

Inter-office memorandum to the Acting Director of the Legal Department, concerning the waiver of immunity – actual and implied

PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS—ARTICLES 104 AND 105 OF THE CHARTER OF THE UNITED NATIONS—CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, 1946—IMMUNITY FROM EVERY FORM OF LEGAL PROCESS—CONSENT OF AN INTERNATIONAL ORGANIZATION TO APPEAR BEFORE COURTS FOR PURPOSES OF ADJUDICATION IS EVIDENCED BY A WAIVER OF IMMUNITY—WAIVER OF IMMUNITY OF THE UNITED NATIONS IS GOVERNED BY THE 1946 CONVENTION—PERMISSION PROVIDED TO THE ORGANIZATION TO WAIVE ITS IMMUNITY ONLY INsofar AS LEGAL PROCESS IN A PARTICULAR CASE IS CONCERNED—WAIVER OF IMMUNITY CANNOT EXTEND TO MEASURES OF EXECUTION—INABILITY TO EXTEND THE RIGHT OF WAIVER *IN FUTURO* BY THE TERMS OF A CONTRACT—AUTHORITY OF SECRETARY-GENERAL TO CARRY OUT THE WAIVER OF IMMUNITY IS IMPLIED IN HIS ROLE AS THE CHIEF ADMINISTRATIVE OFFICER—THE UNITED NATIONS MAY PROVIDE FOR MODES OF SETTLEMENT OF DISPUTES ARISING OUT OF CONTRACTS OR OTHER DISPUTES OF A PRIVATE LAW CHARACTER—ARBITRATION CLAUSES ARE NOT ENVISAGED AS A WAIVER OF IMMUNITY IMPLIED OR IN FACT

The United Nations is given by Articles 104 and 105 of the Charter, the Convention on the Privileges and Immunities of the United Nations,^{*} and, in [Member State], by [Law No. ...], certain privileges and immunities necessary to the fulfilment of its functions including a legal entity and the capacity to hold property and to enter into contracts and to institute legal proceedings.¹ At the same time, the United Nations has been given immunity from suit and every form of legal process. It has been stated, however, that legal privilege does not impart immunity from legal liability but only exemption from local jurisdiction. (*Dickenson v. Del Solar*, Great Britain, Kings Bench Division, 1929 (1930) 1KB376) Therefore, it is possible for a sovereign or an international organization possessing immunity to appear before the courts and have their rights and legal liabilities adjudicated if the sovereign or the international organization has consented to the jurisdiction of the courts. Such consent is evidenced by a “waiver” of immunity.

Waiver of immunity of the United Nations would be governed insofar as the organization itself is concerned by the Convention on the Privileges and Immunities of the United Nations since this convention was adopted by the General Assembly on 13 February 1946 and thereby became binding on the United Nations.

Article 2, section 2, of the General Convention states:

“The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.”

Since the words “except insofar as in any particular case it shall have waived its immunity” must refer to the words “shall enjoy immunity from every form of legal process”, which immediately precedes this phrase, it would appear that by this article permission is given to the United Nations to waive its immunity only insofar as legal process in any particular case is concerned, and such permission is also limited by the restriction that such waiver cannot extend to any measure of execution.

^{*} United Nations, *Treaty Series*, vol. 1, p. 15 and vol. 90, p. 327 (corrigendum to vol. 1).

¹ General Convention on the Privileges and Immunities of the United Nations, article I, article II, section 2, 4. Public Law [No. ...].

Legal process is defined by Bouvier's *Law Dictionary* as, "The means of compelling a defendant to appear in court, after suing out the original writ, in civil, and after indictment, in criminal cases." – "The means or methods pointed out by a statute or used to acquire jurisdiction of defendants whether by writ or notice."

Since the words, "legal process" were substituted by the Preparatory Commission for the words "judicial proceedings", it would appear that these words were directed toward court proceedings but that it was thought desirable that it should be stated expressly that the immunity extended not merely to the proceedings themselves but also to the steps in a legal action preparatory and subsequent to such judicial proceedings, thus, for example, execution is a legal process from which the United Nations is immune, although it is not a judicial proceeding, but a consequence of one. The fact that the words restricting such a waiver from extending to any measure of execution have been added to the same clause would indicate that waiver was envisaged only in the case of legal process involved in judicial proceedings, since execution can result only from a judicial proceeding.

Such limitation of waiver to a particular case, and only insofar as legal process is concerned would coincide with the view taken by the English courts that – a sovereign cannot waive *in futuro*, but only, in a particular instance when he is about to be brought before the courts.¹ The limitation as to measures of execution coincides with the English and American view that even if a judgment is rendered by a competent court, it cannot extend to measures of attachment or execution.²

According to the reports of the Preparatory Commission of the United Nations, article 2 of the General Convention was based on similar articles in the constitution of international organizations. Some of these constitutional instruments, such as that of United Nations Relief and Rehabilitation Administration, provide that the member Government accord to the administration the facilities, privileges, exemptions and immunities which they accord to each other "including immunity from suit and legal process except with the consent of or so far as is provided for in any contract entered into by or on behalf of the Administration."

A similar provision is contained in article IX, section 3 of the Articles of the International Monetary Fund,** providing for waiver of immunity for the purposes of any proceeding *or by the terms of any contract* thereby differentiating between the two forms of waiver. Apparently, it was not the intention of the Preparatory Commission or the General Assembly to extend waiver this far insofar as the United Nations was concerned or such a provision would have been included rather than just the words "legal process". In fact the words used in the original draft of this section were: "The organization, its property and its assets wherever located and by whomsoever held shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings *or by the terms of any contract*."³

This wording was changed by the Legal Committee of the Preparatory Commission to read in the more restrictive fashion that it now stands. It must be concluded, therefore, that it

¹ See *infra* *Mighell v. Sultan of Johore*.

² See *infra* *Dexter and Carpenter v. Kunglig Jarnvagsstyrelsen*.

** United Nations, *Treaty Series*, vol. 2, p. 39.

³ P.L. Leg 39, 8 December 1945, Draft Recommendation on Privileges and Immunities.

was not the intention of the Preparatory Commission or of the General Assembly, to extend the right of waiver *in futuro* by the terms of a contract.

Since permission is given by the General Convention to the United Nations to waive its immunity in any particular case insofar as legal process is concerned, it is to be supposed that the authority to carry out such a waiver is placed with the Secretary-General, since the Secretary-General is responsible for the administration of the United Nations. It would not be feasible to expect the Secretary-General to ask further authority from the General Assembly in each instance that legal process is to be served upon the United Nations, also the fact that the General Assembly found it necessary to write in a limitation upon the extent of any waiver insofar as execution is concerned would indicate that the General Assembly intended to transfer this authority to the Secretary-General since if it were itself the waiving authority, there would be no necessity for making a limitation for its own right of waiver. This argument might be countered by stating that it is specifically provided in the General Convention that the Secretary-General may waive immunity insofar as officials and experts of the United Nations are concerned (sections 20, 23, 29). However, such a provision would be necessary in this instance since otherwise it might be supposed that the official or expert was entitled to waive his own immunity. In the case of the United Nations, the Secretary-General is “the chief administration officer of the Organization” and therefore such a clarification concerning the ability of the Secretary-General to waive the Organization’s immunity probably did not appear to be necessary to the Preparatory Commission or the General Assembly. In this connection, it is interesting to note, that the Secretary General of the League of Nations was able to waive the immunity of the League and in fact negotiated the “Modus Vivendi” with the Swiss Government without submitting it to the Assembly for ratification or approval (see Jessup, *A Modern Law of Nations*).

However, if the United Nations were to enter into a contract in which immunity was, in fact, waived *in futuro*, this particular view regarding the inability of the United Nations to waive *in futuro* by the terms of a contract might not be followed by the [Member State] courts at the present time since the [Member State] has not yet ratified the General Convention and is therefore still governed by the terms of [Law No. ...] which states:

“Sec. 2 (b) International organizations, their property and their assets, wherever located, and by whomsoever, held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign Governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.”

Since the immunity of the United Nations is created by treaty and statute rather than by comity, common law and international law as is the immunity of a sovereign, such statutory limitations might be taken to affect the position of the United Nations where they could not be taken to affect the position of a sovereign.

Arbitration

Although the Secretary-General is not specifically authorized to waive the immunity of the Organization by the terms of any contract, section 29 of the Convention provides that:

“The United Nations shall make provisions for appropriate modes of settlement of:

- (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;
- (b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.”

It is stated in the minutes of the Legal Committee of the Preparatory Commission documents that this provision has been added so that the Secretary-General may provide for arbitration in contracts to prevent the necessity of proceeding to suit in difficulties arising out of contracts. It can therefore be presupposed that the creation of the authority to provide for appropriate modes of settlement of disputes arising out of contracts did not envisage arbitration as a waiver of immunity, implied or in fact. However, to insure that this view would be followed by the courts of the various countries if this question were to arise, it is necessary to examine the decisions in this matter.

The general view taken on arbitration as a waiver of immunity by the British courts is that an agreement to arbitrate is not a waiver of immunity. This is based on the theory that a sovereign State cannot be sued in the courts of another State unless it expressly agrees to bring itself within the jurisdiction of the State.

It has been held by the British courts that although a sovereign may submit to the jurisdiction of the courts, such consent must be given at the time when the court is called upon to act.

Mighell v. Sultan of Johore (Court Appeals, 1893,) L.R. (1894) 1 Q.B. 149, 159., holds that:

“* * * We had not then to deal with the question of a foreign sovereign submitting to the jurisdiction; everybody knows and understands that a foreign sovereign may do that. But that the question is, How? What is the time at which he can be said to elect, whether he will submit to the jurisdiction? Obviously, as it appears to me, it is when the Court is about or is being asked to exercise jurisdiction over him, and not any previous time. Although up to that time he has perfectly concealed the fact that he is a sovereign, and has acted as a private individual, yet it is only when the time comes that the Court is asked to exercise jurisdiction over him that he can elect whether he will submit to the jurisdiction. If it is then shown that he is an independent sovereign, and does not submit to the jurisdiction, the Court has no jurisdiction over him * * *.”

It has been also held by the British courts that agreement to arbitrate is not a voluntary or implied submission to the courts.

Duff Development Company, LTD., Government of Kelantan and Another (House of Lords, 1924) L.R. (1924) A.C. 797, 809-10, 829, holds that:

“Great Britain:

[Opinion of Lord Sumner] ***The Sultan’s contract to arbitrate in accordance with the Arbitration Act is not, either in itself or in combination with anything else in this case, a submission to the jurisdiction of the High Court. It is not an undertaking given to the Court itself. It is an agreement *inter partes*, and no more. An agreement *inter partes* that the Court shall be enabled to do something, which by law it cannot do, is of no avail, whether it is by statutory rules that the Court is thus incompetent ***, or

by a general rule of common law, like that which gives or creates a foreign sovereign's immunity. Ordinary persons can contract themselves out of the formalities, which the orders and rules prescribe for proceedings, which the Court has power to take*** so too, acting under statutory authority, the High Court allows service of its writ, or of notice of its writ as the case may be, on parties outside the jurisdiction, who, if within it, would have been personally amenable. Sovereigns, however, are not amenable at all, except by their own consent, and there is no principle upon which such consent can be deemed to have been given short of action taken towards the Court itself, such as is commonly called a submission to the jurisdiction. It is, therefore, necessary to find something voluntarily done by the foreign sovereign in or towards the Court and to find in what is done something that really evinces an intention to submit. This seems to me to be beyond the limits of presumption of fiction, for the foundation of the jurisdiction is not any rule of municipal law but the action on an independent personage, who himself is beyond its reach.”

In the United States, a sovereign cannot be sued without his consent, *Wulfsohn et al, v. Russian Socialist Federated Soviet Republic* (Court of Appeals, N.Y. 1923), 234 N.Y. 372, 275-76.), states:

“They may not bring a foreign sovereign before our bar, not because of comity, but because he has not submitted himself to our laws. Without his consent he is not subject to them. Concededly that is so as to a foreign Government that has received recognition ***. But whether recognized or not the evil of such an attempt would be the same. ***”

However, the position of the Federal Courts on arbitration as a waiver of immunity is not clear since there has apparently been no pertinent litigation in point.

Although no case in point on this matter in the New York State Courts has been decided on its merits, a case was brought by Peter B. Payne, Inc., against the National Government of the Republic of China based on a contract agreement made by Payne with the National Resource Commission of China, providing for the payment of a retainer and containing a general arbitration clause. On appearance, after a motion to direct the Chinese Government to arbitrate, the attorney for the Chinese Government appeared specially and asked for a dismissal, claiming that because of its sovereign immunity the Chinese Government could not be brought before the New York State Courts. The court stated that waiver of immunity by an arbitration clause presented a question of fact, and sent the case to a referee. The case was settled on default and there was no decision on the merits. (N.Y.L.J. Aug. 23 & 30, 1946, p. 321, 361.)

Although the British courts take the view that a waiver of immunity by a sovereign must be specific, a more stringent point of view of waiver of immunity is followed by the Italian, Czechoslovak, French, and German courts, particularly where the Government is engaged in business.

Execution and attachment

In this connection, the Italian courts held in *Stato di Rumania c. Trutta* (Corte de Cassazione del Regno, Sezioni unite, 1926) 67 *Monitore dei tribunali* (1926) 288, at 290;

1926 *Giurisprudenza Italiana* 774, 1926 *Foro Italiano I*, 584, at 589-590, in a suit for breach of contract entered into between an Italian merchant and the Rumanian Government for the supply of army provisions in which the Rumanian Government contested the jurisdiction of the Italian courts on the ground of sovereign immunity, that the plea to the jurisdiction must be rejected because in depositing funds in an Italian bank for the satisfaction and guarantee of payment, the Rumanian Government impliedly submitted to the jurisdiction of the Italian courts.¹

In a similar case in 1926, the German courts held that funds deposited by the Turkish Treasury for the Commission of Purchases and Supplies for money due on a contract, conceded the right to plaintiff to prosecute the claim before the local courts. *Turkisch Fiskus* (Reichsgericht, II. Ziv, Se., 174/25 II, 1926, 55. I *Juristische Wochenschrift* (1926) 804.²

A different view is taken, however, by the United States courts. The United States Court of Appeals held in the case of *Dexter and Carpenter v. Kunglig Jarnvagsstyrelsen*, USCCA, 1930 43 F. 2d, 705, that even if a foreign Government consents to be sued, it does not give consent to a seizure or attachment of property of the sovereign Government, and states that the clear weight of authority in this country, as well as that of England and continental Europe, is against all seizures even though a valid judgement has been entered. Similarly, the Municipal Court of the District of Columbia on 16 December 1925 dismissed attachment proceedings against the Pan American Union on a plea that there was no jurisdiction due to its sovereign entity. *Am. Journal of Int. Law* vol. 20 p. 257, 1926. A similar view was stated in *U.S of Mexico v. Schmuck*, 293, N.Y. 264 and in *Hewitt v. Speyer* 250 Fed. 367.

It appears, therefore, that the view of the United States and English courts is that even if an express waiver of immunity is given in a contract by a sovereign State or an agreement to arbitrate made, a judgement entered in such a case could not be executed upon nor could property be attached.

It is stated in E.W. Allen, “*The position of Foreign States before National Courts*” 1933, page 15, that the only exception to this rule is when the action concerns *immovable property located in the country of the forum*. To uphold this except, the case of *The Ice King* (1921) 103 *Entscheidungen des Reichsgerichts in Vizelsachen* 274 wherein it is stated:

“The soils and fixtures thereon form an inseparable part of the territory of the State in which they are situated. They can only be subject to be the authority of this State and only this State is in a position to executive judgement upon such real estate.”

This view has not been followed by the Belgian courts, which stated:

“A contract for construction on a legation building has been deemed to be an act of *puissance publique* such that no jurisdiction could be accrued.”³

(*Brawe v. le Gouvernement*, Ottoman Juge de Paix, Brussels, April 28, 1902, *Pacierisie* 1902-3-290.)

¹ *Competence of Courts in regard to Foreign States*, Research in International Law, Harvard Law School, page 557.

² *Ibid.*, page 559.

³ *Position of Foreign States before National Courts*, E.W. Allen, 1933, page 116.

-nor is it usually followed by the courts where legation buildings are concerned. But in a similar case, the Court Tribunal of Rome held that a contract for the purchase of land on which to erect a legation building was of a purely business nature and therefore the court could take jurisdiction. (*Berruchetti v. Puig y Gasurano*, Foro Italiano 1928-1-857.)¹ The mixed court of Egypt held that the international law principle of immunity could not be extended to litigation having as its object immovable property situated in the country of the forum, for each nation possessed and exercised sole and exclusive sovereignty throughout the whole extent of its territory and to withdraw from it competence in litigation of this nature concerning foreign Governments on the pretext of respecting the latter's sovereignty would be to disparage its own. (*Dame Mango Kildani, Veuve Higgar v. Fisc Hellénique*, Court of Appeals, Alexandria, May 9, 1912, *Bulletin de Législation et de Jurisprudence Egyptiennes* XXIV p. 330 1911-12.) E. W. Allen, *Position of Foreign States before National Courts*, p. 16, 1933.)

However, in a suit brought in the Swiss courts by a contractor against the League of Nations to enforce a contractor's claim for building repairs, the court held that the court could not take jurisdiction over the League of Nations or its property due to its extraterritoriality unless the League waived its immunity. In this instance, the League waived its immunity and submitted to the jurisdiction. (*Schnidlin v. Société des Nations*, Court of Appeals, Geneva, Feb. 6, 1925. *Revue de Droit International Privé* XXI (1926) p. 103.)

In this connection, the Headquarters of the United Nations are specifically made inviolable by the Headquarters Agreement, section 9, and by section 3 of the General Convention which states:

“The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.”

Therefore, this theory regarding real property would not affect the inviolability of the territory in the United Nations Headquarters area, particularly if jurisdiction were ceded in accordance with the New York State Law giving authority for the ceding of jurisdiction over this area by the State.

20 December 1948

¹ *Position of Foreign States before National Courts*, E.W. Allen, 1933, page 116.