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Decisions of International and Foreign Tribunals

RENÉ H. HIMEL, JR., Departmental Editor

The Netherlands

On November 28, 1968, the Court of Appeal at The Hague rendered a significant decision in the case of *NV Cabolent v. National Iranian Oil Company*.

The defendant, NIOC, is a commercial joint-stock company owned by the State of Iran, which organized the company to develop the nationalized Iranian oil and gas industry. The company's management is largely autonomous, its activities are financed from its own revenues rather than by public funds, it is a corporate entity empowered to make contracts and engage in other commercial activities, and the State is not liable for its debts, which can be satisfied only out of the company's own assets.

In 1958, NIOC and Sapphire Petroleums Ltd., a Canadian company, entered into an agreement which was approved by an act of the Iranian Parliament rendered operative by Imperial Decree. The agreement provides for oil exploration and exploitation by Sapphire for the parties' joint benefit; for arbitration of disputes arising thereunder; and that the agreement may not be changed or invalidated, nor performance thereof impeded, by governmental action.

A dispute arose under the agreement and was arbitrated. The arbitrator ordered NIOC to make certain payments to Sapphire. Sapphire organized Cabolent under Dutch law to seek enforcement of the award in the Dutch courts; and, to secure its recovery, caused conservatory attachments (garnishments) to be levied on funds of NIOC in the hands of four oil companies domiciled at The Hague. On NIOC's exception, the District Court thereafter declared itself incompetent, on sovereign-immunity grounds, to take cognizance of Cabolent's claim. 3 *International Lawyer* 185.

The Court of Appeal reversed this judgment. The Court concluded that the agreement between NIOC and Sapphire contains "mainly provisions of a private law nature and was concluded between two parties who for the purpose of the agreement were equal, or at least of equivalent status;" and that "accordingly, when NIOC concluded the agreement, it was not acting *jure imperii*, that is to say, it was not performing an act which must be regarded in law as a pure act of state on the part of the State of Iran."

The Court held that under the modern rule, one state is exempt from the jurisdiction of another only in respect of *acta jure imperii*, or "pure acts of

state," and not in respect of other acts, or *acta jure gestionis*. The Court went on to hold that "a judicial award is, by its nature enforceable; and if immunity constitutes no bar to competence, it cannot in principle do so either for enforcement."

The Court recognized that enforceability may be limited by some other rule of international law, but pointed out that "the only rule of international law that could possibly come into consideration here is the rule which states that things intended for the public service are exempt from measures of execution in another country."

The Court then held that contractual payments owed by the garnishees to NIOC are not intended for the public service of Iran, even though the payments may be made, by NIOC's direction, into the Imperial Treasury either as the ultimate beneficiary or in satisfaction of NIOC's income tax liability.

Court of Justice of the European Communities

In *Wilhelm v. Bundeskartellamt*, Case No. 14/68, XV Reoueil, 1969-1, p. 1, CCH Common Market Reporter ¶ 8056, the Court, on February 13, 1969, decided that national authorities may proceed against violators of domestic antitrust law, so long as such application of the domestic law does not prejudice the full and uniform application of Community law. The plaintiffs, as officials of eight German corporations, were fined by the Bundeskartellamt at Berlin for violating the German Law Against Restraints of Competition (1957) by agreeing on a price increase for aniline. Meanwhile the Commission of the European Communities had commenced a proceeding against some of the plaintiffs' firms, and others, under Article 9, ¶ 3 and Article 3 of Regulation No. 17. The plaintiffs argued to the Berlin Kammergericht that the Bundeskartellamt had no jurisdiction to entertain an action involving a violation that was the subject of a parallel pending proceeding before the Commission; and the Kammergericht requested the Court to issue a preliminary ruling. In holding that national authorities may proceed concurrently with the Commission, the Court also declared that equitable considerations imply that in determining a penalty, account should be taken of a prior penalty imposed for the same offense.

Commission of the European Communities

In *Christiani and Nielsen*, IV/22548, Official Journal No. L165, p. 12, CCH ¶ 9308, the Commission, on June 18, 1969, granted a negative clearance as to a restrictive agreement between a parent and a wholly-owned subsidiary corporation, on the ground that Article 85, ¶ 1 of the Treaty can apply only when the parties involved are actual or potential

competitors, a condition which does not exist as between a parent and its wholly-owned subsidiary.

In *Paint Manufacturers' Association*, IV/597, Official Journal No. L168, p. 22, CCH ¶ 9312, the Commission, on July 10, 1969, granted a negative clearance as to a quality-control agreement by a group of Dutch paint manufacturers. The only restriction applicable to Common Market countries is that products exported under certain names must meet stated specifications as to technical properties, requirements as to price maintenance and sales conditions being applicable only to exports of non-member countries.

In the case of the *International Quinine Cartel*, IV/26623, Official Journal No. L192, CCH ¶ 9313, the Commission imposed fairly substantial fines (range \$10,000-\$210,000) on the parties to extensive agreements establishing export quotas, allocating markets and fixing prices for quinine and quinine derivatives. The Commission held that domestic statutes of limitations are inapplicable to forestall imposition of fines by the Commission for violations of Article 85 of the Treaty; and that any general principle or prescription or laches, which might be deducible from the existence of statutes of limitation in all of the Common Market countries, was inapplicable in this case in view of the gravity of the violations, the shortness of time between cessation of the violations and commencement of the Commission's investigation, and the expeditiousness with the Commission conducted its investigation after it was advised of the cartel's activities.

In the case of the *Dyestuff Manufacturers* (arising from the same facts as *Wilhelm v. Bundeskartellamt*, noted above), IV/26267, Official Journal No. L195, CCH ¶ 9314, the Commission also imposed fines for price increases resulting from what the defendants contended was conscious parallelism. The Commission noted that the rates of increase were identical and practically simultaneous in all member countries, and held that the increases were concerted. It also noted that the instructions given by the producers to their sales agencies were similarly worded, and that the producers were in the habit of exchanging price information frequently.

In *Clima Chappée-Buderus*, IV-26625, Official Journal No. L195, CCH ¶ 9316, and *Jaz-Peter*, IV/26437, Official Journal No. L195, CCH ¶ 9317, the Commission declared specialization agreements exempt from Article 85, ¶ 1 of the Treaty. Each agreement was between a French and a German firm, and in each agreement each party agreed to limit its production to specified types of the equipment involved (air conditioning in one case, clocks in the other), and named the other party as its exclusive distributor in the other party's home country. The Commission found in each case that the agreement met the exemption requirements of Article

85, ¶ 3 for improvement of production and distribution on a limited basis without elimination of substantial competition.

European Court of Human Rights

On July 23, 1968, the Court of Human Rights, in plenary session, handed down its judgment on the merits in the Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (a preliminary ruling in the case was noted at 2 *International Lawyer* 576).

Six French-speaking Belgians filed complaints with the Commission of Human Rights in the period 1962-64, to the effect that the Belgian law establishing the language of education in the various French-, Dutch- and German-speaking and bilingual sections of the country violates Articles 8(1) and (2) and Article 14 of the European Convention of Human Rights and Article 2 of the [First] Protocol to the Convention. Articles 8(1) and (2) guarantee the right of respect for private and family life, subject to interference only as required in the national interest; Article 14 forbids discrimination on the grounds *inter alia* of language, national or social origin, or association with a national minority; and Article 2 of the Protocol guarantees the right to education in conformity with the parents' religious and philosophical convictions.

The Court, to which the Commission referred the complaints, unanimously rejected most of the complainants' contentions. Construing Article 2 of the Protocol, the Court held that it does not require a State to furnish public education, but does guarantee individual access to such educational institutions as may be provided, and guarantees, further, that such access should be meaningful in the sense that the beneficiary should be enabled to benefit from his education subjectively as well as objectively (by obtaining official recognition of completion of his studies). Subject to these general limitations, Article 2 leaves the States considerable regulatory leeway, specifically in the linguistic area. The Court found that Article 8 of the Convention has only slight specific bearing on the questions presented, but that Article 14 is important since it prohibits discriminatory measures in establishing entrance requirements for public educational institutions. The Court declined, however, to give Article 14 an absolutist reading denying all discrimination as the French text might justify ("sans distinction aucune"). Instead the Court held, in view of the more restrictive English version ("without discrimination"), that complete equality of treatment is not called for, and that distinctions based on objective justifications are permissible if there is a reasonable relationship between the law under consideration and the aim sought to be realized, viewed against the legal and factual background characterizing the society of the State.

Specifically, the Court held that neither Article 2 of the Protocol nor Article 14 of the Convention guarantees to anyone the affirmative right to obtain instruction in a language of his choice, but only freedom from unreasonable discrimination on linguistic grounds.

On the basis of these holdings, the Court found that Belgium's refusal to provide, or to subsidize private schools providing, instruction in a language different from that prevailing in a given region involves no violation of the Convention or the Protocol. The Court had some difficulty with the statutory provisions withdrawing all State subsidies from private schools offering instruction in a language other than the prevailing one in a given region, and requiring graduates of non-subsidized schools to pass a special examination to obtain official "homologation" (necessary for university study) of their diplomas. However, withdrawal of the subsidies was held to be a reasonable concomitant of a lawful governmental policy of encouraging instructions only in the dominant language of the region in which a school is located, to preclude indirect subsidization of education not in conformity with that policy. And the requirement of a special examination (not of excessive difficulty and the fee for which is very small) was found to be necessitated by the fact that non-subsidized schools are not subject to governmental inspection.

The Court also sustained the special provision, justified by the legitimacy of the special objective of maintaining the bilingual character of the University of Louvain despite its location in a Dutch-speaking region, for instruction in French in that region limited to children of French-speaking teaching staff, employees and students of the University. But, by an 8-7 vote, the Court held that the Convention was violated by a provision denying access to French-language schools in the Brussels suburban area, a French-speaking enclave in a Dutch-speaking region, to children of French-speaking families living outside the area; since access to the Dutch-language schools in the area was not similarly restricted to Dutch-speaking children living in the area, the majority of the Court felt that this provision was based solely on considerations relating to language, rather than on any valid policy considerations relating to scholastic, administrative or financial reasons. Excerpted at 8 *International Legal Materials* 825.

