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Commercial Leases and International Law:

The Consulate of Israel Matter

Abstract:

A tenant, arguing that the peaceable enjoyment of its premises was jeopardized by the arrival of the Consulate General of Israel, filed an interlocutory injunction to remedy the situation. The tenant invoked security issues to support its claim. The Consulate of Israel argued that the tenant's action should be dismissed on account of the immunity provided by the State Immunity Act.

Renting commercial office space is usually a decision that holds few surprises. On occasion, however, a tenant's peaceable enjoyment can be violated. In such cases, either the lease signed by the parties or the Civil Code of Québec will determine their rights and obligations. The law can hold unexpected surprises, however, and that is what a tenant of Westmount Square, who believed that the presence of another tenant on its floor violated his right to peaceable enjoyment, learned at its expense. Strangely, it is quite rare to see leasing issues subject to the rules of international law and, more specifically, subject to the State Immunity Act (R.S.C. 1985, c. S-18). Indeed, in a recent judgement rendered on November 26, 2008, the Superior Court of Québec ruled on the application of the State Immunity Act in the case of Robert Teitlebaum and Salomon Katz vs. Société de gestion Cogir and the State of Israel and others (Guy Cournoyer, S.C.J., Superior Court, Montreal, 500-17-043751-083, 2008 QCCS 5625, JE 2009-61). As we will see, the State Immunity Act brings a unique dimension to a situation that could have had an entirely different outcome.

In this case, petitioners Robert Teitlebaum and Salomon Katz are tenants whose offices are on the sixth floor of Westmount Square. Less than a year ago, the Consulate General of Israel leased premises on the same floor.

Recall that the offices of the Consulate General of Israel were previously located at 1155 René-Lévesque West, and that their presence at that location had been the cause of weekly demonstrations by both Palestinian supporters and Israeli supporters on Friday afternoons at the corner of Peel and René-Lévesque. Due to security concerns for themselves as well as for their employees and their clients, the petitioners asked their landlord and the Consulate General of Israel to implement special security measures by means of an interlocutory injunction and an action in damages. The State of Israel responded by calling for the proceedings to be dismissed based on the immunity provided by the State Immunity Act. This is a very interesting case in that a tenant is directly challenging a State on a point of civil law. The situation necessarily raised legal issues regarding the recourses a civil party can have against a State.

What is State Immunity?

State Immunity refers to the protection that a State is afforded against being sued before the courts of other States. It is, in fact, the application of the principle of protection given to a State against the violation of its sovereignty in case of legal proceedings against that State or its representatives in a foreign State. This rule has several exceptions, including, notably, when a State carries out commercial activities. In such cases, the State does not have immunity.

In the Robert Teitlebaum case, the petitioners mainly argued the following points:

Instead of moving to a separate free-standing building, the State of Israel chose to occupy premises in an office building in which they built a fortified bunker that provided protection only for the Consulate and that exposed its neighbours to an unacceptable risk.

The petitioners argued that they have a right to the peaceable enjoyment of their premises without threat to their security. The presence of the consulate poses a real and serious danger to the petitioners. Furthermore, the petitioners argued that it is not necessary to wait until individuals are injured or even killed (death is an exception under Section 6 of the State Immunity Act) before

taking legal action, as they are doing. In short, the petitioners argued that the State Immunity Act is inapplicable under the circumstances of the present case; and, consequently, no immunity should apply in this case.

In Canada, it is clear that any civil recourse against a State exercised before Canadian courts is governed by the State Immunity Act. This law, in general, provides immunity to foreign States, their government, the members of their government, agencies, departments, and other political and government organizations. At present, the law provides exceptions to this immunity in case of (i) any death or personal or bodily injury that occurs in Canada, (ii) any damage to or loss of property that occurs in Canada, (iii) commercial activity, and (iv) matters of maritime law.

The issue that the court had to consider was whether a foreign State had the immunity required to prevent it from being sued in court over this matter. The petitioners based their arguments on Section 5 of the State Immunity Act which stipulates that the foreign state is not immune from the jurisdiction of a court in any proceedings that relate to commercial activity. Consequently, according to the petitioners, the signing of the lease at Westmount Square constitutes a commercial activity, which precludes the application of the alleged immunity. The State Immunity Act defines commercial activity as "any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character." The judge replied to the petitioners that, on the face of it, it would be surprising if the activities of a consulate were considered to be commercial activities.

The judge concluded that the signing of a lease by the State of Israel and the Consulate General of Israel is certainly a commercial activity in nature, but the operations of an embassy or a consulate are, as is recognized by jurisprudence, a typical example of state activity that should be covered by State Immunity. In this regard, the judge quoted Canada Labour Code, Re, [1992] 2 S.C.R. 50 (S.C.C.) where at issue was whether labour relations on a military base constituted commercial activity. On this point, Judge Laforêt concluded that "While bare employment contracts are primarily commercial in nature, the management and operation of a military base is undoubtedly a sovereign activity. The operations of embassies and offshore military posts are the quintessential examples of state activity that should be immune from foreign review." Consequently, the judge concluded that the exception set forth in Section 5 of the State Immunity Act was not applicable because the security measures implemented by the Consulate of Israel are directly and closely linked to the operation of an embassy and are therefore protected by the State Immunity Act.

A similar decision to that rendered by the Superior Court of Québec involving a commercial lease was also the subject of judicial review elsewhere, notably a decision rendered by the Court of Cassation in France. In this case, the Spanish Consul General was facing eviction proceedings regarding its tourist office and consequently the termination of its commercial lease. The Spanish State intervened in the proceedings, claiming State Immunity. Initially,

the court of first instance ruled that the signing of a lease constituted a matter in the form and in accordance with private law and thus such an activity was at least in part a commercial activity. Consequently, State immunity was inapplicable. However, the Paris Appeals Court took the view that the tourist office was actually the Spanish State and, consequently, that the lower court had been wrong in refusing to apply the principles of immunity, the tourist office having no legal personality.

Following this decision, the Court of Cassation (the French Supreme Court) took a different position, the conclusion of which reads as follows:

> *This court considers, however, that by entering in France into an agreement for a commercial lease, subject to the rules applicable to every person proposing to operate a business, the Spanish State cannot be considered as having performed an act of public power putting its sovereignty in issue. This would apply even if its intention, which was not specified in any provision of the lease, had been to carry out activities in the rented premises which were in the nature of a public service.*

This decision demonstrates the importance of the activity carried out in the leased premises in the determination of the existence of immunity, and this decision clearly shows that according to French law the activity had to be specified in the lease. On this topic, Charles Rousseau, Director of the Revue Générale de Droit International Public, writes the following (77th year, Volume 77, p. 908): "This judgement puts an end to the controversy regarding the question of knowing whether State Immunity is based on the nature of the activity that is carried out or on the quality of the one carrying out the said activity. Overturning the judgement rendered on February 25, 1971 by the Paris Appeals Court (the same Revue, 1972, pp. 592-594)—which had voided the judgement rendered on May 14, 1970 by the Tribunal de grande instance de Paris (ibid., 1971, pp. 561-565)—the Supreme Court holds that a contract whose purpose is the carrying out of commercial activities does not allow a foreign State to claim immunity if the actions of a governmental nature carried out in the leased premises are not stipulated in a specific provision in the lease."

In any event, this is a very interesting question that the Court of Appeal of Québec may have to rule on in the near future! •