IMMUNITY OF FOREIGN STATE IN FRENCH PRACTICE

Abstract. *The article contains analyses of the immunity of foreign states in the context of French legal practice. There are also cases of adoption of new legal norms to strengthen the state immunity of France.*
Keywords: *territory, sovereignty, immunity, case law.*

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Introduction-Sources and Types of Immunity in International Law

Immunity is a legal institution that is located at the intersection of public international law and private international law, and therefore interests almost all international lawyers — attorneys, judges, prosecutors, arbitrators, etc. — and all branches of modern law, as well as the history of law and philosophy of law.

Lawyers, consciously or not, face the concept of "sovereignty" on a daily basis and use it.

"Immunity" is a word of Latin origin. In Latin, the noun "munus" means, in particular, "obligation, burden". "Munera militae" — military obligations. From the word "munus" comes the word "immunitas", i.e. the position of a person who is released from obligations. For example, the expression "immunitas omnium rerum", which we find in various Latin texts, means "release from all obligations".

When did the institution of "immunity" appear in legal circulation?

The Thirty years` war ended by the peace of Westphalia, which was signed October 24, 1648, the two treaties, Osnabrück (between the Holy Roman Emperor and his allies,[1] on the one hand, and Sweden with allies on the other) and Munster (between the Emperor and France).

The peace of Westphalia had a great influence on the development of international law. The Treaty of Westphalia recognized for all participants not only the right to territory and to supremacy, i.e. to sovereignty, but also their equal rights regardless of the differences in their religious confession and the form of state system.

In addition to its narrow legal significance, the principles of the concept of the "Westphalian world" are still the main structure of the world order, and form the basis of the so-called "Westphalian system".

The principle of sovereignty, sovereign equality and equality of states implies the generally recognized principles of immunity of states from foreign jurisdiction, as well as the immunity of state property.

According to the principle of immunity of states from foreign jurisdiction, no state can exercise its power over another, and a foreign state cannot be brought before the court of another state as a defendant, except with its express consent.

[1] «История международного права» — Ю.Я.Баскин и Д.И.Фельдман, Москва, Международные отношения, 1990 г. (стр. 94)

The principle of state property immunity is a logical consequence of state immunity, and it is closely related to it. In accordance with this principle, state property cannot be subjected to any coercive measures without the consent of the state-owner of the property.

The essence of state immunities has been, and may still be, the subject of intense debate in the doctrine. For most authors, immunity is a universally recognized principle of international law. For others, immunity is an attribute of the state, an element inherent in the very sovereignty of the state, regardless of international practice or custom, and thus is absolute.

The concept of the absolute nature of state immunity prevailed in the XIX century, and was applied to all acts of a foreign state. This was the French position. However, later French jurisprudence considered this issue in the light of the nature of the foreign state's activities, and distinguished acts related to the exercise of state powers (acta jure imperii) from acts of a purely civil or commercial nature (acta jure gestionis), for which the foreign state is not entitled to enjoy any immunity.

The principle of a sovereign state, which implies immunity from jurisdiction and immunity from coercive measures, was enshrined in the UN Charter: "The organization is based on the principle of the sovereign equality of all its members."

On December 2, 2004, after much work by the International Law Commission, the UN General Assembly approved the Convention on jurisdictional immunities of states and their property.

The preamble of the Convention mentions that jurisdictional immunities of states and their property have been generally recognized as a principle of customary international law. The rules set out in the Convention relate to the concept of limited immunity of a foreign state and correspond — in general terms — to the decisions of French jurisprudence.

France ratified this Convention on 28 June 2011, but the Convention has not yet entered into force due to the insufficient number of countries participating in this Convention.

Diplomatic and consular immunities and privileges are regulated by the Vienna conventions on diplomatic relations (1961) and on consular relations (1963).

The Development of French Judicial Practice and Its Impact on the Adoption of New French Norms — the Issue of Immunity in the Light of "Russian Cases"

The immunity of a foreign state is a principle of international law, but its implementation requires a domestic mechanism. In some countries, this implementation mechanism is enforced by law, such as in the US[2] or the UK.[3]

In France, until recently, there was no law on jurisdictional immunities of foreign states, so the application and interpretation of immunities were implemented through judicial practice and precedents.

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[2] Foreign Sovereign Immunity Act (1976)

[3] State Immunity Act (1978)

As already mentioned, at the beginning of the 19th century, French practice adhered to the concept of absolute immunity. This position was taken by the French court of cassation in the case concerning Spain, declaring that "a state cannot be brought before a foreign court on the basis of obligations that that state has accepted."[4]

However, due to the development of economic and business activities of States, French judicial practice has shifted in the direction of the concept of limited immunity.

In this process, a significant role was played by the "Russian Affairs", which will now be discussed.

France-Export Case / Gostorg and Trade Representation of the USSR in France (Decision of February 19, 1929)

This case concerns a dispute that arose between the French firm France Export and the trade mission of the USSR in France, as well as with Gostorg (the state import and export office of the Russian Federation and a joint-stock company) over a contract to organize a commercial exhibition in Soviet Russia in 1925.

The French firm appealed to the French court and seized the Bank accounts of the trade Mission and Gostorg in France. The court decision was appealed by the trade mission of the USSR, with the reference to the fact that under Soviet laws, foreign trade was a monopoly of the Soviet state, which enjoys immunity.

The French court of cassation took into account that according to the appealed decision of the commercial act of a trade Mission are not state sovereignty, but rejected the appeal of the Soviet Union due to the fact that the question of interpretation of foreign law applies to facts, not law, and is not a possible ground for appeal.

Chaliapin Case / Trade Mission of the USSR in France (Decision of December 15, 1936)

Fyodor Chaliapin lived in exile since 1922. In 1930 VAO (All-Union foreign Trade Association) “International book”, with the help of the Soviet trade mission in Paris, imported Chaliapin’s book “Pages of my life” to France. The fact is that Chaliapin did not consent to such operations, which he considered a violation of his copyright, so the famous singer filed a lawsuit against the trade mission and asked for damages. The claim of Chaliapin was satisfied, and by the decision of December 15, 1936 the court of cassation rejected the USSR’s complaint, given that the actions of the trade mission, i.e. the importation of Chaliapin’s book without his consent was a commercial action that could not relate to the sovereignty and immunity of the state, and which entailed the responsibility of the Soviet state.

[4] Cour de cassation, Chambre civile, 22 janvier 1849 (the case concerned a dispute between a French enterprise and the Spanish government regarding a contract for the supply of shoes for the Spanish army)

It should be noted here that the legal status of the Soviet trade mission changed as a result of the signing of the Soviet-French agreement of January 11,1934,[5] but this agreement, which determined the status of the Soviet trade mission in France, including in the field of immunity, could not be applied to actions that took place before its signing, and were the subject of a court case initiated by Chaliapin.

The Shchukin Affair (Matisse Paintings)

Here it is proposed to give the floor to Professor Boguslavsky:

"...the collection (Shchukin) was nationalized in 1918. The daughters and then the grandson of S. I. Shchukin filed several lawsuits against the Soviet state, and then against the Russian Federation, in relation to paintings by French artists from this collection, taken abroad for exhibitions.

"The first such case — about Picasso's paintings — was considered in 1954 by the court of The Seine Department in France. Several paintings by this artist were taken from the USSR to Paris and displayed in one of the French museums. The claim was brought by the daughter of S. I. Shchukin-Ekaterina Shchukina-Keller, who demanded to recognize her ownership of the paintings and to impose an arrest. The claim was dismissed. One of the reasons is that the paintings were purchased many years ago by a foreign state on its own territory and in accordance with its own laws.

"... in connection with the holding (in 1993) at the Pompidou center for art and culture of the exhibition of paintings by Henri Matisse from the State Hermitage and the Pushkin State Museum of fine arts, another daughter of S. I. Shchukin, Irina Shchukina Keller, as well as a certain I. Konovalov, claiming to be the grandson of a famous collector of Western paintings, I. A. Morozov, filed a number of claims ... the Plaintiffs demanded the imposition of preliminary arrest on the paintings and exhibition catalogues, recognizing their ownership rights to the paintings and paying them compensation in large amounts. The paintings, we will remind, passed into state ownership on the basis of the nationalization decrees of 1918.

"the court ... recognized that in the absence of the consent of the state to consider the case, claims cannot be considered by the court. For the same reason, the court denied the plaintiffs in respect of their requirements on the implementation of coercive measures ...

Professor Boguslavsky also notes the following:

"It is difficult to overestimate the significance of the French court's decision in this case, since the French legislator reacted very quickly to it. Soon after this decision was made, the law of 8 August 1994 was adopted, according to which cultural property imported by a public authority, public entity or foreign cultural institution intended for public display in France is not subject to seizure during the period when it is provided to the French state or any legal entity authorized by it. By a joint order of the Minister of culture and the Minister of foreign Affairs, each exhibition has its own time limit and a list of cultural values is determined (fixed) ... " [6]

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[5] Совет Народных Комиссаров СССР — постановление от 23 января 1934 г. N 177 «О советско-французском торговом соглашении»

[6] М.М. Богуславский «Культурные ценности в международном обороте - правовые аспекты», изд. Юристъ, Москва, 2005 г.

For the first time, the decision of the "Russian case" led to the adoption of new French legislation.

Noga Case / Russian Federation (Embassy of the Russian Federation, Trade Mission of the Russian Federation, Permanent Mission of the Russian Federation to UNESCO) (Paris Court of Appeal, August 10, 2000)

In 1991-1992, the Swiss firm Noga entered into a number of agreements with the RSFSR, under which the firm undertook to provide loans to the government of the RSFSR for the purchase of food and consumer goods with installments by supplying the company at an agreed tariff of petroleum products. In this transaction, goods were delivered to Russia at inflated prices, and petroleum products were delivered to Noga at low prices.

Under the terms of the agreements, Russia was responsible for the performance of contracts with its property, while waiving sovereign immunities, i.e., the immunity of the state and its property

In 1993, the Russian government decided to terminate the agreements.

Noga was able to bring a case in the international arbitration court in Stockholm and in 1997 the Swedish court decided in favor of Noga in two claims, recognizing that Russia owed the company $63 million. Since then, the company has managed to seize Russian property abroad several times. In 2000 in France, Noga has secured the arrest of accounts of Russian diplomatic services, the Bank of Russia, Vnesheconombank and state-owned companies, as well as the arrest of the Russian sailing ship Sedov. However, the accounts were unblocked, property seizures were declared illegal, and the company was fined.

Among all arbitral and judicial decisions rendered in France and in other countries, in this complex and lengthy case, the decision of the Paris court of 10 August 2000, deserves special attention because it concerns the arrest of a firm Noga of accounts in force in France and opened in the name of the Russian Embassy, Trade mission of the Russian Federation, Permanent mission of the Russian Federation to UNESCO, with the result that the activities of the diplomatic service of the Russian Federation has been very difficult.

The company Noga justified its position by the fact that, according to the text of commercial agreements, Russia renounced its sovereign immunities, without exception, and that as a result, Russia thereby renounced the immunity of bank accounts, especially since the Vienna Convention does not provide for the immunity of bank accounts of diplomatic missions.

Nevertheless, the French court decided that, in accordance with the "spirit" of the Vienna Convention, the bank accounts of diplomatic missions are part of items that are the property of the Embassy, intended for the conduct of diplomatic state activities,

«Судьба культурных ценностей», изд. Юристъ, Москва, 2006 г.
«Спор во французском суде», Российский адвокат, май 2007 г.
«Свидетель Эпохи», изд. Норма, Москва, 2008 г.

and enjoy immunity. With regard to Russia's waiver of its immunities, the court decided that the waiver of the immunities provided for in the Vienna Convention was different from the waiver of general state immunities, and therefore required unambiguous but deliberate and special wording. Consequently, the Paris court removed the arrest of the company Noga from the accounts of the Embassy and other diplomatic services of the Russian Federation.

However, a little later, in another case,[7] concerning another state, the French court of cassation decided that the waiver of immunities did not require special wording!

Given all these fluctuations in judicial practice, it is not exaggerated to note that any court case has a random share! In other words, lawyers of the Russian Federation are lucky!

Yukos Case

It is not only impossible, but premature to state, even in a simplified manner, all the procedural twists and turns of this scandalous case, in which the Hague court of appeal is due to make a decision in a few days (February 18th).

It should only be noted that the former partners of Yukos have withdrawn all claims that were brought in French courts, due to the fact that the French law no.2016-1691 of December 9, 2016,[8] which basically includes the rules of the UN Convention adopted in 2004, and as a result, the continuation of the claims of Yukos against the Russian Federation is unpromising in French courts.

The adoption of the new French law is easily explained by the fact that France, despite the fact that it is a clear supporter of international arbitration and a party to a number of international agreements on the recognition and enforcement of arbitral awards, should not become a regular, permanent "battleground" between foreign states and their creditors.[9]

In this matter, it is not without interest to note that, in accordance with the French legal system, judicial precedents usually make it possible to clarify the meaning of an obscure, sometimes vague law and determine the purpose that the French legislator pursued.

On the contrary, in the case of immunity of a foreign state, the judicial practice of its hesitation forced the French legislator to adopt a new law and thus put an end to the judicial "indecision".

And the French legislator said: "let there be light. And there was light ... " at least on the issue of the immunity of a foreign state and its property

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[7] Cour de cassation, 1ère chambre civile, 13 mai 2015, Société Commissions Import Export (Commisimpex) c/ République du Congo

[8] See Annex 1 to this text

[9] « L'article 59 de la loi dite « Sapin II « relatif aux immunités des Etats étrangers et de leurs biens «, J. Boissise et L. Legrand, Annuaire Français de Droit International, 2017, p. 765 et s.

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7. "The fate of cultural values", ed. jurist, Moscow, 2006;
8. "Dispute in French court", Russian lawyer, may 2007;
9. "Witness of the epoch", ed. Norma, Moscow, 2008;

ANNEX 1:

Code of civil enforcement measures (EXT.)
(as amended in accordance with law no. 2016-1691 of December 9, 2016)

Article L 111-1-1 Enforcement or enforcement measures may not be applied to the property of a foreign state without prior judicial authorization issued by a ruling of a judge at the request of one of the parties without the participation of the other party.

Article L 111-1-2 Enforcement or enforcement measures against property belonging to a foreign state may be authorized by a judge only if one of the following conditions is met:

1. A foreign state has expressly agreed to take such measures;

2. A foreign state has reserved or designated property for the satisfaction of the claim that is the subject of this proceeding;

3. In the case of a judicial or arbitral award against a given state, if the property of the state is directly used or intended to be used by the state for purposes other than state non-commercial purposes, and there is a link between the property and the entity against which the legal proceedings were directed.

In accordance with paragraph 3 of this article, the following categories of state property, in particular, are not considered as property directly used or intended for use by the state for purposes other than state non-commercial purposes:

a) property, including any bank account, used or intended for use in the performance of the functions of a diplomatic mission of a state or its consular offices, special missions, representations to international organizations, or delegations to organs of international organizations or to international conferences;
b) property of a military nature or used or intended for use in the performance of military functions;

c) property that is part of the cultural heritage of the state or part of its archives and is not displayed or intended for sale;
d) property that is part of the exposition of objects that are of scientific, cultural or historical interest and is not displayed or intended for sale;
e) rights to state obligations that are of a tax or social nature.

St. L-111-1-3 no enforcement or enforcement measures may be taken on property, including any bank account, used or intended for use in the performance of the functions of a state's diplomatic mission or its consular offices, special missions, representations to international organizations or delegations to organs of international organizations, unless the state has expressly waived the immunity of the property concerned.