Case Comments

International Law Cases in National Courts

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Several cases involving sovereign immunity have recently come before courts in the United States. In addition, other cases with international ramifications have been decided.

Sovereign Immunity

The primacy of the United States Department of State in determining whether or not to accord sovereign immunity in a particular case was reaffirmed in *Amkor Corporation v. Bank of Korea,* 298 F.Supp. 143 (S.D.N.Y. 1969).

Defendant, the fiscal arm of the Korean Government and acting as its agent, invited bids for the construction of a caustic soda plant to be built for a private Korean corporation pursuant to a program of economic cooperation between the Korean and United States Governments. Plaintiff was the successful bidder for certain machinery and equipment, but subsequently the agreement was cancelled by the Director of the International Cooperation Administration. Plaintiff brought an action against defendant based on breach of contract and, alternatively, on breach of defendant's warranty of authority when it entered into the agreement.

Defendant requested a suggestion of immunity from the Department of State, but was refused, on the ground that, under the "restrictive theory" of sovereign immunity, the essence of the transaction was commercial or private as opposed to governmental or public. The note from the Department of State indicated that the restrictive policy focuses on the nature of the activities in question rather than the character of the government agency involved or upon its reasons for engaging in the activities.

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Defendant's motion to dismiss on the sole ground of sovereign immunity was denied on the ground that the Department of State's determination that immunity need not be extended was binding on the court. The court quoted the decision in *Victory Transport, Inc. v. Comisaria General,* 336 F.2d 354 (2d Cir. 1964), *cert. den.* 381 U.S. 934 (1965), to the effect that it is senseless to deny a litigant his day in court to avoid embarrassing the State Department if that agency indicates, either directly or indirectly, that it will not be embarrassed.

The court further noted that, in any event, under the facts of the case, the activities giving rise to the dispute were private and commercial in nature and, therefore, applying the restrictive theory of sovereign immunity, defendant was not entitled to immunity.

Sovereign Immunity

In its second consideration of the case,† the United States District Court for the Southern District of New York considered the defense of sovereign immunity put forth by The Republic of Vietnam to a motion to compel arbitration in *Pan American Tankers Corporation v. Republic of Vietnam,* 296 F. Supp. 361 (S.D.N.Y. 1969).

Plaintiffs' motion arose out of an agreement for the transportation of cement, which, plaintiffs alleged, was breached by defendants, the Ministry of Economy of The Republic of Vietnam and two Vietnamese corporations. Plaintiffs served a notice of motion for an order to compel arbitration pursuant to the alleged contract, to which motion The Republic of Vietnam appeared specially and entered its plea of sovereign immunity, based on the contention that its role in the transactions involved was that of governmental supervisor over the expenditure of foreign exchange, and that, therefore, its acts were political or sovereign in nature.

The Court declined to accept the plea of sovereign immunity entered by The Republic of Vietnam. In the first place, following the criteria set out in *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes,* 336 F.2d 354 (2d Cir. 1964), *cert. denied* 381 U.S. 934 (1965) for cases in which the State Department has not made an affirmative suggestion of immunity, the court held that what The Republic of Vietnam was accused of doing could not be characterized as public or sovereign acts. It indicated that the critical inquiry concerned the basic character of the line of conduct which generated the lawsuit, which, in this case, was the alleged breach of a commercial contract to transport cement. The only action that

†The first was in *Pan American Tankers Corporation v. Republic of Vietnam,* 291 F. Supp. 49 (S.D.N.Y. 1968), which involved the procedural point of how a plea of sovereign immunity should be entered and adjudicated, and was reported in 3 THE INTERNATIONAL LAWYER 700 (April 1969).

The Republic of Vietnam would be required to defend was the making of a contract containing an applicable arbitration provision. Such activity, the court concluded, was commercial in nature and, therefore, sovereign immunity should not be accorded to The Republic of Vietnam.

Further, the court noted that, even assuming that the alleged currency control activities claimed by The Republic of Vietnam were material to the issue of sovereign immunity, The Republic of Vietnam failed to sustain its burden of proving that its role was limited to political or sovereign acts. The only proof put forth was an affidavit of the Ambassador of The Republic of Vietnam to the United States merely denying that The Republic of Vietnam was a contracting party and asserting that it acted only to control the expenditure of foreign exchange.

However, in conjunction with its claim of sovereign immunity, The Republic of Vietnam had submitted various documents which obliquely raised other questions as to whether, under the applicable law of Vietnam, (a) the signature of the director of Commercial Aid signified only that the Vietnamese Government had approved the proposed importation of cement and that said signature did not make the Government a party to the agreement, and, (b) assuming that The Republic of Vietnam did enter into a contract of some kind with plaintiffs, whatever it was did not incorporate the arbitration clause upon which plaintiffs relied. The court indicated that the references to such arguments were vague and ambiguous and, holding in abeyance its decision ordering the parties to proceed to arbitration, it granted The Republic of Vietnam leave to file papers stating in specific and plain terms every ground of its objections to the arbitration proceedings demanded by plaintiffs.

Sovereign Immunity—Puerto Rico

In the case of *Alcoa Steamship Co., Inc. v. Perez,* 295 F.Supp. 187 (1968), the United States District Court of the District of Puerto Rico affirmed the right of the Commonwealth of Puerto Rico to plead sovereign immunity.

Plaintiffs, various steamship companies engaged in the transportation of cargo between the ports of the United States and Puerto Rico, sought relief in connection with demands made upon them by the defendant, Manager of the Puerto Rico State Insurance Fund. Plaintiffs had been notified that the Puerto Rico Workmen's Accident Compensation Act required them to pay for insurance to cover the seamen employed aboard their vessels as to the risk of accidental injury while working in the territorial or navigable waters of Puerto Rico. Plaintiffs first sought a declaratory judgment of their rights against the defendant's collection of such insurance premiums.

This Court's first ruling dismissed plaintiffs' action on the ground that

"Congress intended to clothe the Government of Puerto Rico with power to provide for the application of its workmen's compensation act, to injuries suffered by employees on local navigable waters." (295 F.Supp. at 189). This ruling was later overturned by the United States Court of Appeals for the First Circuit, which held that the Puerto Rico Workmen's Accident Compensation Act could not preempt the general rule of maritime law which Congress had expressly made applicable to Puerto Rican waters. The court held that it was not the intent of the Puerto Rican legislature that this Workmen's Accident Compensation Act be used to require an employer to purchase duplicate compensation insurance.

On plaintiffs' motion for judgment, the District Court enjoined the defendant from collecting the insurance premiums from plaintiffs and ordered the reimbursement of moneys previously collected.

Defendant then raised the question of sovereign immunity claiming that, since the State Insurance Fund pays over all premiums collected by it to the Commonwealth of Puerto Rico, the second form of relief sought by plaintiffs is, in effect, a suit against the Commonwealth of Puerto Rico. In this case the court upholds defendant's contention, finding that the real party in interest is the Commonwealth of Puerto Rico, since it would be the Commonwealth which would have to pay over the previously collected premiums.

The question then before the Court is "whether or not Puerto Rico can be sued without its consent in a Court of the United States." (295 F.Supp. at 191). The answer to this question the Court determines is "closely tied to the question of whether Puerto Rico is a sovereign or not, in a fashion similar as the states of the United States are sovereigns." (295 F.Supp. at 193). The Court points to the case of *People of Porto Rico v. Rosaly y Castillo*, 277 U.S. 270, 33 S.Ct. 352 (1913), which reversed the decision of the Supreme Court of Puerto Rico and held that the Territory of Puerto Rico had been organized in a manner very similar to the way in which the Territory of Hawaii had been organized, and that the Territory of Puerto Rico was similarly immune from suits to which no consent had been given.

The court then goes on to hold that the legislation permitting Puerto Rico to become a Commonwealth in 1952, "did not abridge what sovereign powers Puerto Rico had been granted [under previous United States legislation], but rather continued them and, if anything, amplified them." (295 F.Supp. at 197). The Court summarizes the legislation in arriving at the status of the Commonwealth of Puerto Rico as follows:

> The Commonwealth of Puerto Rico is a body politic which has received, through a compact with the Congress of the United States, full sovereignty over its internal affairs in such a manner as to preclude a unilateral revocation, on the part of Congress, of that recognition of powers.

> There can be no question that under the Foraker Act and the Jones Act, and more so under the Federal Relations Act, the Government of Puerto Rico is sovereign and has at least the same attributes as any other fully organized Territory or State. (295 F.Supp. at 197).

The court then points out that the Commonwealth of Puerto Rico has given its consent to be sued pursuant to the Act on Claims and Suits Against the Commonwealth, Act. No. 104 of June 29, 1955, as amended, which requires that actions on those specific causes of action set forth therein be brought before the Court of First Instance of Puerto Rico, rather than before the Federal Courts.

After dismissing certain grounds of defense, the court holds that it lacks jurisdiction to order the refunds of premiums previously collected by the defendant on the grounds that the Commonwealth of Puerto Rico, as to this request of relief, is the real party in interest and is entitled to invoke its sovereign immunity.

Sovereign Immunity – Salary of United Nations Employee

In *Means v. Means,* 303 N.Y.S.2d 424 (N.Y. Fam. Ct. 1969), the Family Court held that the salary and allowances paid to an employee of the United Nations were exempt from an order of sequestration sought on behalf of the employee's dependents.

The case arose when petitioner (the employee's wife, or ex-wife depending on the effects of a Turkish divorce obtained without personal jurisdiction over petitioner) brought a proceeding seeking the sequestration order as an indication that she and her child were entitled to more than the amount being remitted to her by the United Nations pursuant to the purported Turkish decree of divorce. Such an order would be a tangible basis for petitioner to request the support of the Department of State of the United States to persuade the U.N. to consent to remit to the court a greater amount than it was remitting to petitioner.

Judge Midonick held that, since respondent neither was served personally nor appeared at a statutory hearing, the order for support should be temporary and the sums, if any, impounded to give respondent an opportunity to appear. However, expressly excluded "for the time being" from any sequestration order were all sums payable or to become payable from the United Nations Secretariat to respondent as an employee thereof. The exclusion was based on the sovereign immunity of the United Nations and could not be interfered with unless and to the extent that the United Nations consented to placing such sums at the disposal of the orders of the court.

Sovereign Immunity – Consular Property

The Court of Appeals of New York recently answered affirmatively the

question of whether, as a matter of customary international law, consular premises are exempt from municipal real property taxes. *Republic of Argentina v. City of New York,* 25 N.Y.2d 252, 250 N.E.2d 698 (Ct. App. N.Y. July 1, 1969).

The Republic of Argentina, owner of property in New York City which it uses as its consulate, instituted the action against the City of New York seeking, in one count, the return of the real property taxes it paid on that property between 1947 and 1965 and, in the second count, a judgment declaring those premises tax exempt and discharging the tax liens imposed against the property for unpaid taxes assessed since 1966. On cross-motions for summary judgment, the lower court found for the City and was affirmed on appeal.

In answer to plaintiff's claim of immunity, the City contended that there is no established international rule preventing local taxation of consular offices. The United States Government, appearing as amicus curiae, argued in support of Argentina that, under recognized principles of international law, state and municipal taxes should not be assessed against foreign government-owned property used for public noncommercial purposes. The Court, in reversing the appeal court decision, agreed that immunity should be accorded, not "solely upon what the government urges are to its best interests," but on the basis of customary international law.

The main source of such law looked to by the Court was the Vienna Convention on Consular Relations of 1963, which, though not yet ratified by the Senate, constituted "weighty authority" as a consensus of international lawyers as to what "principles" were "generally accepted" in international law. The Vienna Convention, observed the Court, provided that consular premises should be "exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered." (Art. 32, Sec. 1)

The Court pointed to several reasons why "so many nations refrain from imposing real estate taxes on foreign consulates." For one, it would be difficult, if not impossible, to enforce the collection of any tax levied against a friendly foreign government if that government did not wish to pay it, since no sovereign state can itself be sued, nor have its property attached or levied upon without its consent. In view of this, the Court continued, including among its assets a tax levy which it could not collect would be misleading for the city. The City argued that its tax claims constituted a lien on the premises in case the foreign government disposed of the property to an entity which had no immunity. However, the Court disagreed on the ground that:

> . . . since a lien has an immediate adverse effect upon the amount which the government would receive on a sale, to sanction its imposition would constitute a direct interference with the property of a foreign state and, as such, would violate the principle of sovereign immunity.

Finally, the Court rejected defendant's attempt to distinguish between "diplomatic" and "consular" property for reasons of taxation, stating that:

> In short, then, the test of immunity is not whether the property is used for a 'diplomatic' purpose, but, rather, whether it is used for a 'public' or 'governmental' purpose and, accordingly, it follows that consular property owned and maintained by a foreign government is exempt from local real estate taxation, just as is its ambassadorial property, under principles of customary international law.

Therefore, the Court concluded that the Republic of Argentina should be granted summary judgment on its second count declaring the consular property exempt from city taxes. However, since plaintiff had not previously presented to the city comptroller a demand for the refund of sums paid for past taxes in accordance with the city's Administrative Code, the Court affirmed the dismissal of plaintiff's first cause of action.

Clean Bills Of Lading – Transoceanic Shipping

In *Greene, Steel & Wire Co. v. F. W. Hartmann & Co.*, 299 N.Y.S.2d 654 (App. Div. 1969), plaintiff purchased an amount of wire coils from seller in Germany, which arranged shipment with a transoceanic shipping company. The wire was received by the shipper's agents at several ports in Germany, loaded aboard a vessel under charter to the shipper and delivered to the shipper's agent in the Port of New York, where it was unloaded and stored on piers in Brooklyn. The coils when unloaded were rusted and plaintiff brought an action claiming damages for alleged breach of contract and negligence against the shipper and its agent in New York, and another cause of action against the owner and operator of the piers for negligence in failing to protect the coils after unloading, thereby causing further damage.

The court affirmed a finding against the shipper on the ground that its acceptance of the cargo on clean bills of lading created a presumption in plaintiff's favor that the wire accepted for shipment was free of apparent defects. Since the record supported a finding that the coils when unloaded in Brooklyn were rusted beyond any superficial oxidation for which responsibility was excluded in the bills of lading, plaintiff was entitled to recover its damage from the shipping company. The court further held that interest would run from the date of completion of salvage operations rather

than from the date on which the wire was unloaded at the pier, since damages were unliquidated and unascertainable until that time.

However, the court reversed judgments against the agent in the Port of New York and against the owner of the pier. The agent was not a party to the shipping contract and was therefore not liable for damages before delivery to Brooklyn. Since plaintiff had supplied no proof of further damage after delivery, or of the agent's knowledge of the condition in the bills of lading requiring unloading under a covered pier, or of the agent's actual direction of the unloading, insufficient evidence had been produced of the agent's negligence. Plaintiff's claim was also held to have failed against the owner of the pier since plaintiff did not allege or prove its own freedom from contributory negligence and established neither the extent of damage on arrival nor the extent to which such damage was aggravated by the alleged successive negligence of the owner of the pier.

Jurisdiction – Doing Business

In a recent case before the Supreme Court in Westchester County, New York, the court held that it lacked jurisdiction to hear a suit brought on grounds of negligence and breach of warranty by a New York resident against the parent Volkswagen company ("VWAG") in Germany. In the case of *Delagi v. Volkswagenwerk AG of Wolfsburg, Germany,* N.Y.L.J., May 20, 1969, at 19, col. 8 (Sup. Ct.) the plaintiff, a resident of New York, brought an action on grounds of negligence and breach of warranty for personal injuries and property damage suffered in an accident in West Germany. Plaintiff, while a member of the United States Armed Forces stationed in West Germany, had purchased a new Volkswagen there, which was subsequently recalled by VWAG because of defective parts and workmanship. Soon after the automobile was repaired by a Volkswagen dealer in West Germany, plaintiff claimed that the front wheel suspension collapsed causing him to lose control of the car and resulted in serious injuries to himself and total loss of the car.

The principal contention of the defendant, and the grounds on which the suit is finally dismissed, is that, pursuant to CPLR 3211(a)(8), the court lacks jurisdiction because the defendant does not do business in New York. In support of its motion to dismiss for lack of jurisdiction, VWAG contended that all of its manufacturing and selling of automobiles and parts is done in Germany. It transacts no business in New York, nor has it appointed any agent for service of process in New York. It has no property, employees, or telephone listings in New York. All its products sold in the United States are sold to a wholly-owned subsidiary, which is a completely separate enterprise located in New Jersey. Title to defendant's

products sold to the subsidiary passes in Germany. The wholly-owned subsidiary then sells the cars and parts to a completely independent New York entity for distribution in New York.

The Court points out that its jurisdiction in this case would have to be based on either Sections 301 or 302 of the New York CPLR. The bases of jurisdiction encompassed by these two provisions are summarized by Justice Sirignano as follows:

> "So in order to acquire and exercise personal jurisdiction over a foreign corporation there must be a showing that the corporation is doing business within the state; or that the cause of action arose out of a transaction of business or the commission of a tortious act within the state; or that a tortious act committed by it outside of the state causes injury within the state; or owns, uses or possesses any real property situated within the state."

On the issue of doing business in New York, the defendant claimed that none of its operations would subject it to the court's jurisdiction; the traditional touchstones of doing business such as the maintenance of bank accounts, the owning or leasing of property, the employment of personnel or a telephone listing are not present in this case. Plaintiff argued that defendant was doing business in New York, however, on grounds that New York is a vast market for the purchase of defendant's automobiles resulting in a financial benefit to VWAG, and that Volkswagens are heavily advertised in New York. The court pointed out that the injury resulting from the alleged negligent act did not occur in New York. Furthermore, the court found that the defendant's wholly-owned subsidiary in New Jersey is not the agent of defendant, pointing to language in the import agreement with the subsidiary to the effect that the subsidiary will act on its own behalf and for its own account, with no authority whatsoever to act as agent for or on account of the parent.

The court concludes, therefore, that under the facts of this case the proper forum for this suit is Germany since the accident and injury occurred in Germany and since defendant is not doing business in New York within the meaning of CPLR 301 or 302. The court also holds that defendant did not submit itself to the court's jurisdiction by seeking to vacate subpoenas or to quash subpoenas brought against an advertising agency and a distribution agency in New York. Defendant has the right to move to quash or modify these subpoenas since it is affected by them, and such motions do not go to the merits of the action.

Civil Rights – Aliens

In the California case of *People v. Navarro*, 76 Cal. Rptr. 660 (Ct. App. 1969) the court upheld a 1925 decision to the effect that inability to speak

English was alone an insufficient basis to infer alienage of a person accused of the crime of possession of gun by a non-citizen.

The defendant had been arrested with a .44 caliber Magnum revolver in his possession and charged with violation of California's Dangerous Weapons Control Law, Penal Code section 12021. Upon arrest the only evidence that the defendant was an alien was his inability to speak English.

After receiving the proper Miranda warnings in Spanish, defendant admitted he was from Mexico and not legally present in the United States. The State did not contend, however, that this admission could be used in a preliminary hearing to establish probable cause where no independent evidence of alienage existed.

This court upheld the lower courts ruling that defendant's inability to speak English was insufficient as a matter of law to sustain the necessary inference of alienage.

The court suggests that it might have reached the opposite result if this had been a case of first impression, but it did not find "the compelling reason or change in underlying law" necessary to justify its rejection of the California Supreme Court holding in *People v. Quarez,* 196 Cal. 404, 238 p. 363 (1925).

Enforcement of Alimony and Support Agreements

In the recent case of *Blitz v. Vietorisz,* N.Y.L.J., July 10, 1969, at 2, col. 1 (App. T.) plaintiff brought an action seeking back payments of alimony and support pursuant to a court-approved agreement which the two parties had entered into while residents of Chile. This agreement had subsequently been incorporated into a Mexican divorce decree.

The court, citing *Auten v. Auten,* 308 N.Y. 155 [1954], held that the law of Chile had the most significant contracts with the matter in dispute and, therefore, governed the interpretation of the agreement. Under Chilean law, this agreement was shown to be valid and enforceable.

Defendant argued that plaintiff could not recover back alimony and support payments since she had denied defendant his visitation rights under the agreement.

This defense was rejected by the court on two grounds. The court first holds, citing New York authority, that when the agreement does not make the payments conditional on rights of visitation, the only proper course of action is a motion to amend the decree to so provide. Secondly, the plaintiff had not, as a matter of fact, deprived defendant of his rights of visitation.