

Summary

State Enterprises in Private International Law *by Professor Dr. Bernd von Hoffmann, Trier*

1. a) State enterprises exercise an economic activity under State control.
b) They play an important part in every contemporary economic system.
c) Each legal form according to which State enterprises are organized (government department, public corporation, private company) represents a certain type of State control; in practice, however, those forms are interchangeable and do not offer a reliable yardstick to determine the intensity of State control.
2. In international transactions the treatment of State enterprises like a State or like a private enterprise depends upon its exercise either of governmental or of economic activity (*jus imperii* — *jus gestionis*). To determine that activity primordial importance is given to the nature of the activity and not to its purpose.
3. In international transactions State enterprises shall be treated on the same footing as private enterprises. Therefore any privilege has to be excluded as well as any discrimination.
4. a) The conflicts approach tends to submit all legal relationships, in which a State enterprise is involved, to the domestic law of the State involved. In such event the State is not only legislator but also subject to legislation.
b) Misgivings in the conflicts approach (*supra a*) have to be compensated by standards of substantive law. Those standards may be introduced either by invoking the public policy exception (against the proper law of the transaction) or by immediate application of those standards (immunity). In both situations the applicable standards are different from rules of the *lex fori* for domestic use; They have to be developed on a comparative law basis.
5. Immunity of a State enterprise does not depend upon its legal form but upon the nature of its activities. Therefore State enterprises with separate legal identity may claim immunity provided they are exercising governmental activities; on the other hand State enterprises without such legal identity cannot claim immunity provided they exercise commercial activities.
6. The capacity of State enterprises to submit disputes international commercial arbitration depends upon the law governing its incorporation.

At present there does not (yet) exist an international public policy that commends to disregard an exclusion of that capacity which has been provided for by the law applicable to the incorporation of the State enterprise.

7. a) Contracts concluded by State enterprises exercising economic activities are governed by party autonomy. Any legal order may be chosen including a neutral law. There is no real need to admit the choice of general principles of law on the exclusion of any national system of law.
b) In the absence of the parties choice of the applicable law the legal system to which the State enterprise adheres does not apply; the applicable law is determined by the general connecting factors governing contracts between private parties.
c) Mandatory rules of public law (concerning administrative contracts) may be taken into account even if parties have submitted the contract to foreign law.
8. Acts of State (like import or export restrictions) exempt State enterprises from performance provided those acts have been governed by governmental reasons. They are no excuse for non-performance if they are designed to correct economic mis-planning or to allow more profitable transactions to the State enterprises.
9. Piercing the veil of State enterprises has to follow the same standards as piercing the corporate veil of private enterprise.
 - a) The direct liability of the State is governed by the law of incorporation of the State enterprise.
 - b) Nowhere there can be found a legal rule which allows to disregard the separate legal identity of a daughter company only because the mother company exercises control or allows activities of the daughter company exceeding its assets.
 - c) Neither *lex fori* nor public policy allow to disregard the separate legal identity of State enterprises on the legal grounds set out *supra* b. Only an analogous application of those rules governing the liability in inter-group relations in company law may lead to a subsidiary liability of a State for losses of its enterprise which have been caused by its measures of supervision.