LLOYD'S LAW REPORTS

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[1976] VOL. 1] The "Harmattan" PART 1

COURT OF APPEAL

July 9, 10, 11, 14, 15, 1975

THAI-EUROPE TAPIOCA SERVICE LTD
v.
GOVERNMENT OF PAKISTAN, MINISTRY OF FOOD AND AGRICULTURE DIRECTORATE OF AGRICULTURAL SUPPLIES (IMPORT AND SHIPPING WING)

(THE "HARMATTAN")

Before Lord DENNING, M.R., Lord Justice LAWTON and Lord Justice SCARMAN

Conflict of laws — Jurisdiction — Foreign sovereign — Vessel chartered to Polish company for voyage from Gdansk to Karachi — Demurrage to be settled between owners and receivers of cargo — Bill of lading incorporating terms of charter-party issued to Polish company — Subsequent endorsement to West Pakistan Agricultural Development Corporation — Corporation dissolved and succeeded by Government of Pakistan — Vessel bombed at Karachi and discharge delayed — Claim by shipowners against Government of Pakistan for demurrage — Sovereign immunity pleaded — Whether plea successful.

The plaintiffs, who were the disponent owners of the vessel *Harmattan,* chartered her to a Polish company under a voyage charter-party on the "Gencon" form, for a voyage from Gdansk, Poland, to Karachi for the carriage of a cargo of fertilizers. The charter-party stated (inter alia) that 16 days for discharge were allowed and that

> Should the vessel be detained beyond the time allowed at loading and discharging ports demurrage to be paid by the charterers respectively receivers at the rate of £400 per running day . . . Demurrage/despatch at the port of discharge to be settled directly between the Owners/Receivers without any responsibility of the charterers.

The Polish company shipped 12,000 metric tons of fertilizer on the vessel at Gdansk and received a bill of lading which incorporated the terms of the charter-party. The bill of lading was endorsed to the West Pakistan Agricultural Corporation, which took up the documents and paid for the goods. On Dec. 2, 1971, the vessel arrived at Karachi and gave notice of readiness to discharge. On Dec. 6 the port was bombed and she was moved to a discharging berth. Discharge was completed on Feb. 24, 1972. The plaintiffs applied for leave to issue a writ against the Corporation claiming 67 days' demurrage. Leave to do so was granted, but before the writ was served the Government of Pakistan informed the plaintiffs that the Corporation no longer existed and had been succeeded by the defendants. The plaintiffs amended the writ and claimed demurrage from the defendants. The Government of Pakistan entered a conditional appearance and applied for the writ to be set aside on the ground of sovereign immunity.

———*Held*, by CUSACK, J., that the writ would be set aside.

On appeal by the plaintiffs:

———*Held*, by C.A. (Lord DENNING, M.R., LAWTON and SCARMAN, L.JJ.), that none of the transactions in the present case occurred within the territorial jurisdiction of the English Courts, and none of the exceptions to the rule that a foreign sovereign could not be impleaded applied (*see* p. 5, col 2; p. 6, col. 1; p. 7, col. 2; p. 8, col. 1);

———*The "Cristina"*, [1938] A.C. 485; (1938) 60 Ll.L.Rep. 147, applied.

Appeal dismissed. *Leave to appeal to the House of Lords refused.*

Per LAWTON, L.J., (at p. 6): In my judgment it is most important that rules of this kind should not be altered save by the appropriate judicial or legislative body. Every working day all over the world those engaged in international trade make agreements. Very often they are by word of mouth or by telex messages. What has been so agreed is often

incorporated into pro forma documents which are used all over the world. Those who make agreements of these kinds very often seek to embody in these the law of this country. They would be unlikely to do so if the law became like some continental street names, changing every decade or so. I can see no reason at all for departing from rules which have been recognized by the commercial world now for nearly 100 years. Those who provide in these contracts that English law shall apply know what they are doing and they know what to expect from our Courts.

The following English cases were referred to in the judgments:

Annefield, (C.A.) [1971] P. 168; [1971] 1 Lloyd's Rep. 1;

Charkieh, (1873) L.R. 4 Adm. & Ecc. 59;

Compania Mercantil Argentina v. United States Shipping Board, (1924) 131 L.T. 388;

Cristina, (H.L.) [1938] A.C. 485; (1938) 60 Ll.L. Rep. 147;

Lariviere v. Morgan, (1872) L.R. 7 Ch. App. 550;

Mellenger v. New Brunswick Development Corp., (C.A.) [1971] 1 W.L.R. 604;

Njegos, [1936] P. 90; (1935) 53 Ll.L.Rep. 286;

Parlement Belge, (C.A.) (1880) 5 P.D. 197;

Porto Alexandre, (C.A.) [1920] P. 30;

President of India v. Metcalfe Shipping Co. Ltd., (C.A.) [1970] 1 Q.B. 289; [1969] 2 Lloyd's Rep. 476;

Rahimtoola v. Nizam of Hyderabad, (H.L.) [1958] A.C. 379;

Swiss Israel Trade Bank v. Government of Salta, [1972] 1 Lloyd's Rep. 497;

Union of India v. E.B. Aaby's Rederi A/S, [1974] 2 Lloyd's Rep. 57; [1974] 3 W.L.R. 269;

Wallem Shipping (Hong Kong) Ltd. and Telfair Shipping Corp. v. Owners of the ship "Philippine Admiral": (The *Philippine Admiral*), [1974] 2 Lloyd's Rep. 568.

This was an appeal by the plaintiffs, Thai-Europe Tapioca Service Ltd., from a decision of Mr. Justice Cusack who had given judgment in favour of the defendants, Government of Pakistan, Ministry of Food and Agriculture Directorate of Agricultural Supplies (Import and Shipping Wing) in an action by the plaintiffs claiming demurrage in respect of the vessel *Harmattan* which discharged a cargo belonging to the defendants at Karachi, and had set aside the writ on the ground that the defendants were entitled to the immunity granted to a foreign sovereign.

Mr. Bernard A. Rix (instructed by Messrs. Holman, Fenwick & Willan) for the appellant plaintiffs; Mr. David Kemp, Q.C., and Mr. Anthony Hallgarten (instructed by Messrs. Loxley, Sanderson & Morgan) for the respondent defendants.

The facts are stated in the judgment of Lord Denning, M.R.

JUDGMENT

Lord DENNING, M.R.: The plaintiffs are the disponent owners of the vessel *Harmattan.* They carry on business in Hamburg in West Germany. On Sept. 30, 1971 they let her on a voyage charter to a Polish company C.I.E.C.H. She was to proceed to Gdansk in Poland and there load a cargo of fertilizers in bags, carry it to Karachi in Pakistan and deliver it there. The charter-party was on the Gencon form and contained this provision about demurrage:

> Should the vessel be detained beyond the time allowed at loading and discharging ports demurrage to be paid by the Charterers respectively Receivers at the rate of £400 . . . per running day . . . Demurrage/despatch at the port of discharge to be settled directly between the Owners/Receivers without any responsibility of the Charterers.

The charter-party also contained this arbitration clause:

> Any dispute arising under this Charter Party shall be settled by arbitration in London in accordance with the law and procedure prevailing there.

On Oct. 16, 1971, the Polish charterers shipped the fertilizer onto the *Harmattan* at Gdansk. It was over 12,000 metric tons. The master issued a bill of lading on the Gencon bill form. It named charterers C.I.E.C.H. as the shippers. The port of discharge was Karachi. The goods were consigned to the order of the National Bank of Pakistan with direction to notify the West Pakistan Agricultural Development Corporation at Lahore.

The bill of lading provided that

> All the terms conditions liberties and exceptions of the Charter are herewith incorporated.

But that, of course, did not incorporate the arbitration clause into the bill of lading, see *The Annefield*, [1971] P. 168; [1971] 1 Lloyd's Rep. 1. The bill of lading was endorsed to the West Pakistan Agricultural Development Corporation. They took up the documents and paid for the goods. The property in the goods thereupon passed to the West Pakistan Agricultural Development Corporation. The corporation took the goods on the terms of the bill of lading which incorporated the terms of the charter-party and the payment of demurrage, but not the arbitration clause. No doubt it was governed by English law, see *The Njegos*, [1936] P. 90; (1935) 53 Ll.L.Rep. 286. But that was its only connection with England.

On Dec. 2, 1971, the *Harmattan* arrived at Karachi and gave notice of readiness. She had to wait for a berth, but the charter provided that " time lost in waiting for berth to count as discharging time ". Five days later, on Dec. 6 or 7, 1971, while she was still waiting, the port of Karachi was bombed by hostile aircraft from India. The *Harmattan* was hit and seriously damaged. She was subsequently taken to a discharging berth where the cargo was discharged and the West Pakistan Agricultural Development Corporation took delivery of it. Discharge was finally completed on Feb. 24, 1972, a total of 83 days from the time she gave notice of readiness. So the cargo was taken off but the vessel itself became a constructive total loss. After allowing for lay-time of 16 days, the shipowners said that demurrage was payable for 67 days at £400 a day. They claimed demurrage from the West Pakistan Agricultural Development Corporation on the ground that they were the receivers of the cargo and liable under the bill of lading, because it incorporated the terms of the charter-party that "demurrage" was to be settled directly between the owners and receivers. The claim was refused.

On Aug. 31, 1973, the shipowners applied to the High Court in England for leave to issue a writ against the West Pakistan Development Corporation and to serve it out of the jurisdiction on the ground that the proper law of the contract was English law. The Master gave leave. On Sept. 4, 1973, the shipowners issued the writ claiming demurrage in the sum of £26,968.61 or damages. Before the writ was served, however, the solicitors for the Government of Pakistan told the shipowners that the West Pakistan Agricultural Development Corporation no longer existed. It had been dissolved and had been succeeded by the Government of Pakistan, Ministry of Food and Agriculture Directorate of Agricultural Supplies (Import and Shipping Wing). So on Dec. 14, 1973, the shipowners amended the writ and made the Government of Pakistan Ministry, Directorate &c. defendants instead of the West Pakistan Agricultural Development Corporation. Notice of the writ was given to the Directorate at Lahore. The Government of Pakistan, by its London solicitors, entered a conditional appearance and applied to set aside the writ. It claimed sovereign immunity. On July 23, 1974, the Master here set aside the writ. On Nov. 20, 1974, the Judge affirmed the decision. The shipowners now appeal to this Court.

The solicitor to the Government of Pakistan at Islamabad has made an affidavit saying:

> The Directorate of Agricultural Supplies has no corporate or other status save as a department attached to the Food and Agricultural Division of the Federal Government of Pakistan. The Directorate has no legal entity separate from the Government of Pakistan and it cannot sue or be sued by, the Government of Pakistan. The Government of Pakistan as a foreign sovereign state does not consent to submit to the jurisdiction of this Honourable Court and be impleaded in the present proceedings. The plaintiffs can, however, if they so desire and subject to the law of Pakistan, sue the Government of Pakistan in the Courts of Pakistan.

There has also been produced the Pakistan ordinance under which the West Pakistan Development Corporation carried on its commercial operations. It provided for its dissolution by art. 82. It gave the Government of Pakistan power to declare that the corporation should be dissolved from a named date: and that from that date

> (a) all properties, funds and dues which immediately before the said date were vested in or were realisable by the Corporation shall vest in and be realisable by the Government

(b) all liabilities which immediately before the said date were enforceable against the Corporation, shall be assumed by and be enforceable by the Government.

Under the powers of the ordinance the West Pakistan Agricultural Development Corporation was dissolved in 1972 and its liabilities assumed by the Government of Pakistan.

Now these shipowners, as I have said, seek to sue in England the Government of Pakistan. They have no contract at all with that Government. Their only right is by the law of Pakistan under the ordinance. The Government of Pakistan claims sovereign immunity. They are ready to let the claim be considered in the Courts of Pakistan, but not in England. The question is whether it is entitled to immunity.

Mr. Rix for the shipowners has taken us through a fascinating study of sovereign immunity and its development. But I do not think we need follow him today through all its ramifications. The general principle is undoubtedly that, except by consent, the Courts of this country will not issue their process so as to entertain a claim against a foreign sovereign for debt or damages. The reason is that, if the Courts here once entertained the claim, and in consequence gave judgment against the foreign sovereign, they could be called upon to enforce it by execution against its property here. Such execution might imperil our relations with that country and lead to repercussions impossible to foresee. We have quite recently had examples in our Courts where this general principle has been applied. One was the decision of this Court in *Mellenger v. New Brunswick Development Corporation,* [1971] 1 W.L.R. 604. Another was the decision of Mr. Justice MacKenna in *Swiss Israel Trade Bank v. Government of Salta and Banco Provincial de Salta,* [1972] 1 Lloyd's Rep. 497. The general principle has also been recognized by many European countries in the European Convention of 1972 on state immunity. Article 15 says that a contracting state shall be entitled to immunity from the jurisdiction of the Court of another contracting state if the proceedings do not fall within certain exceptions: and that the Court shall decline to entertain such proceedings even if the state does not appear. It has also been recognized by the United States of America in the case of *Isbrandtsen Tankers v. President of India,* which is reported in [1971] 446 Fed. Rep. (2nd) 1198. The Court of Appeals of the 2nd Circuit in New York upheld the claim to sovereign immunity. It gave this reason:

> A judicial decision against the Government of a foreign nation could conceivably cause severe international repercussions, the full consequences of which the Courts are in no position to predict.

So it seems to me that the general principle must be applied unless it comes within any of the recognized exceptions. But the exceptions are several and they are important. Some are already recognized: others are becoming to be recognized. I will state some of them.

First, a foreign sovereign has no immunity in respect of land situate in England. If he takes a lease of land and fails to pay the rent, the lessor can institute proceedings for forfeiture. If he borrows money on mortgage of land here and fails to pay the interest, the mortgagee can pursue his usual remedies, *see The Charkieh,* (1873) L.R. 4 Adm. & Ecc. 59 at p. 97 by Sir Robert Phillimore.

Second, a foreign sovereign has no immunity in respect of trust funds here or money lodged for the payment of creditors. The English beneficiary or creditor can ask the English Courts to adjudicate upon the claim, even though the foreign government declines to appear, *see Lariviere v. Morgan,* (1872) L.R. 7 Ch. App. 550.

Third, a foreign sovereign has no immunity in respect of debts incurred here for services rendered to its property here. If it owns a trading vessel which goes aground on our shores, the tugs which pull it off are entitled to be paid, and, if not paid, the vessel can be arrested. *The Porto Alexandre,* [1920] P. 30 (which decided otherwise) would be decided differently today, having regard to the Brussels Convention of 1926 and to the criticism to which that case has been subjected in the House of Lords in *The Cristina* [1938] A.C. 485; (1938) 60 Ll.L.Rep. 147 at pp. 495-6, 519-520 and 159-160 and 169-170 and elsewhere. Likewise if a foreign government owns a motor vehicle here and sends it to a garage here to be repaired, the repairer is entitled to be paid: and if not paid, he can claim a lien on the car. This exception is further supported by the decision of the Hong Kong Court of Appeal in *The Philippine*

Admiral, [1974] 2 Lloyd's Rep. 568. It is now under appeal to the Privy Council.

Fourth, a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our Courts. If a foreign government incorporates a legal entity which buys commodities on the London market: or if it has a state department which charters ships on the Baltic Exchange: it thereby enters into the market places of the world: and international comity requires that it should abide by the rules of the market. Usually the contract contains an arbitration clause, in which case, of course, there is a voluntary submission to the jurisdiction of the arbitrators and the supervision of them by the Courts: see, for instance, *President of India v. Metcalfe & Co. Ltd.,* [1970] 1 Q.B. 289; [1969] 2 Lloyd's Rep. 476. But even if there is no arbitration clause — or for any reason it is inapplicable — a foreign government which enters into an ordinary commercial transaction with a trader here must honour its obligations like other traders: and if it fails to do so, it would be subject to the same laws and amenable to the same tribunals as that, see, for instance, *Union of India v. E.B. Aaby's Rederi* A/S, [1974] 2 Lloyd's Rep. 57; [1974] 3 W.L.R. 269, of the undertaking given by the High Commissioner in London. This fourth exception has been recognized in the Courts of the United States in respect of transactions which are properly within the territorial jurisdiction of those Courts. In a case in 1964, *Victory Transport Inc., owner of the S.S. Hudson v. Comisaria General de Abastecimientos y Transportes,* an American ship had been chartered to carry a cargo of wheat from Alabama to a Spanish port. It was chartered by the Spanish Ministry of Commerce. It sustained damage in the Spanish port. The United States owner of the ship sued in the United States Courts for damages or to have the matter referred to arbitration. Sovereign immunity was claimed. The claim was rejected by the United States Court of Appeals of the Second Circuit.

I may perhaps say that I had occasion to study sovereign immunity in *Rahimtoola v. Nizam of Hyderabad,* [1958] A.C. 379. I took more pains about it than any other case in which I have taken part. On coming back to it now, I would adhere to all I said then and in particular to p. 422:—

> Sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute. Is it properly cognisable by our Courts or not? If the dispute brings into question, for instance, the legislative or international transaction of a foreign government, or the policy of its executive, the Court should grant immunity if asked to do so: but if the dispute concerns, for instance, the commercial transaction of a foreign government (whether carried out by its own departments or agencies or by setting up separate legal entities) and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.

This test would apply to all the exceptions which I have stated. I would stress particularly the necessity that the dispute should "arise properly within the territorial jurisdiction of our Courts". By this I do not mean merely that it can be brought within the rule for service out of the jurisdiction under R.S.C., O. 11, r. 1. I mean that the dispute should be concerned with property actually situate within the jurisdiction of our Courts or with commercial transactions having a most close connection with England, such that, by the presence of parties or the nature of the dispute, it is more properly cognizable here than elsewhere.

But none of the exceptions apply in the present case. None of the transactions here occurred within the territorial jurisdiction of these Courts. They are as far off as the moon. Here a state corporation in Pakistan agreed to buy fertilizers from a firm in Poland. They may even have bought them from a government department in Poland. The goods were shipped by a Polish concern on a vessel owned by a German company and carried to Karachi. When there the vessel was bombed by hostile aircraft and damaged. The shipowners claimed demurrage. The state department in Pakistan has since been dissolved, but its assets or liabilities have been taken over by the Pakistan Government. I can see no possible justification for these Courts asking the Government of Pakistan to come here to contest the claim. That sovereign has offered to let the case be decided by the Courts of Pakistan. Seeing that the delay