

ABSTRACT

STATE IMMUNITY AT THE DAWN OF THE 21ST CENTURY: TWILIGHT OR RENAISSANCE?

JAROSLAV KUDRNA, ESQ., LL.M.

State immunity is a foundation of public international law. Sovereign immunity is based on the fundamental principle of international law, namely the equality of states - *par in parem non habet imperium*. State immunity is thus a manifestation of state sovereignty and states demonstrate respect for the sovereignty of other states by according immunity to foreign states appearing before their courts.

The principle of state immunity is a dynamic area of public international law. State practice is continually evolving through national laws and court rulings. The aim of this thesis is to describe the current development of state immunity and to identify possible future trends. Another objective is to draw from current developments and offer practical recommendations on state immunity for both investors and states.

The 20th century can be described as a twilight of state immunity: an absolute theory of state immunity shifted towards a restrictive one. That century witnessed the decline and fragmentation of state immunity.

In contrast, if the UN Convention on jurisdictional immunities of states and their property enters into force and is ratified by a large number of states, state immunity might experience a resurgence in the 21st century. The 21st century may therefore be a century in which state immunity again finds its harmony and is unified at the global level.

Will the 21st century be the twilight or renaissance of state immunity? The author tackles this question by analyzing state immunity and its trends at the dawn of the new century.

To predict the future development of state immunity, it is necessary to first understand its past. After an introduction to the subject (Chapter 1), the thesis will recount the historical development of state immunity from an absolute to a restrictive theory (Chapter 2).

Then, legal sources of state immunity will be mentioned, both international and national (Chapter 3).

The next chapter (Chapter 4) will distinguish state immunity from other doctrines, such as the Act of State and Political Question, and will also distinguish it from immunity of foreign officials. The thesis will not delve deeply into diplomatic immunity or immunity of international organizations, but the author believes that it is useful to introduce these concepts and to clarify their relationship to state immunity.

Before discussing state immunity as such, it needs to be placed within the broader subject of jurisdiction (Chapter 5). The court of another State must first have jurisdiction to even deal with the question of state immunity.

The author will then respond to one of the basic questions about state immunity, namely, who actually benefits from state immunity. It is already apparent from the name of the doctrine that it is the state. But how is state defined for state immunity purposes? This is an essential question for the purpose of applying the principle of state immunity (Chapter 6).

Before discussing the substantive rules of state immunity, it will be useful to see some procedural issues related to state immunity, such as the requirements for service of process to states in the context of state immunity or burden of proof (Chapter 7).

Next will be a discussion of the material rules of state immunity, beginning with immunity from jurisdiction and the exceptions thereto (Chapter 8), and then immunity from execution and its exceptions (Chapter 9). Some exceptions to state immunity will be discussed in great detail, and others, such as employment contracts and personal injuries, will be mentioned only briefly.

The author will then move on to the practical aspects of state immunity (Chapter 10). This chapter discusses, from the point of view of the investor and the state, the advantages and disadvantages of selecting arbitration, the advantages and disadvantages of the waiver clauses and the appropriate wording of the waiver clauses. It will also include strategies for investors facing non-paying states.

An assessment of the current development of state immunities will follow (Chapter 11). Apart from the human rights impact on state immunity, this chapter will also mention the issue of the so-called vulture funds that figure in many recent cases against the states. This chapter will also review the UN Convention on the Privileges and Immunities of the States and their Property. The author first discusses the reasons for its non-entry into force. It will then show that even though the Convention is not yet legally binding, it is obvious that it already has an impact on state practice. The author also considers in this chapter the advantages and disadvantages of the entry into force of the UN Convention from the

perspective of states and investors. The entry into force of the UN Convention does not necessarily have to be a positive development for both state creditors and states.

The thesis will conclude with the author's assessment of the possible future development of state immunity (Chapter 12).

The thesis confirms the author's hypothesis that the beginning of the 21st century is not witnessing a twilight of state immunity. State immunity still plays an important role and cannot be seen as becoming more restrictive. On the other hand, a renaissance of state immunity through harmonization is not yet visible. The UN Convention has not entered into force and, given the identified causes for its non-entry into force, the author is not optimistic that the UN Convention will soon become a universally applicable convention. State immunity remains and will remain fragmented among various national regimes. This gives States some room to maneuver in their response to current developments. As a result of current developments, such as the debt crisis and the rise of vulture funds, execution immunity has been reinforced at least for some categories of assets and this trend will remain. This is a revival or renaissance of state immunity. "The last bastion of state immunity"¹ will certainly not fall at the beginning of the 21st century.

¹ Draft articles on jurisdictional immunities of States and their property (1991). *Yearbook of the International Law Commission*. 1991, sv. 2, available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/4_1_1991.pdf (last visited April 6, 2016), commentary on Art. 18, ¶ 2.