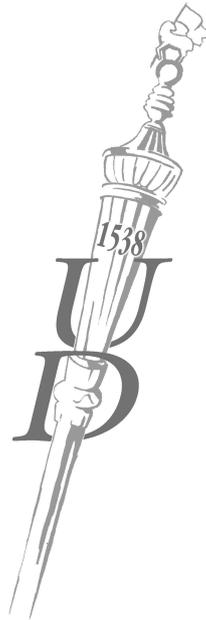


**University Doctoral (PhD) Dissertation Abstract**

**SCOPE AND EFFECT OF THE IMMUNITY PRINCIPLES IN INTERNATIONAL  
PRIVATE AND BUSINESS LAW**

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## A. Introduction, problem formation

Commercial activities of states are often protected by the principle of immunity. As the doctrine developed over the years in the form of undisputed international usances<sup>1</sup>, states enjoy sovereignty and immunity for their activities whether governmental (*acta jure imperii*) or commercial (*acta jure gestionis*).<sup>2</sup> We have to, however, distinguish the two basic forms of immunity: enforcement and jurisdictional immunity. Immunity from jurisdiction refers to a limitation of the adjudicatory power of national courts<sup>3</sup>, whereas immunity from enforcement prevents courts of the forum state from imposing measures of constraint on the foreign State.<sup>4</sup>

Traces of origin in early history shows that the immunity doctrine was an absolute concept, though it was granted to merchants who enjoyed the status of state dependents.<sup>5</sup> This absolutism went through the development of customary international law<sup>6</sup> and impeded state confidence in international market, commonly by using immunity as a safe harbor for their misconduct. The absolute character of immunity, however, tended to fundamentally be unfair for private entities when they got engaged in commercial relations with state enterprises. The shield of immunity was commonly used to avoid private accountability for the state's commercial activities. Western Europe and the United States then constructed a slight restriction of the immunity doctrine<sup>7</sup>, especially in dealing with disagreement of immunity for the commercial nature of state activities.

The restrictive approach of the immunity doctrine provided that states could merely be immune from the jurisdiction related to their "public acts" (*acta jure imperii*) but were not

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<sup>1</sup> BYERS, M. (1999) *Custom, Power, and the Power of Rules*. Cambridge: Cambridge University Press. p.4. SHAW, M. N. (2008) *International Law*. Cambridge: Cambridge University Press. p.141.

<sup>2</sup> YEE, S. (2003) Foreign Sovereign Immunities, Acta Jure Imperii and Acta Jure Gestionis: A Recent Exposition from the Canadian Supreme Court. 2 (2) *Chinese Journal Of International Law*. p.649.

<sup>3</sup> LAUTERPACHT, H. (1951) The Problem of Jurisdictional Immunities of Foreign States. 28 *British Yearbook of International Law* 220. pp.220-225.

<sup>4</sup> WIESINGER, M. (2006) *State Immunity from Enforcement Measures*. University of Vienna. p.1. [Online] Available from: [http://intlaw.univie.ac.at/fileadmin/user\\_upload/int\\_beziehungen/Internetpubl/wiesinger.pdf](http://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/wiesinger.pdf) [Accessed: March 2nd, 2015].

<sup>5</sup> ROLLINGER, R. and ULF, C. (eds.) (2002) Commerce and Monetary Systems in the Ancient World Means of Transmission and Cultural Interaction, *Proceedings of the Fifth Annual Symposium of the Assyrian and Babylonian Intellectual Heritage Project*, Innsbruck, Austria. p.97.

<sup>6</sup> BROWNLIE, I. (2008) *Principles of Public International Law*. 7th edition. Oxford: Oxford University Press. pp.323-327.

<sup>7</sup> McNAMARA, T. (2006) A Primer on Foreign Sovereign Immunity, *Paper presented in Union Internationale des Avocats, Winter Seminar on International Civil Litigation and the United States of America*. p.1. [Online] Available from: <http://www.dgslaw.com/images/materials/McNamara1.pdf> [Accessed: March 2nd, 2015]. See also NICHOLSON, F. (1961) Sucharitkul: State Immunities and Trading Activities. 2 *Boston College Law Review* 459. p.60-61. ALLEN, E. (1933) *The Position of Foreign States before National Courts, Chiefly in Continental Europe*. New York: The Macmillan Company. p.301.

immune from the jurisdiction of foreign forums for their “private acts” (*acta jure gestionis*).<sup>8</sup> This concept was then adopted by several national laws, i.e. Foreign Sovereign Immunity Act (the United States)<sup>9</sup>, The State Immunity Act (the United Kingdom)<sup>10</sup>, and was also used as a source of interpretation by judges, i.e. in the case of *Stukonis v. USA Embassy*<sup>11</sup>, *Philippine Embassy Bank Account*<sup>12</sup>, *Leica AG v. Central Bank of Iraq et Etat Irakien*<sup>13</sup>, and other cases in which the courts improved the appropriate test to determine the acts of the state whether these have a public or private character. Furthermore, international communities agreed upon initiatives to universalize such restrictions of the immunity doctrine through multilateral treaties such as the European Convention on State Immunity (1976)<sup>14</sup> and the United Nations Convention on Jurisdictional Immunities of States and Their Territories (2004)<sup>15</sup>.

The concept of restrictive immunity could not gain full universal acceptance because, obviously, some countries are still interpreting immunity as an absolute concept. In the recent case of *FG Hemisphere Associates LLC v. Democratic Republic of the Congo*, the High Court of Hong Kong by formal support from the Minister of Foreign Affairs of Hong Kong ‘in position that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of ‘restrictive immunity’.<sup>16</sup> Moreover, private actors must work hard to prepare argumentation in determining the acts of state whether the debated act is of a public or private nature. This often burdens the court’s infrastructure and energy. Even if the Court rules for the private actors, they are forced to struggle with the enforcement court which sometimes operates in under a different legal system, and, therefore, applies different interpretations and practices. They still have to go through the enforcement process, unless there is a consent of their partner state to waive the immunity under the scope of the private

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<sup>8</sup> McNAMARA, T. *loc.cit.* DORSEY, W. (1997) Reflections on the Foreign Sovereign Immunities Act after Twenty Years, 28 *Journal of Maritime Law and Commerce* 257. pp.262-265.

<sup>9</sup> *Ibid.*

<sup>10</sup> BOWETT, D. (1978) The State Immunity Act 1978. 37 (2) *The Cambridge Law Journal*. p.193.

<sup>11</sup> TOLEIKYTĖ, N. *The Concept of State Immunity and The Main Challenges*. [Online] Available from: [http://www.tf.vu.lt/dokumentai/Admin/Doktorant%C5%B3\\_konferencija/Toleikyte.pdf](http://www.tf.vu.lt/dokumentai/Admin/Doktorant%C5%B3_konferencija/Toleikyte.pdf) [Accessed: March 3rd, 2015].

<sup>12</sup> Philippine Embassy Case, Germany, Federal Constitutional Court, 13 December 1977, 46 BVerfG, 342; 65 ILR 146. p.164.

<sup>13</sup> *Leica AG v. Central Bank of Iraq et Etat Irakien*, Cour d’appel, Brussels, 15 Feb. 2000.

<sup>14</sup> European Convention on State Immunity, May 16, 1972, 1495 U.N.T.S. 181.

<sup>15</sup> United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) [hereinafter ‘UN Convention on Jurisdictional Immunities’]

<sup>16</sup> *FG Hemisphere Associates LLC v. Democratic Republic of the Congo*, Judgment of the High Court of the Hong Kong Special Administrative Region No. 928 of 2008. par.14. [Online] Available from: [http://legalref.judiciary.gov.hk/lrs/common/search/search\\_result\\_detail\\_body.jsp?ID=&DIS=63653&QS=%28firm%29&TP=JU](http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_body.jsp?ID=&DIS=63653&QS=%28firm%29&TP=JU) [Accessed: March 3rd, 2015].

agreement.

In the twenty-first century, international businesses and several working groups encourage states to restrict the immunity doctrine within the scope of their national laws and practices. The main argument these entities bring up to justify the urge for limitation of a wide interpretation of the immunity doctrine is basically the dynamics of modern economic development. Under such circumstances, it is an obvious need from the investors to get legal certainty, predictability to protect their investments in a foreign country. When a state could maintain justice within the business environment, this would increase the state's image make it look like a pro-investment state, and may also boost the economic development for the nation's welfare.

## **B. Core legal issues and methodology of the research**

Based on the above described anomalies of the recent practices related to the immunity doctrine, this dissertation proposes four core legal issues to be analyzed:

1. How did the concept immunity evolve over the years to gain its present form?
2. How far international treaties and certain domestic laws should go to regulate and restrict the application of the immunity doctrine?
3. What are the challenges in the application of the restrictive immunity concept?
4. What would be the best regulatory and practical methods to restrict the doctrine of immunity?

To provide a comprehensive analysis, the doctrinal research methodology was greatly used for this study. Its interpretative scheme, and the overall framework of categories, assumptions, and concerns operate, set up and demarcate the very meaning, scope, and purpose of this study.<sup>17</sup> In addition to this research methodology, three other methods were also used to address the core issues this dissertation proposes to cover: the historical, the normative, and the case-oriented approaches.

## **C. Absolute immunity as the core problem in international economic relations**

State immunity is universally defined as follows: a state does not fall under the jurisdiction of foreign courts (immunity from jurisdiction) and that its property located in

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<sup>17</sup> SALTER, M. and MASON, J. (2007) *Writing Law Dissertations*. New York: Pearson Education Limited. pp.44-45.

foreign territory is not subject to attachment and execution (immunity from execution).<sup>18</sup> This legal concept allows states to perform their public functions effectively and to protect their representatives to conduct international relations in order to achieve their national interests and agendas. When a state or its representatives are sued before foreign municipal courts, they may prevent the adjudication by pleading state immunity.

State immunity developed as an “undisputed principle of customary international law”. Every legal system (common law, civil law and other legal systems) share the same legal concept on state immunity. The difference can only be traced in the various legal approaches they follow: whether the principle emphasizes the absolute character or the restrictive character of immunity. The two approaches are based on different rationale, since the absolute application of state immunity is considered a traditional approach, and the restrictive application is mostly practiced in the modern era, the post mid-twentieth century.<sup>19</sup>

The rationale behind the absolute character of state immunity is precluding one State from exercising jurisdiction over another under the principle of *par in parem non habet imperium* (an equal has no power over an equal).<sup>20</sup> This is a very old principle in international law that was originally created to endorse an absolutist form of sovereignty, that implied over-simplified view on the role of the sovereign in global settings.<sup>21</sup> The maxim could be traced back to the fourteenth century, namely to a jurist called Bartolus who wrote the following: ‘*Non-enim una civitas potest facere legem super alteram, quia par in parem non habet imperium*’ (for it is not for one city to make the law upon another, for an equal has no power over an equal).<sup>22</sup>

By using the historical approach, this study shows that prior to the twentieth century, state immunity was absolute in almost all states. In the past, even, as proved under historical practice in Mesopotamia and Greece, traders or merchants enjoyed absolute immunity due to their position as the representative of their Kings or *polis* in which their commercial acts and diplomatic missions were combined. In Mesopotamia, merchants enjoyed the full confidence of the King, and one would not be wrong to suppose that in such enterprises commercial

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<sup>18</sup> BOUCHEZ, L. (1979) The Nature and Scope of Immunity from Jurisdiction and Execution. 10 *Netherlands Yearbook of International Law* 3. p.3.

<sup>19</sup> GORDON. (1977) The Origin and Development of the Act of State Doctrine. 8 *Rutgers Camden Law Journal* 595. p.596.

<sup>20</sup> BADR, G. (1984) *State Immunity: An Analytical and Prognostic View*. The Hague and Boston: Martinus Nijhoff. p.89.

<sup>21</sup> NAGAN, W. and ROOT, J. (2013) The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the United Nations Charter, and the Application of Modern Communications Theory. 38 *University Florida Faculty Scholarship* 375. p.376.

<sup>22</sup> BADR, G. *loc.cit.*

activity and diplomatic mission were combined.<sup>23</sup> This means that merchants enjoyed the protection similar to those in diplomatic missions, while they worked as commercial agents of the state, and they even emphasized and boosted their private purposes in business. Compared to the Mesopotamian practices that granted all traders the status of immunity from public obligations, in Ancient Greece only traders with honorific conditions could enjoy the status of *proxenos*. These *proxenos* titles were not simple honors with no tangible advantages, as might be inferred from the fact that the *polis* often added privileges such as *ateleia* (immunity from public burdens)<sup>24</sup>, *asylia* (freedom from seizure of one's goods)<sup>25</sup>, and *epimeleia* (an injunction to the officials of the state to watch over the *proxenos*' interests)<sup>26</sup>.

In international economic relations, state parties tend to claim immunity as a defense before the domestic courts. Sovereign entities claim to be expanded not only for their political activities (*acta jure imperii*) but also for their commercial activities. In this position, state parties use the absolute immunity principle to evade contractual obligations, or to avoid commercial liability to pay financial losses as the result of their contractual breaches. This situation will surely cause unfair situations for their business partners, and it also undermines the values of international commerce and international relations.

#### **D. Restrictive immunity under international treaties and in domestic laws**

During the globalization process in the international market, the need to apply restrictive immunity has become a common approach that does not attach immunity to commercial purpose. This understanding is proved by several multinational treaties<sup>27</sup>, such as the European Convention on State Immunity 1972, and the United Nations Convention on Jurisdictional Immunity of States and their Properties 2004.

The European Convention on State Immunity was the first comprehensive international multilateral treaty that addressed the problem of state immunity. It was adopted on 16 May 1972 by the Council of Europe and came into force on 11 June 1976. The Convention was clearly an attempt in international legislation on one of these perennial

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<sup>23</sup> NEUMANN, H. (1999) Ur-Dumuzida and Ur-Dun. In DERCKSEN, J. G. (ed.) *Trade and Finance in Ancient Mesopotamia*. Leiden: Proceedings of the First MOS Symposium. p.52.

<sup>24</sup> HARDING, P. (ed.) (1985) *From the End of the Peloponnesian War to the Battle of Ipsus: Translated Documents of Greece and Rome II*. Cambridge: Cambridge University Press. p.178.

<sup>25</sup> REED, C. M. (2003) *Maritime Traders in Ancient Greek World*. Cambridge: Cambridge University Press. p.xi.

<sup>26</sup> There had a clause in specific enabling the *proxenos* to seek redress in Athens at the court of the Polemarch. LOW, P. (2008) *Athenian Empire*. Edinburgh: Edinburgh University Press. p.136.

<sup>27</sup> The rules of immunity originate from customary. However, in the modern development of international law, immunity then has been adopted into bilateral and multilateral treaties.

problems among a group of European states to establish restrictive measures on immunity. It is currently ratified by eight countries in the European Union such as: Austria, Belgium, Germany, Luxembourg, Netherlands, Switzerland and the United Kingdom.<sup>28</sup> Five of these countries (Austria Belgium, Netherlands, Luxembourg and Switzerland) are also parties to the Convention's Additional protocol that established the European Tribunal in matters of State Immunity.<sup>29</sup> This Tribunal determines disputes under the Convention.<sup>30</sup>

In December 2004, the United Nations Convention on Jurisdictional Immunities of States and their Properties (UN Convention) was adopted by the United Nations General Assembly.<sup>31</sup> Capping more than a quarter of a century of intense international negotiation, the new treaty is the first modern multilateral instrument to articulate a comprehensive approach to issues of state or sovereign immunity from suits in foreign courts.<sup>32</sup> The main purpose of this Convention is to provide a single rule and common measures on the application and interpretation of state immunity. It also harmonizes the restrictive approach of state immunity into the domestic laws of the Contracting States. Indeed, the Convention builds on the experiences gathered under the 1972 European Convention on State Immunity as well as on state practices under various domestic statutory regimes.<sup>33</sup> Unfortunately, this Convention has not yet come into force because its failure to be ratified by the minimum number of states.<sup>34</sup> Until now, there are only 12 state parties to this Convention, including: Austria, France, the Islamic Republic of Iran, Japan, Kazakhstan, Lebanon, Norway, Portugal, Romania, and Saudi Arabia.<sup>35</sup>

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<sup>28</sup> Council of Europe. (2016) *Chart of Signatures and Ratifications of Treaty European Convention on State Immunity*. [Online] Available from: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/074/signatures> [Accessed: November 20th, 2015].

<sup>29</sup> The Additional Protocol to the European Convention on State Immunity, came into force on 22 May 1985.

<sup>30</sup> EDWARDS, R. (1981) Extraterritorial Application of the US Iranian Assets Control Regulations. 75 *American Journal of International Law*. p.870.

<sup>31</sup> UN Convention on Jurisdictional Immunities.

<sup>32</sup> STEWART, D. P. (2005) The UN Convention on Jurisdictional Immunities of States and Their Property. 99 (1) *The American Journal of International Law* 194. p.194.

<sup>33</sup> DICKINSON, A., LINDSAY, R., and LOONAM, J. P. (2004) *State Immunity: Selected Materials and Commentary*. Oxford: Oxford University Press.

<sup>34</sup> UN Convention on Jurisdictional Immunities, art.30 paragraph (1) and (2) stated that: "(1) The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. (2) For each State ratifying, accepting, approving or acceding to the present Convention after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession."

<sup>35</sup> Committee of Legal Advisers on Public International Law (CAHDI). (2011) *State of Signatures and Ratifications of the UN Convention on Jurisdictional Immunities of States and Their Property and the European Convention on State Immunity*. [Online] Available from: [http://www.coe.int/en/web/cahdi/meeting-documents?p\\_p\\_id=101&p\\_p\\_lifecycle=0&p\\_p\\_state=maximized&p\\_p\\_mode=view&\\_101\\_struts\\_action=%2Fa](http://www.coe.int/en/web/cahdi/meeting-documents?p_p_id=101&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_101_struts_action=%2Fa)

When we focus on the number of ratifications, both treaties have only limited number of ratifications. However, more and more domestic laws are now applying the restrictive approach of immunity. So far, most common law countries like the United States, the United Kingdom, Canada, Australia, and Singapore apply the restrictive approach of the immunity doctrine in their national laws. In 2015, Russia adopted the Law on Jurisdictional Immunities of Foreign States, however, in practice, Russian courts base their judgments on the principle of reciprocity.<sup>36</sup> The rest of the world (in particular, the developing countries, often referred to as ‘Third World’ countries) are uncertain to apply the restrictive immunity theory, and some of them still accord absolute immunity for commercial activities of foreign sovereigns.<sup>37</sup> For instance, China, the second largest economy in the world, still keeps the absolute approach on immunity alive.<sup>38</sup>

This study also states that the attitude of civil law countries has gradually changed due to various reasons influenced mainly by market globalization. The domestic courts in Indonesia<sup>39</sup> and Sweden<sup>40</sup> are examples that while they do not have definite and codified laws to adopt restrictive immunity, they still turned to the application of the restrictive approach of immunity.

#### **E. Legal response to the immunity defense in commercial and business transactions**

1. The laws of the United Kingdom and the State of New York may be solutions as choices of the governing being so sophisticated in restricting the doctrine of immunity.

In international law, the doctrine of immunity is a derivation from the principle of *par in parem non habet imperium* (one sovereign power cannot exercise jurisdiction over another

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<sup>36</sup> Reciprocity is defined as this analogy: “*If Russian property has limited or no immunity in a particular country, Russia shall be empowered to establish similar restrictions on that country’s property located in the Russian territory.*” This law has uncertain applicability since there is no limitation on how far to limit the ‘reciprocity’. See ROUDIK, Peter. Russian Federation: New Law Allows Seizure of Foreign Government’ Property [online]. In *Library of Congress*. Washington DC. Available from: <http://www.loc.gov/law/foreign-news/article/russian-federation-new-law-allows-seizure-of-foreign-governments-property/> [Accessed: November 29<sup>th</sup>, 2015].

<sup>37</sup> Judgement, Indian Supreme Court, 1996. In *Ali Akbar v. United Arab Republic*. HIR SC 230 [online]. Available from: <http://indiankanoon.org/doc/104377/>. See BANKAS, Ernest K. (2005) *The State Immunity Controversy in International Law*. Germany: Springer. pp. 119-202.

<sup>38</sup> ZHU, L. (2007) State Immunity from Measures of Constraints for the Property of Foreign Central Banks: The Chinese Perspective. 6 *Chinese Journal of International Law* 67. pp.73-74. See also *Democratic Republic of Congo v. FG Hemisphere Associates LLC*. (2009) 1 H.K.L.R.D. 410.

<sup>39</sup> Judgement, Indonesian Supreme Court, 2012. In *Indra v. the United States Consulate*. No. 673 K/Pdt.Sus/2012.

<sup>40</sup> BOSCHIERO, Nerina, et al. (2013) *International Courts and the Development of International Law*. The Hague: Asser Press. pp. 82-83.

sovereign power). As sovereign entities, states enjoy immunity, a legal protection for their representatives, assets, and activities. However, this study supports Lauterpacht's view: the doctrine of immunity is basically not part of customary international law, considering the inconsistencies of its application and related practice.<sup>41</sup> Prior to the mid-twentieth century, state immunity was seen in nearly absolute terms.<sup>42</sup> In the era of globalization, states became more engaged in commercial activities, and private entities interacting with foreign states lashed out absolute sovereign immunity as a fundamentally unfair practice that eliminates judicial recourse and one that favors state parties.

During the historical development, the approach on state immunity changed to a restrictive immunity concept. This approach is based on the two different acts of the state. According to the restrictive immunity doctrine, private acts of the state (*acta jure gestionis*) are no longer immune. Only public acts of the state (*acta jure imperii*) enjoy privilege to be immune from foreign jurisdictions. Belgian courts were among the very firsts to adopt the private acts as exceptions under the general principle in early 1857.<sup>43</sup> In modern era, restrictive immunity has been adopted by the common law countries through their domestic legislations, however, some states still apply the absolute approach of immunity.

Considering that the restrictive approach of immunity doctrine has no universal application, this study found that choice of law provisions may be effective solutions to the immunity bridge problem. To avoid unfair treatment, parties in international commercial agreements are obliged to choose the law that promotes their favorable and fair business relationships. The chosen governing law will determine the validity and enforceability of the contract. This study recommends that the Law of New York and the English Law could offer suitable governing laws for contractual agreements involving state parties. The two laws are worthy governing law because of the modern and sophisticated systems they created, guaranteeing predictability, providing certainty, and because both systems apply and support the restrictive immunity theory.

a. Modern and sophisticated laws

The modern and sophisticated laws of England and the State of New York are core foundation of the common law systems. These systems rely on two primary sources of law: codified law (including constitutional law, statutory law, and

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<sup>41</sup> LAUTERPACHT, H. (1951) *op.cit.* pp.227-228.

<sup>42</sup> HENDERSON, C. W. (2010) *Understanding International Law*. Oxford: John Wiley & Sons. p.140. *See Schooner Exchange v. McFadden*. (1812) 11 US (7 Cranch) 116. p.135.

<sup>43</sup> ALEBEEK, R. V. (2008) *The Immunity of States and Their Officials in International Criminal and International Human Rights Law*. Oxford: Oxford University Press. p.14. *See FINKE, J. op.cit.* p.858.

regulatory law) and case law (precedents). Even if the codified law is unclear, Courts enjoy an utmost freedom for interpretation. Court decisions are of legal significance: they serve bases for future decisions of the courts if arisen from the same material facts. These systems are universally known as the ones built on the doctrine of precedents forming the cornerstones of common law systems.<sup>44</sup>

In fact, the precedent system contributes majorly in modernizing the law. Both statutory law and case law are completing each other. They are more adaptable and responsive to complex and even complicated legal disputes than civil law systems. In certain areas, English and New York Law may show differences, for instance in the adoption of the good faith doctrine. New York Law confirms that ‘every contract imposes obligation of good faith in its performance’<sup>45</sup>, while in contrast, English Law clearly deny the adoption of the good faith principle in its contract law<sup>46</sup>. With strong emphasis on precedents, such differences motivate the court to establish certain measures and legal reasoning<sup>47</sup> rather than adverse legal constraints.

b. Guarantee of predictability

Consistency of binding precedents in the common law legal systems provides predictability. For experienced parties, the laws that assure predictability fit their basic needs. During the negotiation stage, parties can predict that the existing codified rules and case law sufficiently provide guidance for their future performance. Moreover, the contract would be more efficient if the chosen governing law paired with the forum selection clause point to the same jurisdiction and legal system. Choosing the English Law as governing law and the courts of England and Wales as intended dispute settlement forums in the agreement will prevent parties from the problem of competition between the *lex*

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<sup>44</sup> HARRIS, B.V. (2002) Final Appellate Courts Overruling Their Own “Wrong” Precedents: The Ongoing Search for Principle. 118 *Law Quarterly Review* 408. pp.412-413.

<sup>45</sup> Uniform Commercial Code (1990). Section 1-(203)

<sup>46</sup> CARTWRIGHT, J. (2007) *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer*. Oxford: Hart Publishing. p.60.

<sup>47</sup> English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. See *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd.* (1989) 1 Q.B. 433. *First Energy (UK) Ltd. v. Hungarian International Bank Ltd.* (1993) 2 Lloyd’s Rep 194. *Scottish Power Plc. v. Kvaerner Construction (Regions) Ltd.* (1999) SLT 721. MCKENDRICK, E. (2010) *Contract Law: Text, Cases, and Materials*. Oxford: Oxford University Press. p.501. ABELL, M. and HOBBS, V. (2013) The Duty in Good Faith in Franchise Agreements – A Comparative Study of the Civil and Common Law Approaches in the European Union. 11 *International Journal of Franchising Law* 1. pp.9-11.

*fori* on the enforceability and interpretation of the forum selection clause in the chosen law.<sup>48</sup>

c. Restrictive approach of immunity

As we previously discussed, both English law and New York law grant immunity to the states but not in commercial activities. These restrictive immunity concepts are also recognized as binding precedents. The US FSIA legislates that the immunity of a foreign state is not extended to suits based on its commercial acts.<sup>49</sup>

The United Kingdom's State Immunity Act provides general regulation of immunity and lists certain exceptions of immunity to promote the doctrine of restrictive immunity.<sup>50</sup>

2. Submission to arbitration is a submission to judicial jurisdiction

Practicing lawyers recommend that it is important to waive the immunity clause in a contract. This clause indicates a consent of the state unconditionally and irrevocably that it would not invoke immunity as a sovereign entity. However, not all parties in international commercial transactions are aware of this clause and option. In this matter, private parties must build strong arguments against the state parties that claim for immunity in their commercial activities. Using the immunity defense, state parties are sometimes reluctant to abide their agreements to arbitrate the dispute.<sup>51</sup>

Waiver of the immunity could be implicit as in a form of an arbitration clause or agreement. This means that submission to arbitration is implied consent to waive state immunity. It depends, however, that under certain circumstances that waiver of immunity is not explicit and sufficient enough.<sup>52</sup> Choice of law clause also plays an important role to restrict immunity. Choosing the law of the country that interprets immunity restrictively is also considered a waiver of immunity by implication.<sup>53</sup> This legal concept has been recognized as a common rule under the common law systems, for example under section 1605

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<sup>48</sup> CLERMONT, K. M. (2015) Governing Law on Forum-Selection Agreements. 66 *Hastings Law Journal* 643. p.652.

<sup>49</sup> The United States Foreign Sovereign Immunities Act, 15 ILM 1388 (1976) [hereinafter 'US FSIA'], section 1602.

<sup>50</sup> The State Immunity Act, 17 ILM 1123 (1978) [hereinafter 'UK SIA'], section 3.

<sup>51</sup> DOMKE, M. (1971) The Enforcement of Maritime Arbitration Agreements With Foreign Governments. 2 (3) *Journal of Maritime Law and Commerce* 617. p.618.

<sup>52</sup> *Svenska Petroleum Exploration AB (Schweden) v. Government of the Republic of Lithuania & AB Geonafta (Lithuania)*. EWCA Civ 1529 (2006).

<sup>53</sup> The FSIA legislative history outlined that "with respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of particular country should govern a contract." BORN, G. (1996) *International Civil Litigation in US Courts: Commentary and Materials*. Third Edition. The Netherlands: Kluwer Law international. p.227.

(a) (1) of the US FSIA stating that ‘a party’s agreement to arbitrate in the United States is considered consent to enforcement of that agreement and, therefore, a waiver of immunity in enforcement actions’.<sup>54</sup> Moreover, section 456 of the US Restatement stated that: “under the law of the United States, an agreement to arbitrate is a waiver of immunity from jurisdiction in: an action or other proceeding to compel arbitration pursuant to the agreement and an action to enforce an arbitral award rendered pursuant to the agreement.”<sup>55</sup>

The connection between the submission of arbitration and the waiver of immunity is also applied in the form of precedents. The Court in *American Construction Machinery and Equipment Corp. v. Merchandised Construction of Pakistan Ltd.* argued that “by engaging in most aspects of arbitration, Merchandised Construction of Pakistan, Ltd. as sovereign respondent waived its right to immunity under US FSIA”.<sup>56</sup> This case followed the previous case in *Ipitrade International v. Federal Republic of Nigeria* which stated that “agreement to arbitrate or to submit to the laws of another country constitutes an implicit waiver. This waiver cannot be revoked by a unilateral withdrawal.”<sup>57</sup> Even in civil law legal systems like France, the *Cour de Cassation* in the *SOABI v. Senegal* case stated that “whereas... a foreign state has submitted to arbitration, in doing so, has accepted that the award may be granted *exequatur*...”<sup>58</sup>

## F. Conclusions

In the modern era of free trade, each country is conducting economic relationships and activities without borders and under diverse forms of cooperation. They are allowed to enter into agreements with private parties to reach certain economic goals and purposes. Both parties of the agreement, however, cannot not avoid the potential of a dispute typically arising in the performance stage. In practice, state parties tend to claim immunity as a defense for the breach they committed. Their positions as sovereign entities claim to be expanded not only for their political activities (*acta jure imperii*) but also in commercial activities though some jurisdictions that regulate the restrictive immunity for *acta jure gestionis* (private and commercial acts of a state).

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<sup>54</sup> US FSIA, section 1605 (a) (1).

<sup>55</sup> Restatement (Third) Foreign Relations Law of the United States (1987), section 456 (2) (b).

<sup>56</sup> *American Construction Machinery and Equipment Corp. v. Merchandised Construction of Pakistan Ltd.* S.D.N.Y. No. 85-3765 (1987), p.3.

<sup>57</sup> *Ipitrade International v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978).

<sup>58</sup> *SOABI v. Senegal*, Cass. Fr., 30 I.L.M. 1167. MULLER, A. S. and MIJS, W. (1994) *The Flame Rekindled: New Hopes for International Arbitration*. Dordrecht: Martinus Nijhoff, p.168.

Before the twentieth century, state immunity was considered an absolute doctrine. In the past, even, as proved under historical practice in Mesopotamia and Greece, traders or merchants enjoyed absolute immunity due to their positions as the representatives of their Kings or the *polis* in which their commercial acts and diplomatic mission were combined. This absolute approach also had been applied by modern nations. In 1972, the Council of Europe initiated to adopt restrictive approach of immunity through the European Convention on State Immunity. This Convention urged the application of the restrictive approach not only in European regions but universally through the United Nations Convention on Jurisdictional Immunity of States and Their Properties (2004). Unfortunately, only limited number of states ratified these sophisticated treaties. It means that the absolute approach of immunity is still being widely used by states even until now. The absolute immunity is actually influenced by the old concept of Westphalian legacy on state sovereignty although Hugo Grotius insisted that sovereignty has some limits and the exercise of sovereignty must be reasonable.

This study found that in the post twentieth century era, there are three groups of states practicing state immunity: the first group of states apply the restrictive approach of immunity. This group includes not only common law countries but some civil law states such as. The United States, the United Kingdom, Australia, Singapore, Canada, South Africa, Austria, Belgium, Germany, Luxembourg, Netherlands, and Switzerland belong to this group. The second group of states apply the absolute approach of immunity such as: China and Russia. The third group of states have unclear measure of state immunity, however, they are supportive to the restrictive approach of immunity, such as: Indonesia, Malaysia, India, and Thailand. The number of states in the third group is increasing and are dominantly influenced by the free market competition and investment opportunities.

We cannot deny that in twenty-first century, the existence of hybrid non-state actors raises challenges in the application and interpretation of immunity as a defense in their commercial activities. This study concluded that powerful hybrid non-state actors took frequent attempts to use immunity in order to avoid contractual obligations. The absence of some uniform standards to restrict immunity would be a potential danger in international economic relations. Indeed, immunity is a valuable protective clause for sovereign entities but it must be used as restrictively as possible, in particular in cases of commercial relations. Some national jurisdictions that applied restrictive immunity have been effectively maintaining qualitative and quantitative just legal reasoning. Yet, un-guided restrictive interpretation of immunity leads to uncertainty in implementation and it messes with fair business relations.

In order to support the universal application of restrictive approach of immunity, this study highlighted the role of choice of law and arbitration clause in the international business contracts. With range of benefits particularly in enabling parties to escape from unfair and inconsistent legal systems, choice of law also plays important role to select certain laws with restrictive approach of immunity. This study recommends that English and New York law are the most suitable governing laws in dealing with the immunity challenges, because the two laws confidently provide codified law and binding precedents to exempt immunity privileges for state actors and other sovereign entities. Moreover, the two laws are also widely accepted as governing law in commercial agreements because of their sophisticated nature and assurance of predictability. There are some laws other than New York and English law that also provide restrictive approach of immunity such as the Canadian Sovereign Immunity Act 1982, the Australian Foreign States Immunity Act 1985, and the Singapore State Immunity Act 2014. Austria, Belgium, Cyprus, Georgia, Luxembourg, Netherlands, and Switzerland as the member of Council of Europe also apply restrictive immunity based on their ratified Convention on State Immunity 1972. Countries like China and Russia that, although legislatively apply restrictive immunity, are nevertheless uncertain in practice. The rest of the world seem to have a somewhat unclear approach of immunity.

This study also found that some national jurisdictions recognized the conceptual connection between arbitration agreements and the waiver of immunity. The common law system ruled that an agreement to arbitrate is considered an implied consent to waive state immunity. This rule embodied in the codified laws as well as in the court's judgements. France belongs to the civil law family and they apply the same concept. Hence, this concept shall serve as a guideline for other national jurisdictions that are still unclear to adopt certain measures to restrict the immunity in arbitration or in court litigation processes.



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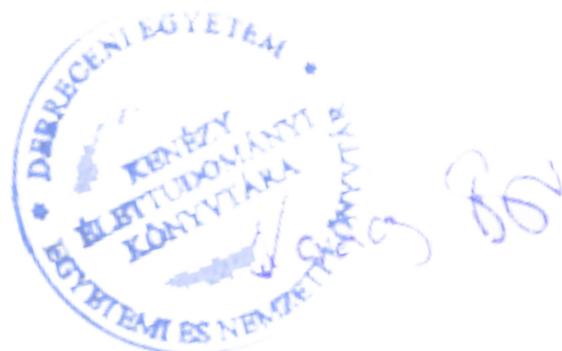
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13. **Nur Heriyanto, D. S.:** Consolidating the Social and Security Protection of ASEAN Migrant Workers in European Union through Future Free Trade Agreement between Asean and the European Union.  
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