Iustum Aequum Salutare
IX. 2013. 1. • 53–60.

NOTES ON SOME RECENT DEVELOPMENTS INFLUENCING STATE IMMUNITY

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As recently reported in the press, heirs of Holocaust survivors have filed a lawsuit in Chicago against the Hungarian State Railway Company (hereinafter: 'MÁV'), demanding compensation for MÁV's involvement in deporting Jews to the Nazi concentration camps during World War II. The plaintiffs seek two hundred and forty million dollars in compensatory damages, plus an additional one billion dollar in punitive damages from MÁV according to a complaint filed in early February 2010 in Chicago.[1]

Even if such proceedings affecting the immunity of the State of Hungary are not common, the above example draws our attention to the fact that visibility and relevance of foreign state (or sovereign) immunity has grown significantly and nowadays it is not unthinkable to face such challenges also in Hungary.[2]

The purpose of the present contribution is not give a comprehensive summary on state immunity concepts and on enforcement of foreign decisions and arbitral awards but rather to give a short review of the recent developments in relation to the situation of the immunity concepts (mainly 'extra Hungariam'*)* and to record some impressions thereon.

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[1] Victims of the Hungarian Holocaust v. Hungarian State Railways, 10-00868, U.S. District Court, Northern District of Illinois (Chicago). According to the complaint, MÁV "knowingly provided the trains for delivering 437,000 Jews to their death in Auschwitz" between March and October 1944. Under the relevant U.S. law the Hungarian railway company can be sued if it is „engaged in commercial activity in the United States. "This final requirement is satisfied by the fact that the defendant sells tickets and passes for its railways through its agents in the United States," the document reads. The lawsuit was filed under the Alien Tort Claims Act, a U.S. law that allows victims of alleged abuses abroad to sue in federal court over violations of international law, according to the lawyers who filed the case.

[2] The legal theory has foreseen these challenges already before the transitions in Central Europe. See Kecskés, László: Állami immunitás és kárfelelősség. *Jogtudományi Közlöny* 1988. április, 174–175. and other essays by the author.

In the first part, starting from general principles of state immunity, we try to reveal the limits of the scope of state immunity and demonstrate – as we see in the opening example – that the application of normative hierarchy theory in international law concerning international crimes (jus cogens) may be in contention with the application of state immunity. In the second part we will focus on some practical consequences of the *iure imperii-iure gestionis* distinction in connection with arbitration agreements. Then we shall take into consideration the most important consequences of the study.

1. Grains arising from the field of international criminal cases

Before discovering the aforementioned incoherence between customary international law and state immunity, we first need to shortly summarize the doctrine of foreign state immunity, which doctrine, like most legal doctrines, has evolved and changed over the last centuries, progressing through several distinct periods.[3]

The first period has been called the period of absolute immunity, because foreign states enjoyed complete immunity from domestic legal proceedings. The second period emerged during the early twentieth century, when certain nations adopted a restrictive approach to immunity in response to the increased participation of state governments in international trade. This period was marked by the development of the theoretical distinction between *acta jure imperii*, acts of public authority for which immunity was granted, and *acta jure gestionis*, commercial activities for which a state may not invoke the plea of its immunity before a foreign court.[4]

When examining the doctrine of state immunity on the international law level, we can easily face the conflict of international jus cogens and state immunity especially in cases of human rights violations. "State immunity is not an absolute state right under the international legal order. Rather, as a fundamental matter, state immunity operates as an exception to the principle of adjudicatory jurisdiction. Moreover, while the practice of granting immunity to foreign states has given rise to a customary international law of state immunity, this body of law does not protect state conduct that amounts to a human rights violation."[5] These realities seem to lead us to the conclusion with respect to human rights violations that the forum state enjoys ultimate

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[3] For a general overview of the development of the doctrine, see Ernest Kwasi Bankas: *The state immunity controversy in international law. Private suits against sovereign states in domestic courts.* Heidelberg, Springer, 2005.; Gamal Moursi Badr: *State immunity: An analytical and prognostic view.* The Hague, Martinus Nijhoff Publishers, 1984.; Kecskés, László: Az állam, mint jogalany a nemzetközi kollíziós magánjogban. In Burián, László – Kecskés, László – Vörös, Imre: *Magyar nemzetközi kollíziós magánjog. Európai kitekintéssel.* Budapest, Krim Bt., 2005. 160–175.; Mádl, Ferenc – Vékás, Lajos: *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga.* Budapest, Nemzeti Tankönyvkiadó, 2004. 152–166.

[4] Hargitai, József: Az üzletelő állam. A diplomáciai és konzuli képviseletek által kötött jogügyletek és az állam immunitása. *Jogtudományi Közlöny* 1998. december, 482.

[5] Lee M. Caplan: State immunity, human rights and jus cogens: A critique of the normative hierarchy theory. *The American Journal of International Law,* 2003. 744.

authority, by operation of its domestic legal system, to modify a foreign state's privileges of immunity. On the other hand we cannot be sure that this conclusion stands the trial of practice. In this respect we are referring to the Kalogeropoulou[6] and to the Al-Adsani[7] decisions of the European Court of Human Rights ("ECHR"). The first time that the ECHR had to deal with the question of whether states may rely on state immunity in cases concerning breaches of peremptory and non-derogable *jus cogens* norms was the case of Al-Adsani vs. United Kingdom, where the ECHR decided that Kuwait could rely on state immunity against a claim brought in the United Kingdom concerning acts of torture allegedly committed by a member of the Kuwaiti government. In the Kalogeropoulou admissibility decision the ECHR, again by majority, confirmed the Al-Adsani judgment, holding that Greece had not violated the applicants' right of access to court by allowing Germany to rely on state immunity against civil enforcement proceedings in Greece.[8]

In 2004, the Italian Corte di Cassazione, in the Ferrini-decision denied the immunity of Germany for the following reasons: firstly because the crimes had been committed by the soldiers of the German Reich on Italian soil and secondly, because the atrocities were qualified as war crimes and crimes against humanity belonging to jus cogens. In 2008, the Corte di Cassazione rendered two additional judgments against Germany which confirmed that Italian courts had jurisdiction over Germany in compensation cases for war damages.[9]

Germany instituted proceedings against Italy before the International Court of Justice (hereinafter: 'ICJ') in respect of a dispute originating from violations of obligations under international law allegedly committed by Italy through its judicial practice in that it has failed to respect the jurisdictional immunity which Germany enjoys under international law.[10]

In its decision as of Februay 3, 2012 the ICJ found by a majority of twelve to three judges that *Germany's right to sovereign immunity had been infringed by the decisions of the Italian courts and by a majority of fourteen to one vote that*

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6 European Court of Human Rights, *Kalogeropoulou et al. vs. Greece and Germany*, Admissibility Decision of 12 December 2002, available at: http://hudoc.echr.coe.int.

7 European Court of Human Rights, *Al-Adsani v. United Kingdom*, Judgment of 21 November 2001, available at: http://hudoc.echr.coe.int.

8 Kerstin Bartsch – Björn Elberling: Jus cogens vs. state immunity, round two: The decision of the European Court of Human Rights in the Kalogeropoulou et al. vs. Greece and Germany decision. *German Law Journal,* 2004/5. 477–478. The authors give a detailed analysis on the whole problem.

9 http://conflictoflaws.net/2012/hess-on-italy-v-germany/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+conflictoflaws%2FRSS+%28Conflict+of+Laws+.net%29. Since 2005, the Greek claimants sought the enforcement of the Distomo decision in Italy and, finally, seized the Villa Vigoni, a property of the German State near the lake Como which is used for cultural exchanges.

10 Jurisdictional immunities of the State (Germany v. Italy: Greece intervening), judgment of the ICJ as of February 3, 2012, see http://www.icj-cij.org/docket/files/143/16883.pdf

the enforcement measures against the Villa Vigoni equally infringed Germany's sovereign immunity from enforcement measures.[11]

The above facts seem to convince us that apart from other possible procedural arguments (on the European stage) the State of Hungary may successfully rely on state immunity in such a procedure which was referred to in footnote one.

2. Fruits from the field of international arbitration

Let us contemplate on the question of an other field and scrutinise this controversial issue in the light of the Creighton decision of the French Cour de Cassation. The doctrine of state immunity also distinguishes the *immunity from jurisdiction and the immunity from execution* which distinction has interesting consequences in the field of arbitration agreements.[12] Particularly the question whether or not a legal person of public law, by virtue of entering into an arbitration agreement, necessarily and automatically (i.e. without any express stipulation to this effect) waives its immunities from jurisdiction and execution, is still very controversial in the literature as well as amongst arbitrators.[13]

A part of the 'traditional' doctrine, which nowadays is rather propagated by a minority, considers that the conclusion by an international organisation of a valid arbitration agreement cannot be considered as a waiver of its immunity from jurisdiction irrespective of the field in which such arbitration proceedings are sought.[14] A major part of the current doctrine, with reference to the distinction between acts of public authority (jure imperii) and commercial activities (jure gestionis), considers that a state may not invoke the plea of its immunity from jurisdiction before a foreign court, as far as commercial activities or acts of commercial nature are concerned. This principle also applies when a state acts like a person of private law, for example by virtue of entering into an arbitration agreement. In such a case, it is widely accepted today by the major part of the current doctrine that by virtue of entering into such an arbitration agreement, a state or an international organisation is presumed to have waived its immunity from jurisdiction.[15] On the other hand, a state or an international organisation is entitled to invoke its immunity from jurisdiction, as far as acts of public authority are specifically concerned; the notion of 'acts of public authority'

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11 Ibid.

12 We have gained support for our arguments from the field of arbitration proceedings, because the referred jurisdiction of the supreme courts may have larger and theoretical effect.

13 Gaetan Zeyen: Les immunités des États dans les contrats d'investissement: du nouveau avec l'arrêt Creighton ? *Revue de droit des affaires internationales,* 2006/3. 333.

14 Pierre Klein: *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens.* Bruxelles, Bruylant, 1998. 258.

15 Richard Boivin: International arbitration with states: An overwiew of the risks. *Journal of International Arbitration,* 2002. August, 295.

encompasses sovereign acts, as well as acts accomplished or decided, in order to fulfil tasks of 'public utilities'.[16]

As per the immunity from execution, according to the classical point of view a waiver from the immunity from execution must result from an express stipulation to this effect; such a waiver may not be deduced from a waiver from the immunity from jurisdiction. However, a part of the current doctrine considers that a waiver from immunity from jurisdiction, resulting from the conclusion of a valid arbitration agreement by a state or an international organisation, extends to the immunity from execution.[17]

Let us see now two recent exemples: a French decision which seems to restrict the scope of state immunty exception and a Canadian decision which is rather contrary to the French one.

In its decision of 6 July 2000, the French Supreme Court (Cour de Cassation, 1ère chambre civile) held that states which agree to arbitration under the arbitration rules of the International Chamber of Commerce (hereinafter: 'ICC') cannot resist the enforcement of awards against their assets in France on the basis of state immunity from execution. The French Supreme Court held that an agreement by a state to arbitration under the ICC Rules of Arbitration implied an automatic waiver of the state's immunity from execution.

As we see above an arbitration agreement is generally considered to constitute a waiver from immunity from *jurisdiction* by a state, and this decision confirms the principle that merely by entering into an arbitration agreement a state does not automatically waive its immunity from *execution*. However, the Supreme Court held that in agreeing to arbitration under the ICC Rules a state does waive its immunity from execution. This is because, in the Supreme Court's interpretation, the ICC Rules themselves provide for a waiver of immunity from execution.

Creighton Ltd, an American company, was awarded more than US$8 million against the State of Qatar in three ICC arbitration awards. Creighton tried to enforce the awards by attaching assets belonging to the State of Qatar held by the Qatar National Bank and the Banque de France in France.

The Paris Court of Appeal held that the attachment was invalid and ordered the assets to be restored to the State of Qatar. This was on the basis of Qatar's immunity from execution. The Court of Appeal held that the State of Qatar had not expressly waived its immunity from execution, and it had also not been shown that the assets that had been attached were commercial assets or assets relating to the subject matter of the dispute. The Court of Appeal stated that an arbitration clause did not imply an automatic waiver of a foreign state's immunity from execution.

The Supreme Court overturned the decision of the Court of Appeal and held that the assets could be attached.

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[16] See Nguyen Quoc Dinh – Patrick Daillier – Alain Pellet – Kovács, Péter: *Nemzetközi közjog.* Budapest, Osiris, 2001. 223.

[17] Zeyen i. m. 335.

According to certain commentators the French Cour de cassation by reversing the decision of the Cour d'appel of Paris, which had adopted the point of view of the 'classical' doctrine with regard to the immunity from execution (e.g., the need for an express waiver, which can not be deducted from the mere conclusion of an arbitration clause and the acceptance to submit the arbitration under specific rules), innovated by establishing a new principle in the field of international arbitration: the principle of an implicit waiver by a state from its immunity from execution, by the mere act of entering into an arbitration agreement and finaly abolished in a certain sense the basic distinction between legal persons of private law and legal persons of public law.[18]

However as professor Gaillard reveals, the existence of a contradiction between the principle of effectiveness of arbitral awards and the principle of state immunity from execution, suggested by the Cour de Cassation in the Creighton decision, can only be understood by also taking into consideration the principle of autonomy of state legal entities (*i.e.*, legal persons affiliated with the state). Indeed, these first two principles are not mutually exclusive. However, there does exist an incompatibility between the principles of effectiveness of arbitral awards, state immunity from execution, and autonomy of state entities. All combinations being possible, when any two of these principles are respected the third is necessarily sacrificed.[19]

In the meantime the practice of the Cour de Cassation developed very fast. The French Supreme Court set aside enforcement measures carried out by NML Capital Ltd against the Republic of Argentina in judgements dated 28 March 2013.[20] NML Capital Ltd was the beneficial owner of bonds issued by Argentina in year 2000. As the relevant financial contracts contained a clause granting jurisdiction to New York courts, the creditor sued Argentina before a U.S. federal court, and obtained in 2006 a judgment for US $ 284 million. In the summer 2009, NML Capital initiated enforcement proceedings in Europe. The contracts contained a waiver of immunity from enforcement. NML Capital Ltd first attached assets covered by diplomatic immunity. In a judgement of 28 September 2011[21] the *Cour de cassation* ruled that the waiver did not cover diplomatic assets since diplomatic immunity is governed by special rules which require a waiver to be both express and specific, i.e. provide specifically that it covers diplomatic assets. Then NML Capital Ltd focused on non diplomatic assets. It attached monies owed by French companies to Argentina through their local branches. The assets were public, however: they were tax and social security claims. The *Cour de cassation* decided to extend its new doctrine that waiver of immunity of enforcement should be both express and specific to public assets. The new rule is that waivers should specifically mention the assets

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18 Zeyen i.m. 337.

19 Emmanuel Gaillard: Effectiveness of arbitral awards, state immunity from execution and autonomy of state entities – Three incompatible principles. In: Emmanuel Gaillard – Jennifer Younan: *State entities in international arbitration*. IAI Series on International Arbitration No. 4. Geneva, Juris Publishing, 2008. 181.

20 http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/394_28_25871.html

21 http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/867_28_21103.html

or categories of assets to which they apply. As a consequence, as the waiver did not specifically mention tax and social revenues, it did not apply to them.

An other recent but not arbitration proceeding (Trudel vs. Nahmiash [sub nom New Jersey Department of the Treasury of the State], Division of Investment vs. Trudel, 2009 Québec Court of Appeal 86.)[22] in Canada also raised a number of important issues and it is worth exploring it in further detail.

The dispute underlying Trudel initially arose from a number of class action lawsuits by investors against Nortel Networks in the U.S. and Quebec in 2004 and 2005. The plaintiff in one of the U.S. actions was the New Jersey Department of the Treasury, Division of Investment ('New Jersey'), an organ of the State of New Jersey and thus a 'state' within the meaning of the federal State Immunity Act ('the Act').[23]

Subsequent to a settlement in the U.S. actions in June 2006, the Quebec Superior Court approved the extension of the settlement to include a pending Quebec class action. Philippe Trudel and Bruce Johnston, the lawyers acting for the Quebec plaintiffs' class, submitted their proposed fees; New Jersey, together with several other parties to related actions, intervened to make joint submissions questioning the amount of the fees. Trudel and Johnston, believing that the intervenors' submissions were defamatory, then brought an action against the intervenors and their lawyer, Laurent Nahmiash.

According to the Canadian Supreme Court, determining the application of the commercial activity exception requires a two-step analysis: first, determining the nature of the activity, and second, whether the proceedings were 'related to' the activity. Most of the caselaw on the commercial activity exception has focused on whether the state activity at issue is 'commercial' The application of the exception in Trudel, however, turned solely on the second part of this test. The question at issue was, in effect, how far does 'related to' extend?[24]

The plaintiffs put forward a kind of 'commercial-by-transitivity' argument: the defamation proceedings were 'related to' New Jersey's commercial activity because the allegedly defamatory statements were made in the context of separate proceedings where the commercial activity exception admittedly applied. The court rejected this argument, relying on the analytical framework used by the Ontario Court of Appeal in Bouzari v. Iran. In Bouzari, the plaintiff brought suit in relation to his imprisonment and torture by Iran. The plaintiff alleged his arrest resulted from Iranian government efforts to force him to pay a percentage of his consultant's commission from a joint venture between the Iranian national oil company and a foreign consortium. In rejecting the application of the commercial exception in the circumstances, the court held that the ultimate intention or purpose of the state acts of torture did not make them 'commercial' in nature; rather, the acts themselves must

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22 New Jersey (Department of the Treasury of the State of), Division of Investment vs. Trudel, 2009 QCCA 86 (CanLII) see http://www.canlii.org/fr/qc/qcca/doc/2009/2009qcca86/2009qcca86.html

23 http://www.slaw.ca/2009/01/26/foreign-state-immunity

24 Ibid.

be commercial. The damages sought in the proceedings must be related to the alleged commerciality of the activity.[25]

Conclusion

As per the latter case we can say as a criticism that (i) such an approach would render arbitral awards considerably more difficult to enforce, at least where the applicable state immunity statute lacks a specific exception for arbitration. Furthermore (ii) the distinction of immunity from jurisdiction and immunity from execution seems to be quite artificial in practice and the procedure may be considered only as a theatrical performance if the immunity from execution applies.

On the other hand there are serious arguments for the acceptance of the Canadian approach and for the rejection of the Creighton formula.

If we consider the question from a larger perspective (sociologic approach of law, public policy[26]) we can defend the exception of state immunity of execution. There is no doubt that companies, corporate structures may be more influent and may have bigger economic power then certain states. Financial dependence of states may lead to the breach of the sovereignity[27] of the state which situation is against international legal order.

This approach is also supported by the social doctrine of the Roman Catholic Church in which we learn that the fundamental task of the State in economic matters is that of determining an appropriate juridical framework for regulating economic affairs, in order to safeguard "the prerequisites of a free economy, which presumes a certain equality between the parties, such that one party would not be so powerful as practically to reduce the other to subservience".[28]

If a state can generally rely on state immunity – as we see in the decisions of the ECHR – in case of violation of a jus cogens norm, a majori ad minus it is acceptable that the immunity from execution applies in other cases.

Very often the execution in such cases may affect assets serving for diplomatic functions since these assets are often accessible to the other party. If we permitted to seize diplomatic assets it would breach the diplomatic immunity and the Vienna Convention on Diplomatic Relations (and also the sovereignity of the state)[29].

In conclusion, the denial of the possibility to refer to state immunity from execution seems to lead us to the situation that certain States may have jurisdiction on other States.

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25 Ibid.

26 Lábady, Tamás: *A magyar magánjog (polgári jog) általános része*. Budapest–Pécs, Dialóg Campus, 2000. 115., 122.

27 See the concept of economic sovereignity: Quoc Dinh–Daillier–Pellet–Kovács i. m. 220.

28 Pontifical Council for Justice and Peace: Compendium of the social doctrine of the Church see: http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html section. 352.

29 *Noga-case,* see Sigvard Jarvin-Anette Magnusson (szerk.): *International Arbitration Court Decisions*. New York, JurisNet LLC, 2008. 589.