

November 2005

AUSTRIA

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| (a) | Registration no. | A/1 |
| (b) | Date | 10 May 1950 |
| (c) | Author(ity) | Supreme Court (Oberster Gerichtshof), judgment |
| (d) | Parties | Hoffmann Dralle(individual) vs. Czechoslovakia (State) |
| (e) | Points of law | Pursuant to international and Austrian law Foreign States are exempted from Austrian jurisdiction only in relation to acts of a ius imperii character. |
| (f) | Classification no. | O.b.3., 1.b, 2.b |
| (g) | Source(s) | No. 1Ob167/49 and 1Ob171/1950; Austrian legal information system (see: http://www.ris.bka.gv.at - Rechtsinformationssystem – Judikatur Justiz (OGH); see as well: Grotius International Law Reports Volume 17 p 155 |
| (h) | Additional information | similar decisions:1Ob622/49; 1Ob130/50; 2Ob21/48; 2Ob448/50;1Ob264/52; 2Ob243/60; 5Ob343/62;5Ob56/70;3Ob38/86;9ObA170/89;9ObA244/90; 7Ob627/91; 1Ob28/92; 1Ob100/98g; 8ObA201/00t; 4Ob97/01w |
| (i) | Full text - extracts - translation - summaries | Summary English: see below Full text: Appendix A/1 * |

Summary:

The appellant (Mr. Hoffmann) was the representative in Austria of the German firm of G. Dralle which owned certain trade marks registered in Austria and which were applied to goods manufactured by them and offered for sale by the appellant in Austria. A branch office of the Hamburg firm in Bohemia was the owner of the mentioned trade marks registered in the Austrian register. In 1945 the branch office was nationalized. The nationalized firm requested the appellant's customers in Austria not to offer for sale under the mentioned trade marks any of the goods supplied by the appellant. Mr. Hoffmann applied for an injunction to restrain the Czechoslovak firm (the respondent) from using the mentioned trade marks in Austria. The respondent claimed to be immune from Austrian jurisdiction and to be entitled in any case to use the trademarks concerned.

1 The supreme Court stated that the question whether a foreign State can be subject to jurisdiction of another State has not been answered in a uniform manner by Austrian and foreign courts. Some countries stuck to the concept of absolute immunity others only in the context of acts of ius imperii character. Thus there was no generally accepted rule in international law establishing the concept of absolute immunity of foreign States. The Supreme Court stated further that in the present case the respondent's claim to immunity concerned commercial and not political activities of a foreign sovereign State and thus the respondent was subject to Austrian jurisdiction. The Czechoslovak nationalization decree was only valid in the territory of Czechoslovakia and had no extraterritorial effect. Accordingly the respondent was not entitled to use trademarks owned by its predecessor in Austria. The Supreme Court decided that in result the appellant was entitled to an injunction restraining the respondent from using the trade marks in Austrian territory.

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| (a) | Registration no. | A/2 |
| (b) | Date | 30 April 1986 |
| (c) | Author(ity) | Supreme Court (Oberster Gerichtshof), judgment |
| (d) | Parties | L-W Verwaltungsgesellschaft mbH&Co.KG (individual) vs. D V A (State) |
| (e) | Points of law | The Court establishes that execution of a judgment on a running account of an embassy is only exceptionally permitted if the plaintiff proves that the account serves exclusively for private purposes of the embassy. |
| (f) | Classification no. | O.b., 1.b, 2.b |
| (g) | Source(s) | No. 30b38/86, Austrian legal information system (see: http://www.ris.bka.gv.at - Rechtsinformationssystem – Judikatur Justiz (OGH); see as well: Grotius International Law Reports Volume 77 p 489 |
| (h) | Additional information | see as well judgment of the Supreme Court no. 6 0b 126/58 |
| (i) | Full text - extracts - translation - summaries | Summary English: see below Full text: Appendix A/2 * |

Summary:

The plaintiff held a default judgment against the Democratic Republic of A. The judgment was subsequently declared enforceable and the plaintiff obtained an attachment order on a bank account held by the embassy of the D. R. of A. in Vienna. The D. R. of A. appealed against the attachment in reliance on a certificate issued by its embassy in Vienna which stated that the bank account in question was an official account allocated for the performance of sovereign functions.

The Court of Appeal held that in these circumstances the bank account was not subject to attachment. The judgment was confirmed by the Supreme Court. Contrary to its previous view (see judgement no. 6 0b 126/58) the Supreme Court found that although there was no rule in international law which prohibits execution against foreign States in general, there is such rule as to the execution on property which serves the performance of sovereign (embassy) functions.

Due to the difficulties involved in judging whether the ability of a diplomatic mission to function was endangered international law gave wide protection to foreign States and referred to the typical, abstract danger to the ability of the mission to function and not to the specific threat in a particular case. Thus operating accounts of embassies were not subject to execution without the consent of the State concerned, unless the plaintiff proves that the account serves exclusively for private purposes of the embassy.

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| (a) | Registration no. | A/3 |
| (b) | Date | 21 November 1990 and 13 September 1994 |
| (c) | Author(ity) | Supreme Court (Oberster Gerichtshof), judgment, and Administrative Court (Verwaltungsgerichtshof), decision |
| (d) | Parties | R. W. (individual) vs. Embassy of X. (State) |
| (e) | Points of law | Employment contracts between foreign missions in Austria (States) and Austrian employees are subject to Austrian jurisdiction. |
| (f) | Classification no. | O.b.2., 1.b, 2.b |
| (g) | Source(s) | No. 9ObA244/1990 (Supreme Court) and No.93/09/0346 (Adm. Court), Austrian legal information system (see: http://www.ris.bka.gv.at-Rechtsinformationssystem – „Judikatur Justiz OGH“and „Verwaltungsgerichtshof“) |
| (h) | Additional information | similar decisions: see No. 04/01/0260-11 (Administrative Court, 29 April 1985), No. 98/08/0127 (Administrative Court, 12 October 1998). |
| (i) | Full text - extracts - translation – summaries | Summary English: see below Full text: Appendix A/3 * |

Summary:

An individual employed locally as a photographer by a foreign embassy in Vienna filed a suit against her employer who had issued a notice terminating her contract arguing that the employer had not observed the relevant provisions of Austrian industrial law. The defendant appealed to the Supreme Court claiming immunity. The Court noted that the employment contract in this case was a legal relationship under private law in respect of which a foreign State was subject to Austrian jurisdiction by virtue of the rules of both international and Austrian law. The Supreme Court noted as well that international organisations enjoyed more far-reaching privileges and immunities than States, the immunity of international organisations arose from the relevant international agreements and intended to protect international organisations from interference of States. The same case was dealt with by the Administrative Court, which agreed to the view of the Supreme Court as to the applicability of Austrian industrial law in this case.

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| (a) | Registration no | A/4 |
| (b) | Date | 10 February 1961 |
| (c) | Author(ity) | Supreme Court (Oberster Gerichtshof), judgment |
| (d) | Parties | X:Y. (individual) vs. Embassy of X (State) |
| (e) | Points of law | The Court establishes that driving a government owned vehicle for official purposes is not an act of ius imperii character |
| (f) | Classification no./n° | O.b.1, 1.b, 2.b |
| (g) | Source(s) | No. 2Ob243/60, Austrian legal information system (see: http://www.ris.bka.gv.at); see as well: Grotius International Law Reports Volume 40 p 73) |
| (h) | Additional information | judgement of the Supreme Court No. 1Ob167/49 and 1Ob171/1950 |
| (i) | Full text - extracts - translation – summaries | Summary English: see below Full text: Appendix A/4 * |

Summary:

The plaintiff's car was damaged in a car accident with a vehicle owned by the Government of the United States (defendant). The defendant contended that since at the time of the accident the car was carrying diplomatic mail, the act was of ius imperii character and the case was therefore not subject to Austrian jurisdiction. The Supreme Court reiterated its view previously expressed in *Dralle vs Republic of Czechoslovakia* that a distinction must be drawn between *acta iure imperii* and *acta iure gestionis* and that in respect of the latter a foreign State is subject to Austrian jurisdiction. In determining whether an act was *iure imperii* or *iure gestionis* the Court stated that the act itself and not the purpose for which it was performed had to be considered. In the present case the US Government had operated a vehicle on a public road, an act which could be performed as well by an individual. Therefore the case was subject to Austrian jurisdiction.

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| (a) | Registration no. | A/5 |
| (b) | Date | 23 February 1988 |
| (c) | Author(ity) | Supreme Court (Oberster Gerichtshof), decision |
| (d) | Parties | X.Y. (individual) vs. X (State) |
| (e) | Points of law | The construction as well as the operation of nuclear power plants is not an act of ius imperii but of ius gestionis character and therefore not excluded from national jurisdiction. |
| (f) | Classification no. | O.b., 1.b, 2.b |
| (g) | Source(s) | No.5Nd509/87, Austrian legal information system (see: http://www.ris.bka.gv.at) and Austrian Journal of Public and International Law, Vol. 39, 1988/89 p.360 |
| (h) | Additional information | |
| (i) | Full text - extracts - translation - summaries | Summary English: see below Full text: Appendix A/5 * |

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Summary:

The plaintiff, owner of a real estate in Austria, claimed the omission of the construction of a nuclear power plant in a neighbouring State, arguing that already in normal operation the effects would be above the standards customary in place. Jurisdiction *ratione loci* was not given. The plaintiff requested the Supreme Court to determine which court was competent *ratione loci* pursuant to section 28 of the Austrian law concerning the jurisdiction of courts in civil law matters, RGBL. 111/1895 as most recently amended, BGBl. I Nr. 98/2001. The Supreme Court decided that the request was justified and stated that legal proceedings in the State concerned were unreasonable for the claimant and obviously not possible, as there the problem under consideration was treated a public law problem and from acts *iure imperii* no civil obligations could arise. The Supreme Court stated further that the question of whether an act is of *iure imperii* or *iure gestionis* character needed to be assessed according to general international and not national law. The construction as well as the operation of a nuclear power plant were in the area of *iure gestionis* and therefore not excluded from national (Austrian) jurisdiction.

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| (a) | Registration no. | A/6 |
| (b) | Date | 14 June 1989 |
| (c) | Author(ity) | Supreme Court (Oberster Gerichtshof), judgment |
| (d) | Parties | N. P. (individual) vs. R. F. (State) |
| (e) | Points of law | The European Convention on State Immunity is only applicable if both the State against which legal action is taken and the State in which the procedure takes place are parties to the convention |
| (f) | Classification no. | O.b.2, 1.b, 2.b |
| (g) | Source(s) | No. 9ObA170/89, Austrian legal information system (see: http://www.ris.bka.gv.at - „Judikatur Justiz, OGH“) |
| (h) | Additional information | see as well No. 30b38/86 (Supreme Court) |
| (i) | Full text - extracts - translation - summaries | Summary English: see below Full text: Appendix A/6 * |

Summary:

An individual employed locally by a foreign consulate in Austria filed a suit against her employer for payment of overtime and vacation compensation. The defendant claimed immunity pursuant to the Vienna Convention on Consular Relations and the European Convention on State Immunity. The Court noted that the first convention was not applicable as the plaintiff had a contract with the sending State and not with a consular officer. The European Convention on State immunity could only be applied if both the State against which legal action is taken and the State in which the procedure takes place were parties to the convention, which was not the case. The Court reiterated its view that employment contracts of this kind were a legal relationship under private law in respect of which a foreign State was subject to Austrian jurisdiction by virtue of the rules of both international and Austrian law.

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| (a) | Registration no. | A/7 |
| (b) | Date | 23 January 2001 |
| (c) | Author(ity) | Regional Court Vienna as appellate Court (Landesgericht Wien), judgment |
| (d) | Parties | E. AG Wien (individual) vs. L (State) |
| (e) | Points of law | The conclusion of a rental lease by a foreign State is a relationship under private law, even if the rented real estate is used for the location of the embassy of that State. |
| (f) | Classification no. | O.b.1, 1.b, 2.b |
| (g) | Source(s) | 40/R7/01b, Austrian legal information system (see: http://www.ris.bka.gv.at - Judikatur, Justiz LG) |
| (h) | Additional information | |
| (i) | Full text - extracts - translation - summaries | Summary English: see below Full text: Appendix A/7 * |

Summary:

The landlord (plaintiff) took legal action against the tenant (a State) who was in arrears with the payment of rent. The defendant argued that the real estate had been rented to accommodate its embassy in Vienna and that the conclusion of the lease contract was therefore in performance of sovereign function and the case not subject to Austrian jurisdiction. The Regional Court of Vienna noted that for determining whether an act was iure imperii or iure gestionis the act itself and not the purpose for which it was performed had to be considered. The conclusion of a rental lease by a foreign State needed to be qualified as a relationship under private law, even if the rented real estate is used for official purposes (location of the embassy) of that State. Therefore the case was subject to Austrian jurisdiction.

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| (a) | Registration no. | A/8 |
| (b) | Date | 11 June 2001 |
| (c) | Author(ity) | Supreme Court (Oberster Gerichtshof), decision |
| (d) | Parties | R. W. (individual) vs. US (State) |
| (e) | Points of law | The denial of a State to comply with a request of service of a legal documents is an act of ius imperii character. |
| (f) | Classification no. | O.a, 1.a, 2.a |
| (g) | Source(s) | No. 8ObA201/00t, Austrian legal information system (see: http://www.ris.bka.gv.at -, „Judikatur Justiz, OGH“) |
| (h) | Additional information | |
| (i) | Full text - extracts - translation - summaries | Summary English: see below Full text: Appendix A/8 * |

Summary:

The plaintiff filed a suit against the US (her employer) for compensation for damages arising from her employment contract. The Court requested the Federal Ministry of Justice to forward the respective legal documents through diplomatic channels to the defendant (US Department of Justice).

The documents were left with the Department of State by the driver of the Austrian Embassy in Washington, the signature on the acknowledgement of receipt was not readable. The defendant claimed immunity referring to a note verbale of its embassy and failed to appear before the Court. The plaintiff requested a default judgment. The Court did not comply with this request, arguing that there was no sufficient proof that the action and the summon had been served on the defendant correctly. The Appellate and the Supreme Court stated that according to international law the implementation of letters rogatory or their denial was an act of *ius imperii* character and the case therefore not subject to Austrian jurisdiction. In determining whether an act was *iure imperii* or *iure gestionis* the Court repeated its view previously expressed (see A/4) that the act itself and not the purpose for which it was performed had to be considered.

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| (a) | Registration no. | A/9 |
| (b) | Date | 14 February 2001 |
| (c) | Author(ity) | Supreme Court (Oberster Gerichtshof), decision |
| (d) | Parties | A. W. (individual) vs. J.(H).A. F.v.L.(Head of State) |
| (e) | Points of law | An incumbent Head of State against whom legal action for the declaration of paternity is taken in a foreign State is immune from jurisdiction of that State unless it impossible to sue the Head of State concerned in his home country |
| (f) | Classification no. | 1.a, 2.a |
| (g) | Source(s) | No. 70b316/00x, Austrian legal information system (see: http://www.ris.bka.gv.at - „Judikatur Justiz, OGH“) |
| (h) | Additional information | |
| (i) | Full text - extracts - translation - summaries | Summary English: see below Full text: Appendix A/9 * |

Summary:

The plaintiff brought an action against an incumbent head of State as well as against his sister and two brothers and applied for a declaration of paternity.

The first defendant claimed immunity. The District Court dismissed the application. The Regional Court as Court of Appeal affirmed the judgment of the District Court concerning the question of absolute immunity of foreign heads of States. The plaintiff finally lodged an appeal with the Supreme Court. She argued that the right of a person to a declaration of paternity by a court took precedence over immunity. Even if the first respondent, due to its immunity, did not fall under the jurisdiction of Austrian courts, the plaintiff had to be granted a right to redress against the other respondents.

The Supreme Court stated that an essential principle deriving from international law was that foreign heads of State, by virtue of their office (*ex officio*) and at least during the term of their office “*ratione materiae*”, were exempt from the jurisdiction of other States. They were also exempt from the jurisdiction of other States with regard to private acts “*ratione personae*” (absolute immunity). The Supreme Court noted that the first defendant therefore enjoyed immunity and was not subject to Austrian jurisdiction. This was not true for the other defendants who do not live in the same household with the head of State concerned.

The Supreme Court further stated that only if legal action against an incumbent head of State in his home country is impossible the right of declaration of paternity might - under the aspects of humanitarian law - precede the relevant principles of international law concerning immunity of heads of State.

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| (a) | Registration no. | A/10 |
| (b) | Date | 14 May 2001 |
| (c) | Author(ity) | Supreme Court (Oberster Gerichtshof), decision |
| (d) | Parties | K. S. (individual) vs. Kingdom of B. (State) |
| (e) | Points of law | The Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (Lugano Convention 1988) creates a system of international jurisdiction and does not refer to the immunity of states and diplomatic agents. Claims which arise from iure imperii acts and state liability are excluded from this convention. Art. 11 of the European Convention on State immunity does not cover compensation for immaterial damage. The distinction between acts iure imperii and iure gestionis is irrelevant in this context. |
| (f) | Classification no. | 0.a, 1.a, 2.a |
| (g) | Source(s) | No. 40b97/01w, Austrian legal information system (see: http://www.ris.bka.gv.at - „Judikatur Justiz, OGH“) |
| (h) | Additional information | |
| (i) | Full text - extracts - translation - summaries | Summary English: see below Full text: Appendix A/10 * |

Summary:

An Austrian citizen filed an action against the Kingdom of B. claiming inter alia compensation of damages which arose from the sanctions imposed by Austria's 14 EU partners claiming that the call to boycott and the decision to impose sanctions on Austria were not iure imperii acts and that the Kingdom of B. was therefore subject to Austrian jurisdiction. The Kingdom of B. claimed immunity. The Supreme Court noted that the question whether and under which conditions legal action can be taken against a foreign State was ruled both by international customary and treaty law. One of such international treaties was the European Convention on State immunity. Both the Kingdom of B. and Austria are parties to the convention, but Article 11 of this convention was not applicable (as claimed by the plaintiff) as it did not cover immaterial damage. Therefore the Kingdom of B. was immune from Austrian jurisdiction according to Article XV of the mentioned convention. The Court noted further that there was no distinction between acts iure imperii and iure gestionis in this context.

The Supreme Court also stated that the question of immunity had not been ruled specifically EU law. Therefore general international law was applicable and this fact led as well to the immunity of the Kingdom of B. from Austrian jurisdiction.

This legal situation was not changed by the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (Lugano Convention 1988) as this convention created a system of international jurisdiction and does not refer to the immunity of states and diplomatic agents . Claims which arose from iure imperii acts and state liability were excluded from the mentioned convention. Finally the Supreme Court stated that the mentioned acts of the Kingdom of B. were with no doubt an activity in the field of foreign policy and therefore acts of ius imperii character.

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| (a) | Registration no. | A/11 |
| (b) | Date | envisaged for autumn 2002 |
| (c) | Author(ity) | Austrian Parliament; amendment to the law on the status of OSCE institutions in Austria |
| (d) | Parties | |
| (e) | Points of law | The principle of customary international law that State aircrafts and their personnel enjoy certain privileges and immunities will be codified for Austria if the Austrian Parliament approves a government bill (see draft para. 5b sub-section 2 of the above-mentioned amendment). |
| (f) | Classification no. | O.a; 1.a, 2.a |
| (g) | Source(s) | see amendment to be adopted to BGBl. Nr. 511/1993 as amended by BGBl. Nr. 735/1995; see Austrian legal information system (http://www.ris.bka.gv.at - Bundesrecht) |
| (h) | Additional information | |
| (i) | Full text - extracts - translation - summaries | Summary English: see below Full text: Appendix A/11 * |

The Austrian government has submitted a bill to Parliament containing various amendments to the Austrian law on the status of OSCE institutions in Austria, BGBl. Nr. 511/1993 as amended by BGBl. Nr. 735/1995. One of these (draft para. 5b sub-section 2) relates to State aircrafts which participate in observation flights within the framework of the Open Skies Treaty (to which Austria is not a party). In accordance with international customary law the new provision will, if adopted by Parliament, grant certain privileges and immunities to these aircrafts and their personnel when passing through Austria.