ARGENTINA

Sovereign immunity—Foreign States—Office of the Department of Commerce of Canada—Whether entitled to jurisdictional immunity—Effect of refusal to submit to the jurisdiction—The law of Argentina

TOWNSHEND DE BRIOCHETTO *v.* OFFICE OF THE DEPARTMENT OF COMMERCE OF CANADA

Argentina, Supreme Court. 21 *November* 1949

(Longhi, Valenzuela, Casares, Perez and Pessagno, *Judges*)

SUMMARY: *The facts:*—Proceedings were brought against the Office of the Department of Commerce of Canada and writs were served through the offices of the Argentine Foreign Ministry on the Canadian Embassy, with the purpose of ascertaining whether Canada would submit to the jurisdiction. The Canadian Government refused to do so. The Attorney-General moved for the proceedings to be struck out.

Held:—The proceedings were struck out.

The action was directed against the Office of the Department of Commerce of Canada and related to the Commercial Section of the Embassy. The refusal of the Canadian Government to submit to the jurisdiction of the Court meant that the action could not proceed.

The following is the text of the judgment of the Court:

The present proceedings, like those in the same cause brought before the courts of labour law of the Capital . . . , are directed against the Office of the Department of Commerce of Canada. According to the statements of the diplomatic representatives of that State, they relate to the Commercial Section of the Embassy . . . and, in any case, it emerges from the statements of the plaintiff that the defendant is the State of Canada . . .

That being so, the proceedings must be struck out owing to the decision of the Government of Canada refusing to submit itself to the jurisdiction of the Court . . . (*Fallos:* 178, 173; 190, 415; 209, 365).

On the merits and in accordance with the Opinion submitted by the Attorney-General it is declared that this Supreme Court lacks original jurisdiction to try the action.

[Report: *Fallos de la Corte Suprema,* Vol. 215, 1949, p. 252. (In Spanish)]

Sovereign immunity—Foreign States—Jurisdictional immunity—Effect of lack of consent of foreign State to proceedings—The law of Argentina

OPPENLANDER DE SOSKA *v.* EMBASSY OF ECUADOR

Argentina, Supreme Court. 12 *November* 1951

(Valenzuela, Casares, Perez and Pessagno, *Judges*)

SUMMARY: *The facts:*—A private individual brought an action against the Republic of Ecuador in the person of its Ambassador claiming compensation for an industrial accident. The Government of Ecuador did not consent to the proceedings being brought. The Attorney-General submitted his Opinion that the proceedings should be struck out.

Held:—The proceedings were struck out.

The Government of Ecuador had not given its consent to trial of the suit and the Supreme Court therefore had no jurisdiction. It made no difference whether the action had been brought against the foreign State itself or the person of its accredited Ambassador.

The following is the text of the judgment of the Court:

The Court has examined the writ served in this action, which is brought to obtain compensation for an industrial accident under Law 12.867.

It results from the documents in the case that the Government of Ecuador does not consent to this Court trying the action.

Whether the action is brought against the Republic of Ecuador or against the person of the accredited Ambassador of that country, Article 24, paragraph 1 of Law 13.998 requires that the lack of jurisdiction of this Court must be declared, following *Fallos:* 215, 418 and other cases.

On the merits and in accordance with the Opinion of the Attorney-General, it is declared that this Supreme Court lacks original jurisdiction to try the action.

[Report: *Fallos de la Corte Suprema,* Vol. 221, 1951, p. 171. (In Spanish)]

AUSTRIA

Sovereign immunity—Foreign States and their property—Contract of employment — Termination of — Austrian university professor employed by the Republic of Indonesia — Whether claim can be brought in Austrian courts—Immunity from jurisdiction—Whether conclusion of contract an act *iure gestionis* — Attachment of bank deposits — Whether Indonesian State entitled to immunity from attachment — Whether purpose of funds over which attachment sought is relevant—The law of Austria

NEUSTEIN *v.* REPUBLIC OF INDONESIA[1]

Austria, Supreme Court. 6 *August* 1958

(Deutsch, *President;* Gitschthaler, Lassmann, Bachofner and Nedjela, *Judges*)

SUMMARY: *The facts:*—The plaintiff, an Austrian university professor, had been appointed, by authority of the Government of Indonesia, as professor at an Indonesian university. He took up his post but his contract was terminated prematurely by the defendant. The plaintiff sought to recover part of the loss suffered. He asserted that Austrian courts had territorial jurisdiction because the defendant had assets (an account with an Austrian bank) in Austria. The court of first instance made an order of attachment for the sum claimed and appointed a curator for the defendant. The appellate court declared the proceedings a nullity, rejected the complaint on the ground of incompetence and held that the Labour Court of Vienna had jurisdiction. Both parties appealed to the Supreme Court. The plaintiff contended that the jurisdiction of the ordinary courts should be confirmed and that the procedural steps already taken should be endorsed. The defendant argued that the claim should be dismissed for lack of jurisdiction.

Held:—Both appeals were partially successful. The judgment of the appellate court was vacated, the plaintiff's motion for the appointment of a curator was rejected, the attachment was vacated and the case remitted to the court of first instance for further proceedings.

(1) It had not been disputed hitherto that the plaintiff's claim arose out of a private law relationship between himself and the defendant. Foreign States were subject to Austrian jurisdiction in all legal disputes arising out of relationships of private law.

(2) Should it appear in the course of the proceedings that the appointment and dismissal of the plaintiff had constituted an act of sovereignty this would mean that the claim would fail but not that the action should have been dismissed *in limine.*

[1] Case No. 6 Ob 126/58.

(3) An attachment order on property in Austria owned by persons not resident within the jurisdiction, including foreign States, could be issued but only under certain conditions. Where a bank account held by a foreign State at an Austrian bank was involved, it had to be ascertained whether the account held at that bank existed exclusively for the exercise of the sovereign rights of the foreign State (its representation abroad) or whether it was used for commercial transactions governed by private law. The mere fact that an account was held in the name of a foreign State "for its legation" was not decisive.

The following is a summary of the formal opening paragraph of the judgment:

The plaintiff, Dr Erwin Neustein, brought an action for the sum of 101,000 schillings and costs against the defendant, the Republic of Indonesia, represented by a curator appointed under Article 119 (2) of the Code of Civil Procedure (*ZPO*). Both parties are appealing against a judgment of the Superior Provincial Court (*Oberlandesgericht*) of Vienna of 21 April 1958 whereby, on the defendant's appeal from the judgment of the Provincial Court (*Landesgericht*) for Civil Law Matters of Vienna of 22 March 1958, the proceedings were held a nullity, the action was dismissed for lack of jurisdiction and jurisdiction was attributed to the Labour Court of Vienna.

The following is the text of the relevant part of the judgment of the Court:

[The Supreme Court] rules as follows:

Both grounds of appeal are partially successful.

(1) The judgment of the appellate court is quashed.

(2) The decision of the court of first instance on the appointment of a curator for the defendant is varied by rejecting the plaintiff's application for such an appointment.

(3) The interim injunction granted by the court of first instance is vacated and the case is remitted to the court of first instance for a fresh decision on the application of the plaintiff for an interim injunction.

(4) The costs of the plaintiff's appeal and of the appeal by the defendant, represented by the curator, against the granting of the interim injunction are to be reviewed, along with the costs of the first instance proceedings, at the time of the final judgment.

(5) The plaintiff shall, within fourteen days and subject to execution, pay the defendant the sum of 2,608.07 schillings as costs of the appeal for the benefit of the curator appointed for it, Dr. Robert Jörg, of Vienna, attorney.

Grounds of the judgment

In his action, brought before the Provincial Court (*Landesgericht*) for Civil Law Matters in Vienna against the ''Republic of Indonesia represented by the Legation of that Republic, Schmöllegasse 3 c, Vienna 4'', the plaintiff claimed that on 15 April 1955 a contract of appointment was concluded between himself and the accredited envoy in Vienna of the defendant Republic, whereby he was engaged as University Professor at the University of Bandung or alternatively at another university in Indonesia to be specified later. Pursuant to this appointment the plaintiff was nominated by a decree of the President of the defendant Republic issued in Djakarta on 10 January 1956 to be Professor of Mathematics and Physics. He took up his teaching duties in Indonesia but his contract, which was for period of three years, was terminated by the defendant prematurely and without reasons by decree of the President of the State dated 22 March 1956. As a result of this breach of contract by the defendant, the plaintiff suffered loss totalling 848,960 schillings as itemised in the claim. In the present action the plaintiff claims only 101,000 schillings and costs, and grounds jurisdiction in this Court on the basis of Article 99 of the Jurisdictional Statute (*JN*).[2] The defendant Republic ''or its Legation'' has an account with the Creditanstalt-Bankverein in Vienna which was said to contain 1,650,000 Dutch guilders. In view of this bank balance, the plaintiff sought to secure his claim for 101,000 schillings and costs by applying for an interim injunction in the form of an attachment order up to the amount of the sum claimed.

In its decision of 22 March 1958 the court of first instance granted the interim injunction sought and appointed Dr. Robert Jörg of Vienna, attorney, to be curator of the defendant Republic under Article 119(2) of the Code of Civil Procedure (*ZPO*) on the ground that the attempt to effect service of the claim and the application for an interim injunction on the Indonesian Legation in Vienna through the offices of the Federal Chancery (Foreign Affairs) had failed by reason of the Embassy's refusal of acceptance. Speaking through the curator so appointed, the defendant contested the interim injunction and also the appointment of a curator. The appellate court did not investigate the merits of the appeal but took the opportunity to declare the proceedings a nullity, to dismiss the action for lack of jurisdiction and to leave each party to pay its own costs. The wording of this decree, which is now under appeal, was eventually altered on the plaintiff's application by inserting after the first paragraph the words ''The Labour Court of Vienna has jurisdiction''. The appellate court was thus of the opinion that on the facts alleged in the complaint the claims in question arose from an employment relationship. It followed that

[2 See note 2b, p. 7 below.]

the Labour Courts had exclusive jurisdiction to hear the claim and that the court had to take this point of its own motion whatever stage the proceedings had reached. No further reasons were given for attributing local jurisdiction to the Labour Court of Vienna either in the decree or in the order modifying the decree.

Both parties have appealed against this decree. The plaintiff argues that the decree in question should be altered so as to confirm the jurisdiction of the Provincial Court (*Landesgericht*) for Civil Law Matters in Vienna, to remit the case to that court for further proceedings and to endorse the procedural steps already taken, especially the granting of the interim injunction. Through the curator, the defendant argues that the decree in question should be altered so as to dismiss the action on the grounds that the proceedings are inadmissible owing to the lack of domestic jurisdiction.

Both grounds of appeal have some merit.

In appealing to the court below the defendant, through its curator, contested the holding of the court of first instance in issuing the interim injunction, that domestic jurisdiction existed for these proceedings and that it therefore had jurisdiction to issue the injunction. This was a matter which the appellate court was allegedly bound to investigate of its own motion under Article 42 of the Jurisdictional Statute (*JN*), and which it should have dealt with first before making its pronouncement on the jurisdiction of a municipal labour court, but it had made no such investigation.

[This Court considers that] in interlocutory proceedings there was no need for further inquiries on the question of domestic jurisdiction since no doubt had been raised at any stage about the accuracy of the relevant allegations in the complaint. According to these allegations the plaintiff expressly avers that a contract of appointment, that is to say *a contract of service under private law,* was concluded with the Republic of Indonesia and that he suffered damage by breach of this contract on the part of the defendant. According to these allegations in the complaint, there is private law relationship between the plaintiff and the defendant Republic and this claim arises from it. Foreign States are subject to domestic jurisdiction in all legal disputes arising out of relationships of private law (*SpruchRep.* 28 *neu* = *SZ.* XXIII/143).[2a] Thus there is no present need to seek further grounds to establish domestic jurisdiction and its existence can be assumed at the present stage of proceedings. Given that domestic jurisdiction exists for a civil matter, it is then necessary to examine whether the court in question has jurisdiction over the subject matter of the case. Bearing in mind the statements contained in the complaint in the present case it needs to be asked whether the labour courts do not, in fact, have exclusive

[2a] The text of this Rule of Precedent appears below at p. 12.]

jurisdiction. If so the connected demand for an interim injunction, which labour courts are not specifically empowered to grant, would confer jurisdiction under Article 387(2) of the Law on Execution (*EO*). Now it is true that the plaintiff alleges that he had a contract of employment with the defendant but he does not mention any fact which brings the case under any of the five headings in Article 3 of the Labour Courts Act (*Arbeitsgerichtsgesetz*). In the present case it need not be decided whether the jurisdiction of Austrian labour courts might be affected by the consideration that the employment relationship has a foreign connection. Even if the view is accepted (as maintained by Stanzl, *Das Recht der Arbeit,* Vol. 21, March 1956, pp. 7 *ff.*) that a foreign element in an employment relationship, especially the fact of its having been formed abroad, makes no difference to the competence of Austrian labour courts, their domestic jurisdiction and competence still depend on the presence of one of the five factors mentioned in Article 3 of the Labour Courts Act. If no labour court has local jurisdiction under Article 3 of the Labour Courts Act, but jurisdiction can nevertheless be established under a general rule, the courts of ordinary jurisdiction take the place of the labour courts (*ArbSlg* 5818).

The plaintiff claims that jurisdiction arises under the general rule contained in Article 99 of the Jurisdictional Statute (*JN*).[2b] Contrary to the view of the defendant, as represented by his curator, the preconditions of jurisdiction based on property are undeniably satisfied in this case. It is irrelevant whether the account with the Creditanstalt-Bankverein is in the name of the Republic of Indonesia or in that of the Viennese Legation of that Republic, since in either case it constitutes an ''asset'' of the defendant. The term ''asset'' contained in Article 99 of the Jurisdictional Statute (*JN*) includes all property over which there is a power of disposal (1 Ob 451/53). Therefore a bank credit in Vienna on which a foreign State or its diplomatic representatives abroad may draw is unquestionably an ''asset'' in the sense of Article 99 of the Jurisdictional Statute (*JN*). So far as the creation of jurisdiction under Article 99 is concerned it is irrelevant that such an asset may be exempt from execution, for example, on the ground of extra-territoriality (see also *SZ.* II/1).

Domestic jurisdiction therefore exists for the present dispute and the court has both jurisdiction over the subject matter and local jurisdiction to deal with the claim as well as the application for an interim injunction (Article 387 (1) of the Law on Execution (*EO*).) Should it

[[2b] Article 99 of the Jurisdictional Statute (*JN*) provides:
Claims concerning property rights or interests against persons having no domicile in Austria may be brought before any Austrian court within whose jurisdiction area are located assets of such persons or the asset actually forming the object of the litigation.
(This translation is taken from I. Seidl-Hohenveldern, ''State Immunity: Austria'', 10 *Netherlands Yearbook of International Law* 97 (1979).)]

appear in the course of the proceedings that the appointment and dismissal of the plaintiff constituted an act of sovereignty, this would mean that the claim would fail but not that it should have been dismissed *in limine*. It would be like a claim for damages brought against the Republic of Austria in which it was established in the course of the proceedings that the damage was attributable to an act of sovereignty. Since the holding that the Labour Court of Vienna had jurisdiction over the subject matter and local jurisdiction has been seen to be erroneous, the decree of the appellate court must be vacated.

The appointment of a curator for the defendant was, however, premature. In his complaint the plaintiff described the defendant Republic as represented by its Legation here. The attempt made by the Federal Chancery (Foreign Affairs) to effect personal service of the complaint together with the application for an interim injunction on the Legation of the Republic of Indonesia in Vienna failed because the Legation made it known that it was not empowered to represent the Republic of Indonesia in a civil suit before an Austrian court, or to accept judicial documents in connection with private litigation. Article 119 (2) of the Code of Civil Procedure (*ZPO*) is, however, only applicable if service on the defendant is incapable of being effected through the offices of the Federal Chancery (Foreign Affairs) and the Federal Chancery (Foreign Affairs) has so informed the Federal Ministry of Justice. The latter condition was not satisfied in this case. On the contrary, in communicating the fact that the Legation had said that it had no right to accept service of the documents the Federal Chancery expressly stated that it would make inquiries through the Austrian diplomatic representative in Indonesia to find out which Indonesian authority was charged with representing the Republic in civil law matters and would inform the Federal Ministry of Justice of the outcome. Since the appointment of a curator is not necessary for the *issuance* of an interim injunction and since it cannot yet be said, as the result of the inquiries by the Federal Chancery (Foreign Affairs) are not known, that service may not be effected on the defendant by mail or by diplomatic means, the preconditions for the appointment of a curator do not yet exist. The appointment of the curator, which he opposed on appeal by arguments not considered by the appellate court, must therefore be vacated and the application for the appointment of a curator rejected. The curator was qualified to raise these grounds of appeal, since from the time he is appointed until the appointment is vacated a curator has the right to lodge an appeal on behalf of his principal.

Finally, the interim injuction granted by the court of first instance must be vacated for the reasons which follow, and the case is remitted to the court of first instance for a fresh decision after further proceedings.

No execution may be levied on extraterritorial property (Walker, *Internationales Privatrecht,* p. 180). A freezing order or a garnishee order may only be granted against persons outside the jurisdiction, including foreign States (*SZ.* III/32 and elsewhere) under the conditions stated in Article IX (2) of the Introductory Act to the Jurisdictional Statute (*EinfG. z. JN*)[3](see also Heller, *EO*, Manz 1953, p. 94). Before an interim injunction was issued, there should have been inquiries to discover whether what is held at the bank is extraterritorial property or an account for the receipt and making of payments on commercial transactions of private law. The mere fact that the bank account is in the name of the Republic of Indonesia ''for its Legation'' does not permit the inference that the account exists exclusively for the exercise of the sovereign rights of a foreign State (representation abroad) and is not an asset serving private law functions. This must now be ascertained, in particular by obtaining a declaration under Article IX (3) of the Introductory Act to the Jurisdictional Statute (*EinfG. z. JN*).[3]

The decree was therefore correct in other respects. [. . .]

[Report: Unpublished. (In German)]

[3 Article IX of the Introductory Act to the Jurisdictional Statute provides:

(1) The rules in the Jurisdictional Statute shall apply also to disputes concerning civil law matters which are subject to domestic jurisdiction in virtue of treaties or according to principles of public international law, provided that such matters are not exempted from the jurisdiction of ordinary courts by special rules of law.

(2) Persons who enjoy exterritoriality according to principles of public international law shall be subject to domestic jurisdiction if and insofar as they submit voluntarily to the jurisdiction of domestic courts, or if the litigation concerned relates to their immovable assets located in Austria or to their vested rights in respect of domestic immovables belonging to other persons.

(3) In case of doubt as to the existence of domestic jurisdiction concerning an exterritorial person, or if exterritoriality is recognized in favour of a person, the court concerned must obtain a declaration from the Minister of Justice. This declaration will bind the Court when deciding whether the Court may exercise its jurisdiction.

(This translation is taken from I. Seidl-Hohenveldern, *loc. cit.*, 97.)]

Sovereign immunity — Foreign States — Germany-Romania Population Transfer Agreement, 1940—Obligation upon German Reich to pay compensation for loss of property consequent upon resettlement — Claim by private individual for payment of compensation — Whether Federal Republic of Germany entitled to jurisdictional immunity—Acts *iure gestionis* and *iure imperii*—Whether treaty obligation to pay compensation to individuals governed by private or public law—Whether such obligation a matter for legislation—The law of Austria

X *v.* Federal Republic of Germany[1]

Austria, Supreme Court. 14 *February* 1963

Summary: *The facts:*—The plaintiff, a naturalised Austrian subject, had been resettled under an agreement of 22 October 1940 between Romania and Germany for the transfer of persons of German ethnic origin. This agreement gave rise to an obligation on the part of the Romanian State to pay compensation for property left behind by resettled persons. The plaintiff brought an action against the Government of the Federal Republic of Germany claiming that he was entitled to receive compensation since funds had been paid by Romania to Germany under the agreement. The Embassy of the Federal Republic of Germany in Austria refused to accept service of the writ in the action. On appeal, the Austrian Supreme Court raised of its own motion the question of whether the Federal Republic was entitled to jurisdictional immunity.

Held:—The Federal Republic of Germany was entitled to jurisdictional immunity.

(1) The theory of relative imunity was an established part of Austrian law. Immunity was to be granted in respect of *acta iure imperii* and was denied in respect of all *acta iure gestionis*. In specific cases the decision as to whether to grant immunity or not depended on whether the claim derived from an act which the foreign State had performed in exercise of its sovereign rights or arose from legal relations or circumstances within the sphere of private law, on the basis of which the foreign State had the same rights or obligations as a private individual.

(2) The obligation of the German Reich under the treaty in question to pay the resettled persons the equivalent of the property left behind in Romania was not based on a collective agreement under private law or on individual agreements between the German Reich and the resettled persons but was an obligation under public law resulting from a political measure taken by the German Reich. The fulfilment of this obligation was therefore a matter for legislation, like all legal questions relating to war damage.

The following is the text of the judgment of the Court:

[1] Case No. SZ 36/26.