TOWARDS AN ATTACHMENT OF EMBASSY BANK ACCOUNTS

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1. Creditors of a foreign state often have little recourse when their debtor fails to honor its financial obligations. They are not likely to seek legal action in the foreign states' judicial system as such procedure would be costly and burdensome. The alternative, legal action in the own courts, often will be ineffective. The inefficacy may sometimes be caused by the immunity of jurisdiction the foreign state may enjoy, although this immunity is quite restricted at present. The risk of impossible enforcement is much greater. Indeed, states often have but few assets abroad which moreover generally enjoy immunity from enforcement. The irritated creditor could be tempted to secure payment with funds held on the foreign states' embassy account.

2. Treaty provisions sometimes can preclude the attachment of embassy accounts. For instance, the European Convention on State Immunity (1972), to which Austria, Belgium, Cyprus, Great Britain and Switzerland are parties, grants absolute immunity from attachment among the member states (1). In addition the Belgian-USSR Protocol on the Status of the Soviet Sales Representative for instance excludes the attachment of embassy funds to satisfy obligations undertaken by the representative (2).

It is, however, noteworthy that the Vienna Convention on Diplomatic Relations (1961) does not grant immunity to embassy bank accounts. Its article 22, para. 3 only grants immunity to « the premises of the mission, their furnishing and other property thereon and the means of transport to the mission ». Consequently a bank account not located in the embassy is excluded from its scope. It has been argued that immunity of embassy bank accounts impliedly would follow from article 30 of the Vienna Con-

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(1) European Convention on State Immunity, Basle dd. 16 May 1972 (XI *I.L.M.* 470 [1972], *Mon. belge*, 10 June 1976), art. 21-23.

(2) Protocol dd. 14 July 1971 (*Mon. belge*, 11 May 1973), art. 7, par. 2 *in fine*.

vention which grants inviolability to all property of a diplomat wherever located. Article 30 surely immunizes diplomats' bank accounts from attachment (3). However, this article concerns only the diplomat's personal property and should not be extended to include the embassy's property. During the treaty's negotiations it was made clear that the embassy's immunity only applied to property located within the embassy's buildings (4). Therefore, an extension of the embassy's immunity to its bank account goes beyond the provisions of the Vienna Convention.

The Vienna Convention did not purport to contain a comprehensive regulation of diplomatic immunities. Rather, its preamble recognized that « customary international law should continue to govern questions not expressly regulated ». However, customary law on the immunity of bank accounts is not well-defined. There is only a handful of relevant court decisions rendered by Austrian, British, German and U.S. courts (5). As yet, however, no Belgian court has dealt with the issue.

3. This article will examine whether embassy bank accounts can be attached under general international law. Starting from the well-established principle that the host-state may do nothing which may impede the functioning of the diplomatic service, it will conclude that money to be used to pay the diplomatic service, may not be attached (Part I). A contrario, however, attachment of funds not used for the diplomatic service, still remains possible. Similarly the mixed accounts, *i.e.* accounts containing funds for the diplomatic service as well as for other purposes, can be attached (Part II). The attachment, however, does not cover the whole embassy bank-account but only the amount of the debt which leads to the attachment. Moreover some funds to be used for the diplomatic service escape attachment. Consequently the distinction between attachable and non-attachable funds has to be made (Part III). The borderline between the financing of the diplomatic service and of other activities is often hard to draw. Much depends on whom, creditor or embassy, the burden of proof is laid. Moreover only funds which will be used for diplomatic service within a rather near future — *e.g.* two months — should be unattachable in my opinion.

In this text I shall not deal with procedural points closely related to

(3) See *Yearbook I.L.C.*, 1958, II, 101. M. HARDY, *Modern Diplomatic Law*, Manchester, 1968, 50 ; R. VENNEMAN, « L'immunité d'exécution de l'Etat étranger », in *L'immunité de juridiction et d'exécution des états*, Brussels, 1971 (117), 152, 155.

(4) Proposal from Ukrainia, Doc. A/CONF. 20/2, 13/2, 132 United Nations Conference in Diplomatic Intercourse and Immunities, Vienna, 2 March-14 April 1961, *Officials Records*, vol. II, pp. 20, 57.

(5) Austrian Supreme Court, 6 August 1958, quoted by I. SEIDL-HOHENVELDERN, « State Immunity — Austria », *N.Y.I.L.*, 1979, 97 at 108 ; *Alcom Ltd. v. Republic of Colombia*, House of Lords, 2 W.L.R. (1984), 750 at 757 ; Court of Appeal, 24 October 1983, 3 W.L.R. (1983) 906 ; XXII, *I.L.M.*, (1983) 1307 at 1317 ; Bundesverfassungsgericht, 13 December 1977, *ZaöRV*, 1978, 242 at 280-282.

domestic procedural systems such as the notification of the attachment to the embassy (6).

4. Two preliminary issues have to be discussed yet.

First, one could question whether a bank, the legal owner of the funds deposited, could enjoy any immunity at all as it is but a private person and not a state. A deposit, however, gives rise to a claim for refund. Attachment of the embassy bank account precludes the embassy from obtaining refund of the deposited money and affects it just as much as attachment of any other of its assets (7). Consequently funds deposited on a bank account may enjoy as well immunity as other embassy assets.

Second, it is of no avail to distinguish between *attachments for enforcement* (saisie-exécutoire) and *prejudgement attachments* (saisie-arrêt). Since prejudgement attachments prevent the embassy from using its deposited funds as much as enforcement attachments would, the principles of immunity from enforcement are relevant to both forms of attachment (8).

I. — NO ATTACHMENT OF FUNDS TO BE USED FOR THE DIPLOMATIC SERVICE

5. Austrian, German and British courts have already excluded attachment of embassy funds to be used for diplomatic service.

As early as 1958, the Austrian Supreme Court ruled out attachment of embassy-money to be used « in the exercise of a sovereign right, *i.e.* in the performance of its diplomatic functions » (9). It concluded that a university professor engaged by Indonesia, could only attach money of the Indonesian embassy in Vienna, which came from commercial transactions or was to be used for them.

6. In 1977 the Bundesverfassungsgericht, the German Constitutional Court, granted immunity from attachment to an embassy account that was used to pay official expenses. A lower judge ordered the Republic of the Philippines to pay back — rent and renovation expenses for its embassy in Bonn. The owner petitioned the Amtsgericht to attach the embassy bank accounts. As permitted under Article 100 of the German Constitution, the Amtsgericht submitted the issue to the Bundesverfassungsgericht —

(6) For a discussion of such points under Belgian law, I refer to H. VAN HOUTTE, « Naar een beslag op rekeningen van ambassades », in *Liber Amicorum E. Van Bogaert*, Antwerp, 1986, 294 at 302-305.

(7) See *Alcom Ltd. v. Republic of Colombia*, House of Lords, 2 W.L.R. (1984), 750 at 757. See also for Belgium : A. M. STRANART, « La saisie-arrêt », questions récentes in « *Les voies conservatoires et d'exécution* », Brussels, 1982, 85 at 124-126.

(8) See *e.g.* J. CRAWFORD, « Execution of judgments and foreign sovereign immunity », *A.J.I.L.*, 1981, 820 at 868-869.

(9) Austrian Supreme Court, 6 August 1958, quoted by I. SEIDL-HOHENVELDERN, « State Immunity — Austria », *N.Y.I.L.*, 1979, 97 at 108.

whether immunity always excludes attachment or only when the attachment would hinder the embassy from continuing its diplomatic functions? The Constitutional Court ruled that a host state may never impede an embassy from carrying out its functions : *ne impediatur legatio*. Thus, accounts used to finance the operation of an embassy cannot be attached. The Court deemed it irrelevant that Article 22, para. 3 of the Vienna Convention only grants immunity to property within the embassy premises, as this provision does not affect the host state's general duty to allow the embassy to function properly (10).

7. More recently the House of Lords similarly has recognized that embassy accounts are immune from attachment in *Alcom Ltd. v. Republic of Colombia* (11). Alcom Ltd. had installed security devices on the Colombian embassy. When its invoice remained unpaid, it obtained a default judgment against Colombia and attached the embassy-accounts held at the First National and Barclays banks. The embassy invoked its immunity and requested the court to set aside the attachment. The House of Lords, which had to decide the case as the Court of last resort, stated that international law grants immunity to a state whenever it acts in exercise of its sovereign authority. Referring to the list of diplomatic functions contained in article 3 of the Vienna Convention, their Lordships considered « if one were seeking for prototypes of things done in the exercise of its sovereign authority by one state within the territory of another it would be difficult to find examples more striking than those included in this list ».

Funds to carry out these diplomatic functions consequently cannot be attached. Their Lordships specified « neither the executive nor the legal branch of government in the receiving State — and enforcement of judgments of courts of law is a combined operation of both these branches — must act in such manner as to obstruct the mission in carrying out its functions » (12). The House of Lords reached this conclusion by extensively referring to the Bundesverfassungsgericht decision which it considered « wholly convincing ». Moreover it found an additional argument for immunity in article 25 of the Vienna Convention which obliges a receiving state to « accord full facilities for the performance of the functions of the mission ».

However, these considerations were not considered decisive : « The fact that under public international law, including the Vienna Convention to which the United Kingdom is a party, the bank account of the Colombian diplomatic mission would have been entitled to immunity from attachment,

(10) Bundesverfassungsgericht, 13 December 1977, *ZaöRV*, 1978, 242 at 280-282.

(11) *Alcom Ltd. v. Republic of Colombia*, House of Lords, 12 April 1984, 2 *W.L.R.*, 1984, 750. See my commentary of this decision : H. VAN HOUTTE, « Die Vollstreckungsimmunität der Bankguthaben einer Botschaft », *IPRax*, 1986, 50-52.

(12) 2 *W.L.R.* (1984) at 754.

is not sufficient to answer the question » (13). Indeed, under English law the Vienna Convention is not self-executing. In Great-Britain state immunity is exclusively regulated in the State Immunity Act (1978).

The State Immunity Act was not considered as sufficient ground to grant immunity by the Court of Appeal, which decided the case below. For this court article 3(3) read in combination with articles 13 and 17, surprisingly refused immunity from enforcement to embassy accounts used to pay goods and services. The Appeal-judge considered himself bound by the statutory text even when it endangered the functioning of an embassy, protected under the Vienna Convention : « I can quite see that the embassy may be brought to a standstill. Unfortunately we are bound to give effect to parliamentary intentions as expressed in the Statute » (14). The House of Lords avoided a choice between the literal application of the State Immunity Act and the Vienna Convention. It was willing to interpret the Act « against the background of international law ». It could thus conclude that funds used for the « day-to-day running » of the embassy could not be attached (15).

8. The highest courts in Austria, Germany and Great Britain thus decided that international law excludes attachment of embassy-funds used to finance the running of the diplomatic mission. Similarly treaties, such as the Belgian-Soviet Protocol on the Status of the Soviet Commercial Representative, grant immunity to all property « which is exclusively used for the exercice of diplomatic rights » (16).

9. The immunity of funds to be used for the diplomatic function was, however, not recognized by U.S. District Court for the District of Columbia. In a 1980-decision it allowed a shipping company to attach a bank-account of the Tanzanian embassy because Tanzania had refused to comply with an arbitration award (17). The attachment was granted although the account was used to pay the embassy staff and its day-to-day running. The Judge nevertheless considered the money to be used for « commercial activities » which are denied immunity under § 1603 (d) of the U.S. Foreign Sovereign Immunities Act (1976). The District Court sustained its view with a quotation from the Act's preparatory works : « The fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical ... A contract to make repairs on an embassy

(13) 2 *W.L.R.* (1984) at 753-754.

(14) Court of Appeal, 24 October 1983, 3 *W.L.R.* (1983), 906 ; XXII, *I.L.M.* (1983), 1307 at 1317.

(15) 2 *W.L.R.* (1984) at 758.

(16) Protocol dd. 14 July 1971, *Mon. belge*, 11 May 1973, art. 7, para. 3.

(17) District Court, District of Colombia, 18 November 1980, *Birch Shipping Corporation v. Embassy of the United Republic of Tanzania*, 63 *I.L.R.*, 524.

building (constitutes a commercial activity). Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function ... » (18).

In no event has this view of a lower U.S. court weighted against the contrary view shared by the Supreme Courts of Austria, Germany and Great Britain. Moreover the U.S. District Court only interpreted the domestic Sovereign Immunities Act; it did not refer to international law as the three supreme courts did. The district court has even been heavily criticized in its application of U.S. domestic law (19). Consequently the U.S. district court decision does not undermine the otherwise well-established principle that attachment of funds to finance the diplomatie service is excluded.

II. — DETACHMENT OF « MIXED ACCOUNTS »

10. An embassy account may be « mixed », *i.e.* contain funds to be used for diplomatic functions as well as funds for other uses. Only the former can enjoy immunity. Does the presence on a bank-account of funds enjoying immunity, prevent the attachment of the account?

The German Constitutional Court has recognized on the level of principles that embassy-funds used for other than diplomatic purposes may be attached. The Court realized however that the delicate line between diplomatic and other use in fact could only be drawn after lengthy investigations which moreover would certainly infringe upon the sending state's privacy in the conduct of diplomacy. Respect of this privacy in fact excluded — so the Constitutional Court decided — any attachment of an embassy account, albeit that the account is partially or even completely composed of funds for non-diplomatic use (20). Thus for practical reasons « mixed » embassy accounts could never be attached.

The Austrian Court did not follow this course. It was prepared to allow attachment of embassy-accounts which could be proven to be used exclusively for non-diplomatic purposes. Accounts for exclusive diplomatie use of course enjoyed immunity. Unfortunately, however, the Austrian Court did not consider the status of embassy accounts for mixed (*i.e.* for diplomatic as well as non-diplomatic) use (21).

In the *Alcom*-case the House of Lords did not go as far. Their Lordships decided that an embassy-account is not *per se* immune. For them an embassy-account may be attached when its funds are exclusively or quasi-exclusively used for non-diplomatic purposes. The fact that a diplomatic

(18) 63 *I.L.R.*, 524 at 527.
(19) R. CRAWFORD, *art. cit.* at 864.
(20) Bundesverfassungsgericht, 13 December 1977, *ZaöRV*, 1978, at 282.
(21) I. SEIDL-HOHENVELDERN, *art. cit.*, 108.

activity is sporadically financed by such an account would not impede attachment. An account quasi-exclusively used for diplomatic functions, would on the other hand enjoy immunity even when it sporadically finances non-diplomatic activities. Indeed, for the House of Lords an embassy account is « one and indivisible ». Immunity has to be granted or refused to the account as a whole. Pure commercial accounts thus may be attached; mixed accounts only if they are but sporadically used to pay diplomatic functions (22).

The U.S. District Court took still more lenient approach. It was willing to attach an embassy account as soon as even a small part of its funds were used for non-diplomatic purposes. It considered that embassies otherwise would escape attachment and enforcement too easily (23).

11. In fact, however, the question is not whether mixed accounts may be attached in their entirety or not. Attachment of a mixed account is necessarily limited in two ways. First, only these funds, which are on the account at the moment of attachment and are « attachable » (see part III), may be attached. Second, attachment is only granted for a specifie amount, even when a larger attachable amount is on the account. In fact very often a parallel-account (*i.e.* a *bis*-account) is opened after attachment to gather non-attached and new funds (24).

III. — DISTINCTION BETWEEN ATTACHABLE AND UNATTACHABLE FUNDS

12. Sending states should not mix funds to be used for diplomatic use with other funds. In this way, the embassy accounts exclusively used for the diplomatic service may enjoy immunity where the other accounts do not (25).

The decisive criterion to distinguish embassy-account funds, enjoying immunity from those which do not, is the destination of the funds; not their origin. Consequently it is immaterial whether the funds *e.g.* were transfered from the sending state or constitute proceeds from oil sales. Only the intended use of the funds is relevant (26).

(22) 2 *W.L.R.* (1984) at 784-785. Also R. CRAWFORD, *art. cit.*, at 863.

(23) 63 *I.L.R.*, 527.

(24) See *e.g.* J. M. NELISSEN GRADE, « Derdenbeslag op bankrekeningen », *Liber Amicorum F. Dumon*, Antwerp, 1984, 677 at 682-684.

(25) See the Austrian Supreme Court-decision,I. SEIDL-HOHENVELDERN, *art. cit.*, at 108; *obiter dictum* in Bundesverfassungsgericht, 13 December 1977, *ZaöRV*, 1978, 283; G. RESS, « Entwicklungstendenzen des Immunität ausländischen Staaten », *ZaöRV*, 1980, 217 at 271 and H. SYNVET, « Quelques réflexions sur l'immunité d'exécution de l'Etat étranger », *Journ. Dr. Int.*, 1985, 865 at 884.

(26) French courts used as well the « origin » of funds as their « destination » (*e.g.* French Cass., 2 November 1971, *Journ. Dr. Int.*, 1972, 267). « Origin » as criterion probably followed from Cass., 5 February 1946, *Journ. Dr. Int.*, 1946-1949, 1 which concerned however an excep-

Moreover, immunity from attachment may not depend on the sending state's political sensitivity. Immunity is not granted out of fear that otherwise the relations with the receiving state would suffer. It is only granted in cases where attachment would prevent the diplomatic service (27).

13. Immunity from attachment surely has to be granted to funds used to finance the various activities listed in the Vienna Convention as part of the diplomatic function : representation of the sending state, negotiations with the receiving state, protection of the interests of the sending state and its nationals, investigation of and reporting on conditions and developments in the receiving state and promotion and development of friendly relations. Consequently, the funds to pay the diplomats salaries, the rent of the embassy building and the phone bills cannot be attached.

However, on many occasions it may be difficult to determine when funds are to be used for the diplomatic service and enjoy immunity or not. The borderline between money to carry out diplomatic functions and other funds often is indeed hard to draw. It has for instance been suggested that an embassy does not use fixed term deposits for a particular purpose and that these deposits consequently would be attachable (28). Moreover, for many payments, *e.g.* the renewal of embassy furniture, it is unclear whether they concern the exercice of the diplomatic function or not. Much will depend upon the surrounding circumstances and the strict or broad scope given to the diplomatic functions.

14. It often will be difficult to prove the destination of the funds. Such destination may for instance be deduced from the fact that identical or similar expenses have been paid out of the account in the past. In my opinion, the burden should be upon the embassy to provide this evidence. Indeed it is the embassy which claims the benefit of immunity : *actori incumbit probatio.* To that effect the embassy may submit a certificate which, however, should not be viewed as conclusive evidence. The British State Immunity Act (S. 13(5)) for instance considers such certificate « as sufficient evidence unless the contrary is proven ». In the *Alcom*-case the House of Lords was willing to refuse immunity to the Colombian embassy's account when the claimant could rebut the ambassador's certificate that

tional set of facts : A Norvegian businessman who intended to put his money in security in 1940, entrusted them to the Norvegian embassy in Paris which deposited them first on a specific account, and later on the general embassy account. The embassy was but a trustee of the funds, which were clearly from private origin. These funds consequently could be attached, especially since the reason for attachment was not a debt of the Norvegian State or embassy, but of the businessman himself.

(27) See R. CRAWFORD, *art. cit.*, 841, note 110. Also Bundesverfassungsgericht, 13 December 1977, *ZaöRV*, 1978, 284 ; however annotation BOUREL, *Rev. Crit. Dr. Int. Priv.*, 1978, 534 at 538.

(28) R. CRAWFORD, *art. cit.*, at. 864.

« the funds are not in use nor intended for use for commercial purposes but only to meet the expenditure incurred in the day to day running of the Diplomatic Mission » (29). However it is rather difficult for an outsider, unfamiliar with the embassy administration and without access to its books, to contradict an embassy's certificate. The Court of Appeal in the same *Alcom*-case consequently attributed less weight to the certificate. In spite of the ambassador's declaration to the contrary it concluded from the facts that the money nevertheless was used for « commercial transactions » and consequently did not enjoy immunity (30). The U.S. District Courts had similar doubts about the factual correctness of the declaration from the Tanzanian ambassador (31).

Courts could even appoint experts to examine whether embassy funds are intended for diplomatic use. The Tribunal de Grande Instance of Paris, for instance, once appointed a commission composed of an expert and two former magistrates for that purpose (32). Expert examinations, however, generally take a long time. When the attachment would be suspended until their results are known, the funds may have disappeared already. If, on the other hand, funds are attached until the experts' report establishes immunity for some, funds deserving immunity will be blocked for a long time in violation of international law. It appears more appropriate that the embassy claiming immunity from attachment should extensively prove which funds are to be spent for diplomatic use. Indeed, only the embassy can present the evidence within such a short time that the diplomatic service will not suffer.

15. Even if it is established that funds are used for diplomatic service, their immunity should not be unreasonably extended. Indeed, one should always remember that the sending state is bound by the most fundamental duty « to respect the laws and regulations of the receiving state » (Vienna Convention, art. 41, para. 1). Immunity consequently is never granted to evade debts and escape enforcement of judgments but only to carry out the diplomatic functions. Respect for the law of the receiving state can be best combined with respect for diplomatic services of the sending state, when immunity is only granted to funds to be used for diplomatic service in a rather near future — *e.g.* two months. Indeed within such a period after the attachment, the sending state is able to transfer new funds to the unattached *bis*-account for financing of further diplomatic activities. In short, immunity should only be granted to funds necessary to pay diplomatic services in the period new funds could not have arrived yet.

(29) 2 *W.L.R.* (1984) at 759-760.
(30) XXI *I.L.M.* (1983) at 1316.
(31) 63 *I.L.R.* at 526.
(32) Tribunal de Grande Instance, Paris, 5 March 1979, *Journ. Dr. Int.*, 1979, 857.

CONCLUSION

16. At present more and more state property is losing its immunity from attachment in the state's own forum. The moment has come to limit also the foreign state's immunity from attachment. Embassy bank-accounts should only enjoy immunity within the limits imposed by international law. Too liberal a grant of immunity would unduly infringe creditors right of judicial redress and may constitute a violation of their human rights (33). A strict application of immunity which would sometimes allow attachment of embassy-accounts, will on the contrary impel foreign states and embassies to comply with the law of the host-state — a welcome achievement in international relations.

(33) See on the immunity of enforcement as violation of human rights : P. LEMMENS, « De uitvoeringsimmuniteit van publiekrechtelijke rechtspersonen in strijd met de Rechten van de Mens? », *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (1984), at 163-168.