

Paradigm

INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS

FALL 2014

Law Firm of the 21st Century

Think Globally. Act Locally.

Current Legal Topics:

*North America • Europe, Middle East & Africa
Latin America & Caribbean • Asia Pacific*



Dealing with Diplomatic Immunity

Diplomats and diplomatic buildings enjoy diplomatic immunity and inviolability. That's how countries show that they respect each other's sovereignty and independence. It also allows them to maintain international relations without having to fear their representatives will be pressured by legal proceedings or arrests. These privileges are far reaching: Julian Assange, the internationally wanted founder of WikiLeaks, has been living in the Ecuadorian Embassy in London for two years now, in a building the British police are not allowed to enter.

Based on our experience as lawyers for several foreign missions in the Netherlands, in this article I will provide guidance on legal disputes involving diplomats.

When a foreign diplomat whose speeding caused a fatal car accident in the land he was posted to in 2013 avoided prosecution by invoking immunity, and then quickly returned to the sending state, the local court could not do anything to stop him. This caused much indignation.

Therefore, more and more governments are taking measures against abuses of immunity, for instance by withdrawing parking permits or tax-free fuel cards and by publishing a blacklist of diplomats refusing to pay their fines.

What are the consequences of diplomatic immunity for citizens dealing with diplomatic institutions and diplomats? Can rules governing the relations between countries be invoked in the case of commercial transactions? Everyone dealing with diplomats or diplomatic institutions can be faced with the limits of diplomatic immunity and inviolability. This may involve buying, selling and leasing real estate, delivery of goods, and employment in an Embassy or Consulate.

Diplomatic Immunity and Inviolability

Diplomatic immunity means that Embassies, Consulates and diplomats and members of their family are not subject to the legal authority of the host country. Though the laws and regulations of the

receiving state are not applicable to them, they are expected to observe common rules. In addition, the court does not have jurisdiction either. Furthermore, diplomats do not have to pay taxes.

In addition to immunity, there is also inviolability. This means the premises of diplomatic missions must not be entered, they must not be searched, property must not be seized and persons must not be arrested by the host country.

These and other rules on diplomatic relations are specified in the Vienna Conventions of 1961 (on Diplomatic Relations) and of 1963 (on Consular Relations), which have been ratified by most countries. In addition, there are also the *United Nations Convention on Jurisdictional Immunities of States and Their Property* and the *European Convention on State Immunity*. They have been ratified by fewer countries but can be used by courts as an indication of what is regarded as customary international law in cases that are not governed, or in less detail, by the Vienna Conventions.



Reinier W.L. Russell

Reinier W.L. Russell is managing partner of the law firm of Russell Advocaten B.V. He has worked for many years with issues regarding diplomatic immunity, representing Embassies and Consulates in the Netherlands. Reinier also assists domestic and foreign businesses in the Netherlands with corporate and commercial matters including litigation. He deals with business formation and reorganization, corporate governance, insolvency law, employment issues, real estate issues and all aspects of liability and contract law.

Russell Advocaten B.V.
Reimersbeek 2
1082 AG Amsterdam
The Netherlands

+31 20 301 55 55 Phone
+31 20 301 56 78 Fax

reinier.russell@russell.nl
russell.nl

Not all actions performed by the diplomatic service are subject to immunity. A distinction is made between official activities (*acta iure imperii*) and personal activities (*acta iure gestionis*). Only official activities are subject to immunity. Thus, if a foreign Embassy in Washington places a lunch order with a catering service operating in the neighborhood, the catering service can take legal action if the bill remains unpaid. Not all countries make this distinction, however, and some are convinced that all activities by diplomats are covered by immunity.

The level of diplomatic immunity may differ according to the function and status of the diplomat. Leading diplomats enjoy the highest degree of immunity, whereas technical, clerical and consular staff generally enjoy functional immunity, i.e. only for activities in connection with the performance of their official duties. An Embassy janitor will rarely be able to appeal to immunity in a private dispute. However, for reasons of national security this may be entirely different for security staff members.

Commercial Contracts and Real Estate

Representatives of Embassies and Consulates may conclude commercial contracts on behalf of the missions. Does state immunity apply to such commercial contracts as well? That mainly depends on the reason for the conclusion of the contract. Concluding a commercial contract will, in principle, not be qualified as an official act. The contract will thus fall under the *acta iure gestionis* and state immunity does in principle not apply.

However, commercial contracts can also contribute to preserving the Embassy or Consulate and as a result, fall under the *acta iure imperii*. Purchasing or leasing an Embassy building or residence of the ambassador or senior diplomats belong to the latter category. However, if an economic attaché decides to build a real estate portfolio in his temporary place of residence, immunity will not apply. In the event the real estate is meant as accommodation for diplomats, the portfolio may however well be covered by immunity.

Employment Law and Social Security

Employment law is an area of limited immunity. According to customary international law, concluding an employment contract falls under the *acta iure gestionis* and immunity does not apply. This paragraph is not applicable if the employee has the nationality of the sending state or his or her common place of residence is not in the receiving state. Professional diplomats usually fall under these exceptions.

If a dispute arises regarding the employment contract of locally recruited support staff, the court of the host country can render a judgment on it. An exception is if the Embassy refers to its own national security. Obviously, the court cannot check whether this plea was made justly without violating state immunity.

Mandatory social security insurance is closely connected with employment law. Mandatory social security insurance is not a tax and therefore, fees must be paid. In the event one is subject to the mandatory social security insurance, one also has to fulfill the obligations of social security

insurance such as reintegration rules in the event of sickness. These rules can differ from country to country.

Disputes with Diplomats

What happens if the Embassy or Consulate does not fulfill its obligations? In principle, in the event of *acta iure gestionis*, the law of obligations of the host country will apply. In this case, if it turns out that a settlement cannot be reached, legal proceedings against the Embassy can be launched if necessary. If an Embassy appears at a court session and does not immediately invoke immunity, it is considered to have waived its immunity. If the claimant wins the lawsuit, the matter will not necessarily be over. The buildings and bank accounts of Embassies are inviolable and therefore not subject to execution.

However, a state is expected to cooperate when it comes to the enforcement of a judgment. After all, diplomatic relations are based on mutual respect. If an Embassy refuses to fulfill its obligations, the claimant does not have any legal coercive measures. An option may be to report the refusal to comply with a judgment to the Ministry of Foreign Affairs that maintains relations with the diplomatic community.

Conclusion

State and diplomatic immunity is not absolute but subject to limitations. However, even if there is no diplomatic immunity involved, inviolability may still apply. When disputes involving immunity arise, it is advisable to get assistance from a lawyer who is experienced in dealing with these complex matters. 