State immunity — Employment — Immunity in disputes arising out of an employment contract with an embassy — United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004 — Article 11(1) and (2)(a) of Jurisdictional Immunities Convention constituting customary international law — Whether employee was employed to perform sovereign activities — Whether determinative — Whether States enjoying immunity regarding disputes with employees performing activities closely functionally related to diplomatic and consular functions of the State — The law of Austria

United States Embassy Employee Case[1]

(Case 9 Ob A37/19k)

Austria, Supreme Court. 28 *November* 2019

Summary:[2] *The facts*:—The plaintiff, an Austrian national, was an employee of the defendant, the United States Embassy in Vienna, from 1974 until her contract of employment was terminated in 2017. Before her contract was terminated, the plaintiff had worked for the Commercial Service, the foreign trade organization of the US Department of Commerce, as a subject specialist for certain industries. Her functions included assisting US companies wishing to enter the Austrian market in various ways, as well as advising Austrian companies on entering the US market.

The plaintiff challenged the termination of her contract before the courts of Austria. The defendant argued that the plaintiff had performed sovereign functions and that it therefore enjoyed State immunity under customary international law as codified in Article 11 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004.

The court of first instance rejected the plea of State immunity, as the plaintiff was not employed in an area in which the defendant acted with sovereign authority. The defendant appealed. The appellate court upheld the appeal and dismissed the lawsuit. It held that, since the scope of functions of the plaintiff consisted of promoting economic relations between the defendant State and Austria, she had been involved in the fulfilment of one of the official core tasks of a diplomatic mission within the meaning of Article 3(1)(e) of the Vienna Convention on Diplomatic Relations, 1961. The plaintiff's activities

[1] The plaintiff was represented by Mag Dr Markus Vetter, and the defendant was represented by CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH.

[2] Prepared by Mr P. Janig.

https://doi.org/10.1017/ilr.2022.30 Published online by Cambridge University Press

had therefore also been sovereign and the defendant had correctly invoked its State immunity. The plaintiff appealed.

Held:—The appeal was dismissed. The United States enjoyed immunity in proceedings arising out of an employment relationship with an employee engaged in sovereign activities.

(1) In the absence of an applicable treaty, the matter of State immunity for actions arising out of employment relationships had to be assessed on the basis of customary international law. The pertinent norm was codified in Article 11 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004 (paras. 22-31).

(2) Under customary international law, a State might invoke immunity in employment proceedings if an employee were employed to perform certain functions in the exercise of sovereign authority. Thus, courts did not have to assess exclusively the nature of the transaction, but also the purpose of the work of the employee. The content of an employee's activities and, with regard to diplomatic or consular staff, their functional connection with the diplomatic or consular duties of the sending State were determinative. These diplomatic and consular functions followed from Article 3 of the Vienna Convention on Diplomatic Relations, 1961 and Article 5 of the Vienna Convention on Consular Relations, 1963. They included the promotion and development of commercial and economic relations between the sending State and the receiving State. To the extent that the functions of the employee were closely related to the diplomatic and consular activities of the State, they were to be considered sovereign (paras. 32-41).

The following is the text of the decision of the Court:[3]

DECISION

[1] The appeal is not granted.

[2] The plaintiff is obliged to reimburse the defendant for the costs of the appellate proceedings in the amount of EUR 1,489.86 (including EUR 248.31 VAT) within 14 days.

TEXT

[3] The plaintiff is an Austrian national. Since 1974 she was an employee of the embassy of the respondent in Vienna. The employment was terminated by a letter delivered to the plaintiff on 17 March 2017.

[3] The paragraph numbers have been inserted by the editors.

https://doi.org/10.1017/ilr.2022.30 Published online by Cambridge University Press

[4] Following her initial employment in the administration as a telephone operator and in the secretariat, the plaintiff at first worked in the Economic and Trade Bureau, attached to the US Department of State. This was subsequently outsourced and taken over by the "Commercial Service", the foreign trade organization of the US Department of Commerce. The Commercial Service constitutes a small unit within the American embassy in Austria. The plaintiff worked for the Commercial Service and was indirectly subordinate to the Head of the Commercial Affairs Department; in some instances she reported directly to him. She was a subject specialist for the IT-Telecom, Tourism and Aviation industries and some smaller departments. She had to coordinate her decisions with superiors through an approval procedure. Her name appeared in correspondence with Austrian companies; in correspondence with the defendant, documents were prepared by the embassy counsellor or the chargé d'affairs.

[5] A job description of the plaintiff from 2003 states, with regard to the basic functions of the position, among other things:

> Serves as trade expert of the trade department in Austria and has area responsibility for the main areas of information technology, which includes network hardware and services, internet services, aviation and defence as well as travel and tourism, and develops strategies for companies wishing to enter the global market. Supports US companies to export to Austria, by identifying local buyers, agents/retailers and subsequently developing a market entry strategy. Provides information regarding tariff regulations, licensing requirements, trade restrictions, trade regulations, as well as relevant laws and technical information on specific products that facilitate product entry into Austria. Recommends to company representatives Austrian government officials and business people to meet, attends meetings with them and advocates for them as appropriate. . . . Maintains a wide range of contacts with key officials in the course of these areas and in key ministries of the Austrian government. Conducts research and prepares factual and analytical reports on various issues impacting US exports and trade in assigned sectors. Examines and seeks to resolve trade complaints in assigned sectors. Conducts comprehensive advocacy campaigns for major government procurement projects in assigned industry sectors. Organizes seminars, workshops and conferences for assigned industries, this including recruiting US companies, keynote speakers, sponsors and multipliers to promote US products and services in Austria. Prepares presentations and scenarios for the ambassador as part of assigned projects.

[6] Part of the functions of the plaintiff was to attempt to remove market barriers for US companies in Austria. One of her main agendas recently was to deal with lifting the ban on direct sales of American cosmetic products in Austria. She assisted American companies in

https://doi.org/10.1017/ilr.2022.30 Published online by Cambridge University Press

bringing their products to market, finding a distributor or other trading partner and promoting products. On the internet, on websites attributable to the defendant, the contact details of the plaintiff and of the responsible embassy counsellor as well as the responsibilities for the individual industry sectors were visible, which is why the plaintiff was also contacted directly. She also held ongoing discussions with the competent Austrian authorities. In the case of customs-related questions, she obtained information and forwarded it. Where necessary, she also made inquiries to the attaché in Brussels and forwarded this information.

[7] The Commercial Service organized events such as workshops and seminars in Austria with Austrian partners such as the Federation of Austrian Industries (*Industriellenvereinigung*), the Austrian Economic Chambers and Austrian banks. The plaintiff obtained cost estimates for such events, determined the budget and calculated the contribution to the costs for the US companies. After approval by supervisors, she commissioned Austrian companies. The Commercial Service organized trade shows in the US, with the goal of recruiting Austrian companies to participate therein, and provided logistics on-site in the US. This involved arranging appointments, providing translations and offering arrangements through Austrian travel agencies.

[8] As a "Control Officer for Visitors of the Department of Commerce for the Ministerial Councillor, the Ministerial Director and for the Ambassador and the Chargé d'Affaires at events held in Austria" she prepared the programme at the level of an embassy counsellor, coordinated appointments and accompanied persons to appointments, at which she performed necessary translations, for example in connection with bilateral talks to remove trade barriers.

[9] In the "Visit USA Committee", which was founded to promote tourism in the US, the plaintiff represented the embassy counsellor for trade as a member of the board. In this capacity, she drafted strategies and marketing plans for the promotion of tourism in the US.

[10] In the present action, the plaintiff challenges her termination pursuant to Sec 105(3) No 1 lit 1 and No 2 Labour Constitution Act (*ArbVG*). She argues that sovereign immunity does not apply to disputes arising from employment contracts with employees of diplomatic missions. She had not been authorized to perform sovereign functions. Her functions had included advising Austrian companies/investors wishing to establish a permanent establishment/branch in the defendant state, as well as assisting companies from the defendant state with market entry barriers or advising and assisting such companies

https://doi.org/10.1017/ilr.2022.30 Published online by Cambridge University Press

with various Austrian distribution models and the related tax issues. The termination was unacceptable on social grounds and invalid due to a proscribed motive.

[11] The defendant contested that and raised the objection of lack of jurisdiction. It therefore relied on its state immunity. The plaintiff had been hired as a "Commercial Specialist" in the field of information technology for the defendant in Austria. Her functions included among others the promotion of economic relations between the defendant and Austria. She was responsible for maintaining contacts with officials and employees of the Austrian government and ministries. The scope of her functions had included developing strategies concerning the market entry of companies of the defendant and their support in entering the market. The plaintiff had been active in the field of "economic diplomacy". The scope of these functions was not to be considered part of private sector activities, but fell under the term "sovereign activities". The defendant thus enjoyed immunity pursuant to Art. 11(2)(a) of the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004. Moreover, according to Art. 11(2)(c) of the Convention, a state may also invoke its immunity if the subject matter of the proceedings is the renewal of employment or reinstatement of an individual. That was the case here, as the action sought the "retroactive" restoration of the employment relationship. These provisions were applicable as customary international law irrespective of the ratification of the Convention.

[12] The *court of first instance*, after a separate hearing, rejected the plea of lack of jurisdiction and immunity. There were no indications that the plaintiff was employed in an area in which the defendant acted with sovereign authority. The United Nations Convention on Jurisdictional Immunities of States and Their Property was not yet in force due to a lack of sufficient ratification. Moreover, the subject of the proceedings was not the recruitment, renewal of employment or reinstatement of an individual, but the request to declare the notice of termination to be invalid. In such a case, the defendant could only invoke its immunity if the proceedings were against its security interests, which is not the case.

[13] The *appellate court* upheld the appeal of the defendant against that decision and dismissed the lawsuit. Foreign states could invoke their immunity before foreign courts to the extent that the acts concerned had been performed by them in the exercise of sovereign authority. In legal disputes arising from relationships under private law, on the other hand, they were subject to domestic jurisdiction. The delineation was based on general international law. The United

https://doi.org/10.1017/ilr.2022.30 Published online by Cambridge University Press

Nations Convention on Jurisdictional Immunities of States and Their Property had not yet entered into force as the required number of ratifications had not occurred, but it was regarded as a codification of existing customary international law. Art. 11 contained a separate provision concerning employment contracts, which distinguished, among other things, whether the activities of the employee were to be considered part of the sovereign or the private sphere. In short, the scope of functions of the plaintiff consisted of promoting economic relations between the defendant and Austria. Thus, she had been involved in the fulfilment of one of the official core tasks of a diplomatic mission within the meaning of Art. 3(1)(e) of the Vienna Convention on Diplomatic Relations. Therefore, her activities had also been sovereign, which was why the defendant had correctly invoked its state immunity.

[14] The appellate court allowed the appeal to the Supreme Court, as the decision departed from the previous case law of the Supreme Court and there was no case law yet on the question whether the United Nations Convention as customary international law could be taken as a basis.

[15] The plaintiff's appeal is directed against that decision, with the request to restore the decision of the court of first instance.

[16] The defendant requests to dismiss the appeal, in the alternative to reject it.

LEGAL REASONING

[17] The appeal is admissible for the reasons stated by the appellate court, however it is not justified.

[18] 1. State immunity in a general sense refers to the principle recognized under customary international law that a state is not subject to the national jurisdiction of foreign states. Deriving from the principle of the sovereign equality of states, the basic legal principle is that states may not sit in judgment on one another. However, the law of general state immunity has undergone a transformation from an absolute to a mere relative right, not least because of the increasing cross-border commercial activities of state authorities. Only sovereign acts, *acta iure imperii*, enjoy the protection of immunity, while a state is procedurally on equal terms with a private economic actor with regard to other activities, *acta iure gestionis* (Höfelmeier, *Die Vollstreckungsimmunität der Staaten im Wandel des Völkerrechts* 16). It is no longer a general rule of international law that a state enjoys

https://doi.org/10.1017/ilr.2022.30 Published online by Cambridge University Press

immunity also for non-sovereign acts. Immunity is not granted for private economic activities and private economic assets (see Reinisch [ed.], *Handbuch des Völkerrechts* [5th edn] [2013], VI MN 1557). However, state immunity still exists to a large extent without restriction for those acts that constitute sovereign acts of a state. Acts of a state that have sovereign character are thus not subject to the national jurisdiction of the forum state.

[19] 2. It is correct that the Supreme Court has repeatedly considered in its case law that a foreign state, which acts like an entity under private law (*Privatrechtsträger*) when concluding employment or work contracts to be performed in Austria, may be sued under that contractual relationship and that the performance of the work itself, rather than its purpose, must be taken into account (9 ObA 170/89; 9 ObA 244/90; 1 Ob 100/98g).

[20] In its decision 9 ObA 170/89, for instance, the Supreme Court pointed out that in applying the generally recognized rule of international law and Art. 9 of the Introductory Law to the Law on Jurisdiction (*EGJN*), foreign states are exempt from jurisdiction in the exercise of their sovereign function. If, on the other hand, the foreign state acted like an entity under private law, for example when concluding an employment contract for work to be performed in Austria, it can be sued in Austria under that contractual relationship.

[21] That decision was criticized by Seidl-Hohenveldern (ZfRV 1990, 302 ff). The supreme principles of consular and diplomatic law were to maintain the ability of the mission to function "*ne impediatur legatio*". With reference to the regulations and case law in other states, he concludes that the determinative factor in granting immunity is whether or not the employee was entrusted with the exercise of sovereign functions. If the employee exercises sovereign functions, the forum state may not interfere in disputes arising from that relationship.

[22] 3. The assessment of the question to what extent states enjoy immunity must primarily be based on existing international law, thus, in the absence of treaty norms, on customary international law.

[23] The attempts to codify immunity in treaty law have led to the adoption of the "United Nations Convention on Jurisdictional Immunities of States and Their Property" by the United Nations General Assembly on 2 December 2004. According to Art. 30 of the Convention, it enters into force on the thirtieth day after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. As this has not yet occurred, the Convention—unless it reflects existing customary

https://doi.org/10.1017/ilr.2022.30 Published online by Cambridge University Press

international law—has no binding effect. It is also true that the defendant has not ratified the Convention, but Austria has.

[24] 4. Thus it is to be examined to what extent the Convention, in so far as it may be of relevance for the present case, constitutes customary international law.

[25] Art. 11 of the Convention reads:

Contracts of employment

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform particular functions in the exercise of governmental authority;

. . .

(c) the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;

(d) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;

. . .

[26] The appellate court assumed that Art. 11 of the Convention is to be considered customary international law. In response, the plaintiff's only objection is that the Convention did not enter into force and that the defendant could not rely on the argument that an agreement, which it did not sign itself, has binding effect on the basis of customary international law. However, these arguments are not convincing, as customary international law is precisely not derived from a treaty obligation, but emanates from a general legal conviction and practice in absence of such an obligation.

[27] In the materials on the approval of the Convention by Austria it is pointed out that the Convention represents a codification of existing customary international law (RV 1161 BlgNR 22. GP 1). Irrespective of the extent to which these materials may be used to interpret the treaty, this reference shows that the Austrian legislator considers the provisions of the Convention to be binding even without the ratifications required for entry into force.

https://doi.org/10.1017/ilr.2022.30 Published online by Cambridge University Press

[28] The legal view that Art. 11 of the Convention in particular constitutes customary international law has repeatedly been held by the European Court of Human Rights (ECtHR). In its judgment of 23 March 2010 (GC), Application No 15869/02, *Cudak* v. *Lithuania*, in which a violation of Art. 6 ECHR had to be assessed, the ECtHR pointed out that measures of a contracting state that reflect a generally recognized rule of international law on state immunity could not generally be considered a disproportionate restriction of the right of access to a court. The granting of state immunity in civil proceedings pursues the legitimate aim of promoting comity and good bilateral relations between states.

[29] In its deliberations, the Court considered that the United Nations Convention, which in Art. 11 in principle excludes—with some exceptions—state immunity with regard to employment contracts of embassy employees, had not yet entered into force due to the lack of sufficient ratifications. At the same time, however, it ascertained the customary status of Art. 11 of the Convention. The Convention was therefore also applicable in the relationship with a state which had not yet ratified it, but which had not objected to it either.

[30] The ECtHR continued this jurisprudence in the judgment of 29 June 2011 (GC), Application No 34869/05, *Sabeh El Leil* v. *France*. It repeated that Art. 11 of the Convention, as customary international law, was also applicable to states which have not ratified the Convention and have not objected to it. It further examined whether the exceptions in Art. 11 were applicable, in particular whether the applicant was employed to perform functions in the exercise of sovereign authority.

[31] 5. The ECtHR is to be followed in that Art. 11 of the Convention, in so far as it is of relevance for the present case, must be taken into account and examined as customary international law, also in respect to Art. 6 ECHR. However, this not only concerns the admissibility in principle of actions arising from employment relationships, but also requires, in so far as the state sued invokes it, the examination of the exceptions stipulated by it, in the present case that the employee was hired to perform certain functions in the exercise of sovereign authority.

[32] This is in line with the fact that the European Court of Justice, in its judgment of 19 July 2012, C-154/11, *Ahmed Mahamdia* v. *Algeria*, also assumed that in view of its content, the international law principle of state immunity was not opposed to the application of Regulation No 144/2001 to a dispute in which an employee seeks

https://doi.org/10.1017/ilr.2022.30 Published online by Cambridge University Press

remuneration and contests the termination of his employment concluded with a state, if the court seized of the case finds that the activities performed by the employee do not fall within the exercise of sovereign authority or if the action cannot conflict with the security interests of the state (para. 56).

[33] The appellate court thus correctly assumed that a state may invoke immunity from jurisdiction in proceedings before another state, if the employee was employed to perform certain functions in the exercise of sovereign authority (see Art. 11(2)(a) of the Convention).

[34] 6. Thus, for the examination of immunity it is also decisive whether the functions assigned to the employee are sovereign or not sovereign in nature. The content of the activities carried out as well as their—existing or non-existing—functional connection with the diplomatic or consular duties of the pertinent state are determinative. According to Art. 38(2) of the Vienna Convention on Diplomatic Relations, Federal Law Gazette No 1966/66, the receiving state in exercising its jurisdiction may not unduly interfere with the performance of their functions.

[35] According to Art. 3(1)(d) and (e) of the Vienna Convention on Diplomatic Relations, it is the function of a diplomatic mission to ascertain by all lawful means conditions and developments of the receiving state and report thereon to the government of the sending state, as well as to promote, inter alia, economic relations between the sending state and the receiving state. Moreover, diplomatic missions may also perform consular functions (see Art. 3(2)). According to Art. 5(b) and (c) of the Vienna Convention on Consular Relations, Federal Law Gazette No 1969/318, consular functions consist in, inter alia, furthering the development of commercial and economic relations between the sending state and the receiving state as well as ascertaining by all lawful means conditions and developments in the commercial and economic life of the receiving state, reporting thereon to the government of the receiving state and giving information to interested persons.

[36] In accordance with these provisions, the promotion of the development of commercial and economic relations between the sending state and the receiving state must therefore be regarded as the core area of consular activity. The function of diplomatic missions, contained in Art. 3(1)(e) of the Vienna Convention on Diplomatic Relations, to promote and develop economic relations between the sending state and the receiving state is an informational, mediatory and general activity of trade promotion, which also includes arranging business contacts with potential economic partners in the host state (see

https://doi.org/10.1017/ilr.2022.30 Published online by Cambridge University Press

Richtsteig, *Wiener Übereinkommen über diplomatische und konsularische Beziehungen* [2nd edn], Art. 3, 20; Wagner/Raasch/Pröpstl/Oelfke, *Wiener Übereinkommen über diplomatische Beziehungen*, 92).

[37] 7. The activities of the plaintiff essentially served to deepen economic relations between the defendant and Austria, by, on the one hand, advising and supporting American companies to distribute their products in Austria, and, on the other hand, recruiting Austrian companies for the American market, for instance for trade fair visits. At the same time, she was involved with Department of Commerce visits, events organized by the defendant in cooperation with important Austrian partners, as well as efforts to have market restrictions removed.

[38] These activities admittedly do not concern the core area of state activities. However, the functions of the plaintiff are closely functionally related to the diplomatic as well as consular and thus sovereign activities of the defendant.

[39] 8. In the appeal, the plaintiff also does not dispute that her functions may be subsumed under Art. 3(1)(e) of the Vienna Convention on Diplomatic Relations, as assumed by the appellate court. She only objects to taking account of Art. 3 in interpreting "sovereign activities", although she does not explain in more detail why, in her view, the functions of a diplomatic mission defined in this provision should not have a sovereign character.

[40] 9. In summary, it must therefore be assumed that Art. 11(1) and (2)(a) of the United Nations Convention on Jurisdictional Immunities of States and Their Property constitute customary international law and are to be taken into account when examining the immunity of the state in actions brought by employees. Therefore—in a departure from previous case law—it is no longer exclusively the nature of the transaction, the provision of services, but also the purpose of the work, the existence of a sovereign activity, that is decisive.

[41] The appellate court thus correctly assumed that the defendant may invoke its immunity, based on customary international law codified in the exception of Art. 11(2)(a) of the United Nations Convention on Jurisdictional Immunities of States and Their Property.

[42] It is therefore no longer necessary to examine whether the plaintiff's request for a declaration of the invalidity of the termination also falls within the scope of exception codified as customary international law in Art. 11(2)(c) of the United Nations Convention on Jurisdictional Immunities of States and Their Property, as it seeks to maintain the employment relationship.

https://doi.org/10.1017/ilr.2022.30 Published online by Cambridge University Press

[43] The appeal was thus to be denied.

[44] 10. The decision on costs is based on Sec 41, 50 Code of Civil Procedure (*ZPO*).

[Report: Unofficial translation by Mr Philipp Janig prepared for 24 *ARIEL* (2019) 203, revised (German original)]

https://doi.org/10.1017/ilr.2022.30 Published online by Cambridge University Press