INTERNATIONAL PRIVATE LAW RELATIONS WITH PARTICIPATION OF THE STATE: GENERAL CHARACTERISTICS, CONTENT, TYPES, IMMUNITY

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Abstract: The article examines current trends in the development of state immunity in private international law relations. The author defines the scope of these relations and provides their general characteristics, while also identifying the peculiarities of the state's participation as a subject of private international law. Furthermore, the author explores the content and types of international private legal relations, along with their development trends and regulatory peculiarities. Special attention is given to the development of state immunity and the justification for functional (limited) immunity of states. Legal acts are analyzed, showcasing the role of judicial practice in this domain. Finally, the author argues for the necessity of applying functional (limited) immunity in international private law relations.

Keywords: international private-law relations; legal personality of the state; functional (limited) immunity; immunity of a foreign state; commercial transaction.

1 Introduction

Active processes of globalization, the expansion of the sphere of regulation of interstate relations, the unification of international relations, the expansion of trade in the international market, and the emergence of new ways and means of conducting commercial and non-commercial activities all indicate the relevance of regulating such processes. These developments contribute to the growth of dynamics in the turnover of goods between entities. In this context, such relations are civil (private) in their legal nature, based on the equality of parties. Here, equality refers to the legal equality of rights and obligations among subjects entering into civil (private) relations, rather than their actual equality. However, in certain cases, certain subjects, due to their status, may have a special legal nature that allows them to deviate from the principle of equality. One such subject is the State, which holds a unique position in civil (private) relations, particularly in private international law, stemming from the principle of state sovereignty. The basis for this assertion is the immunity of the State, which derives from the principle of state sovereignty. These ongoing processes underscore the necessity of studying international private law relations involving the State, as well as understanding the content and features of such relations. This is particularly pertinent in the context of the need for legislative reform in Ukraine, where our country lacks a law on the immunity of foreign states in private law relations (although there is only a draft law) [13].

2 Materials and Methods

The methodological basis of the study consists of general scientific methods, including the dialectical and system-structural approaches, as well as methods of induction and deduction. Additionally, special methods are employed, primarily the formal-legal, comparative-legal, and historical-legal methods. The main research methods employed are formal-legal and historical analysis, which are utilized to explore current trends in the development of state immunity in private international law relations, conceptual approaches to the main principles of this institution's development, and their reflection in legal norms.

3 Results and Discussion

The scope of state participation in private-law relations complicated by a foreign element (as well as in public-law relations) has been growing recently. The scope of these relations is quite large, and they are developing under the influence of one of the cornerstone institutions of private international law - the institution of state immunity.

Traditionally, there are two main groups of relations governed by private international law: 1) economic, commercial, scientific, technical and cultural relations in the part of them that falls under the rules of private international law; 2) relations with a foreign element regarding property and personal non-property, family, labor and other rights of a private law nature. In the first case, the task of private international law is to regulate business commercial relations between organizations and firms of different countries, to create a favorable climate for foreign investment, to promote economic integration between countries, etc. Important for our study are those international legal relations in which the state is the subject. It should be noted that private international law regulates relations of an international nature. These are primarily property relations, along with which non-property relations arise, for example, in the field of copyright and patent law. These are relations of loans granted by the state, concessions, and inheritance of property located in a foreign country. In the second half of the twentieth century, international trade grew significantly, leading to the conclusion of numerous multilateral and bilateral treaties.

The state can and does participate as a subject of law in various civil relations that do not extend beyond the territory of the state and are not complicated by a foreign element, without having priority in such relations. As noted in the literature, "the issue of the State's participation in civil law relations of an international nature, in which it always acts as a special subject of law, is resolved in a completely different way. In order to develop international cooperation, the state increasingly engages in various public and private relations, both property and non-property, with other states, international organizations, as well as legal entities and individuals. The scope and diversity of these relations are significant; for instance, the state may be a party to contracts for the purchase or lease of land in a foreign country for diplomatic missions or other needs, lease or construct real estate in foreign countries, or issue bonds in their territory. It may also act as a guarantor in civil law relations of legal entities or individuals to foreign countries or foreign legal entities or individuals, among other roles. In recent years, alongside traditional civil agreements, states have increasingly utilized new forms of private law relations that are complex in nature. For example, the state enters into concession agreements, under which a foreign investor is granted the right to develop natural resources on a compensated and fixed-term basis, or production sharing agreements, under which it transfers the right to develop natural resources to a foreign investor on a compensated and fixed-term basis, with the products obtained distributed between the state and the foreign investor on agreed terms [10].

The international nature of economic circulation is an undeniable fact in the development of the modern world. Moreover, recent decades have been characterized by the intensity and multilateral nature of international commercial relations, particularly trade, economic, scientific, technical, and other forms of cooperation between states and their entities. Such cooperation takes various forms, from the conclusion of foreign economic contracts between entrepreneurs from different countries to regional agreements (such as the European Union, the North American Free Trade Agreement, the Pacific Economic Cooperation Association) and global organizations (such as the World Trade Organization, the General Agreement on Tariffs and Trade, the International Monetary Fund), which establish the fundamental principles of economic circulation.

Accordingly, the legal regulation of international relations is evolving into a global form and content, encompassing not only intergovernmental relations but also non-governmental interactions. This trend is evidenced by the expansion of regulatory scope through international legal norms of both treaty and customary origin, changes in approaches to regulation (such as simplification of international requirements for legal assistance and enforcement of commercial disputes), and the

increasing role of international organizations and supranational judicial bodies (such as the European Court of Human Rights of the Council of Europe, the European Court of Justice of the European Union) in determining the rules of conduct for states and individuals.

The state is actively engaging in various legal relations, including property relations, with foreign legal entities, international business organizations, or even individual foreign entrepreneurs. States have increasingly become involved in commercial activities closely linked to international commodity and financial markets. Not only has the number of transactions entered into by states increased, but they have also become more diverse. States are increasingly seeking loans from foreign banks and international financial organizations. They can grant and receive loans, issue securities to raise funds, provide guarantees for loans and borrowings, enter into concession agreements with foreign investors, and engage in production sharing agreements. Additionally, they often enter into agreements on significant long-term investments, particularly in the oil production and refining industry. Furthermore, states can acquire and lease land plots abroad, as well as sell and lease land plots, buildings, and structures owned by the state. They also enter into contracts for contractor works for state needs, as well as agreements for the purchase and sale of goods and provision of services. International private law relations are significantly expanding in today's interconnected world. This expansion is characterized by the economic interdependence of states and the growth of not only traditional forms of foreign economic relations but also relatively new forms such as leasing operations and franchising. Foreign investments play an active role in the economies of different countries, while industrial, scientific, and technical cooperation is advancing. New forms of foreign company participation in the construction of various facilities and the development of natural resources are emerging, while existing forms are continuously being improved.

The modern world economy is a complex interweaving of various economic factors: production, capital, information, technology, and labor markets. This complexity is primarily attributed to the rapid development of new technologies in the second half of the twentieth century. The reduced time and costs of transportation and communication have virtually eliminated natural barriers to global trade, financial transactions, and intellectual flows. Information systems have not only transformed the international market but have also accelerated the development of transnational business relations. The contemporary global economic system relies heavily on the widespread use of private property, factors of production, and the distribution of goods and services primarily through free markets.

The establishment of a worldwide computer network and other advancements in computer science have introduced new challenges for private international law, particularly in areas such as property protection and copyright. The transnational utilization of information data and the commercialization of space have become feasible. The increasing interdependence of states is evident in the expanding cooperation across various domains, as well as the rising number of interactions among individuals, irrespective of their citizenship or place of residence.

At the same time, these trends in the regulation of international commercial relations do not imply that individual states have entirely relinquished their influence in this domain. Moreover, such a scenario appears unlikely as long as the sovereign state remains the primary form of existence for human communities, and one of the fundamental principles of international law is the principle of sovereign equality among states. The essence of this principle lies in the obligation of states to respect each other's sovereign equality, distinctiveness, and all rights inherent in sovereignty. Clearly, modern states do not completely abandon certain public functions in specific areas. This includes issues such as foreign and defense policy, currency and tax regulation, budgetary relations, and the social sphere. One such function is the administration of justice within the state's own territory through the system of state judicial power.

A conflict situation may concern not only entities of the same state but also counterparties from different countries. The latter is especially relevant for participants in international economic circulation. Considering this, one of the leading English lawyers in the field of private international law, C.M. Schmitthoff, noted that "legal disputes can never be ruled out" in this area of human activity [7].

Our country is actively involved in all these processes, as highlighted in the scientific literature. According to the World Bank, Ukraine is recognized as a nation with a high level of integration into the global economy and world commodity markets. The weighted average indicator of openness of its commodity markets for the period 2006-2015 was 48.8% for exports, 52.9% for imports, and 81.6% for overall foreign trade. These figures significantly surpass those of our closest neighboring countries such as Poland, Romania, and Russia, but remain lower than those of Moldova, Belarus, Hungary, and Slovakia. These statistics underscore the importance of Ukraine's economic development. Foreign trade has emerged as a pivotal factor in generating income and profit for many Ukrainian enterprises, with only a small fraction relying solely on the domestic market. Consequently, a considerable number of jobs in the country are dependent on the scale of export and import activities. In recent years, the foreign trade aspect of Ukraine's economic growth has gained increasing prominence. The signing and implementation of the Free Trade Agreement with the EU, along with agreements with Canada and Uzbekistan, and ongoing efforts to establish free trade areas with Turkey, Israel, and the United Kingdom, highlight the need for a growing number of specialists capable of making informed decisions to navigate the global and regional trade landscape effectively [4].

The presence of a foreign element determines the connection of civil law relations with the legal orders of different states. It is worth noting that in private international law, the concept of the "foreign element" is commonly used, although, as Professor A.S. Dovhert observes, it may not be the most precise term. This concept should be understood not merely as a structural unit of legal relations, but rather as a feature that imbues the elements or legal facts of legal relations with an international dimension [5]. The Law of Ukraine "On Private International Law" of June 23, 2005, No. 2709-IV establishes the principles governing the participation of the state and legal entities of public law in private law relations with a foreign element. According to Article 30, "the rules of this Law shall be applied to private law relations with a foreign element involving the state and legal entities of public law on a general basis, unless otherwise provided by law" [6]. This provision thus enshrines the principle of applying the provisions of the Law of Ukraine "On Private International Law" to private law relations involving the state and legal entities under public law on a general basis.

The state, as a subject of law, occupies a unique position in civil (private) relations, particularly within private international law. This distinction is primarily manifested through the concept of state immunity, which stems from the principle of state sovereignty. Professor A.S. Dovgert highlights that the Law of Ukraine "On Private International Law" of June 23, 2005, defines "private law relations as relations based on the principles of legal equality, free will, property independence, with individuals and legal entities as subjects" [3]. In international practice, "the state in private law relations is regarded as a legal entity under public law" [5].

States possess universal international legal personality, as well as civil legal personality, allowing them to directly engage in foreign economic commercial activities, referred to as "diagonal" relations, i.e., civil law relations with foreign individuals or legal entities. A notable peculiarity of states is their ability to enter into property transactions without being legal entities in the strictest sense of the term. *The international legal personality* of a sovereign state, comprising legal capacity

and legal personality, encompasses its ability to acquire international rights and assume international obligations. This is evident in the state's capacity to enter into international political and economic treaties. Full participation in international relations necessitates that a state, as a subject of international law, possesses sovereignty, legal capacity, and equality. These three elements are closely interconnected, and the absence of any one property deprives a state of its ability to function as an international legal entity. As a member of the international economic community, every sovereign state possesses the capacity to bear international rights and obligations, or, in other words, to be a legal entity.

When characterizing the civil legal capacity of the state, it should be noted that by entering into civil law relations, the state voluntarily limits its immunity while retaining its status as an organization endowed with public authority functions, which it is capable of exercising in other domains. When characterizing the legal capacity and capacity to act of public legal entities, it is important to emphasize that they differ from legal entities primarily in that they are not primarily established for participation in civil law relations. Civil law engagement is auxiliary to their main activities, although often necessary. For the state, as well as other public legal entities recognized as subjects of civil law, it is essential to ensure their participation in civil law relations while fully respecting the interests of all participants in civil transactions as legally equal subjects in private law relations with each other.

For the state, economic activity or economic function is no less important than its other functions. The state carries out such activities, particularly in civil circulation, not as a private entity, but as a sovereign entity wielding public authority. When entering into a civil law transaction, the state acts as a distinct subject of civil law, serving not the personal interests of private individuals, but rather the public interest and the interests of its society.

Foreign economic activity is a significant aspect of international private law relations in which the state participates as a party. These activities may encompass both unilateral foreign economic transactions, such as when foreign entities purchase state-issued bonds, and foreign economic agreements where the other party to the agreement is a foreign individual or legal entity, as seen when the state enters into agreements with foreign companies [9].

Modern economic science identifies the main trends in the development of the world market for goods and services, including the following: accelerated development of international trade after World War II and the predominant growth of foreign trade compared to the overall pace of economic development in countries; significant influence of factors operating in the production sector, such as structural changes and cyclical fluctuations in the world economy; and the growth of export (and in some cases import) quotas, indicating the increasing involvement of countries in the global economy. In all these processes, the state plays an important role as a subject of foreign economic activity.

In the economic sphere, a sovereign state cannot only enter into international treaties and agreements with other states to establish economic relations but also directly enter into commercial contracts. In an open market economy, states become business entities and actively engage in commercial relations with foreign private individuals and legal entities. To achieve certain goals of their economic policy, states may create monopolies in certain sectors of the national economy (e.g., extraction of strategic natural resources, railroad transportation, postal services, etc.). However, such actions do not deprive the state of its sovereignty. Thus, a sovereign state, possessing international legal personality, carries out its actions independently of anyone's will. It is worth noting that international trade, which constitutes a distinct sphere of international private law relations, is often described as 'the traditional and most developed form of international economic relations,' accounting for up to two-thirds of the value of all cross-border economic flows [9]. Foreign trade agreements, i.e., civil law agreements concluded by subjects of international law (counterparties) engaged in commercial activities aimed at trade exchange, are established in accordance with the law. In the classical sense, international trade encompasses international commodity and monetary relations, representing the aggregate of foreign trade activities of all countries worldwide. Among the various types of foreign economic transactions involving the state, the predominant role belongs to *the international sale and purchase of goods*. These transactions are often accompanied by contracts for carriage, freight forwarding, insurance, and settlements, which are also independent types of foreign economic transactions. As noted in the literature, 'international trade is historically the first form of international economic relations. This is because it represents a relatively straightforward exchange between states— the exchange of goods and services. Furthermore, it covers approximately 80% of all international economic relations' [4].

The substantive legal regulation of international sales contracts and the rights and obligations of the seller and the buyer arising from such contracts are unified in the *United Nations Convention on Contracts for the International Sale of Goods* dated April 11, 1980 (Vienna Convention) [15] (entered into force on January 1, 1988), which has been ratified by more than 60 states. The Convention defines the contract for the international sale of goods, contains provisions on the form of contracts and the procedure for their conclusion, regulates the content of the rights and obligations of the seller and the buyer, as well as the liability of the parties for non-performance or improper performance of their obligations under the contract. Additionally, the Convention includes provisions on the transfer of risks from the seller to the buyer and obligations of the parties to preserve the goods. If one of the parties to the transaction is located in a country that has not acceded to the Convention, the Convention will not apply to such a transaction. In a sale and purchase agreement, the transfer of ownership of the goods from the seller to the buyer is a prerequisite. This is the main distinction between a sale and purchase agreement and other types of agreements, such as lease, license, insurance, and other agreements, which do not necessitate the transfer of ownership of goods. Instead, the subject of the agreement is either the right to use the goods or the provision of services. Such agreements encompass all contracts recognized under civil law, provided they meet the characteristics of a foreign trade transaction: international sale and purchase, international leasing, international transportation, international settlements, services, etc.

International trade in commodities on the world market is characterized by certain features, including regulatory mechanisms, the specifics of interaction between sellers and buyers, and the characteristics of particular commodity markets. It is noted that "trade in commodities may be carried out under the most favored nation (MFN) regime, on a compensatory basis, or under a preferential trade regime" [4]. These features form the basis for classifying numerous forms of trade.

Other common types of foreign economic agreements to which the state may be a party include investment agreements with a foreign investor, *concession agreements, production sharing agreements, and others*. The issue of immunity for those states that actively attract foreign investment has become particularly important in modern economic relations. Investors are interested in the state that receives investments waiving its immunity in case of disputes between the investor and the state.

As noted above, the scope of private law relations involving the State is quite extensive, and they are evolving under the influence of one of the cornerstone institutions of private international law: the institution of State immunity. The expansion of the State's participation in international economic activity in the second half of the twentieth century led to the establishment of *the concept of limited immunity* not only in legislative and treaty law but also in the judicial practice of

different countries. *The concept of absolute immunity,* which originates from common law — *'par in parem non habet jurisdictionem,'* meaning disputes between equal subjects cannot be resolved in the courts of one of them — has significantly reduced its influence in international private law relations. In other words, a lawsuit against a foreign state is not subject to the jurisdiction of the national courts of other states due to the sovereignty of the defendant. It does not matter whether the claim arises from the political actions of a foreign state or from its commercial transactions. The only exception is when the defendant state has voluntarily waived its immunity. In the practice of states, there are international treaties in which the contracting parties voluntarily waive jurisdictional immunity in the field of merchant shipping and certain commercial relations. The vast majority of bilateral and multilateral investment treaties contain a voluntary waiver of jurisdictional immunity by states in the event of disputes arising in connection with investments. Some multilateral conventions also exclude the right of states to jurisdictional immunity in commercial transactions. Particularly, such rules are laid down in the 1982 *UN Convention on the Law of the Sea* (section 3, part 2) [16].

On the one hand, the concept of functional (limited) jurisdiction allows for the possibility of bringing a foreign state, without its consent, into a judicial procedure on civil claims. However, at the same time, the state maintains protective immunity from actions that entail material consequences, such as interim measures or enforcement of court decisions. On the other hand, supporters of the absolute jurisdictional immunity of states argue that "absolute" does not mean "inviolable," pointing out that under international law, states may voluntarily express their consent to waive jurisdictional immunity.

The concept of functional (limited) immunity does not recognize the non-jurisdiction of the state in commercial transactions. Any counterparty of a foreign state under a commercial transaction has the right to file a claim with the jurisdictional authority established by the relevant provisions of the contract to hold the sovereign state liable for failure to fulfill or incomplete fulfillment of its contractual obligations. Historically, the concept of functional (limited) immunity began to develop in the mid-twentieth century from the practice of national courts of Belgium, Italy, and other Western European countries. These courts started to distinguish between acts of the government *jure imperii* and acts of a commercial nature *jure gestionis*, denying jurisdictional immunity in the latter case [1].

Nowadays, the concept of functional (limited) immunity is enshrined in legislation in a number of countries or is used in judicial and arbitration practice. These countries include Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Italy, Norway, Pakistan, Singapore, Switzerland, the United Kingdom, the United States, and others. Some of these states also participate in the 1972 European Convention on the Immunity of States, which is based on the same concept of limited immunity, as well as in the 2004 UN Convention on Jurisdictional Immunities of States and Their Property.

When a state acts as a so-called "*trading state,*" i.e., enters into private law commercial relations or transactions (i.e., *jure gestionis* actions), it forfeits the right to immunity concerning its property and other rights. According to this concept, and without the special consent of the state in question, regardless of whether the state adheres to the concept of absolute immunity or not, each state itself determines and establishes within its jurisdiction the limits and conditions for granting immunity to other states.

Thus, today it is clear that the state cannot avoid commercial activity; moreover, it seeks to participate in it and therefore must be prepared to limit its immunity for the sake of developing international relations of a private law nature.

Commercial activity of states, according to national legislation and international legal acts, is the most significant exception to immunity. According to the Legal Encyclopedia, the term "*commercial activity*" is derived from the Latin commercium - trade. In a broad sense, it refers to activity in the field of trade and trade turnover, which, with the development of economic relations, encompasses more parties and types of economic activity [7]. In modern foreign legislation, the concept of *commercial activity* is used both in a narrow (trade) and broad sense. According to the Law of Ukraine "On International Commercial Arbitration" of 1994 [14], commercial activity can be carried out in various spheres of economic life, not limited to trade relations. These may include agreements for the supply of goods or services, the exchange of goods or services, distribution agreements, trade representation, factor transactions, leasing, engineering, construction of industrial facilities, provision of consulting services, purchase and sale of licenses, investment, financing, banking services, insurance, operating or concession agreements, joint ventures, and other forms of industrial or business cooperation, as well as transportation of goods and passengers by air, sea, rail, or road.

This approach is confirmed in the practice of most countries, where the broadest interpretation of commercial (trading) activity is applied. This concept includes any economic activity related to industrial production, agriculture, construction, insurance, financial services, etc., as well as actions related to business.

The feature of making a profit serves as the basis for dividing economic activities into commercial and non-commercial ones, necessitating the consideration of the specifics of the legal regime for these types of activities in commercial law. As explained by the US Court of Appeals in the case of the Federal Bank of Nigeria, "if an activity is one that a private person can engage in, it does not give rise to immunity" [2]. In many countries, commercial activities are regulated by commercial codes (such as Australia, Austria, Argentina, Bulgaria, Brazil, Estonia, Poland, Romania, the United States, France, Japan, etc.). For example, Australian law defines a commercial transaction as "a commercial, trade, business, professional, industrial, or similar transaction, including contracts for the supply of goods or services, loans, and other financial arrangements and financial guarantees" [11].

Thus, the participation of the state in international private law relations is characterized by several features. First, it possesses jurisdictional immunity, i.e., immunity from the jurisdiction of foreign courts. The fact that a sovereign state is not subject to anyone's will results in its jurisdictional immunity in economic relations. State immunity is an expression of national sovereignty, encompassing the international legal principles of non-interference in the internal affairs of other states and respect for the rights inherent in sovereignty. Accordingly, state immunity is an institution of public international law. Within its internal legal order, the state does not enjoy such immunity in civil law relations, being an equal partner with other subjects in such relations.

A state's waiver of immunity is made in accordance with the laws of the relevant state. However, the waiver of one type of immunity (e.g., judicial immunity, preliminary injunctive relief, or enforcement of a court decision) does not imply the waiver of another. For instance, a state's consent to participate in a foreign lawsuit does not extend to agreeing to interim measures or enforcing a foreign court judgment. Nonetheless, a foreign state does not enjoy immunity if it itself is a plaintiff.

Secondly, the peculiarity of the state's participation as a party in international private law relations lies in the fact that agreements with foreign parties are typically subject to the law of that state. This provision was reflected in the well-known decision of the Permanent Court of International Justice in The Hague regarding the loans of the Yugoslav and Brazilian governments in 1929, which stated that "the peculiarity of state sovereignty includes the fact that the state is not presumed to have subjected the essence and validity of its obligations to a legal order other than its own." It should be acknowledged that this principle remains significant today.

The scientific literature also offers another rationale for applying state law to contractual relations with private individuals: in the absence of a clause specifying the applicable law in a contract with the state, the law most closely connected to the contract is applied. Typically, this is recognized as the law of the state, as transactions involving the state often have significant ties to the territory of that state. For instance, investments made under investment treaties typically occur within the territory of the state party to the treaty [12].

The provision that the contract is governed by the law of the state implies that a foreign private individual must take certain measures to minimize the risks associated with possible changes in the laws of its counterpart, the state. The state may intentionally alter its legislation in a manner that exempts itself from liability under a contract with a foreign private individual. According to the general principles of private international law, applicable law refers to the law currently in force. In other words, judges and arbitrators are obligated to apply the law as it exists at the time of the dispute, not at the time of the transaction. As noted by J. Morris, "the applicable law is the living law and must be applied as it stands at the time of contract performance, not as it stood at the time of contract formation" [8].

4 Conclusion

The State is an equal participant in international private-law relations, possessing international legal personality, which enables it to engage in various civil, foreign trade, and foreign economic relations, without any inherent priority. International private law relations involving states can be categorized by areas of activity, primarily encompassing property and non-property relations, such as those pertaining to copyright and patent law, international trade in goods and services, foreign economic relations (including investment agreements, concession agreements, production sharing agreements, and the financial sphere), among others.

One of the most significant aspects of state participation in international relations is the principle of immunity, which states possess to a limited extent in private law relations. In the context of commercial activities, the state waives its immunity. To ascertain the commercial nature of a contract involving the state, the primary consideration should be its nature and purpose. Disputes arising from such activities are adjudicated by the competent national court or, by mutual agreement of the parties, may be submitted to arbitration.

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