

STATES AND INTERNATIONAL ORGANIZATIONS AS SUBJECTS OF PRIVATE INTERNATIONAL LAW

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Abstract

This article explores the unique position of states and international organizations as subjects of private international law. Traditionally viewed as actors in public international law, these entities also engage in legal relationships and transactions governed by private international law. Through an analysis of the relevant literature and a review of select case studies, the paper elucidates the evolving role of states and international organizations in the field, addressing questions of immunity, jurisdiction, and the application of national laws.

Keywords: private international law, states, international organizations, jurisdiction, immunity, transnational law, conflict of laws.

Introduction

Private international law, or conflict of laws, traditionally addresses relationships between private individuals and entities across national borders. However, states and international organizations have increasingly engaged in commercial activities and entered into relationships that necessitate the application of private international law principles. This expansion requires new considerations, such as issues of state and organizational immunity, conflicts of law, and jurisdictional questions.

The central aim of this article is to analyze how private international law accommodates states and international organizations as subjects. By examining various legal frameworks and precedents, the article will demonstrate how states and organizations navigate the landscape of private law while balancing their unique legal positions.

A considerable body of literature examines states and international organizations in public international law. However, comparatively less attention has been directed at their roles within private international law. Key authors in the field, such as Pierre Mayer, Friedrich K. Juenger, and Richard Fentiman, have outlined the frameworks of private international law, et they only occasionally address the challenges posed by states and organizations engaging in private-sector transactions.

The legal principles of immunity and jurisdiction form the basis of scholarly debate in this field. Some authors argue that private international law should offer limited immunity to states and international organizations in order to foster fair competition and justice within transnational commercial relations. Others posit that such immunity is necessary to protect state sovereignty and organizational autonomy. This section of the paper will summarize the central arguments and legal theories that underpin this debate.



This study employs a combination of qualitative legal analysis and case study examination. First, it reviews key international legal instruments, including the United Nations Convention on Jurisdictional Immunities of States and Their Property, to identify standard practices and limitations concerning the immunity of states and international organizations. It also uses selected case studies, such as Republic of Argentina v. NML Capital Ltd. and European Union v. Kingdom of Belgium, to illustrate practical applications and evolving norms. Data were gathered from legal databases, treaty repositories, and relevant case law.

In private international law, states and international organizations can, under certain conditions, act as parties or "subjects" within legal proceedings. While traditionally, private international law primarily addresses disputes among individuals or corporations across borders, there are specific circumstances where states and international organizations become involved in a private law context.

1. States as Subjects of Private International Law

- Sovereign Immunity: Generally, states enjoy sovereign immunity, which means they are not subject to the jurisdiction of foreign courts. However, there are exceptions, especially when states engage in commercial or non-sovereign activities, often called *acta jure gestionis* (commercial acts), as opposed to *acta jure imperii* (sovereign acts). For instance, if a state entity is involved in a commercial contract dispute abroad, the state may be treated as a private actor, allowing the court to assert jurisdiction.

Sovereign immunity is a doctrine under international law that generally protects states from being sued in foreign courts, affirming that a sovereign state should not be subject to the jurisdiction of another state. However, as you noted, there are significant exceptions, primarily distinguished by the type of activities in which the state is engaged.

The two main categories are:

Acta Jure Imperii (Sovereign Acts): These are actions undertaken by a state in its sovereign capacity, such as legislation, military actions, and diplomatic functions. Such acts are typically protected under sovereign immunity, meaning foreign courts cannot adjudicate claims involving these activities.

Acta Jure Gestionis (Commercial or Private Acts): When a state or its entities engage in commercial activities similar to private entities (e.g., entering into business contracts or trade agreements), they are not automatically shielded by sovereign immunity. This is because, in these instances, the state is acting more like a private party rather than as a sovereign. Courts may thus assert jurisdiction over such disputes, treating the state entity like any other commercial actor.

This distinction helps balance the respect for state sovereignty with fairness in commercial dealings, ensuring that states cannot claim immunity to avoid liabilities arising from commercial transactions.

- Contracts and Commercial Disputes: When states enter into commercial contracts with private entities (e.g., joint ventures, investments, or procurement contracts), they may agree to resolve disputes in specific jurisdictions or arbitration forums, treating them as private actors under contract law.



When states engage in commercial contracts with private entities, they often do so under terms that resemble those of private commercial transactions. In these agreements, states can agree to resolve disputes in certain courts or arbitration forums, placing themselves in the position of "private actors" subject to contract law, rather than using sovereign privileges.

This approach of handling commercial disputes is guided by several principles:

Waiver of Sovereign Immunity: By agreeing to resolve disputes in specific jurisdictions or arbitration forums, the state may waive its sovereign immunity, at least in that particular contract's scope. This allows private entities to bring actions against the state as they would with any other private entity.

Neutrality and Fairness: The use of arbitration or foreign jurisdictions often provides a neutral setting, which can increase fairness and confidence in the resolution process. This is particularly relevant where there may be concerns about impartiality in the state's own legal system.

Choice of Law: These contracts typically specify which country's law will govern the agreement, creating clear expectations for both parties. International commercial law (e.g., the United Nations Convention on Contracts for the International Sale of Goods) may apply if the contract crosses borders.

Enforceability: Many international arbitration awards are enforceable under the New York Convention, which is recognized by most countries, providing a relatively straightforward enforcement process for judgments compared to relying on domestic courts.

Investment Treaties and Conventions: Some disputes may also fall under bilateral or multilateral investment treaties, such as the ICSID Convention, which offers additional protections and dispute resolution mechanisms for foreign investors in signatory states.

This contractual approach allows states to participate in the global economy while ensuring that commercial disputes are resolved on commercial terms, balancing state interests with those of private entities in a predictable and legally structured manner.

- Recognition and Enforcement of Foreign Judgments: In private international law, the rules for recognizing and enforcing foreign judgments may apply to states when involved in private-law disputes, although this area can be complex due to the interplay of international treaties and national laws on immunity.

Recognition and enforcement of foreign judgments in private international law is indeed a nuanced area that balances international treaties, national laws, and principles of sovereign immunity. Here are some key points to consider:

Framework for Recognition and Enforcement: The primary objective is to determine when a foreign judgment can be recognized and enforced in a different jurisdiction. This usually requires the foreign court to have had proper jurisdiction and the judgment to be final and conclusive.

International Treaties: Various treaties govern the recognition and enforcement of foreign judgments, such as the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. These treaties aim to facilitate cross-border legal processes by establishing common standards.



National Laws: Each state has its own legal framework for recognizing and enforcing foreign judgments. Some countries may have specific statutes outlining the requirements for enforcement, while others might rely on common law principles.

Sovereign Immunity: This principle complicates matters, as states often enjoy immunity from the jurisdiction of foreign courts. However, in cases involving private law disputes, such as commercial contracts or torts, exceptions to immunity may apply. Courts must carefully assess whether the foreign state acted in a commercial capacity, which could permit enforcement.

Public Policy Considerations: Even if a foreign judgment meets jurisdictional requirements, it may be denied recognition or enforcement if it contradicts the public policy of the enforcing state. This doctrine acts as a safeguard against enforcing judgments that are fundamentally incompatible with domestic legal principles or human rights standards.

Reciprocity: Some jurisdictions require a reciprocal agreement, meaning that they will only recognize and enforce foreign judgments if the other state is willing to do the same for theirs. This is often an important consideration in bilateral relations and can influence the willingness of states to engage in cross-border dispute resolution.

Judicial Discretion: Ultimately, the decision to recognize and enforce a foreign judgment often lies with the courts of the enforcing state, which may exercise discretion based on various factors, including the nature of the dispute and the relationships between the states involved.

In conclusion, the recognition and enforcement of foreign judgments in private international law is a complex interplay of treaties, national laws, sovereign immunity, and public policy, requiring careful navigation to achieve effective cross-border justice.

2. International Organizations as Subjects of Private International Law

- Legal Personality: International organizations typically have legal personality, allowing them to enter into contracts, acquire property, and be subject to legal obligations in member states. Examples include the United Nations, World Bank, or regional organizations like the European Union. This grants them the capacity to act in a private law context.

Indeed, international organizations typically possess what's known as "legal personality." This means they have the legal standing necessary to perform actions typically reserved for private individuals or corporations, such as entering into contracts, holding assets, and being accountable under legal obligations in various jurisdictions.

The legal personality of organizations like the United Nations or the World Bank allows them to function effectively in international law and within member states. It's also essential for cooperation between nations, as it grants these entities the ability to act independently and fulfill their roles in global governance, development, and security. For instance:

United Nations (UN): Through legal personality, the UN can make treaties, own property, and engage in legal proceedings. This autonomy is critical for its peacekeeping, humanitarian, and international justice missions.

World Bank: This institution enters into financial agreements, lends funds, and implements development projects globally, leveraging its legal status to operate within various national jurisdictions.



European Union (EU): The EU has a particularly robust legal personality that allows it to legislate on behalf of its member states in certain areas, create binding regulations, and manage agreements with non-EU countries.

These examples underscore the importance of legal personality for international organizations, allowing them to exercise rights and responsibilities similar to legal persons in national contexts.

- Immunity and Privileges: Many international organizations possess immunity under international treaties or host country agreements, but they may waive immunity for particular transactions, especially when involved in commercial activities. For example, the UN often has immunity in member states but may agree to arbitration in commercial contracts, waiving certain protections.

Your summary of immunity and privileges for international organizations highlights an important aspect of their operational framework. Here's a bit more context and elaboration on the topic:

Immunity of International Organizations: International organizations like the United Nations, World Bank, and others generally enjoy a degree of immunity from legal proceedings and jurisdiction of national courts based on their founding treaties or host country agreements. This immunity is designed to protect their independence and ensure they can operate without interference from member states.

Waiver of Immunity: While these organizations have immunity, they can voluntarily waive it in certain circumstances, particularly when it comes to commercial activities. This is often outlined in the contracts they enter into. For instance, in commercial transactions, they may agree to arbitration as a means of dispute resolution, effectively waiving their immunity for those specific dealings.

Examples of Waiver: The UN's involvement in various commercial contracts often includes clauses that specify arbitration or mediation in case of disputes. This approach enables them to engage in international trade, procurement, and other business-related activities while still maintaining some level of immunity.

Balance of Interests: The ability to waive immunity is a crucial mechanism that balances the need for international organizations to engage with private entities and states in commercial matters while also safeguarding their essential functions. This flexibility is critical in fostering cooperation and ensuring that organizations can fulfill their mandates effectively.

Legal Frameworks: The legal frameworks governing these immunities and waivers can vary widely depending on the specific international organization, the nature of the agreement, and the host country's laws. Often, these frameworks are laid out in detailed agreements or statutes. In summary, the immunity and privileges of international organizations play a crucial role in their functioning, but the ability to waive such immunities for commercial activities is equally important for facilitating effective collaboration in the global arena.

- Employment and Contractual Disputes: International organizations may face disputes over employment or contractual obligations, where private international law principles can come into play, especially regarding jurisdiction, choice of law, and enforcement of awards.



Employment and contractual disputes within international organizations can be complex due to the interplay of various legal frameworks. Here's an overview of how private international law principles can address these issues:

Jurisdiction

- Choice of Forum: Contracts often include clauses that designate a specific jurisdiction for dispute resolution. Determining the validity and enforceability of these clauses is essential.
- Forum Non Conveniens: Courts may dismiss a case if another forum is significantly more appropriate for resolving the dispute.
- International Treaties: Conventions such as the Hague Convention on Choice of Court Agreements can influence jurisdictional issues.

Choice of Law

- Governing Law Clauses: Parties may specify which jurisdiction's laws will govern their contract. Courts generally respect these choices unless they contravene public policy.
- Connecting Factors: Courts may look at factors such as the location of the parties, where the contract was performed, and the subject matter of the dispute to determine applicable law.
- Conflict of Laws: When no governing law is stipulated, courts apply conflict of laws principles to ascertain which jurisdiction's laws should apply.

Enforcement of Awards

- Recognition of Foreign Judgments: The enforceability of judgments or arbitral awards across borders can be affected by treaties like the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
- Local Laws and Procedures: Enforcement of foreign judgments may be subject to the laws and procedures of the jurisdiction where enforcement is sought, which may impact the efficacy of international dispute resolutions.
- Sovereign Immunity: International organizations may enjoy certain immunities that can complicate enforcement actions, depending on the jurisdiction.

Dispute Resolution Mechanisms

- Arbitration: Many international contracts include arbitration clauses, which can provide a neutral forum for resolving disputes outside of national courts.
- Mediation: Mediation can be a less adversarial approach, allowing parties to reach a mutually satisfactory resolution.
- Administrative Review: Some international organizations have internal mechanisms for reviewing employment disputes, which can be a prerequisite before seeking external legal remedies.

The resolution of employment and contractual disputes in international organizations requires careful consideration of jurisdiction, choice of law, and enforcement mechanisms. Understanding the principles of private international law can help parties navigate these complexities and protect their rights effectively.

3. Jurisdictional Issues and Arbitration

- Arbitration Agreements: States and international organizations increasingly agree to settle disputes through arbitration to avoid issues related to jurisdiction and immunity. International



arbitration centers, like the International Centre for Settlement of Investment Disputes (ICSID), provide neutral ground where states and organizations can engage in dispute resolution.

- Choice of Law and Forum Selection: In private international law, states and international organizations involved in private transactions might choose a particular legal system or forum to govern the dispute, facilitating resolution and ensuring predictability.

In sum, while sovereign immunity and specific privileges exist, the role of states and international organizations in private international law is recognized when they engage in commercial activities or legal transactions typical of private entities.

The results highlight the tension between the desire to hold states and international organizations accountable in private legal matters and the need to respect their sovereign or quasi-sovereign immunities. For example, while states can waive their immunity in commercial matters, such waivers are often narrowly construed, potentially leading to jurisdictional challenges and enforcement issues. Additionally, international organizations' broader immunities reflect their need for operational independence, but this can create legal obstacles for private entities seeking redress.

These findings suggest that private international law must continue to adapt to the participation of states and organizations in private transactions. The inconsistencies in national judicial approaches indicate a need for greater harmonization of laws and clearer guidelines on immunity waivers.

Conclusions

The analysis underscores the necessity of balancing state sovereignty and organizational autonomy with principles of fairness in private international law. For states, a clearer delineation between commercial and sovereign actions could enhance predictability and fairness in cross-border private transactions. For international organizations, the establishment of more flexible immunity waivers for specific types of transactions could address current barriers to justice for private parties.

Enhanced Treaty Provisions: Establish treaties focusing on private international law issues concerning states and international organizations to reduce jurisdictional conflicts.

Model Legislation: Develop model laws for national adoption to standardize immunity practices in private transactions involving states and organizations.

Judicial Training: Encourage the training of judges in international and comparative law to promote more consistent application of private international law principles.

This article aims to serve as a resource for legal scholars, practitioners, and policymakers in understanding the evolving role of states and international organizations as subjects of private international law. Through a balanced approach to sovereignty and fairness, private international law can better accommodate the complex nature of transnational relations involving these entities.



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