State immunity — Jurisdictional immunity — Employment dispute—Austrian Cultural Institute in Warsaw—National of receiving State employed as librarian—Action for reinstatement — Whether Austrian Institute entitled to jurisdictional immunity — Legal status of Institute — Reciprocity as basis of immunity — The law of Poland

MARIA B *v.* AUSTRIAN CULTURAL INSTITUTE IN WARSAW

Poland, Supreme Court (Labour and Social Insurance Chamber)

25 *March* 1987

SUMMARY: *The facts*:—Maria B, a Polish national, alleged that in October 1984 she was dismissed without notice from her job as librarian at the Austrian Cultural Institute in Warsaw, a position she had held for sixteen years. Her claim for reinstatement was dismissed at first instance and on appeal by the competent Polish tribunals on the ground that her employers enjoyed jurisdictional immunity. The Polish Minister of Labour and Social Affairs lodged an extraordinary appeal against these decisions before the Polish Supreme Court.

Held:—The appeal was dismissed.

(1) The legal status of the Austrian Cultural Institute was governed by the Treaty of Cultural and Scientific Cooperation concluded between Austria and Poland in 1972, which provided for the establishment of an Austrian cultural centre in Warsaw and a Polish cultural centre in Vienna. Each State undertook to give all necessary support to the cultural centre of the other Party situated on its territory and to grant a special status to the official cultural representations which was analogous to that of diplomatic missions. The Austrian Institute was responsible to the Austrian Minister of Foreign Affairs. As such it was a governmental institution of the Republic of Austria which could not be subjected to the jurisdiction of the Polish courts.

(2) In earlier decisions in 1948[1] and 1956[2] the Supreme Court had recognized that a foreign State enjoyed jurisdictional immunity on the basis of reciprocity and the principles adopted in international relations whose source was the equality of States. This view remained valid today. Reciprocity between Austria and Poland was demonstrated by the practice of the two States. Austria treated the Polish Institute in Vienna as part of the Polish Embassy there.

The text of the relevant part of the judgment of the Court commences on the following page.

[1] 24 *ILR* 223.
[2] 26 *ILR* 178.

Maria B lodged before the Local Commission for Employment Disputes in Warsaw a claim against the Embassy of Austria in Poland, in the person of the Austrian Cultural Institute in Warsaw, for reinstatement in her employment with that Institute. The claimant alleged that she had worked as a librarian for the Institute for sixteen years. By letter from the Cultural Counsellor of the Austrian Embassy of 25 October 1984, her contract of employment had been terminated without notice pursuant to Article 52(1)(1) of the Employment Code (termination for fault of employee). According to the allegations of the claimant, however, the grounds invoked did not correspond to the true situation and the letter did not describe facts which would justify her dismissal.

By decision of 9 January 1985 the Commission rejected the claim, recognizing that the Austrian Cultural Institute formed part of the Austrian Embassy in Poland and therefore enjoyed, pursuant to Article 1111(1-2) of the Code of Civil Procedure, immunity from jurisdiction so that it could not be brought before the Polish courts nor, implicitly, before a Local Commission for the settlement of employment disputes.

In an appeal against that decision the claimant objects that it was made in violation of Article 6 of the Employment Code according to which the provisions of that Code are applicable to employment relations between a Polish citizen and the representation of a foreign State exercising its functions on the territory of the Popular Republic of Poland. Article 1111(1) of the Code of Civil Procedure was, in the opinion of the claimant, incorrectly applied because subsection (3) of that Article enables a person enjoying diplomatic immunity and exercising a professional activity in Poland to be brought before the Polish courts.

The ''Tribunal de voivodie'' of Warsaw, in accordance with Article 1143 of the Code of Civil Procedure, requested the opinion of the Minister of Justice who stated that, in conformity with the opinion of the Ministry of Foreign Affairs expressed in its letter of 8 July 1985, the Austrian Cultural Institute enjoyed immunity from jurisdiction. The Tribunal therefore dismissed the appeal of the claimant by judgment of 23 August 1985.

The Institute against which these proceedings have been brought before the Local Commission for Employment Disputes and before the ''Tribunal de voivodie'' has neither participated in the proceedings nor given any clarification, even though the documents were regularly served and it was notified of the meetings of the tribunals concerned.

The Minister of Employment and Social Affairs has lodged an appeal ''en révision extraordinaire'' against the judgment of the ''Tribunal de voivodie'', asking for that judgment and the earlier

decision of the Local Commission for Employment Disputes to be quashed and for the case to be remitted to the Employment Tribunal of Warsaw for a decision on the merits. According to the grounds of appeal, the judgment being challenged was handed down in violation of Article 3(2) of the Code of Civil Procedure and Article 6 of the Employment Code. In the appellant's opinion the Tribunal, without adequately clarifying the legal status of the defendant Institute, accepted without any basis that the Institute formed part of the Austrian Embassy and therefore enjoyed immunity from jurisdiction. There is no agreement or treaty between Austria and the Popular Republic of Poland which exempts employment relations between Polish citizens and the Austrian Cultural Institute from the application of the Employment Code.

In Law

This Court considers that the ground of appeal based on violation of Article 6 of the Employment Code is inapplicable. That Article provides that

> The employment relations between a Polish citizen and a representation mission, or other centre of a foreign State performing its activity on the territory of the Popular Republic of Poland, are subject to the provisions of this Code unless conventions, treaties or international agreements provide otherwise.

Having regard to its purpose, which concerns employment relationships, this provision is a norm of substantive law and cannot serve as a basis for international jurisdiction.

None of the agreements or conventions between the Popular Republic of Poland and Austria, in particular the Convention of 11 December 1963, concerning relations in matters governed by civil law, and the Convention of 14 June 1972, concerning cultural and scientific cooperation, contain any provisions governing the question of jurisdiction in matters concerning employment relations between the citizens of one party and legal bodies of the other. Neither is this question to be considered in the light of the Vienna Convention on Diplomatic Relations of 18 April 1961, which concerns the immunities of diplomatic agents and not the emanations of foreign States. It is true that the Director of the Institute is the Cultural Counsellor of the Austrian Embassy in Warsaw, but in the case at issue he did not act in this capacity and it is not him, but the Institute which he directs, which is the defendant. For this reason the lack of jurisdiction of the Polish courts in this case cannot be based on Article 1111 of the Code of Civil Procedure because the jurisdictional immunity laid down by that provision is enjoyed only by natural persons with diplomatic status.

The lack of international jurisdiction of the Polish courts with regard to the Cultural Institute results from its legal nature. This Court takes into consideration the fact that, as it appears from the letter of the Minister for Foreign Affairs of 8 July 1985, the legal status of the Austrian Cultural Institute in Warsaw (and also of the Polish Institute in Vienna) is governed by the Treaty concerning Cultural and Scientific Cooperation signed between the Popular Republic of Poland and the Republic of Austria on 14 June 1972. Article 16 of the Treaty provides that

> Each of the Contracting Parties shall provide to the cultural centre of the other party established on its territory the necessary support for its activities.

It results from this provision and from the Preamble to the Treaty that the Popular Republic of Poland and Austria undertook to give reciprocal support to the activity of the two cultural centres with a view to developing cultural cooperation between the two countries, so as to contribute to the reinforcement of mutual understanding and friendly relations between the two peoples. Furthermore it appears from Article 16 of the Treaty that the two Parties conferred on the two cultural centres which already existed a superior level of official cultural representations *sui generis* with a status equivalent to that of diplomatic representations.

The Austrian Cultural Institute in Warsaw is responsible to the Austrian Minister for Foreign Affairs. It is therefore a governmental institution of the Austrian Republic. The issuing of a writ against this emanation of the Government of the Austrian Republic is therefore equivalent to the issuing of a writ against the Republic itself.

The provisions of the Code of Civil Procedure concerning international civil procedure do not contain any provision which would allow a foreign State to be brought before the Polish courts. In a similar legal framework governed by the Code of Civil Procedure of 1932, the Supreme Court recognized that a foreign State enjoyed, subject to reciprocity, immunity from jurisdiction on the basis of the principles adopted in international relations whose source was the equality of States (in particular the Supreme Court set out this position in its judgments of 14 December 1948, C 635/48, *P.Pr.* 1949, No 4, p. 119[3] and 26 March 1958, 2 *CR* 172/56, *OSPiKA* 1959, issue No 6, text 160[4]). The Supreme Court considers that this opinion is still valid in the current legal framework.

The existence of reciprocity between Poland and Austria in this regard is demonstrated by the fact, indicated in the letter from the Minister of Foreign Affairs of 8 July 1985, that ''the Austrian Party

[3] 24 *ILR* 223.
[4] 26 *ILR* 178.

regards the Polish Institute in Vienna as forming part of the Embassy of Poland''.

For these reasons, the Supreme Court recognizes that the decisions of the Local Commission for Employment Disputes and the ''Tribunal de voivodie'' of Warsaw are in conformity with the law. The appeal ''en révision extraordinaire'' of the Minister for Employment and Social Affairs is dismissed.

[Report: *Clunet*, 1989, p. 128 (French translation).]

Consular relations — Honorary consul — Immunity — Attachment and execution—Bank account—Whether personal funds of honorary consul benefit from immunity—Requirement that funds allocated for consular functions can be separated from personal funds—Consulate situated in private offices of honorary consul—Vienna Convention on Consular Relations, 1963—Article 61

State immunity—Attachment and execution—Bank account—Funds allocated for diplomatic or consular functions—Whether immunity extends to private funds of diplomatic or consular agent—The law of Switzerland

GRIESSEN

Switzerland, Federal Tribunal. 23 *December* 1982

SUMMARY: *The facts*:—Mr Griessen, a Geneva businessman, was the Honorary Consul of Chad. In October 1982 an attachment order was obtained by Acli Commodity Services on a bank account opened by Mr Griessen under the designation ''Consul J.J. Griessen''. The Geneva offices of the Consulate were also Mr Griessen's private business offices. Mr Griessen challenged the attachment on the basis of immunity from execution, having obtained a certificate from the Chargé d'Affaires of Chad in Paris, stating that the account at issue was intended to cover consular expenses. The responsible Cantonal Authority upheld the attachment on the ground that the account had been used for Mr Griessen's commercial activities and he had failed to give precise details of any expenses incurred in the running of the Consulate. Mr Griessen appealed to the Federal Tribunal.

Held:—The appeal was dismissed.

(1) Assets allocated for the financing of a diplomatic mission of a foreign State enjoyed immunity from attachment. But where assets subjected to

attachment belonged not to a foreign State but to an individual who himself designed them for the functioning of such a mission, without being in any way bound to do so, such a decision was purely arbitrary and could not be invoked against creditors.

(2) Even if it were acceptable to allow the benefit of consular immunity to funds belonging to an honorary consul personally rather than to the State which he represented, where those funds had been voluntarily allocated for the performance of sovereign functions, such immunity could still not be granted in this case. It was not known what funds had been allocated for the needs of the State and the same account was used for the private commercial activities of the Consul.

(3) An honorary consul enjoyed immunity from execution only in relation to contractual obligations entered into within the framework of his official functions and not for obligations arising in the course of his private commercial activities. The same considerations applied to the funds necessary for the functioning of a consular mission as those which limited the inviolability of archives and documents, pursuant to Article 61 of the Vienna Convention on Consular Relations, 1963, to cases where such documents were kept separate from private and commercial materials.

The following is a statement of the facts as reported in *Annuaire Suisse de droit international*, 1984, p. 178:

On 26 October 1982, Acli Commodity Services SA obtained an attachment against J.J. Griessen, a Geneva businessman who was also the Honorary Consul of Chad in Geneva. Amongst those assets subject to the attachment was a bank account No 301 485 Zorro opened in the name of Consul J.J. Griessen, at the address of the Consulate, at the bank of Cantrade, Ormond and Burrus SA. The offices of the Consulate were also the private offices of Mr Griessen. The attachment was enforced on 28 October 1982.

On 10 November 1982 the Geneva Supervisory Authority for the Enforcement of Debts and Bankruptcy dismissed an objection lodged by Mr Griessen against the enforcement of the attachment in so far as it related to the above mentioned account. The Authority found that this account had been used for the commercial activities of the complainant, who had failed to give any precise information as to the nature and significance of the expenses incurred for the functioning of the Consulate.

Griessen appealed against this decision to the Federal Tribunal. In support of his appeal he argues that the Geneva Supervisory Authority failed to take account of a certificate, supplied by the Chargé d'Affaires of Chad in Paris, according to which the account at issue was intended to cover the expenses of the Consulate. In addition, in his capacity as Honorary Consul, the appellant invokes immunity from execution as provided for in the Vienna Convention on Consular Relations of 24 April 1963.

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

1. The *Office des poursuites* is in principle required to execute an attachment order as issued by the competent judge. Nevertheless, according to the jurisprudence, the execution of an attachment order may be refused, pursuant to the limited power of control granted to the *Office* where . . . the assets liable to attachment belong, according to the evidence or even to the statements of the creditor, to a foreign State which has allocated them for public tasks. This applies in particular where such assets have been allocated for the financing of the diplomatic mission of a foreign State in Switzerland where the attachment is to take effect. Immunity from execution protects such assets where the State to which they belong, even if it is itself the debtor, has allocated them for its diplomatic service or for other tasks incumbent upon it in the exercise of its sovereign powers (*cf.* Circular from the Federal Department of Justice and Police to the Cantonal Governments of 26 November 1979 concerning the Sequestration of the Assets of Foreign States, especially at pp. 3 and 4; *cf.* also the Message from the Federal Council of 27 May 1981 concerning the European Convention on State Immunity (*FF* 1981 II 939, 949)).

The situation is different where the assets to be attached belong not to a foreign State but to an individual who declares on his own account, without being bound to do so by a clear or precise obligation, that in whole or in part they are designated for the functioning of the diplomatic mission of a foreign State in the receiving State. Such a declaration would in fact reflect an arbitrary decision on the part of such an individual, which he could not invoke against his creditors.

It may be asked nevertheless whether the benefit of immunity should not in fact be granted to an individual who acts in the capacity of Honorary Consul or other diplomatic appointment, for that part of his assets which are allocated for such purposes if those assets actually belong to a foreign State. At first sight any such assimilation would appear to be dubious. At the very least it would be necessary, for such treatment to be acceptable, to furnish direct proof of the alleged allocation of private assets to public functions, or at least to demonstrate the probability of such an allocation both in principle and with regard to its actual existence. But in this case it is unnecessary to decide this question because the appellant has not succeeded in adducing proof of such an allocation, as will be shown later on.

2. It is not disputed that the bank account at issue, No 301 485 Zorro, belongs to the debtor named in the attachment order and the record of the attachment, that is to say Jean Jacques Griessen personally. He claims today that the fact of having opened this

account in his own name in no way implies that the funds in that account do not belong to a foreign State. In making such a claim not only does he put in question in an inadmissible way findings of fact contained in the judgment under appeal, but he also contradicts earlier declarations made by himself which are contained in the file. It must therefore be accepted that the funds deposited in the bank account at issue indeed belong to the appellant. It is also not disputed that the appellant, in addition to his functions as Honorary Consul of the Republic of Chad, is also a businessman. Furthermore his address for his business affairs is indistinguishable from that of the Consulate. It is true that the appellant has always contended, and this is something which the certificate issued by the Chargé d'Affaires of the Embassy of Chad in Paris who also has responsibility for Switzerland tends to confirm, that the funds deposited in account No 301 485 Zorro served at the same time for the performance of the functions of the Consulate. But it is equally true that the Cantrade, Ormond and Burrus Bank SA, where the account is held, honoured cheques drawn by the appellant which related to his commercial activity, without the latter ever having claimed that the funds thereby paid to his private creditors originated from sources other than the bank account at issue. It is for this reason that the Cantonal Authority asked the appellant to provide details of the nature and significance of the expenses incurred in the functioning of the Consulate. The appellant failed to provide the details which were requested.

The Cantonal Authority considered that if it would have been possible to determine precisely the extent of the personal funds of the appellant which were used to ensure the functioning of the Consulate, in particular by producing accounts, the attachment could have been vacated to the extent that the assets subjected to attachment were allocated for the financing of consular services. That Authority adds that, in the absence of more detail on this point, there could be no question of purely and simply withdrawing all assets of the appellant from distraint by his creditors on the ground that those assets were allocated not only to the appellant in his personal capacity and for his business activities but also in part for his consular activity. Furthermore it was doubtful whether this diplomatic activity was really significant and whether it could actually involve significant expenses. The expenses paid for the lease of the Consulate were actually shared amongst the other occupants of the apartment. At all events the Cantonal Authority took the view that immunity from forced execution did not apply to assets which did not belong to a foreign State and over which that State had no rights. If the appellant put at the disposal of the State of Chad funds which belonged to him personally, the Cantonal Authority considered that he did so on his own account without the Republic of Chad being able to lay claim to

those assets or demand that they should be covered by immunity from execution.

This approach to the problem cannot be criticized. The only argument adduced by the appellant against this point of view is that a foreign State which uses assets put at its disposal for the performance of legal acts which are encumbent upon it in the exercise of its sovereign power, is acting *jure imperii* even if, as here, the acts in question are governed by private law. This argument is incorrect. In fact it has not been established, or even alleged, that the Republic of Chad ever entrusted the appellant with the performance of acts governed by private law, with a view to the accomplishment of tasks which that State itself performs in the exercise of its sovereign powers and which might form the basis of the attachment at issue. Not only do the funds in question belong to the debtor in his personal capacity, but furthermore they are not allocated exclusively for the diplomatic activities of the appellant, but are also available for his private commercial activities. The attachment which is aimed at those funds is intended to guarantee a contractual obligation within the framework of the commercial activities of the appellant. Therefore, to the extent that the appellant claims immunity from execution over the totality of the funds which are blocked in the account at issue, his claim would appear to be far too general for it to be accepted in this form. Even if it were acceptable to allow the benefit of consular immunity to funds belonging to the appellant personally, rather than to the State which he represents, where the appellant had allocated those funds for tasks related to the sovereign powers of that State even though the appellant was not under a clear and precise obligation in that regard, such immunity could not be granted in this case. So long as it is not known which part of the bank account subjected to attachment is allocated for the needs of the State in question, and it is clearly agreed that the same account is used for the private commercial activities of the appellant, immunity cannot be granted.

3. . . .

4. It must be conceded to the appellant that in his capacity as Honorary Consul he does enjoy diplomatic immunity. He cannot therefore be subjected to forced execution wherever, and to the extent that, his contractual obligations have been entered into within the framework of his official functions. Nevertheless it goes without saying that such immunity cannot extend to legal acts performed by the Consul in his private capacity or in connection with his professional or commercial activities, as the Cantonal Authority correctly points out. In this regard, the Vienna Convention on Consular Relations itself makes a clear distinction between these two types of activity. Suffice it to refer to Article 61 of that Convention which guarantees the inviolability of consular archives and

documents, provided that they are kept separate from other papers and documents and, in particular, from the private correspondence of the head of a consular post, and from the materials, books or documents relating to their profession or trade. As the Cantonal Authority correctly points out, the same considerations apply to accounting and to the funds necessary for the functioning of the Consulate as those which apply to archives and documents. In this case those funds were mixed together with the personal funds of the appellant so that there could be no question of granting him, on the basis of Article 61, immunity from execution over all his assets without distinction . . .

[The appeal was dismissed.]

[Reports: *Annuaire Suisse de droit international*, 1984, p. 178; *ATF* 108 III 107 (in French).]

State immunity — State corporation — Independent legal personality—Whether entitled to State immunity—Entitlement to immunity limited to acts performed *jure imperii*—Whether property subject to attachment—The law of Switzerland

BANCO DE LA NACION LIMA *v.* BANCO CATTOLICA DEL VENETO

Switzerland, Federal Tribunal. 21 *March* 1984

SUMMARY: *The facts*:—Within the framework of a dispute concerning funds deposited by the Banca Cattolica del Veneto, an Italian bank, with the Banco de la Nacion, a State-owned Peruvian bank, the Italian bank obtained the attachment of funds held in the name of the Peruvian bank at several banks in Zurich. The Peruvian bank appealed against the attachment to the Federal Tribunal arguing that it violated the immunity to which it was entitled under international law.

Held:—The appeal was dismissed.

Foreign State-owned corporations which, according to the law of their seat, were endowed with their own independent legal personality, could not in principle invoke State immunity. The only possible exception to this rule could be where such entities acted in the exercise of sovereign authority (*jure imperii*). In the case of a bank closely linked to a foreign State it would be inequitable to allow it to enter into competition with private banking institutions whilst at the same time granting it immunity to escape the consequences of those transactions.