, and it is clear that there is no violation of public policy, then it is unnecessary to activate the anti-sanction recovery litigation system, which carries a diplomatic counter-sanction function.

Choosing anti-sanction recovery litigation means forgoing the relatively more efficient dispute resolution model of arbitration; parties should make a decision only after carefully considering the costs in relation to their primary business markets. In the 2024 case of "A Certain Chinese Ocean Engineering Equipment Co. v. A Certain Foreign S Equipment Co. Tort Liability Dispute," S Equipment Co. was named for complying with a U.S. sanction order by cutting off communication with the Chinese party and refusing to fulfill payment obligations. The parties to this dispute had agreed in their contract to resolve disputes through arbitration and had designated a foreign law as the governing law. Despite this, the Nanjing Maritime Court, after accepting the case, still affirmed its jurisdiction and resolved the case through mediation. From this, it can be seen that for Chinese parties, there exists the possibility in certain situations for the jurisdiction of anti-sanction litigation to take precedence over an arbitration clause. In the early stages of applying the anti-sanction recovery litigation system, judicial organs, in order to fully realize the legislative purpose and ensure that judgments properly resolve disputes, may strengthen the force of coordination and cooperation with multiple departments. This, however, could very likely cause parties to become mired in lengthy litigation cycles, making the efficiency of dispute resolution inferior to that of arbitration.

Furthermore, anti-sanction recovery litigation is, after all, a form of private remedy that carries a political counter-sanction function, and parties will inevitably be subject to the will of public power. If initiating such litigation, parties should, in order to fully express their views, actively communicate and coordinate with judicial departments in the hope of reaching a judgment that achieves multi-party objectives.

3.2. Relevant departments should fully utilize the working coordination mechanism to resolve disputes

In March 2025, to further detail the implementation of the Anti-Foreign Sanctions Law, the "Provisions on the Implementation of the Anti-Foreign Sanctions Law of the People's Republic of

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China" were promulgated [18]. Article 10 therein stipulates that the various departments of the State Council shall undertake the relevant work of the coordination mechanism, which also reflects that anti-sanction recovery litigation is not limited to judicial resolution.

For instance, the determination of the elements for identifying discriminatory restrictive measures as listed in Article 3 of the Anti-Foreign Sanctions Law—including violating fundamental principles of international law, using various pretexts or one's own domestic law as a form, targeting China and its citizens and organizations, and interfering in China's internal affairs—often requires the comprehensive application of professional knowledge and information from various fields such as diplomacy, economics, and trade. In view of this, when domestic courts handle such issues, they should communicate and coordinate with the departments that enforce the Anti-Foreign Sanctions Law and related blocking statutes, such as the Ministry of Foreign Affairs and the Ministry of Commerce, to obtain necessary official information and policy interpretations. This coordination mechanism gives domestic litigation an advantage that arbitration cannot match when handling issues involving complex national interests and policy sensitivities.

Anti-sanction recovery litigation is not merely a simple civil compensation case; it also carries the important function of the state's counter-measures against foreign unilateral sanctions, aimed at safeguarding national sovereignty, security, and development interests. The jurisdiction of the People's Courts over such disputes should be established based on the principle of appropriate connection as established by the Civil Procedure Law, so as to avoid judicial chauvinism resulting from an over-expansion of jurisdiction. When hearing such cases, courts should also ensure that judicial decisions are consistent with the overall national strategy and avoid displaying excessive aggressiveness that could affect the economic and trade market. Current judicial practice also indicates that Chinese courts tend to resolve such disputes through a "moderate" approach of mediation, so as to ensure that the opinions of both parties are respected to the greatest extent possible and their lawful rights and interests are protected, reflecting the "dispute resolution" characteristics of the East.

4. Conclusion

The anti-sanction recovery litigation mechanism established by Article 12 of China's Anti-Foreign Sanctions Law has become an important system for protecting the lawful rights and interests of Chinese citizens and organizations; however, its overly general and abstract provisions still require their substance to be supplemented and perfected through practice. As a part of China's foreign-related rule of law system, anti-sanction recovery litigation provides a new path for parties to seek relief for their rights, yet it also carries the risk of abuse of process by private entities. For the courts, the exercise of judicial jurisdiction also requires caution to avoid an over-expansion of extraterritorial jurisdiction. When a conflict arises between arbitral jurisdiction and litigation jurisdiction, given the possibility that an arbitral award may be refused enforcement for being contrary to public policy, parties should use anti-sanction recovery litigation as a remedy of last resort. In other words, one should only consider initiating anti-sanction recovery litigation when it is impossible to obtain relief for one's lawful rights and interests through arbitral means. At the same time, judicial departments must also grasp the proper measure in exercising litigation jurisdiction, establishing jurisdiction by assessing connecting factors based on the principle of "appropriate connection." They should fully leverage the working coordination mechanism to establish a well-functioning anti-sanction recovery litigation system, and in doing so, provide a "China solution" and practical experience for the global opposition to improper unilateral sanctions.

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