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## A Note on Sovereign Immunity and Judicial Remedies for Aliens in Courts of the Federal Republic of Germany

Fritz Weinschenk

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# **A Note on Sovereign Immunity and Judicial Remedies for Aliens in Courts of the Federal Republic of Germany**

At the very outset, the following distinctions must be made between:

- I. Suits by aliens against the government of the Federal Republic of Germany (hereinafter referred to as FRG) in foreign courts
- II. Suits by non-Germans (aliens) against the government of the FRG in German courts
- III. Suits by aliens against diplomatic and consular personnel of the FRG
  - a. in foreign courts
  - b. in German courts
- IV. Suits by aliens against officials of the FRG in German courts
  - a. for acts within the scope of their duties
  - b. for torts
  - c. for fiscal matters

These questions will be taken up briefly, in sequence.

## **I. Suits by Non-Germans Against the Government Of the FRG in Foreign Courts**

It is indeed noteworthy that the German legal system has lately departed from the strict rule of absolute sovereign immunity. The German courts distinguish between *acta jure imperii* (public acts) and *acta jure gestionis* (private acts). The concept of absolute immunity is rejected by official commentators. Thus, public acts of the FRG, if sued upon abroad, will certainly be met with the defense of sovereign immunity in the foreign court on the part of the defendant FRG. The New York courts have acceded to this rule and have, accordingly, dismissed complaints on that basis.

It is uncertain what the outcome would be today, if the FRG were to be sued

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\*J.D., New York University School of Law; Partner, Hamburger, Weinschenk & Molnar, New York City.

on a "private act" in American courts. Such cases may not easily arise, since all acts done abroad by the representatives of the FRG in its name will necessarily be *acta jure imperii*. The few instances of private acts may be those where the FRG submits itself to the American jurisdiction by itself appearing as plaintiff. Would the American court regard a counterclaim as fatally defective under the "sovereign immunity" rule, or would it hold that submission constituted a waiver of sovereignty? In *National City Bank v. Republic of China*<sup>1</sup> the United States Supreme Court permitted the bank to interpose counterclaims for an affirmative judgment—even in a situation where the claims were unrelated to the subject of the original suit brought by China.

The Treaty of Friendship, Commerce and Navigation between the FRG and the United States of October 29, 1954 does not provide for any submission to each other's jurisdiction on the part of the national government or any state or political subdivision of either party. Since that date no changes known to the author of this article have occurred. A study of the treaty establishes that the already existing law of both parties has been generally followed.

It can therefore be said that an attempt to sue the German government itself in the courts of the United States or any state thereof will meet with the objection of sovereign immunity on jurisdictional as well as substantive grounds where "public acts" are concerned. This rule cannot be expected to change unless it is abrogated by specific agreements in specific fields.

## II. Suits by Aliens in German Courts

In respect to the rights of aliens, (among them Americans or the American government itself), in the courts of Germany, however, it is clear that the German government can be sued freely by individuals, corporate plaintiffs, or even the government of the United States or a political subdivision thereof, whenever the government of the FRG is an obligor, debtor, or guarantor. Article 103 of the German constitution of May 23, 1949 provides:

Anyone has a right to be legally heard before the court. . . .

Article 19, Subdivision 4 of the German constitution provides:

Where someone is injured in his rights by the public power, legal redress shall be open to him. Ordinary legal processes shall be freely accessible, provided that an alternate adjudication has not been expressly provided for.

This basic rule entitles foreigners generally, regardless of their legal makeup, to sue in the German courts. However, the type of lawsuit here contemplated is

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<sup>1</sup>348 U.S. 356, 75 S. Ct. 423 (1955), 6 Whiteman, *DIGEST OF INTERNATIONAL LAW* 574-576. See also *Et Ve Balik Kurumu v. B.N.S. International Sales Corporation*, 204 N.Y.S.2d 971, 976-977 (counterclaim arising out of same transaction).

one where the government of the FRG is itself a party, as, for example, contracts between foreign corporations and the government on which the government has defaulted or committed breaches.

Under the above circumstances the legal basis for holding the state liable is Par. 31 of the German Civil Code which simply provides that any association (Verein) is responsible for the damage committed by one of its officers or representatives within the scope of the association's business. The concept, "association," also covers the government and its political and administrative subdivisions.

Whether the FRG would ever lay claim to immunity under the *jus imperii* doctrine in its own courts against alien plaintiffs is problematical. If the claim is one encompassed by the usual civil law complex of legal relationships, the constitution and the civil code would seem to bar an immunity defense.

### III. Suits by Aliens Against Officials of the FRG

German law distinguishes between breaches and actionable errors resulting in damages by officials of the government, and acts of the government itself. If the damage resulted from the violation of a duty by an official, Par. 34 of the Constitution provides that the federal government of the FRG must assume responsibility. However, in that case foreign plaintiffs can sue the official only if there exists reciprocity, that is, if the foreign jurisdiction permits suits by Germans against its own officials. There is reciprocity between the FRG and several European countries in this respect. However, no such reciprocity exists between the FRG and the United States. No American, therefore, whatever his legal status, can sue in the German courts if the act complained of was done by an official within the scope of his employment or official duties.

The exception to this rule arises where fiscal liabilities result from the errors of FRG officials. In such cases reciprocity is not required, but the error or act of the official resulting in damage must have harmed a third party. If an American person, corporation or governmental unit has thus been injured, it would seem that the FRG will assume liability on the basis of Article 34 of the Constitution, even though there is *no* reciprocity between the two nations as to official errors.

In case of a tort by a German official, no reciprocity is needed to sue the German official and thereby the government. A "tort", under German law, is a "non-permitted act" under Par. 823 of the German Civil Code. An official who commits a tort within the scope of his official duties will involve the state as the liable party, that is, the state is ultimately responsible for the torts of its officials. The basis for such liability, however, is not the above-mentioned Par. 31 of the Constitution, but Par. 34 of the Constitution in connection with Par. 839 of the Civil Code, which regulates the general liability of public officials.

There would therefore seem to be equality between aliens and Germans as respects access to German courts in "governmental" tort cases.

