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The (New?) EU Interpretation of Heads of Jurisdiction Over the (Traditional?) Understandings of Acta Iure Imperii

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY: EMERGENCE OF NEW INTERNATIONAL CUSTOMARY LAW RULES – BY WHOM?
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Overview

- *Acta iure imperii*, public international law influences international civil procedure
- *Acta iure imperii* and EU international civil procedure: a case for non-application of uniform rules
- The Greek Saga before the CJEU: from non-application to (new?) uniform substantive rules on State immunity – a reversed influce axiom
- Two conclusions
  - on State immunity as a «disconnection clause» in EU international civil procedure,
  - and a possible alternative solution in the Greek Saga

Public international law influences over international civil procedure

- Starting point: «public» and «private» international law are «*two different cups of tea*»

- Common approaches in public and private international law

  - States / effective territorial units for the purposes of applicable «law»

  - Recognition and enforcement of judgments issued by courts of a non-recognised State (internal and external recognition)

Acta iure imperii and EU international civil procedure

- EU international civil procedure: the cross-sectorial relevance of «*acta iure imperii*»
  - Brussels Ia Regulation
  - Regulation 805/2004 (EU Enforcement order for uncotested claims)
  - Regulation 1896/2006 (EU Order for payment procedure)
  - Regulation 861/2007 (Small claims procedure)
  - Regulation 655/2014 (EU Account Preservation Order Procedure)
  - Regulation 1393/2007 (Cross border service of documents)

- Prolification of occasions to rule on the definition of *acta iure imperii*
  - Different solutions to *identical* matters due to the different aim of the different regulation (Greek debt)

continues

- «*Acta iure imperii*» under EU international civil procedure

  - Is NOT defined by EU law – the CJEU has no direct competence to interpret the notion

  - The notion is applied in light of general public international law, which enters the realm and tailors EU international civil procedure
    - Concistency of concepts as per
      - *Companies delegated from States (but cfr. DIRECTIVE 2009/15/EC, recital 16)*
      - *To exercise authoritative powers (Eurocontrol C-364/92)*
      - *Or for civil liability for war crimes (Lechouritou C-292/05)*

  - Does NOT mean that EU law grants immunity

    - *Art 1 influences the scope of application of the Regulation(s) – if an act is sovereign in nature, the only (formal) effect is that civil jurisdiction is addressed under domestic rules on international jurisdiction*

Acta iure imperii, sovereign debt and applicability of EU international civil procedure

- Starting point – different approaches at the domestic level
  - Argentina
  - Nigeria

- Service of documents Regulation
  - *Fahnenbrock C-226/13*
    - Recourse to *petitum* and *causa petendi* scrutiny approach
    - The «direct effect» theory
    - Rejection of solution in some domestic courts

continues

- *Leo Kuhn* C-308/17
  - Practical consequences of *Fahnenbrock C-226/13*: (some) dwell on the place of performance of the contract
  - The investigation on *petitum* and *causa petendi*: recognition of the sovereign nature of unilateral introduction of CAC clauses
  - Rejection of the «direct effect» theory
    - *Fahnenbrock C-226/13* – between overruling and distinguishing

Leo Kuhn – reversing the influence axion between public and private international law

- Practical consequences of *Leo Kuhn* C-308/17
  - Assessment of international jurisdiction under domestic international civil procedure – overruling of previous understandings
  - Possible emergence of a new (regional?) customary rule on State immunty for sovereign debt following non application of EU law

continues

- Would such a custom be consistent with international law, or would it be a progressive evolution?
  - Austrian view
  - Goal and finality of the public act (and proportionality for Human Rights protection)
- Should such a custom evolve, should the *acta imperii* remain a *limit to applicability* to EU law (Art 1), or should it bound directly Member States to declare lack of jurisdiction under uniform rules (Disconnection clause Art 67 Brussels Ia)?

Are there methodologically consistent alternatives to State immunity?

- To avoid a regression to Twycross v. Dreyfus, (1877) 5 Ch. D, 605
  - And to ensure credibility
- So called *"perpetuation qualifications"/"once a trader, always a trader"*
- PIL solution: Fiscal laws are overriding mandatory provisions of a third State that render the obligation invalid
- Eventually, substantive law solution: *vis major*

Thank you for your attention!

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