

State immunity — Enforcement — Property — Bank accounts of a diplomatic mission of a foreign State — Embassy of Indian Republic — Distinction between immunity of a foreign State from jurisdiction and immunity from enforcement — Whether bank accounts exempt from enforcement jurisdiction of Czech Republic

Diplomatic relations — Immunity — Property — Bank accounts of a diplomatic mission of a foreign State — Indian Republic Embassy in Prague — Whether bank accounts exempt from enforcement jurisdiction of Czech Republic — Czech Act on Private International Law — United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, Articles 19(c) and 21(1)(a) — Whether bank accounts used exclusively in performance of function of diplomatic mission — Whether bank accounts could be attached in an execution — Whether decision of lower courts correct — The law of the Czech Republic

STATE IMMUNITY FROM ENFORCEMENT CASE (MN *v.* INDIAN REPUBLIC—EMBASSY OF THE INDIAN REPUBLIC)

(Case No 21 Cdo 43/2018)

Czech Republic, Supreme Court. 27 March 2018

(Doležilek, *President of the Senate*; Putna and Fiala, *Judges*)

SUMMARY:¹ *The facts:*—The plaintiff (the judgment creditor) commenced proceedings in the Czech Republic against the defendant, the Indian Republic (the judgment debtor), to enforce an earlier judicial decision ordering the Indian Republic to make a recurring monthly payment to the plaintiff in the amount of CZK 14,000 per month. As the enforcement was to take place in part by means of an execution against two bank accounts used by the Indian Embassy to the Czech Republic in Prague in the performance of the functions of the diplomatic mission, the lower courts discontinued the proceedings for lack of jurisdiction. The plaintiff filed an extraordinary appeal with the Supreme Court of the Czech Republic.

Held:—The appeal was dismissed.

(1) A State enjoyed immunity from jurisdiction in proceedings which related to its conduct in the exercise of public authority (*acta jure imperii*).

¹ Prepared by Dr Klara Polackova Van der Ploeg.

In matters arising from private-law relations characterized by the legal equality of their participants, the State did not enjoy functional immunity under international law, and Czech courts had jurisdiction to hear such matters² (paras. 16-17).

(2) Immunity of a foreign State from jurisdiction was distinct from immunity from enforcement, which protected the foreign State and its property situated in the State of the forum from measures of constraint, thus limiting the possibility to enforce an obligation of the foreign State as ordered in a judicial decision (para. 18).

(3) It followed from Act No 91/2012 Coll, on International Private Law (§ 7 Section 1 together with § 7 Section 4), and the United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, which restated contemporary general (customary) international law (Articles 19(c) and 21(1)(a)), that the property of a foreign State serving governmental purposes was protected against the enforcement jurisdiction of the State of the forum. This property included bank accounts of the diplomatic mission of a foreign State (including receivables against these accounts) used in relation to the performance of the functions of this mission (paras. 18-20).

(4) As the relevant bank accounts were used exclusively in the performance of the functions of a diplomatic mission, that is in the performance of State authority of a foreign State, the lower courts were correct to conclude that these accounts were exempt from the enforcement jurisdiction of the Czech Republic and therefore could not be attached in an execution (para. 21).

(5) The lower courts correctly based their factual finding that the relevant bank accounts were used exclusively in the performance of the function of the diplomatic mission of the Indian Republic on the affidavit of the Ambassador. Since the courts made no specific findings contradicting the affidavit, it would have been an interference with the internal affairs of a foreign State in violation of international law for the courts to require the Indian Republic to provide specific information about the existence, purpose and use of funds held in its bank accounts or about individual transactions in these accounts (para. 23).

The following is the text of the decision of the Supreme Court:³

RULING

[1] The Supreme Court of the Czech Republic decided in the Senate composed of the President JUDr Jiří Doležilek and Judges JUDr Mojmír Putna and JUDr Roman Fiala, on the enforcement matter of the judgment creditor M. N., represented by JUDr Daniel Uličný, an

² *State Immunity in Labour Law Matters Case*, 142 ILR 206; *Claims Relating to Premises of a Diplomatic Mission Case*, 200 ILR 346.

³ The paragraph numbers have been inserted by the editors.

attorney with registered office at Prague 2, Slezská 949/32, against the judgment debtor Indian Republic—Embassy of the Indian Republic, with its seat in Prague 7, Milady Horákové 60/93, represented by Mgr Aleš Eppinger, an attorney with registered office at Prague 1, Vodičkova 710/31, regarding a recurring payment of CZK 14,000, conducted at the District Court for Prague 7 under Case No 148 EXE 619/2017 regarding a partial stay of the enforcement, on the extraordinary appeal of the creditor against the ruling of the Municipal Court in Prague dated 12 September 2017, No 18 Co 283/2017-62, as follows:

[2] The extraordinary appeal is hereby *dismissed*.

Reasoning

[3] Having appointed bailiff [in Czech: *soudní exekutor*] JUDr Lukáš Jícha, with bailiff office at Přerov, Komenského No 38, to order and perform an execution of an enforceable title—a ruling of the Municipal Court in Prague dated 25 January 2017, No 65 C 5/2016-102—the District Court for Prague 7 decided by a ruling dated 15 June 2017, No EXE 619/2017-19 (on the basis of an application by the Ministry of Foreign Affairs of the Czech Republic dated 9 June 2017) that the execution is stayed as to its method of attachment of receivables from the debtor's two bank accounts with Československá obchodní banka, a.s., on the basis of an execution order No 203 EX 07462/17-11 issued by the bailiff on 6 March 2017 (§ 55 Section 5 and § 52 Section 2 of the Enforcement Code and § 268 Section 1 Letter h) of the Civil Procedure Code). The court established that the debtor's accounts were used only in the performance of the functions of the embassy and concluded, considering § 7 of Act No 91/2012 Coll, on International Private Law, the United Nations Convention on Jurisdictional Immunities of States and Their Property (which the Czech Republic has ratified and which has not yet entered into force but represents a codification of customary international law) and the Vienna Convention on Diplomatic Relations that no execution may be carried out against the bank accounts of the diplomatic mission used only in the performance of the functions of this mission.

[4] On the creditor's appeal, the Municipal Court in Prague confirmed the decision of the court of first instance by a ruling dated 12 September 2017, No 18 Co 283/2017-62. It reasoned that the subject-matter of the enforcement proceedings is the enforcement of a private-law obligation (a right to a payment of an agreed remuneration in the amount of CZK 14,000 per month), that is an obligation, which

is based on the principle of the equality of parties and which is unrelated to the debtor's exercise of public authority, and that this fact may not be disregarded even in enforcement proceedings, which, pursuant to § 7 of Act No 91/2012 Coll, are governed by the same rules on foreign State immunity as the main proceeding [in Czech: *nalézací řízení*]. However, because the debtor submitted to the court an affidavit of the Ambassador of the Indian Republic to the Czech Republic declaring that the embassy's bank accounts are used exclusively for the functions of the embassy, [the Municipal Court] concluded that customary international law and § 7 of Act No 91/2012 Coll protect the public-law function of the foreign mission by a grant[ing] of immunity. The appellate court added that if the court of first instance had not made any specific findings suggesting that the respective bank accounts were not used for the judgment debtor's public-law mission, it was evident that a disclosure of individual credits and debits would violate [the debtor's] public-law immunity.

[5] The creditor filed an extraordinary appeal against the ruling of the appellate court. It states that the court of extraordinary appeal has not yet dealt with the question of whether § 7 of Act No 91/2012 Coll requires the Czech Republic as the receiving State to refrain from the exercise of its jurisdiction [through/by] [the] attachment of a foreign State's bank account in enforcement proceedings. [The creditor] considers that in accordance with § 7 of Act No 91/2012 Coll, immunity from enforcement has the same content as immunity from jurisdiction, does not [extend to/cover] instances involving property accumulated for commercial purposes, and does not bar enforcement against the debtor's bank accounts. It argues that the United Nations Convention on Jurisdictional Immunities of States and Their Property may not be applied by virtue of Article 18 of the Convention and that the immunity from enforcement provided for in Article 19 of the Convention is not a representation of customary international law. [The creditor] considers that the courts have entirely mishandled the burden of proof, because the execution was partially stayed on the basis of the debtor's affidavit that a part of its property (as property of a foreign State) is used exclusively in the performance of the functions of the embassy without the courts taking evidence as to the truthfulness of this affidavit. The creditor moved for the court of extraordinary appeal to modify the appellate court's decision so that the application for the partial stay of the execution is dismissed.

[6] The debtor moved for the court of extraordinary appeal to reject or, alternatively, dismiss the creditor's extraordinary appeal, because it considered that grammatical interpretation of § 7 of Act No 91/2012

Coll leads to the conclusion that property used or intended for use in the performance of State, government and other public authority and functions of the Indian Republic in the territory of the Czech Republic is exempt from enforcement proceedings and that the bank accounts related to the debtor's public-law mission are a property protected by the immunity. [The debtor] further stated that international law traditionally distinguishes between immunity from jurisdiction and immunity from enforcement and that [although] the United Nations Convention on Jurisdictional Immunities of States and Their Property partially limited the absolute conception of the immunity from enforcement by providing that measures of constraint may be taken against the property of a foreign State used for other than government non-commercial purposes, this does not include (among other things) property, including any bank account, used or intended for use in the performance of functions of a State's diplomatic mission.

[7] The Supreme Court of the Czech Republic as the court of extraordinary appeal (§ 10a of the Civil Procedure Code) examined the extraordinary appeal pursuant to Act No 99/1963 Coll, Civil Procedure Code, as in force until 29 September 2017 (thereafter the "CPC"), because the extraordinary appeal challenges a ruling of an appellate court handed down before 30 September 2017 (cf. Article II Point 2 of Act No 296/2017 Coll, which amends Act No 99/1963 Coll, Civil Procedure Code, as amended, Act No 292/2013 Coll, on Special Judicial Proceedings, as amended, and other acts). Having determined that the extraordinary appeal was filed against a final ruling of the appellate court by an entitled person (a party to the proceedings) within the time limit stipulated by § 240 Section 1 of the CPC, [the Supreme Court] first considered the question of the extraordinary appeal's admissibility.

[8] An extraordinary appeal may challenge final decisions of an appellate court as provided by the law (§ 236 Section 1 of the CPC).

[9] Unless otherwise stated, an extraordinary appeal is admissible against any appellate court decision that concludes an appellate proceeding if the challenged decision depends on the settlement of a substantive or procedural law question, in the settlement of which the appellate court departed from the settled decision-making practice of the court of extraordinary appeal or which the court of extraordinary appeal has not yet settled or that the court of extraordinary appeal decides differently or if the court of extraordinary appeal should assess the legal question differently (§ 237 of the CPC).

[10] The challenged decision of the appellate court depends, *inter alia*, on the settlement of a procedural law question of whether a

receivable against the bank account of a foreign State used in relation to the performance of the functions of its diplomatic mission may be subject to enforcement of decisions (execution). Because this legal question has not yet been settled in the extraordinary appeal court's practice, the extraordinary appeal against the appellate court's ruling is admissible in accordance with § 236 of the CPC.

[11] Having examined the appellate court's ruling pursuant to § 242 of the CPC without a hearing (§ 243a Section 1 first sentence of the CPC), the Supreme Court of the Czech Republic concluded that the creditor's extraordinary appeal is not well founded.

[12] The present matter must be considered pursuant to Act No 91/2012 Coll, on International Private Law, as amended (thereafter the "International Private Law Act").

[13] Pursuant to § 7 Section 1 of the International Private Law Act, foreign States are exempt from the jurisdiction of Czech courts to the extent such proceedings arise from their conduct and acts made in the performance of their State, government and other public competencies and functions, inclusive of their property used or intended for use in [this/such] performance.

[14] Pursuant to § 7 Section 2 of the International Private Law Act, the exemption from the jurisdiction of Czech courts does not extend to other conduct, acts or instances to the extent in which customary international law or international treaties allow claims against a foreign State before the courts of another State.

[15] Pursuant to § 7 Section 4 of the International Private Law Act, provisions of Sections 1 and 3 apply also to the service of documents, summoning of witnesses, enforcement of decisions and other procedural acts.

[16] It follows from the cited provisions, inter alia, that foreign States enjoy immunity (exemption from jurisdiction) before Czech courts in the instances in which the proceedings arose from [the] conduct and acts [the foreign States] made in the performance of State, government and other public competencies and functions (that is, in the exercise of public authority) and which involve property used or intended for use in such performance (property serving government purposes). However, the immunity does not extend to other conduct, acts or instances [in which/if] customary international law or international treaties allow claims to be brought against the foreign State before the courts of another State.

[17] The content of State immunity previously perceived as absolute, with any link of a State to the subject-matter of the dispute leading to the finding of immunity and a consequent impossibility of

conducting a proceeding involving [the State] before a foreign court, has developed over time through the dynamic progress of international relations towards a functional conceptualization of this legal relationship, which also forms the basis for the current [legal regulation/law] on the exemption of foreign States from the jurisdiction of Czech courts in the International Private Law Act (cf. also the explanatory memorandum on § 7 of this Act, which specifically invokes this conceptualization). It is beyond doubt that a State enjoys for itself and its property jurisdictional immunity before the courts of another State (*par in parem non habet jurisdictionem*). However, the prevailing development[al] trends have crystallized into the conclusion that a State cannot invoke its jurisdictional immunity—in addition to the cases in which [the State] explicitly waived [its jurisdictional immunity]—even in proceedings relating to [the State’s] commercial transactions, labour contracts, ownership, possession, [or] use of property, in cases of compensation for damage caused to property or persons, in matters of industrial or intellectual property, in relation to participation in business companies; that is, in principle, in situations in which a State does not act as the executor of public authority (*acta jure imperii*). Case law has already established that when a foreign State does not act as a sovereign bearer of public authority but rather as a legal person in matters arising from private-law relations characterized by legal equality of their participants, rules of international law justify the conclusion that this legal person—the foreign State—does not enjoy functional immunity and that the Czech courts do have jurisdiction in these matters (cf. ruling of the Supreme Court dated 25 June 2008, Case No 21 Cdo 2215/2007, published as No 26 in the Collection of Judicial Decisions and Opinions, 2009, or ruling of the Supreme Court dated 6 December 2017, Case No 21 Cdo 3095/2017).

[18] However, the above-mentioned decisions of the Supreme Court concerned immunity of the foreign State from jurisdiction, which must be distinguished from immunity from enforcement, which protects the foreign State and its property situated in the State of the forum from measures of constraint (both post-judgment and pre-judgment) in judicial proceedings in the State of the court. Accordingly, immunity from enforcement does not limit the jurisdiction to conduct judicial proceedings against the foreign State but it limits the subsequent possibility to enforce compliance with the obligation ordered to the foreign State by judicial decision. This immunity gained significance precisely because of the development of international law towards the functional conceptualization of immunity from jurisdiction, because if a decision unfavourable to the foreign

State is made and the order is not voluntarily complied with, the enforcement jurisdiction of the State of the forum and its organs may arise. It follows from § 7 Section 1 together with § 7 Section 4 of the International Private Law Act that at the enforcement stage, the property of the foreign State, which is used or intended for use in the performance of State, government and other public authority and functions of this State (the property serving government purposes), is protected against the enforcement jurisdiction of the State of the forum. Bank accounts of the diplomatic mission of a foreign State (receivables against these accounts) used in relation to the performance of the functions of this mission must be classified as such property.

[19] This conclusion accords with the United Nations (UN) Convention on Jurisdictional Immunities of States and Their Property, adopted by the UN General Assembly on 2 December 2004 in New York (thereafter the “UN Convention”), which restates contemporary general (customary) international law. Although [the UN Convention] is yet to enter into force (out of the required 30 States, only 21 have so far ratified it, including the Czech Republic), it is a generally accepted point of departure for the regime of State immunities.

[20] The UN Convention regulates both immunity of a State from pre-judgment measures of constraint (Article 18 of the UN Convention) and immunity of a State from post-judgment measures of constraint (Article 19 of the UN Convention). The possibility to take measures of constraint against a foreign State before the judgment is handed down is more limited, because no pre-judgment measures of constraint, such as attachment or arrest, may be taken against property of a State in connection with a proceeding before a court of another State, with the exception of express consent of the State to such measure (expressed in an international agreement, an arbitration agreement or a written contract or a declaration made before the court or a written communication submitted after a dispute between the parties has arisen), unless the State has allocated or earmarked the property for the satisfaction of the claim which is the object of that proceeding. Post-judgment, in addition to these situations, measures of constraint may be taken against the property of a foreign State if it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is situated in the State of the forum, while the post-judgment measures of constraint may only be taken against property that is connected with the object against which the proceeding was directed (Article 19 Letter c) of the UN Convention). Any property (among other things),

including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes (Article 21 Section 1 Letter a) of the UN Convention). No measure of constraint against a bank account of a foreign State used or intended for use in the performance of the functions of the diplomatic mission may therefore be taken at the stage of the judicial proceeding unless the State consented to such measure or unless the State allocated (earmarked) a receivable against this bank account for the satisfaction of the claim which is the object of that proceeding.

[21] In the case under consideration, the judgment creditor has sought the order and performance of an execution on the basis of a ruling of the Municipal Court in Prague dated 25 January 2017, No 65 C 5/2016-102, which ordered a preliminary measure in a dispute concerning the invalidity of a notice of termination of an employment relationship and which required the defendant (the judgment debtor) to pay to the claimant (the judgment creditor) CZK 14,000 per month, always on the last day of the respective calendar month. The bailiff, who was authorized to order and perform the execution on 24 February 2018, decided by an execution order dated 6 March 2017, No 203 EX 07462/17-11, on the performance of the execution [through/by] an attachment of a receivable against the creditor bank accounts, both held with Československá obchodní banka, a.s. Considering that on the basis of the factual findings of the courts, these bank accounts are used exclusively in the performance of the function of a diplomatic mission, that is in the performance of State authority of a foreign State—[and] considering the above mentioned—, the conclusion of the courts that [these accounts] are exempt from the enforcement jurisdiction of the organs of the Czech Republic and therefore may not be attached in an execution is correct.

[22] The extraordinary appellant's argument that the courts failed to take evidence regarding the truthfulness of the debtor's affidavit that the respective bank accounts are used exclusively in the performance of the functions of its embassy in the Czech Republic is also ill-founded.

[23] In the matter under consideration the courts made a factual finding that the debtor's bank accounts are used exclusively in the performance of the functions of its diplomatic mission on the basis of an affidavit of the Ambassador of the Indian Republic, KJ, dated 8 June

2017, which was submitted to the court of first instance through the Ministry of Foreign Affairs of the Czech Republic. Considering that no findings have been made that would call this conclusion into question and that requiring the debtor to provide specific information about the existence, purpose and use of [the] funds held in its bank accounts or about individual transactions in these accounts would amount to an interference with the internal affairs of a foreign State in violation of international law, the courts investigated the facts in accordance with statute and international law.

[24] Accordingly, it follows that the challenged ruling of the appellate court is correct. As it has not been established that [the ruling] would suffer any defect listed in § 229 Section 1 of the CPC, § 229 Section 2 Letters a) and b) of the CPC or § 229 Section 3 of the CPC or any other defect that could result in an incorrect merits decision, the Supreme Court dismissed the extraordinary appeal in accordance with § 243d Letter a) of the CPC.

[Arrangement regarding the costs of the proceedings follows.]

No legal remedy is available against this ruling.

[Report: Unofficial translation by Dr Klara Polackova Van der Ploeg
(Czech original)]