

DIPLOMATIC MISSION

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Introduction

Not only foreign companies and foreign entrepreneurs, but also embassies and consulates have to deal with the Dutch when they represent their country in the Netherlands. Foreign embassies and consulates however, have a special status because they are considered to rule under their own flag and not under that of the country of residency. Nevertheless, in some cases they do have to deal with Dutch law, for example with regard to their diplomatic staff.

This article will discuss the limits of diplomatic immunity and how they are defined, the consequences of diplomatic status and the situations in which Dutch law is applicable.

Definitions

Embassy

An embassy is the representation of a particular state in another state. Most states have their embassy in the Hague, where the Dutch government is seated.

The ambassador

The ambassador is a diplomatic official, assigned to serve (and recognized) as the official representative of a particular state in a foreign state or international organization. He holds the highest rank in the diplomatic hierarchy. A diplomatic mission that is headed by an ambassador is known as an embassy.

Consul

A consulate (or consular office) is predominantly in charge of issues relating to individual people and businesses, in other words, issues outside the scope of inter-governmental diplomacy. A country can have several consulates or consulates general in major economic centres to support their economic interests.

Diplomatic corps

The collective body of all diplomats residing in a particular country is called a diplomatic corps.

State immunity

Scope of immunity

The independent character of a sovereign state conflicts with being subjected to the laws and jurisdiction of another state. For this reason, but also in order to enable states to carry out their public functions effectively, states have (state) immunity. State immunity refers to the right or privilege of being exempted from the existing power or jurisdiction of another state.

National courts do not have jurisdiction on claims against a foreign state, its diplomats and/or diplomatic services. There is no uniform law on state immunity, but there are several conventions, such as the European convention on State Immunity (ECSI 1972). Immunity of jurisdiction is only applicable to acts performed by the state in its capacity of state, the so-called *acta iure imperii*. It is not applicable to acts performed by the state in contracts with individuals, the so-called *acta iure gestionis*. This difference is widely accepted. When immunity cannot be invoked, it does not necessarily mean that a verdict can be executed or properties can be seized in full. According to the ECSI for example, a convicted member state will have to act in conformity with the verdict voluntarily. In addition, it is not possible to seize properties meant for public services. It is not permitted either to attach any goods or financial assets of the foreign state that are intended for public services. It is not clear however, whether bank accounts of diplomatic missions and consular posts can be attached. From numerous court decisions it can be concluded that, in case the bank account only serves the purpose of allowing the diplomatic mission or consular post to function, it cannot be attached.

Waiving immunity

Immunity of jurisdiction is not absolute. Therefore, the question of immunity only arises when the foreign state refuses to submit to the jurisdiction of the local court. A state is considered to waive its immunity when it appears in court, when it acts as plaintiff or starts a counterclaim, unless of course it appears in court to invoke immunity. Foreign states can voluntarily waive their immunity, both explicitly and silently. They can do this beforehand, for example in an employment agreement. When immunity is waived or not applicable, the substantial rules of law applicable by the local or territorial court are fully effective.

Immunity of jurisdiction with regard to labour law

State immunity cannot be invoked with regard to disputes concerning employment agreements, if the work takes place in the receiving state and the employee has the nationality of the receiving state. In that case it is not relevant whether the act is an *actus iure imperii* or *actus iure gestionis*.

With regard to a state that is not a party to the ECSI, the court will apply international customary law, which considers the conclusion of an employment agreement an *actus iure gestionis*. Case law shows that the employing state cannot invoke its immunity if the employee has the nationality of

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the receiving state or if he already had permanent residency in the receiving state, before entering into employment. An exception is made with regard to the legal obligation for Dutch employers to obtain a CWI permit when they want to give notice to an employee. An embassy that wants to give notice to its employee does not need such a permit.

Finally, the Dutch Supreme Court has ruled that in specific (safety) situations, based on security reasons, a state can invoke immunity in legal proceedings with regard to termination of a private (employment) agreement.



Ambassadors say cheese

Diplomatic immunity

Diplomatic immunity is a form of legal immunity to ensure that diplomats are given safe passage and are considered not to be susceptible to lawsuit or prosecution under the laws of the receiving state. The rules concerning diplomatic relations are laid down in the Vienna Convention on Diplomatic Relations (VCDR 1961), which also applies to the Netherlands. The VCDR is an international treaty on diplomatic relations and the privileges and immunities of a diplomatic mission. According to the Convention, diplomatic relations between states and permanent diplomatic missions are determined by mutual consent. The functions of a diplomatic mission are among others:

- representing the sending state in the receiving state;
- protecting the interests of the sending state and of its nationals in the receiving state;
- promoting friendly relations between the sending state and the receiving state;
- developing economic, cultural and scientific relations.

In general, the diplomatic missions and their members and families must respect the principles of Dutch law because their immunity does not affect legislation itself. Diplomatic immunity only limits the Dutch authorities in exercising their power with regard to the diplomats' compliance with Dutch legislation.

In addition, according to the VCDR the territory of the diplomatic mission is inviolable and immune from investigation or taxes (extraterritoriality). Agents of the receiving state can only enter the diplomatic mission's territory with consent of the head of the diplomatic mission.

The diplomatic agent is also inviolable. The private residence of a diplomatic agent receives the same protection as the premises of the diplomatic mission. In addition, a diplomatic agent is immune from the criminal, civil and administrative jurisdiction (not relating to private immovable property or succession) of the receiving state. The immunity does not apply to the diplomatic agent's professional and commercial activities outside his official functions. The sending state can waive the diplomatic agent's immunity.

Finally, even members of the administrative and technical staff and family members of the diplomatic mission enjoy some immunity, if they are not nationals of or permanently resident in the receiving state.

Consular immunity

The VCDR is not applicable to foreign consuls and members of their staff. The consular mission falls within the scope of the Vienna Convention on Consular Relations (VCCR 1963), which

confirms that consuls and their staff enjoy immunity with regard to their official acts, but not with regard to their private acts.

Conclusion

Although embassies and consulates, and especially diplomats, enjoy immunity in the Netherlands, there are several situations in which they have to deal with Dutch law. The scope of their immunity depends on the diplomatic nature of their work and the nationality of their employees.

Dutch employees are more likely to be subject to Dutch law than foreigners. In general, diplomatic employees of embassies enjoy immunity with regard to their official acts, but not with regard to their personal behaviour.