

# Jurisdictional Immunity of the Russian Federation as a Subject of International Private Law

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## ABSTRACT

This article discusses the concept of jurisdictional immunity. The problematic provisions related to the understanding of jurisdictional immunity in theory, legislation and judicial practice are presented. The international and national legislation related to the status of the state upon its entry into private law relations is analyzed. Based on the study, the authors propose measures aimed at creating a unique approach in understanding the jurisdictional immunity of the Russian Federation.

**Keywords:** immunity, state, private law relations, foreign trade transactions, jurisdiction

International cooperation is diverse in forms and areas of interaction. It is implemented by various types of entities, which include states. The latter are not only the parties to power relations, i.e. interstate relations of a public law nature governed by public international law, but also participants in private legal relations of a property or non-property nature, i.e. private cross-border relations governed by private international law. To describe the concept of jurisdictional immunity of the Russian Federation as a private international legal entity, this essay uses a comparative legal research method as well as a method for analyzing the existing rules of national and international law in this area of legal regulation.

State immunity is one of the basic fundamentals in private international law that determines the legal status of a State in international transactions and private cross-border relations in general.<sup>1</sup> Immunity, which exempts a State that exercises civil acts with national legal entities of foreign countries from being subject to the foreign courts' jurisdiction as well as from coming within the purview of foreign regulatory legal acts, pre-judgment or post-judgment measures of constraint such as attachment or execution of a decision, as well as arrest or seizure of property, was previously substantiated by the customary legal rules arising from the principles of sovereign equality and respect for sovereignty of States acting in private international law.<sup>2</sup> Proceeding from the modern legal reality, a number of acts of national and international legal nature were adopted, which fully cover these issues.

The first and main of these sources is the European Convention on State Immunity ('ECSI') of 1972. The Russian Federation did not sign or ratify this international treaty. However, on 2 December 2004 the United Nations General Assembly ('UNGA') adopted the United Nations Convention on Jurisdictional Immunities of States and their Property ('Convention') by its Resolution 59/38. The Convention amends and supplements the provisions of the European Convention on State Immunity and in many respects repeats the ECSI provisions.<sup>3</sup> Based on the provisions of Clause 1, Article 30 of the Convention, it enters into force after the delivery of the thirtieth instrument of ratification (as of 2020, only 22 instruments of ratification were delivered). However, despite the above, for the legal realities of the Russian Federation, at least from the point of view of theoretical approaches, this document is the main doctrinal source in the topic under consideration due to the following:

- Subject to amendments and additions, the more recent (in comparison with 1972) provisions of the Convention reflect more modern approaches to understanding the jurisdictional immunity of a State.
- The Convention was signed and ratified by the Russian Federation<sup>4</sup>.

<sup>1</sup> Barieva, A. A. Problems of Development of the Legislation of the Russian Federation in the Field of International Civil Procedural Law // Innovative science. 2017. No. 2. P. 35.

<sup>2</sup> Souresh A. Jurisdictional Immunities of the State: Why the ICJ Got it Wrong // European Journal of Legal Studies. No. 9. 01.04.2017. P. 15.

<sup>3</sup> European Convention on State Immunity (ETS No. 74). Concluded in Basel on 16 May 1972 (as amended) // ATP "Consultant Plus".

<sup>4</sup> Resolution of United Nations General Assembly No. 59/38 dated 2 December 2004 "United Nations Convention on Jurisdictional Immunities of States and their Property" (hereinafter, the texts of regulatory acts are used and cited according to ATP "Consultant Plus". – Author's note).

- The provisions of the Convention have already been partially implemented into national legislation (Federal Law of the Russian Federation on Jurisdictional Immunities of a Foreign State and Property of a Foreign State ('RF Federal Law on Jurisdictional Immunities of a Foreign State')).

The term 'immunity', based on the literal interpretation of all the provisions of the Convention, as well as the Annex to this Convention "Understandings with respect to certain provisions of the Convention", is not explicitly covered and is used in the general "context of draft articles as a whole".

The concept of 'jurisdictional immunity' was formulated in international law, first as a customary law, and then through judicial practice, legislation and international treaties, and means the right of a State not to obey the national procedural laws of other States.<sup>5</sup>

The jurisdictional immunity of a State, according to the Convention provisions, has three components:

- State immunity with respect to itself and its property from the courts' jurisdiction of another State (judicial immunity – Article 5 of the Convention)
- State immunity from pre-judgment measures of constraint, such as attachment or arrest against property of a State taken in connection with a proceeding before a court of another State (immunity from pre-judgment measures of constraint – Article 18 of the Convention)
- State immunity from post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State taken in connection with a proceeding before a court of another State (immunity from post-judgment measures of constraint – Article 19 of the Convention).<sup>6</sup>

In connection with the above, analyzing the meaning of the Convention, several reservations are essential.

1. Immunity of a State is based on the fact that it has sovereignty, and all States are equal. This basic fundamental of international law is expressed in the general principle of international law: "*Par in parem non habet imperium*" ('Equals have no sovereignty over each other'). Consequently, the immunity of a State is always established exclusively in its own jurisdiction.
2. The recognition of jurisdictional immunity proceeds from the principle of its voluntary establishment by a State to which it belongs, and the same principle of voluntary refusal.
3. The recognition of immunity should in no way consist in release of a State from fulfilling its obligations or in release of a State from responsibility for failure to fulfill its obligations.<sup>7</sup>

All of the above, however, must be separable from the immunities granted to States under public international law<sup>8</sup>. Thus, in accordance with Article 3 of the Convention, the concept of jurisdictional immunity does not include:

- Immunities granted to a State in relation to its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to the bodies of international organizations or international conferences and related persons
- Immunities granted to heads of a State
- Immunities in relation to aircraft and spacecraft owned and operated by a State.<sup>9</sup>

In accordance with Clause 1, Article 7 of the Convention, a State cannot invoke immunity from jurisdiction in proceedings before a court of another State in relation to any matter or case, if it has explicitly expressed its consent to a foreign court's exercise of jurisdiction over such a matter or case, due to:

- International agreement (treaty)
- Contract in writing
- Statement in court or written communication in the framework of a specific proceeding.<sup>10</sup>

This essay clearly demonstrates the principle of voluntariness of waiver from jurisdictional immunity. In legal doctrine, two concepts of state immunity are usually considered:

- Absolute immunity
- Limited immunity.

<sup>5</sup> Borisov, V. N., Vlasova, N. V., Doronina, N. G. / Private international law : a textbook / responsible ed. N. I. Mary'sheva. 4th ed., rev. and add. M. : IZiSP, Contract, 2018. P. 128.

<sup>6</sup> Resolution of United Nations General Assembly No. 59/38 dated 2 December 2004 "United Nations Convention on Jurisdictional Immunities of States and their Property"

<sup>7</sup> Borisov, V. N., Vlasova, N. V., Doronina, N. G. / Private international law : a textbook / responsible ed. N. I. Mary'sheva. 4th ed., rev. and add. M. : IZiSP, Contract, 2018. Pp. 130–131.

<sup>8</sup> Enikeev, O. A. Controversial Provisions of Chapter 45.1 of the Civil Procedure Code of the Russian Federation // The rule of law: theory and practice. No. 4 (46). 2016. P. 109.

<sup>9</sup> Resolution of United Nations General Assembly No. 59/38 dated 2 December 2004 "United Nations Convention on Jurisdictional Immunities of States and their Property".

<sup>10</sup> Ibid.

The concept of absolute immunity is based on its application in any legal situation, regardless of the nature of existing legal relationship between the parties.

According to the concept of functional (limited) immunity, a foreign State, its bodies, as well as their property, enjoy immunity only when a State exercises sovereign functions, i.e. *jureimperii* actions. If a State commits actions of a commercial nature (conclusion of foreign trade transactions, concession and other agreements), i.e. *juregestionis* actions, then it does not enjoy immunity. In other words, representatives of the concept of limited immunity believe that when a State puts itself in the position of a private person, it can be sued and its property is subject to measures of constraint.<sup>11</sup>

The United Nations Convention on Jurisdictional Immunities of States and their Property is based precisely on the concept of limited immunity. Thus, this Convention prescribes a number of restrictive cases when, should a dispute arise and be referred to the competence of foreign courts, a member State, i.e. party to the Convention, cannot invoke its jurisdictional immunity.

- If a State enters into a commercial transaction with a foreign natural or legal person (Article 10). In this case, a commercial transaction in accordance with Article 2 of the Convention means any contract or transaction of a commercial, industrial, commercial or professional nature, with the exception of an employment contract.
- If a State and a foreign individual enter into an employment contract and a dispute arises regarding the work that was or should be performed in whole or in part in the territory of that other State (Article 11).
- Cases arising from tort obligations (obligations due to injury to health or property), if actions or omissions took place in whole or in part in the territory of this other State (Article 12).
- Cases, where subject is protection of real rights to real estate or to any property, if real rights to it arise by virtue of inheritance (Article 13).
- Cases, where subject is establishment of the right to the results of intellectual activity (Article 14).<sup>12</sup>

The Convention provides for a reservation to the said rules: "Unless the States directly agree otherwise".

If to talk about what concept the Russian Federation adheres to, then an unambiguous conclusion, at first glance, is difficult to make, since the national law does not contain the Federal Law on Jurisdictional Immunity of the Russian Federation or any other regulatory legal act that somehow reflects the position of the Russian Federation in this matter in relation to itself. Clause 1, Article 7 of the Law on Jurisdictional Immunities of a Foreign State sets forth that a foreign State does not enjoy judicial immunity in the Russian Federation in relation to disputes related to participation of a foreign State in civil transactions with individuals or legal entities or other entities that do not have the status of a legal entity, another State, if such disputes, in accordance with the applicable rules of law, are subject to the jurisdiction of the court of the Russian Federation and these transactions are not related to exercise of sovereign powers by a foreign State. Analyzing this provision, it can be concluded that functional immunity is enshrined in the legislation of the Russian Federation. The provisions of the Arbitration Procedure Code of the Russian Federation and the Civil Procedure Code of the Russian Federation should be also taken into account by virtue of direct indication in the law (Article 256.3 of the RF Arbitration Procedure Code<sup>13</sup> and Article 417.3 of the RF Civil Procedure Code<sup>14</sup>). Before adoption of the Law on Jurisdictional Immunities of a Foreign State in 2015, taking into account the provisions of the Russian law doctrine, it was possible to draw an almost unambiguous conclusion that the Russian Federation adheres to the concept of absolute immunity. However, since this Law entered into force, the advance of the Russian Federation towards the concept of limited immunity became obvious.

Article 7 of the Law on Jurisdictional Immunities of a Foreign State reflects the essence of Article 10 of the Convention, i.e. the main postulate of limited immunity that a State cannot invoke jurisdictional immunity if it enters into private legal relations with individuals or legal entities (in this case, commercial transactions form the basis of private cross-border relations). However, according to Clause 4, Article 7 of the Law on Jurisdictional Immunities of a Foreign State when deciding whether a transaction made by a foreign State is related to the exercise of its sovereign powers, the court of the Russian Federation takes into account the nature and purpose of such a transaction. Based on the literal interpretation of this provision, it can be concluded that it will be the court of the Russian Federation that

<sup>11</sup> Borisov, V. N., Vlasova, N. V., Doronina, N. G. / Private international law : a textbook / responsible ed. N. I. Mary'sheva. 4th ed., rev. and add. M. : IZiSP, Contract, 2018, 2018. P. 135.

<sup>12</sup> Resolution of United Nations General Assembly No. 59/38 dated 2 December 2004 "United Nations Convention on Jurisdictional Immunities of States and their Property"

<sup>13</sup> Civil Procedure Code of the Russian Federation dated 14 November 2002 No. 138-FZ (as amended).

<sup>14</sup> Arbitration Procedure Code of the Russian Federation dated 24 July 2002 No. 95-FZ (as amended).

will determine the nature of legal relations (private or public).<sup>15</sup> Thus, the key role in resolving this issue will be played by the evidence base provided by the parties and fully substantiating the nature of the transaction. However, taking into account the foreign policy attitudes prevailing in the modern world, it will be easy to assume that the court of the Russian Federation will interpret the evidence presented by the parties reflecting the essence of the transaction, not in favor of the interests of justice, but in favor of the interests of the Russian Federation, depending on the subject of the dispute and procedural legal status of the parties. It can be concluded that provisions of Clause 4, Article 7 of the Law on Jurisdictional Immunities of a Foreign State, *inter alia*, act as a deterrent to the growth of the investment attractiveness of the Russian Federation.

In addition to the above differences, the Law also contains the so-called principle of reciprocity (Article 4 of the Law on Jurisdictional Immunities of a Foreign State), which enshrines the provision according to which the Russian Federation may apply restrictions on jurisdictional immunities of foreign States if similar restrictions exist in such States in relation to the Russian Federation. The presence of this provision also indicates the ambiguity of the concept of jurisdictional immunity of the Russian Federation, since the defining provisions of this law, for example, Clause 1, Article 5 or Clause 1, Article 7 of the Law on Jurisdictional Immunities of a Foreign State will not be applied in certain cases, which again raises the question of existence of a contradiction in their joint practical application.<sup>16</sup> Besides, based on the provisions of Clause 4, Article 7 of the Law on Jurisdictional Immunities of a Foreign State, it can be concluded that if, in practice, a court of a foreign State decides to recognize the nature of the transaction as a private law and, accordingly, to exempt the Russian Federation from the right to invoke jurisdictional immunity, then the Russian Federation will introduce similar measures in its territory in relation to this foreign State, which also complicates the practice of law enforcement and entails, first of all, the creation of conditions under which foreign States will be unwilling to conclude commercial transactions with Russian individuals and legal entities.<sup>17</sup>

Practical application of all the above can also give rise to problems in connection with adoption of amendments to the Constitution of the Russian Federation. According to the draft Law on Improving Regulation of Certain Issues Related to Arrangement of Public Authority, Article 79 of the Constitution of the Russian Federation has been amended as follows: decisions of intergovernmental bodies adopted on the basis of provisions of international treaties of the Russian Federation in their interpretation contrary to the Constitution of the Russian Federation, are not subject to execution in the Russian Federation.<sup>18</sup> Thus, decisions of intergovernmental bodies can be interpreted as contradicting the Constitution of the Russian Federation and not enforced in the territory of the Russian Federation, which will further complicate the position of the Russian Federation in the international arena. Moreover, similar consequences may be applicable to disputes arising from foreign economic transactions, which may entail irreversible consequences for foreign economic and investment activities of the Russian Federation.<sup>19</sup>

In addition, Clause 8 of Resolution No. 8 dated 11 June 1999 adopted by the RF Supreme Arbitration Court Plenum on Operation of International Treaties of the Russian Federation in Relation to Arbitration Proceedings contains a provision that the arbitration court accepts a claim in a commercial dispute, where defendant is a foreign State acting as a sovereign, or an intergovernmental organization having immunities under an international treaty, only with the explicit consent of the respondent to consider the dispute in the arbitration court of the Russian Federation. Such a consent should be considered as a waiver of the judicial immunity of a foreign State or international organization.

The consent to consider the dispute in the arbitration court of the Russian Federation must be signed by persons authorized by law of a foreign State or internal rules of an international organization to waive judicial immunity.<sup>20</sup>

Therefore, it can be concluded that the Russian Federation has not abandoned the concept of ab-

<sup>15</sup> Federal Law of the Russian Federation dated 03 November 2015 No. 297-FZ on Jurisdictional Immunities of a Foreign State and Property of a Foreign State in the Russian Federation (as amended).

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Draft Law of the Russian Federation on Amendment to the RF Constitution on Improving Regulation of Certain Issues Related to Arrangement of Public Authority (introduced by the President of the Russian Federation on 20 January 2020).

<sup>19</sup> *Khlestova, I. O.* New Law "On Jurisdictional Immunities of a Foreign State and Property of a Foreign State" // Journal of Foreign Law and Comparative Law. 2016. No. 2. P. 129.

<sup>20</sup> Resolution No. 8 dated 11 June 1999 adopted by the RF Supreme Arbitration Court Plenum on Operation of International Treaties of the Russian Federation in Relation to Arbitration Proceedings (as amended).

solute immunity, and all the above changes are very controversial. In addition, it should be noted that it is rather difficult to determine how a State entering into private legal relations can pursue non-public interests in the transaction and how this private interest will be proven in court.

So, the most optimal solution in the current situation may be adoption of a normative act, which would clearly indicate the approach to jurisdictional immunity of the Russian Federation. This would help to overcome the existing contradictions in law and judicial practice, and would lead to an unambiguous normative rather than judicial interpretation of provisions relating to the jurisdictional immunity of the Russian Federation.

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