

## **Bill for the approval of the European Convention on State Immunity**

The Explanatory Memorandum to the Bill for the approval of the European Convention on State Immunity reads:

"Article 13a of the Act on General Provisions of Kingdom Legislation (*Wet Algemene Bepalingen*, more commonly known as *Wet AB*) reads as follows: 'The jurisdiction of the courts and the execution of judicial decisions and deeds are subject to exceptions recognised in international law'. Thus it is recognised that under conventional and customary international law certain persons, institutions or property cannot be made defendants in proceedings in Dutch courts or be made the subject of enforcement proceedings. [...]

### ***Immunity from jurisdiction***

In Dutch case law the theory of restricted immunity has now been firmly established. In its judgment of 26 October 1973 7, the Supreme Court considered that in cases where the State engages in private activities and therefore enters into legal relationships on an equal footing with private individuals, it is reasonable for the other party to be granted the same degree of legal protection that would be granted if the transaction had been with a private person, and that it must therefore be assumed that the immunity from jurisdiction to which a foreign State is entitled under contemporary international law does not extend to cases where a State has engaged in such activities as those referred to above.

In the light of this broadly stated view of the Supreme Court, there is every reason to leave scope for Dutch courts to exercise the widest possible powers in entertaining proceedings against other Contracting States and therefore to accept the '*zone grise*' of Chapter IV of the Convention by making the relevant declaration referred to in Article 24(1). [...]

### ***Reasons for ratification***

The preparation for ratification by the Netherlands has not been given the highest priority, since the Convention including Chapter IV will not alter the current Dutch legal practice to any appreciable extent. Nevertheless, by acceding to the Convention the Netherlands will be able to contribute to the harmonisation of views in the field of immunity from jurisdiction. [...]

It may be useful briefly to dwell upon the significance of the '*zone grise*', in particular on the extension which it represents in respect of the system laid down in Chapter I of the Convention. [...]

In the above-mentioned judgment of the Supreme Court of 26 October 1973 one of the parties advanced on appeal that a foreign State is subject to the jurisdiction of another State only in proceedings relating to an industrial, commercial or financial activity in which this foreign State is engaged in the same manner as a private person, and if, in addition, there is a clear connection between this activity and the territory of the State where jurisdiction was assumed. The Supreme Court considered that neither the case law of various countries nor the legal literature contained any reference to any prevailing view that the existence of such a connection is a requirement for acceptance of

jurisdiction over disputes in which a foreign State is a party; and that, consequently, no such rule of international law may be assumed to exist.

It may be doubted whether this consideration is fully consistent with the Convention. Nevertheless, although acceptance of the '*zone grise*' may remove the connection in Articles 4-12 between the act and the territory of the State of the forum so that international law may at least be said not to require proof of the existence of such a connection as a condition for jurisdiction of the court of the State of the forum, the requirement that jurisdiction should not be based on exorbitant grounds must not be forgotten.

Not all the grounds of jurisdiction which, in the terms of the Annex to the Convention, qualify as exorbitant, exist in Dutch law. Most significant in practice are the grounds mentioned in (a) and (c).<sup>3</sup> [...]

### ***Execution of judgments***

The Convention is not concerned with the question to what extent a Contracting State may claim immunity from execution of judgments given against it in the State of the forum. Opinions on this question still differ too much from country to country. Thus, some States, while fully accepting the theory of restricted immunity from jurisdiction, make an exception of immunity from execution, taking the view that it is contrary to international law for judgments against a foreign State to be enforced against its will in the State of the forum. Other States consider that such judgments are in principle enforceable, but may not in any case be enforced against property destined for public use.

The latter view was shared by the Court of Appeal of The Hague in its judgment of 28 November 1968, where the Court considered, on the defendant's argument that it is contrary to international law to give effect to a judgment given by a forum other than that of a foreign State against property of that State, or a State organ that can be assimilated to that State, and that therefore Dutch courts are in any case not entitled to entertain proceedings relating to the execution of preventive measures, "that it had already been decided that the international rule of sovereign immunity does not bar in this case the jurisdiction of the Dutch court; that a judicial decision is by its very nature enforceable; that if immunity does not bar jurisdiction, it also does not, in principle, bar execution; that, however, as also appears from Article 13a of the *Wet AB*, it is possible for a rule of international law to restrict enforceability; that the only rule applicable to this case is the rule that property destined for public use is not subject to measures of execution in another country." [...]

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<sup>3</sup> "(a) the presence in the territory of the State of the forum of property belonging to the defendant, or the seizure by the plaintiff of property situated there, unless

- the action is brought to assert proprietary or possessory rights in that property or arises from another issue relating to such property;

or

- the property constitutes the security for a debt which is the subject matter of the action; ...

(c) the domicile, habitual residence or ordinary residence of the plaintiff within the territory of the State of the forum, unless the assumption of jurisdiction on such a ground is permitted by way of an exception made on the account of the particular subject-matter of a class of contracts.

To what extent such awards against a foreign State are subject to a judicial *exequatur* is a question to be determined only by the law of the State of the forum (Cf. in this context, the judgment of the Supreme Court of 26 October 1973).