Theory of Absolute and Functional State Immunity in the Legislation and Judicial Practice of the Russian Federation

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Abstract

This article provides a comprehensive analysis of the concept of "state immunity" as reflected in the legislation and judicial practice of the Russian Federation. A study in decisions of Russian courts prior to the adoption of the Federal Law on Immunities of 2016 leads to the conclusion that, even during the juridical consolidation of the theory of absolute immunity in Russia, on a number of questions Russia in fact adhered to a theory of functional immunity. The concept of absolute immunity which the USSR followed (and which Russia as its legal successor subsequently also followed) gradually began to conflict with the Russian Federation's foreign economic activity and contract practices, and instances of Russia's renunciation of absolute immunity increased in frequency. This tendency clearly shows that in the 21st century the state cannot have absolute immunity because that version of sovereignty conflicts with the global practice of state participation in private international relations. In other words, the Russian Federation with the adoption of its Federal Law on Immunities has moved away from a theory of absolute immunity to acknowledge and employ a theory of the functional immunity of the state. At the same time, the Law on Immunities of 2016 already requires more elaboration and corrections even though it was only recently passed and implemented. The methodology of study is based on the application of formal, logical and comparative research methods together with general systematic methods of analysis and synthesis, deduction and induction. Questions touched upon in this article are widely discussed in establishing doctrines of private international law in both foreign and in Russian studies. Issues connected with state immunity are raised by the authors and suggestions for their resolution are formulated based on the legal experience of contemporary Russia.

Keywords

private international law; subjects of law; state; immunity; absolute immunity; functional immunity; legislation; judicial practice (case law).

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Introduction

Legal entities or subjects of law with diverse legal natures, in particular both the entities or subjects governed by public international law (the state, international intergovernmental organizations) and those governed by national law (physical and juridical persons) can be governed by private international law. It should therefore be understood that one and the same entity in private international law may be a participant in both international and national legal relations. For example, the state in its capacity as a member of an international monetary financial organisation (for example, the International Monetary Fund [hereinafter *IMF*]) is obliged to make payments (e.g. quota subscription payments, in the case of the IMF) into the budget of this organisation in foreign currency. The relations between the IMF and the member state inevitably take an inter-state form. At the same time, if this state concludes an agreement for a loan from a syndicate of banks, then these legal relations will have a private law character and are regulated by the respective applicable national law. In that case, the legal status of the state is no different than the legal status of other entities that are subject to analogous regulated legal relations.

This circumstance has resulted in the adoption by some post-Soviet countries of national laws on private international law to clarify how to determine the status of subjects of law involved in relations that have a foreign element. Among these countries are: Azerbaijan (Law of 6 June 2000 No. 889-IG On Private International Law[1] in which the status of entities subject to private international law is regulated by Chapter II "Persons") and Ukraine (Law of 23 May 2005 No. 2709-IV "On Private International Law"[2] in which Section II in fact defines the status of the state although it is called "Conflicts between norms related to the legal status of physical and juridical persons". That status in Ukrainian law is established by the norms of Art. 30 "Participation of the state and juridical persons subject to public law in private law relations with a foreign element") and some others. However, the norms on the state as a special entity subject to private international law and endowed with immunity are not contained in these laws. In a number of other states, the laws on private international law have been revised, although specific provisions

[1] Law of the Azerbaijan Republic No. 889-IG of 6 June 2000 On Private International Law // *Azerbaijan*. 2000. No. 249].

[2] [Law of Ukraine No. 2709-IV of 23 June 2005 On Private International Law // Vedomosti Verhovnoy Rady 2005. No. 2709-IV. Art. 422].

on the state as a special entity endowed with immunity likewise are mostly absent (Law of Albania of 13 June 2011 No. 10428 On Private International Law[3], the Law of Belgium of 16 July 2004 On the Code of Private International Law)[4] and others.

All countries recognize that the state as the bearer of political power and sovereignty does not lose this quality even in private international legal relations, which is precisely why a mechanism for them to renounce their sovereign nature is necessary. In the end the state enters into private relations voluntarily as if "bifurcating" its juridical personality into private and public segments; and thus as an entity subject to private international law relations, it voluntarily limits its immunity. If that is not done, that kind of limitation can be imposed by another state when a private law dispute arises and/or is considered on its territory. Of course, if questions of conflicts of law arise in this fashion between states, there may be no easy solution.

Much like other countries, Russia strives to prevent these problems from arising and to resolve them justly if they do arise. The adoption of the Federal Law dated 3 November 2015 No. 297-FZ "On Jurisdictional Immunity of a Foreign State and the Property of a Foreign State in the Russian Federation"[5] in force from 1 January 2016 (hereinafter *Law on Immunities*) was without doubt an important step in this direction. Everyone, both theoreticians and legal practitioners, had long anticipated its appearance as part of Russian law. The law permits the status of foreign states to be defined in a exact way. Interpretation of its provisions and an examination of their operation in practice (two years after their adoption) is the task that now stands before us.

The Concept and Basic Theory of Jurisdictional Immunity of the State

In the examination of the legal status of states as subjects of private international law, the institution of state immunity is a basic theoretical problem, which we will now examine in more detail. The concept of state immunity was formed originally in customary international law and only subsequently consolidated in international treaties and judicial practice. The divergence in understanding of this legal institution has prompted a significant number of fundamental studies both

[3] Law of the Republic of Albania No. 10428 of 13 June 2011 On Private International Law. Available at: http://pravo.hse.ru/data/2016/02/22/1139770089/%D0%90%D0%BB%D0%B1%D0%B0%D0%BD%D0%B8%D1%8F%202011.pdf. (accessed: 25.01.2018)

[4] Law of Belgium of 16 June 2004 "On the Code of Private International Law"]. Available at: http://pravo.hse.ru/intprilaw/doc/041801 (accessed: 25.01.2018)

[5] Federal Law No. 297-FZ of 3 November 2015 On Jurisdictional Immunities of a Foreign State and Property of a Foreign State in the Russian Federation // Sobranie zakonodatelstva Rossiyskoy Federatsii (hereinafter SZ RF). 2015, No. 45. Art. 6198.

in Russian and foreign jurisprudence[6]. As applied to the participants in private international law relations, the term "immunity" has been known since the time of ancient Rome when the clergy were not subject to general judicial procedures, i.e. in effect they possessed jurisdictional immunity. The term "immunity" is derived from the Latin word *immunitas* (exemption from taxes, service and so forth). Two basic theories of jurisdictional immunity of the state arise in private international law — absolute and functional (in the literature often called "limited") immunity.

In accordance with the theory of absolute immunity, "the right of the court to examine suits against foreign states and to exact recovery against their property regardless of the nature of the disputed activity (commercial or authoritative) is not recognized".[7] Russia, just like some of the other states which had been republics in the USSR, had up to 2016 almost always adhered to absolute state immunity. Thus, in earlier versions of Art. 401 of the Civil Procedural Code of the Russian Federation (hereinafter Civil Procedural Code of the RF)[8] and Art. 251 of the Arbitration Procedural Code of the Russian Federation (hereinafter Arbitration Procedural Code of the RF)[9] (new versions of both articles can be found in the text of Federal Law of 29 December 2015 No. 393-FZ)[10], the immunity of a foreign state is provided for unconditionally. Any kind of action by Russian courts would be possible only in the event that a state would agree to being brought before a court and/or having measures of compulsory execution applied against it.

The second theory — of functional immunity — is adhered to by the majority of states in the world; special laws were adopted by some of them (in the United States in 1976, in Great Britain in 1978, in Canada in 1972 and so forth). The essence of this theory is that a question about immunity is decided based on the function which the state is fulfilling in a specific, concrete situation: Is it executing

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[6] See for example: *Ushakov N.A.* Jurisdictsionnye immunitety gosudarstv i ih sobstvennosti [Jurisdictional Immunities of States and Their Property]. Moscow: Nauka, 1993; *Khlestova I.O.* Jurisdicationnyi immunitet gosudarstva [Jurisdictional State Immunity]. Moscow: Jurist, 2002; *Fox H., Webb P.* The Law of State Immunity. Oxford University Press, 2015; *O'Keefe R. Tams C., Tzanakopoulos A.* The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary. Oxford University Press, 2013.

[7] *Kaisin D.V.* Immunitet gosudarstva I zaschita inostrannyh gosudarstvennyh kapitalovlozhenyi v Rossii [State Immunity and Protection of Foreign State Capital Investments in Russia] // *Zakon.* 2015. No. 5, P. 160.

[8] Civil Procedural Code of the Russian Federation No. 138-FZ of 14 November 2002 // SZ RF. 2002, No. 46. Art. 4532].

[9] Arbitration Procedural Code of the Russian Federation No. 95-FZ of 24 July 2002 // SZ RF 2002. No. 30. Art. 3012.

[10] Federal Law No. 393-FZ of 29 December 2015 On Introduction of Changes in Separate Legislative Acts of the Russian Federation in Connection with Adoption of the Federal Law On Jurisdictional Immunities of a Foreign State and Property of a Foreign State in the Russian Federation // SZ RF. 2016. Part.1 No. 1. Art. 13.

its political or other authoritative function (*jure imperii*)? As G.M. Velyaminov correctly notes about a state that acts in a private or commercial capacity (*jure gestionis*), "in accordance with the concept of functional immunity, the right to immunity is lost with respect to its property and other rights, and moreover, in accordance with this concept, without special agreement of the given state"[11].

For European states, the basic international legal document regulating state immunity is the European Convention on State Immunity (ETS No.74) (hereinafter *European Convention on State Immunity*)[12], which was adopted by the Council of Europe on 16 May 1972 and now extends to eight countries: Austria, Belgium, UK, Germany, Cyprus, Luxembourg, the Netherlands and Switzerland. Portugal signed the convention on 10 May 1979 but did not ratify it. Those European states which are not participants in the European Convention on State Immunity — France, Denmark, Greece, Italy and others, "employ the concept of functional (limited) immunity of a foreign state not in legislation but in judicial practice"[13].

In the classical understanding of functional immunity, if a foreign state functions as an entity subject to private law, agreement of the foreign state is not required for a court to consider a suit brought against that state. If the state is fulfilling the role of a public law or sovereign entity, i.e. it is acting as the bearer of authoritative power and carries out authoritative activity accordingly, such activity cannot be a matter for consideration in a foreign court without that state's consent. However, the agreement of the state to participate in a private law obligation (in the broad sense) must be considered by the court to be an unconditional agreement to all the consequences which flow from such participation including the procedure for resolution of a dispute both in court (according to general rules of international civil procedure) and through international commercial arbitration (in the event of an agreement on transfer of a dispute for consideration).

The Law on Immunities as the grounds for recognition of a foreign state's renunciation of judicial immunity considers only the situation in which a state takes specified actions regarding a suit in a court of the Russian Federation or has concluded with a contracting party "an arbitral or arbitration agreement concerning the settlement with its participation of disputes which arose or might arise in the future in connection with performance of an obligation". However, there is the reservation that the renunciation operates with respect to "disputes concerning an arbitral or arbitration agreement" (Art. 6(2) of the Law on Immunities). Mean-

[11] *Velyaminov G. M.* Miezhdunarodnoye pravo [International Law*]*. Moscow: Statut, 2015 // SPS Consultant Plus.

[12] European Convention on State Immunity (ETS No. 74). May 16, 1972. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/074(accessed:20.11.2018)

[13] *Veselkova E.E.* Konceptia proekta federalnogo zakona O jurisdiktsionnom immunitete inostrannogo gosudarstva i ego sobstvennosti [Concept of the Draft On Jurisdictional Immunity of a Foreign State and its Property] // Advocat. 2015. No. 10. P. 48.

while, the question concerning the procedure for participation of a state as a party during consideration of a private law dispute can have two answers as Krešimir Sajko rightly notes: "Depending on fulfilment of the prescribed legal requirements, jurisdiction is exercised either by state courts or by arbitration"[14].

Before the adoption of the Law on Immunities, Russia's rejection of the theory of functional immunity had created "serious obstacles to attracting foreign investment in the economy of the Russian Federation"[15]. Nevertheless, we note that functional immunity was provided for, even if not explicitly, in the texts of agreements of the Russian Federation on mutual protection of capital investment. Thus, an agreement between the Government of the Russian Federation and the Government of the Czech Republic "On the Encouragement and Reciprocal Protection of Capital Investments" discusses in Art. 8(1) settlement through negotiation of those disputes which may arise "between one of the Contracting Parties and an investor of another Contracting Party", i.e. it directly refers to a dispute between a state (Russia or the Czech Republic) and an investor which is a physical or juridical person. Furthermore, Art. 8(2) provides for the possibility that an investor may turn to "a competent court or arbitration procedure of the state of the Contracting Party on the territory in which the capital investment was effectuated", to the International Centre for Settlement of Investment Disputes, or to an *ad hoc* arbitration tribunal[16].

A study of other treaties, particularly those on foreign economic transactions, likewise shows that both the USSR and the Russian Federation were compelled to renounce immunity of their trade representations abroad regarding transactions concluded or guaranteed by those states. From this the conclusion can be drawn that even when the theory of absolute immunity was consolidated in its law, Russia in fact acceded to the theory of functional immunity on a number of questions. Hence, when the Concept of the Unified Civil Procedural Code of the Russian Federation was being elaborated, it was pointed out "it is necessary to reflect the concept of functional immunity of a foreign state as bearer of power in the provisions on suits against foreign states and international organizations"[17].

Thus, the theory of absolute state immunity assumes that the state is always sovereign –in both its private and public relations. However, the other applicable

[14] *Sajko K.* The State as a Party in Arbitral Proceedings on Settlement of Private Law Disputes — Miscellaneous. Wolfrum R. et al (eds.) Contemporary Developments in International Law. Brill: Nijhoff, 2015 P. 770.

[15] *Veselkova E.E.* Op. cit. P. 47.

[16] Agreement between the Government of the Russian Federation and the Government of the Czech Republic of 5 April 1994 On the Encouragement and Reciprocal Protection of Capital Investments. // SPS Consultant Plus.

[17] Conception of a Unified Code of Civil Procedure of the Russian Federation (approved by the decision of the Committee on Civil, Criminal, Arbitration and Procedural Legislation of the State Duma of 8 December, 2014], No. 124. Available at: http://www.consultant.ru/document/ // SPS Consultant Plus.

theory, the theory of functional immunity, "conditions immunity on the presence of two factors: the nature of the state as a special subject of law and the actions executed by it in the performance of its functions as a sovereign power"[18]. "In the modern world, the concept of functional immunity is gradually losing its absolute interpretation, which is reflected not only in national law but in international conventions and bilateral agreements"[19].

The Concept of the State as Applied to Rights and as Bearer of the Immunity of the State

In the modern theory of private international law, the determination of the legal status of the state in general and what is denoted by the term "state" (as employed in the Law on Immunities) are constantly under discussion. This discussion has become particularly urgent because that law enumerates in Art. 2 the constituent elements of the concept "state", but nevertheless leaves unclear a number of questions requiring clear answers and commentary. It should therefore be mentioned that physical and juridical persons fulfil a dual role when they participate in private international law relations in the name of the state: on the one hand, they engage in legally significant actions as autonomous subjects of private international law; but on the other hand, they act not in their own interests, but in the interests of the state they represent. In particular, Art. 2 of the Law on Immunities indicates that the term "foreign state" is to be understood as (we note that in the given discussion, the terminological divergence does not have any significance since the discussion is about the content and "verbal load" of the term "state"):

a state other than the Russian Federation and its agencies of state power;

constituent parts of a given foreign state (subjects of a foreign federated state or the administrative territorial formations of a foreign state) and their agencies to the extent to which they are empowered to engage in an action for the purpose of effectuating the sovereign power of the given foreign state, and to the extent that they act in that capacity;

institutions or other formations, regardless of whether they are juridical persons, to the extent to which they are empowered to engage in and do in fact engage in actions for the purpose of effectuation of sovereign power of the given foreign state;

representatives of a given foreign state acting in that capacity.

[18] *Schegolev S.I.* Jurisdiktsionnyi immunitet inostrannuh centalnuh bankov: miezhdunarodnoe i zarybezhnoe pravovoe regulirovanie [Jurisdictional Immunity of Foreign Central Banks: International and Foreign Regulation] // Bulleten' Vyschego Arbitrazhnogo suda Rossiyskoy Federatsii. 2013. No. 1. P. 50.

[19] Miezhdunarodnoe chastnoe pravo [Private International Law]. Lebedev S.N., Kabatova E.V. (eds.). Moscow: Statut, 2015. Available at: http://www.consultant.ru/ (accessed: 20.11.2018)

This interpretation of the basic understanding of "foreign state" is based on changes and additions to the codes and other normative acts which were introduced after adoption of the Law on Immunities. Thus, in the Civil Procedural Code there is direct reference to application of these provisions: "foreign state" is used with the meaning determined by norms of the Law on Immunities (Art. 417.1(4)). The "state" is named in the first instance as the bearer of immunity in the narrow sense of this word. However, the state by itself as a whole (in its public law meaning) is not physically capable of participating in international private relations, i.e. it can only be represented by those persons that act in its name, and first among these are the agencies of state power.

For the full range of characteristics that identify a subject of law as a bearer of immunity of the state, it is also necessary to examine certain aspects of that subject's legal status. Without digressing into a general theoretical interpretation, we will set out only two opinions on the understanding of this category of legal status. In particular, A.A. Akmalova and V.M. Kapitsin, in defining the term "legal status", have pointed out that it is necessary to understand by this term the legally "fixed" position of the subject (as an individual, organisation, state, state agency) in the state, society, or world community[20]. In the opinion of A.V. Malko, the legal status of a subject of law should be understood as the legally assigned position of the subject in a society as expressed by the complex of its rights and responsibilities[21]. In other words, we believe that the legal status of the state (as applied to private international law) means the factual status of the state (in the broad sense of that term) in relations which are the subject matter of private international law. In this sense, V.V. Dolinskaya is right — she assigns derivative legal status based on the general legal status established by the Constitution of the Russian Federation to concrete legal relations[22]. And of course it follows that the legal personality of the bearer of the right should be relied upon for resolution of questions concerning state immunity, where "legal personality" is understood according to the definition of R.S. Sadrieva as "the possibility and, accordingly the legal capacity, of a person to be the subject of law"[23].

A number of specialists point out "the nature of the state is similar to the essence of a juridical person, i.e. it is based on a fiction". By assigning certain indicia

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[20] *Akmalova A.A., Kapitsyn V.M.* Poniatie pravovogo statusa subiekta [The Concept of Legal Status of a Subject]. Moscow: Jurist, 2008. P. 164.

[21] *Malko A.V.* Teoria gosudarstva i prava v schemah, opredeleniah I kommentsriah [Theory of State and Law in Schemes, Definitions and Commentaries]. Moscow: Prospect, 2010. P. 39.

[22] *Dolinskaya V.V.* Pravovoy status I pravosubieknost [Legal Status and Legal Capacity] // Zakony Rossii: opyt, analiz, praktika. 2012. No. 2. P. 9.

[23] *Sadrieva R.R.* K voprosu o suchnosti gosudarstva kak subiekta grazhdanskogo prava [On Essence of State as a Subject of Civil Law] // Aktualnye problemy rossiyskogo prava. 2015. No. 5. P. 70 .

and structural elements, a "legal portrait" or "legal personality" is created[24]. This is completely correct; the state, just like a juridical person, does not itself as a unified whole in fact participate in social relations, including in judicial examinations, but does this through its agencies and officials (or persons empowered by them). Therefore, during discussion in court of a question on state immunity, the status in which the representative of a foreign state acts is materially significant.

We stress once more that state agencies in the first instance possess the legal status to represent a foreign state and to act in its name. However, Russian courts must pay attention to the fact that in a foreign state, just as in Russia, state agencies may be endowed with the status of autonomous juridical persons (and accordingly represent themselves and not the state generally). Therefore, we believe that courts of the Russian Federation should carefully verify the status of representatives of state agencies, namely to establish in what capacity a representative of a foreign state is acting — as part of the state or as a subject of private international law possessing legal autonomy.

In our opinion, the question of presence or absence of immunity of a federated unit of a state (constituent districts of the Russian Federation, Canadian provinces, Indian states etc.) requires separate examination. Usually they are considered to be autonomous persons to whom the immunity of the state is not extended; for example, this is indicated as a general rule in Art. 28(1-2) of the European Convention on State Immunity which provides that autonomous units within a federated state do not enjoy immunity if the state participant in the convention does not submit a notice otherwise. European States (Belgium, UK, Italy and others) regulate the question concerning immunity of state versus public territorial entities in an analogous way.

To clarify the question of immunity of constituent parts of a federated state — such as states, cantons, *länder* and others — it is possible to use the norms of its constitution where their powers to conclude actions (as stated in Art. 2(1)(b) of the Law on Immunities) "for purposes of effectuation of sovereign authority of the particular foreign state" are designated. Thus, we see from the abovementioned provisions of the Law on Immunities and the European Convention on State Immunity that, as of 1 January 2016, Russia has greatly changed its approach to the doctrine of immunity of the state and its constituent parts; specifically, the position of Russia at present concurs with the prescriptions of the European Convention on State Immunity, which is highly significant for building lasting relations with European countries.

We turn to another international act which is not regional but rather universal in character, namely the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004; hereinafter UN Convention on Immunities of

[24] Available at: http://www.consultant.ru/ (accessed: 20.11. 2018)

2004)[25], which the Ministry of Foreign Affairs of the Russian Federation signed in the name of the Russian Federation (at the instruction of the Government of the Russian Federation)[26]. The Convention has not yet come into force. The UN Convention on Immunities of 2004 provides for a somewhat different approach where "constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity" (Art. 2 (1)(b)(ii) are equated with the state (and consequently enjoy immunity). We believe there is reason to be concerned after the convention comes into force that legal non-conformities between Russia and the European States on the question of immunity of constituent parts of the state will arise[27].

It is therefore possible to draw the following conclusions:

concept of state immunity is perceived the same by almost all countries and, therefore, disputes in this connection are practically absent;

with the adoption of the Law on Immunities, the Russian Federation moved from the theory of absolute immunity to an acknowledgement and use of the theory of functional immunity. However, this law, despite its recent enactment, already requires further elucidation and corrections as we indicated above;

the range of subjects acting as "bearers" of state immunity is outlined with sufficient precision in the Law on Immunities, but clarification and further elaboration of details is nevertheless required in certain instances.

Procedural Aspects of Regulating State Immunity in the Russian Federation

After the adoption of the Law on Immunities, additions and changes determining the procedure of application and renunciation of immunity were introduced in a number of Russian legal acts. Thus, in accordance with Art. 417.3(4) of the Civil Procedural Code of the RF, a specially agreed right of a representative to renounce "judicial immunity, immunity with respect to measures for securing a suit, immunity with respect to enforcement of a judicial decision" must be established in a power of attorney or other suitable document issued by the foreign state that is being represented. The Supreme Arbitration Court of the Russian Federation had earlier drawn the attention of the legislature to the necessity for such a norm

[25] 25th UN Convention On Jurisdictional Immunities of States and Their Property of 2 December 200 // SPS Consultant Plus.

[26] Regulation of the Government of the Russian Federation No. 1487-r of 27 October, 2006 On Signing the Convention of the United Nations on Jurisdictional Immunities of States and Their Property // SZ RF. 2006. No. 45. Art. 4720.

[27] See for details: *O'Keefe et al.* The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary. Oxford: Oxford University Press, 2013.

and other procedural aspects long before such changes were made. In particular, in Point 8 of its Decree No. 8 "On Operation of Treaties of the RF as Applied to Questions of Arbitral Procedure" of 11 May 1999, reference is made as follows: an agreement concerning consideration of a dispute in an arbitral court of the Russian Federation must be signed by persons empowered by legislation of the foreign state to renounce its judicial immunity[28].

A state's eligibility for immunity is established at the stage of a preliminary judicial hearing unless the information available at that time does not permit a conclusion. If that is the case, the question is subject to resolution during the examination stage of the judicial hearing. If at the preliminary judicial hearing or during examination in the judicial hearing, the court concludes that the foreign state has judicial immunity, the court will terminate the respective proceeding on the matter in question (Art. 417.7(5) of the Civil Procedural Code of the RF). A federal agency with executive power to determine and execute state policy and normative legal regulation in international relations may participate in a case at the initiative of the court or on its own initiative for the purpose of giving an opinion on the matter of granting jurisdictional immunities to the Russian Federation and its property in a foreign state (Art. 417.8(1) of the Civil Procedural Code of the RF).

Art. 4 of the Law on Immunities applies principle of reciprocity to claims of jurisdictional immunity. This means that, when jurisdictional immunities are granted by states to each other, the court proceeds on the assumption that this is done reciprocally, i.e. reciprocity is intended. However, this assumption may be refuted if judicial examination establishes that the principle of material reciprocity is being violated, i.e. the extent of immunities granted to Russia does not correspond to the extent which Russia grants to a foreign state (Art. 417.9 of the Civil Procedural Code of the RF). When such a judgment is reached, a reduction in the extent of immunities are enjoyed by the foreign state will be imposed, and the court will accordingly render a reasoned decision that applies the principle of reciprocity (Art. 417.9(3) of the Civil Procedural Code of the RF). Nearly analogous provisions are now contained in Chapter 33.1 "Proceedings in Cases with Participation of a Foreign State" of the Arbitration Procedural Code of the RF.

Prior to the adoption of the Law on Immunities, Russian courts had likewise proceeded on the basis of the principle of reciprocity. Thus, the Arbitration Court of the City of Saint Petersburg and the Leningrad Region during consideration on 9 February 2015 of Case No. A56-48129/2014 of a suit brought by Inpredservis, a Saint Petersburg state unitary enterprise providing services to representatives of foreign governments, against the General Consulate of Poland in Saint Petersburg

[28] Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation On Operation of Treaties of the Russian Federation as Applied to Questions of Arbitration Procedure of 11 June 1999. No. 8 // SPS Consultant Plus.

concerning the recovery of 74,330,287 rubles in unjust enrichment and the obligation to vacate a building located at 5th Sovetskaya Street, Building 12-14, Saint Petersburg, established that on 13 April 1983, an Agreement had been concluded in Moscow between the Ministry of Foreign Affairs of the USSR and the Ministry of Foreign Affairs of the People's Republic of Poland in accordance with which the contracting parties on the basis of reciprocity were relieved from payment of rent (hire) for work and dwelling premises to accommodate the embassy and consulate staff.

However, on 26 June 1994 the Ministry of Foreign Affairs of Poland directed Note to the Embassy of the Russian Federation in Warsaw informing the latter about termination of the reciprocal arrangement (on relief from rental payment for the premises enjoyed by the diplomatic and consulate services) as of 30 May 1994. A subsequent decision of a regional court in Warsaw on 24 September 2007 (Case No. II S 1306/06) concerning the suit of the mayor of Warsaw against the Ambassador of the Russian Federation in the Republic of Poland ordered that the real estate located in Warsaw at Shukha Street, Building 17/19, be vacated, and that decision confirmed that the Polish side did not recognize the judicial immunity of the Russian Federation. Based on this violation of the principle of reciprocity and other circumstances, the Russian court exacted from the Polish Consulate the sum of unjust enrichment from its use of the disputed building for the period from July 1, 2011 to July 1, 2014 and obliged the Polish Consulate to vacate the premises[29].

After adoption of the Law on Immunities, as happened with other laws, the Federal Law of 2 October 2007 No. 229-FZ "On Enforcement Proceedings" (in the version of 31 December 2017) made changes to the law on immunities by introducing a new Chapter 12.1 "Procedure for Execution of Judicial Acts with Respect to a Foreign State and its Property"[30]. As noted by A.A. Volos, directing all agencies "of state power to ensure actual (effective) execution of judicial decisions" is a paramount task during enforcement of judicial decisions[31].

Despite its comprehensive and nearly revolutionary influence on the entire procedure for applying state immunity, the Law on Immunities contains certain limitations in its application to certain categories of immunities. Specifically, in accordance with Art. 3b, this law "does not impair privileges and immunities" which in accordance with norms of international law are enjoyed by:

[29] Decision of the Arbitration Court of the City of Saint Petersburg and the Leningrad Region of 9 February 2015 in civil case No. A56-48129/2014 // СПС Гарант.

[30] Federal Law No. 229-FZ of October 2, 2007 On Enforcement Proceedings // SZ RF. 2007, No.41, Art. 449 // SPS Consultant Plus.

[31] *Volos* A.A. Zaschita slaboy storonu v obyazatelstve na razlichnuh stadiyah deistvia mechanizma osushestvlenia grazhdanskih prav I ispolnenia obyazannostei [Protection of the Weaker Party in an Obligation at Various Stages of Operation of the Mechanism of the Exercise of Civil Rights and Performance of Duties] // Konkurentnoe pravo. 2014. No. 4. P. 42.

a foreign state in executing the functions of its diplomatic representatives, consulates, special missions, representatives in international organisations or delegations in agencies of international organisations, or at international conferences, and persons related to them;

heads of state or governments or ministers of foreign affairs;

a foreign state with respect to aircraft or objects in outer space belonging to a foreign state or exploited by it and also military ships and other state vessels exploited for non-commercial purposes.

Such exceptions provide insight into the extent of legal equality (parity) between the state and other entities subject to private international law. As A.Ya. Ryzhenkov have noted, it is quite obvious that there cannot be across-the-board equality between the subjects of private international law because "that would contradict, apart from anything else, other basic principles of civil legislation, namely freedom of contract and the prohibition against arbitrary interference in private relationships"[32]. The residual inequality of the state is manifest, for example, in the state's power acting as sovereign to prohibit the illegal entrepreneurial activities of physical and juridical persons[33].

A state may renounce its immunity through the procedure provided by Art. 5 of the Law on Immunities, including by petition to a court. We note that such a procedure had been available earlier, but not all courts followed it. Thus, in January 2016, the Supreme Court of the Russian Federation "put a stop" to one of the cases that had been examined in many judicial proceedings. Since the state has the right to conclude arbitration agreements, judicial practice proceeds on the basis that an arbitration clause signifies the agreement of the state to the examination of a suit against it through international commercial arbitration. The dispute in question began when a decision on a suit brought by Li Dzhon Bek, a citizen of the Republic of Korea, was rendered by the Arbitration Court under the Moscow Chamber of Commerce and Industry in Case No.A-2013/08 of 11 November 2013.

The Arbitration Court under the Moscow Chamber of Commerce and Industry had proceeded on the basis that, under Art. 11 of the Convention on Protection of Investors' Rights of 28 March 1997[34], the investor is granted the right to address a suit to any arbitration court which is authorized to consider international disputes, including investment disputes. Upon a complaint by the Kyrgyz Republic that the Arbitration Court under the Moscow Chamber of Commerce and Industry lacked

[32] *Ryzhenkov A.A.* K voprosu printcipoa ravenstva v sovremennom grazhdanslom prave [Principle of Equality in Modern Civil Law] / *Poryadok obschestva I sovremennor rossiyskoe pravo [*Social Order and Modern Russian Law]. Moscow: University Book, 2013. P. 611.

[33] *Ermolova O.N.* O priznakah presprinimatelskoy deytetelnosti [On Indicia of Entrepreneurial Activity] // Predprinimatelskoe pravo . 2014. No 3. P. 35.

[34] Moscow Convention on Protection of Investors' Rights of March 28, 1997. Available at: http://www.consultant.ru/document/ // SPS Consultant Plus..

the authority to consider the given dispute on grounds of the absence of an explicit arbitration agreement, the Arbitration Court of the City of Moscow rendered a ruling of 24 June 2014 in Case No. A40-19518/14 that the decision of the Arbitration Court under the Moscow Chamber of Commerce and Industry was to remain in force. The Arbitration Court of the City of Moscow in its capacity as a higher court found that, in the dispute related to rights of an investor in which the Arbitration Court under the Moscow Chamber of Commerce and Industry had considered the petition of Li Dzhon Bek, "grounds for vacating the decision of the arbitration court are absent"[35].

According to similar logic, the same Arbitration Court of the City of Moscow had considered an analogous case relating to a suit by the Stans Energy Corp. (of Canada) and Kutisay Mining LLC (of the Kyrgyz Republic) against the Kyrgyz Republic. Subsequently, the Supreme Court of the Russian Federation in its ruling of 11 January 2016 No. 305-ES15-14564 in Case No. A40-64831/2014 directed as follows: "insofar as an arbitration agreement is absent between the parties and also evidence was not presented to the court of first instance that the Kyrgyz Republic gave its agreement to consideration of the dispute in the Arbitration Court under the Moscow Chamber of Commerce and Industry, the conclusion appears to be justified that the disputed decision of the Arbitration Court mentioned contradicts the principle of respect of State sovereignty, which is a foundational principle of Russian law and a component of public policy of the Russian Federation". The Supreme Court of the Russian Federation also stressed that the agreement of a state to renounce immunity "must be expressed manifestly, clearly and concretely, precisely and unambiguously"[36].

The Law on Immunities provides for the inapplicability of judicial immunity with respect to:

disputes connected with participation of a foreign state in civil legal transactions and(or) execution of entrepreneurial and other economic activity (Art. 7);

labour disputes (Art. 8);

disputes connected with participation in juridical persons or other formations not having the status of juridical persons (Art. 9);

disputes concerning compensation for harm (Art. 11);

disputes connected with intellectual property (Art. 12);

disputes connected with exploitation of a vessel (Art. 13).

If the dispute does not relate to these categories, then the court has the right to apply the provisions of the Law on Immunities and render its opinion based on

[35] Ruling of the Arbitration Court of Moscow of 24 June 2014 in case No. A40-19518/2014 // SPS Consultant Plus.

[36] Ruling of the Supreme Court of the Russian Federation of 11 January 2016. No. 305-ES15-14564 in Case No. A40-64831/2014 // SPS Consultant Plus.

those provisions. Thus, the Arbitration Court of the Republic of Crimea rendered a decree dated 26 May 2016 in Case No. A83-2622/2016 directing that:

> in the given instance, the applicant disputes the decision of the State Registrar of the Department of State Registration of the Ministry of Justice of Ukraine, Sivolin Mikhail Yurevich, with respect to an object of immovable property and the power of the Department of State Registration of the Ministry of Justice of Ukraine, i.e. the dispute is connected with the authoritative powers of the Department of State Registration of the Ministry of Justice of Ukraine and does not arise from private civil and commercial legal relations. From the above it follows that the dispute in the given case cannot be considered in the Arbitration Court of the Republic of Crimea[37].

Contemporary Russian legislation does in fact provide sufficient detail for regulating procedural and other matters pertaining to the invocation of state immunity in the Russian Federation. The basic normative act is the Law on Immunities, which came into force on 1 January 2016, and it appears that it will be useful in unambiguously resolving disputes that involve the participation of foreign states.

Conclusion

Two approaches to state immunity reflected in the concepts of absolute and functional immunity of foreign states have been developed by international court practice. However, in light of the divergent attitudes of states to these concepts, the approach of concluding treaties has been used to reach consensus, specifically the UN Convention on Immunities of 2004 and the European Convention on State Immunity. The former has yet to come into force, but the latter incorporates a distinctive, non-traditional interpretation of functional immunity — indisputable renunciation of immunity is presumed only in instances indicated in Art. 1(1), Art. 5(1) and Art. 6(1). Therefore, the European Convention on State Immunity does not proceed from a general premise of functional immunity. In accordance with Art. 15, by default a state enjoys immunity except for those instances when judicial proceedings fall within Art. 1 through 14 of the Convention.

After adoption of the Law on Immunities, many unified norms came into conflict with its norms. In particular, in treaties on legal assistance only physical and juridical persons are indicated as subjects to which these norms apply, and states as a whole are not mentioned. We believe that reference must be made in those treaties to application of national legislation of contracting states in order to exclude

[37] Ruling of the Arbitration Court of the Republic of Crimea of 26 April 2016 in case No. A83-2622/2016 // SPS Consultant Plus.

extending operation of state immunity with respect to those subjects which are not bearers of state immunity.

A number of European states establish the concept of functional (limited) immunity of a foreign state not in legislation but, as in the Russian Federation before adoption of its Law on Immunities, in judicial practice. In our view, an analysis of the practice of Russian courts before adoption of the Law on Immunities supports the conclusion that, even during the legal consolidation of the theory of absolute immunity, Russia on a number of questions adhered in fact to a theory of functional immunity. The concept of absolute immunity, which the USSR adhered to (and subsequently Russia as its legal successor), gradually began to contradict the practice of foreign economic activity and the contractual practices of the Russian Federation as instances in which Russia renounced its absolute immunity became more frequent. This tendency clearly showed that in the 21st century a state cannot have absolute immunity because this contradicts the global practice of participation of states in private international relations. In other words, with the adoption of the Law on Immunities the Russian Federation went from a theory of absolute immunity to an acknowledgement and use of the theory of functional immunity. At the same time, even though the Law on Immunities has only been in force for a short time, it already requires further elucidation and correction. In particular, the understanding of the term "state" in matters concerning immunity is the subject of debate. This issue has become especially pressing because the Law on Immunities in Art. 2 enumerates constituent elements of the concept "state" but nevertheless leaves unclear a number of questions that require concrete answers and commentary. For example, the law mentions agencies of state power as representatives of the state but does not contain further clarification.

Russian courts should recognize that a foreign state, just as Russia does, endow its state agencies with the status of an autonomous juridical person (and accordingly permit them to represent themselves and not the state as a whole). And therefore we believe that the courts of the Russian Federation should establish in precisely which capacity a representative of a foreign state is acting — as part of the state or as a subject of private international law possessing legal autonomy to act on its own behalf rather than as a representative or arm of a state.

The existence of state immunity exerts a profound influence on a state's participation in private international relations because a state possesses its own specific character arising from the fact that it does not cease being a sovereign. Although states do in fact participate in proprietary, contractual, corporative, delictual and inheritance legal relations in common with physical and juridical persons, Art. 2(1) of the Civil Code of the Russian Federation of 30 November 1994 in the version dated 29 December 2017 (hereinafter *Civil Code of the RF*)[38] contains a norm

[38] Civil Code of the Russian Federation. Federal Law No. 51-FZ of 30 November 1994. SZ RF. 1994. No. 32, Art. 3301 // SPS Consultant Plus.

extending the application of civil legislation only to private persons and not to a state. We believe that this omission in the provision should be corrected by the Russian legislature. It is necessary to introduce an addendum concerning participation of foreign states in civil legal relations which involve a foreign element within the territory of the Russian Federation.

When a state engages in private international relations as a subject of private international law, its status in that capacity constantly commingles with its immunities. A number of norms pertaining to conflicts therefore require correction, in particular:

norm for resolving conflicts in Art. 1213(2) of the Civil Code of the RF in which it is necessary to clarify the provision concerning the location of the object of immovable property by indicating its juridical and not real location;

in Art. 1205 of the Civil Code of the RF, it is desirable to point to the norm of direct application with respect to property of a state (Art. 1192 of the Civil Code of the RF) as well as to include in the Law on Immunities new norms that provide a norm on the concept of immunity of property in Art. 2 and elsewhere to provide separate articles on the procedure for application (or non-application) of immunity to the property of a state and for renunciation of it;

in Art. 1224 of the Civil Code of the RF with respect to escheated property it is necessary to point unambiguously to the application of Russian law and, if the testator is a citizen of the Russian Federation and resides abroad, to the application of the law of citizenship of the deceased (*lex patriae*); furthermore, an analogous unambiguous application of Russian law should be made explicit in the Law on Immunities where priority is assigned to the principle of inheritance over the principle of occupation in order to establish that immunity of the property of a state will begin from the moment of transfer of rights in escheated property to that state.

Norms pertaining to both substantive matters and conflicts are likewise imperfect. The basic problems are as follows:

provisions of the Civil Procedural Code of the RF and of the Arbitration Procedural Code of the RF may lead to inconsistent actions by the courts: prior to accepting a suit the court must first decide which law is applicable in order to establish its content (which is sufficiently difficult because of the requirements of Art. 1191 of the Civil Code of the RF) and only then may the court determine whether to accept the petition to sue (i.e. to establish whether the civil matter falls under the jurisdiction of the Russian Federation);

in the text of Art. 7(1) of the Law on Immunities, the phrase "applicable legal norms" is used, which gives rise to the question of whether this combination of words should be interpreted as identical with the concept of "applicable law" (i.e. the substantive law of a particular state). At the same time, it is generally accepted that questions regarding a particular jurisdiction and systemic jurisdiction in civil

cases are determined on the basis of procedural norms rather than substantive ones. We believe that this uncertainty should be removed. The phrase "in accordance with applicable legal norms" should be excluded from Art. 7(1) of the Law on Immunities.

Probably the Law will be further elaborated, and it will improve legal regulation of private international relations of the Russian Federation.

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