On What an Embassy is (for the Purposes of Regulation 44/01)

Mr Mahamdia lives in Germany. On September 2002 he concluded with the Ministry of Foreign Affairs of the People's Democratic Republic of Algeria a contract of employment for a renewable period of one year, for work as a driver at the Algerian Embassy in Berlin. Mr Mahamdia had to drive guests and colleagues and, as a replacement driver, also the ambassador. In addition, he delivered embassy correspondence to entities in Germany and to the post office. Diplomatic post was received or passed on by a colleague at the embassy who for his part was driven by Mr Mahamdia.

On August 2007 Mr Mahamdia brought proceedings against the People's Democratic Republic of Algeria in the Arbeitsgericht Berlin (Labour Court, Berlin), seeking to be paid for overtime he claimed to have worked in the years 2005 to 2007. Sometime later Mr Mahamdia was dismissed as from 30 September 2007. Mr Mahamdia thereupon added to his principal claim before the Arbeitsgericht Berlin a claim for a declaration that the termination of his employment contract had been unlawful and for him to be paid compensation for non-acceptance and to have his employment continued until the end of the dispute. In the proceedings concerning the dismissal, the People's Democratic Republic of Algeria raised the objection that the German courts had no jurisdiction, relying both on international rules on immunity from jurisdiction and on the agreement on jurisdiction in the employment contract.

By judgment of 2 July 2008, the Arbeitsgericht Berlin allowed that objection, and consequently dismissed Mr Mahamdia's claim. It took the view that, in accordance with the rules of international law, States enjoy immunity from jurisdiction in the exercise of their sovereign powers and the applicant's activities, which were functionally connected to the diplomatic activities of the embassy, were outside the jurisdiction of the German courts. The applicant in the main proceedings appealed against that judgment to the Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court, Berlin and Brandenburg), which by judgment of 14 January 2009 quashed in part the judgment of the Arbeitsgericht Berlin. It observed that, since the applicant was a driver at the embassy, his activities did not form part of the exercise of public powers by the defendant

State, but constituted an activity that was ancillary to that State's exercise of sovereignty. The People's Democratic Republic of Algeria therefore did not enjoy immunity in this case. Moreover, it considered that the German courts had jurisdiction to hear the case, since the embassy was an 'establishment' within the meaning of Article 18(2) of Regulation No 44/2001. Consequently, the rules set out in Article 19 of the regulation applied. It pointed out that, while an 'establishment' is indeed normally a place where commercial activities are carried on, Article 18(2) of Regulation 44/2001 is applicable to an embassy since, first, that regulation does not contain any provision under which the diplomatic representations of States are excluded from its scope and, secondly, an embassy has its own management which concludes contracts independently, including contracts in civil matters such as employment contracts.

The People's Democratic Republic of Algeria appealed to the Bundesarbeitsgericht (Federal Labour Court). By judgment of 1 July 2010, the Bundesarbeitsgericht set aside the judgment appealed against and remitted the case to the Landesarbeitsgericht Berlin?Brandenburg. It ordered the Landesarbeitsgericht to assess the activities of Mr Mahamdia, in particular those relating to interpreting, in order to establish whether they could be regarded as sovereign functions of the defendant State. In addition, should it emerge from the examination that that State did not enjoy immunity from jurisdiction, it instructed the Landesarbeitsgericht to determine the court with jurisdiction to hear the main proceedings, taking account inter alia of Article 18(2) of Regulation No 44/2001 and Article 7 of the European Convention on State Immunity, drawn up within the Council of Europe and opened to signature by the States in Basle on 16 May 1972.

The Landesarbeitsgericht Berlin-Brandenburg considered that, in accordance with Article 25 of the Basic Law of the Federal Republic of Germany, States can plead immunity from jurisdiction only in disputes concerning the exercise of their sovereignty. According to the case-law of the Bundesarbeitsgericht, employment law disputes between embassy employees and the State concerned are within the jurisdiction of the German courts where the employee has not carried out, for the State by which he is employed, activities forming part of the sovereign functions of that State. In the present case, the referring court 'presumes' that Mr Mahamdia did not carry out such activities, since the People's Democratic Republic of Algeria has not shown that he took part in those activities. That court

further considers that the jurisdiction of the German courts follows from Articles 18 and 19 of Regulation 44/2001, but that, for the purpose of applying those articles, it must be established whether an embassy is a 'branch, agency or other establishment' within the meaning of Article 18(2) of that regulation. Only if that is the case may the People's Democratic Republic of Algeria be regarded as an employer domiciled in a Member State. On the basis of those considerations, the Landesarbeitsgericht Berlin-Brandenburg decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'1. Is the embassy of a State outside the scope of … Regulation No 44/2001 … which is situated in a Member State a branch, agency or other establishment within the meaning of Article 18(2) of Regulation 44/2001?

And the answer is "yes". This is what the ECJ, Grand Chamber, ruled on July 19, 2012 (see whole text here):

> Article 18(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that an embassy of a third State situated in a Member State is an 'establishment' within the meaning of that provision, in a dispute concerning a contract of employment concluded by the embassy on behalf of the sending State, where the functions carried out by the employee do not fall within the exercise of public powers.