

Amendments to the Bailiffs Act to regulate the consequences of official acts by bailiffs that are incompatible with the State's obligations under international law

EXPLANATORY MEMORANDUM

[...]

Immunity from jurisdiction

First let us consider the question of jurisdiction. In that respect restrictions on jurisdiction can be found in article 13a of the General Legislative Provisions Act and article 13, paragraph 4 of the Bailiffs' Regulations, the provisions of the latter being found in stricter form in article 3 of the Bailiffs Bill. There are also restrictions deriving from a number of international agreements to which the Netherlands is party: the European Convention on State Immunity (Netherlands Treaty Series (*Tractatenblad*)1973, 43) and the Vienna Convention on Diplomatic Relations (Netherlands Treaty (*Tractatenblad*) Series 1962, 159).

It is clear from these instruments and from Supreme Court case law (especially the judgment of 26 October 1973, *Nederlandse Jurisprudentie* (NJ) 1974, 361) that in this connection it is important whether the matter at issue was an act performed in the context of societal relationships governed by private law. If so, the Dutch courts do have jurisdiction; if not, they do not. However, in recent cases the Supreme Court has taken a more subtle approach to accepting jurisdiction in disputes to which international organisations or foreign States are party, even if the acts in question were performed in the context of societal relationships governed by private law. Reference may be had to the Supreme Court judgment of 23 December 1985 (NJ 1986, 438) where the question of whether an employee plays an essential role in the services offered by the employer was cited as an additional criterion in a labour dispute. Also of relevance in this connection is the Supreme Court judgment of 22 December 1989 (NJ 1991, 70) in which the Court held that according to current thinking, there is a tendency to restrict the privilege of sovereign States to invoke immunity in proceedings before a court in another State, and to grant this privilege only if the forum State is of the opinion that the act on the part of the foreign State that prompted the proceedings against it was clearly a governmental act. The same judgment holds that, while it must in general be assumed that a foreign State which enters into a private-law contract in a host State may not invoke immunity in disputes arising from the contract and that this situation does not alter if the foreign state wishes to withdraw, by means of an act which is distinctively a governmental act, from the binding contractual provisions it has entered into, but that there are nonetheless some exceptions to this basic rule. In the judgment in question, the Supreme Court accepted the following situation as an exception: a foreign State in the exercise of its diplomatic mission and its consular services in the host State may, for reasons of state security, make the conclusion or continuation of a contract (in the case at issue a contract of employment) dependent on the result of a security clearance. This result is not open to review by either the other party to the contract or the courts of the host State. In addition, as stated above, since 1990 there has been another exception in force, which cannot be circumscribed, namely that the Dutch courts have no jurisdiction to declare a foreign power bankrupt (Supreme Court 28 September 1990, NJ 1991, 247). [...]