

NETHERLANDS

LEGAL BASIS

1. **Has your State signed and/or ratified the European Convention on State Immunity (1972) and/or the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004)? Do the authorities of your State consider the provisions of these treaties on service of process as a codification of customary international law? Does your State apply any other international legal instrument (apart from bilateral agreements)?**

The Netherlands has signed and ratified the European Convention on State Immunity (1972). The Netherlands is preparing accession to the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004). Legislation and practice in The Netherlands as regards the service of process on a foreign state are, generally speaking, in line with Article 22 of the 2004 UN Convention.

Apart from the European Convention on State Immunity (1972), the Netherlands is also a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ('Hague Service Convention'). Furthermore, EU Regulation No. 1393/2007 on the service in the EU Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) applies.

2. **Please provide information on:**

- a. **National legislation (in particular its title, source and content; if available, please provide official translations and/or references to Internet sources).**

Legislation in The Netherlands as regards service of process in civil cases is to be found in the Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering¹). The Code of Civil Procedure (CPC) does not contain any specific stipulations on the service of process on a foreign state. However, Articles 55 and 56 do contain rules regarding the service of process on a person or entity not resident or domiciled in The Netherlands. These rules also apply in case of a foreign state.

Articles 55 and 56 require the bailiff charged with serving process on a person or entity not resident or domiciled in The Netherlands to apply the rules of the EU regulation mentioned above or the Hague Service Convention where these apply. The bailiff should also investigate whether any bilateral agreement might be in force. If not, the main rule of Article 55 applies, which entails the writ is served on the Public Prosecution Service which will send one certified copy to the Netherlands Ministry of Foreign Affairs for onward transmission to the Ministry of Foreign Affairs of the foreign state concerned and a second certified copy directly to the intended recipient.

A foreign State does not have to accept service of process on its embassy or other representation in The Netherlands. The Dutch Supreme Court has confirmed in 1997 that a foreign State is not considered to be domiciled in The Netherlands (see below). However, in case the foreign State (through its embassy or otherwise) indicates it explicitly agrees to process being served on the embassy, this will usually be accepted by the court.

It is also worth noting that, under Article 3A of the Bailiffs Act (Gerechtsdeurwaarderswet²), a Dutch bailiff who has been instructed to perform an official act (including service of process), must within reason take account of the possibility that performing the act in question would be

¹ <http://wetten.overheid.nl/BWBR0001827/>

² <http://wetten.overheid.nl/BWBR0012197/>; a translation is attached as appendix 2 to the Dutch note of November 2005 in the CAHDI database on state immunity.

incompatible with the State's obligations under international law, in which case he must inform the Minister of Justice before proceeding. Article 3A empowers the State to intervene, whether or not prompted by the bailiff, when it considers an act to be incompatible with its obligations under international law. (For more information on the Bailiffs Act, see the answers by the Netherlands to the questionnaire on the possibilities for the Ministry of Foreign Affairs to raise issues of Public International Law in procedures pending before national tribunals.)

b. Case law and practice, specifying whether your national courts and tribunals review the lawfulness of the service of process by operation of law.

Supreme Court, 3 October 1997³:

For the purposes of the Dutch Code of Civil Procedure, a foreign State has no domicile elsewhere than the place where it has its seat. It follows that process has to be served at the seat of the foreign State.

Supreme Court 11 July 2003⁴:

Sending of judicial documents by post directly to persons abroad (Art. 10 sub a Hague Service Convention) only complies with the requirements of the Hague Service Convention when the documents have actually been received by the addressee.

Supreme Court 14 December 2007⁵:

When a defendant does not appear and the fulfilment of the conditions of art. 15 (1 and 2) of the Hague Service Convention has not been proven, in principle no judgment shall be given (art. 15 (2)). However, in case of urgency a court may order provisional or protective measures against a defendant who has not appeared, even if the requirements of the Hague Service Convention have not been met, as long as it has sufficient grounds to conclude that the defendant had been notified in a timely manner.

PROCEDURE

3. Please describe the procedure(s) applicable to service of process on a foreign State, specifying the hierarchy between the different methods for serving process. In particular, please provide information on when the service is deemed to be effected, time-limits, the grounds to refuse service of process and the consequences of the unlawfulness of the service.

As mentioned under 2.a. above, the main rule of Article 55 of the Dutch Code of Civil Procedure requires a certified copy of the bailiff's writ to be sent (through the public prosecution service) to the Netherlands Ministry of Foreign Affairs for onward transmission to the Ministry of Foreign Affairs of the foreign state. A second certified copy will be sent directly.

Article 66 of the Dutch Code of Civil Procedure sets out a general rule to the effect that any deficiencies in the writ will only make it void if the defendant has been unreasonably disadvantaged as a result.

a. How are the terms "diplomatic channels" (Article 16 § 2 of the European Convention and Article 22 § 1 c i of the United Nations Convention) interpreted by your national authorities? Please indicate whether these terms include a notification to the embassy of the State concerned in the State of forum.

See the answer under 3. There is no requirement for a notification to be sent to the embassy of the State concerned, although this may happen on occasion.

³ RvdW 1997, 189 C; an English summary can be found in the Netherlands Yearbook of International Law, 1998, pp. 254-256.

⁴ NJ 2005, 311

⁵ NJ 2008, 13 (Yukos/Rebgun).

b. How are the terms “if necessary” (Article 16 § 2 of the European Convention and Article 22 § 3 of the United Nations Convention) interpreted by your national authorities?

The Public Prosecution Service as well as the Netherlands Ministry of Foreign Affairs will check, before onward transmission, that the documents have been translated in one of the official languages of the foreign State concerned. When such a translation is missing, this will be pointed out to the entity or person instituting proceedings who will be given the opportunity to provide one.

4. Where your State is defendant in the proceedings, what is accepted as an adequate service of process? Please specify whether your State accepts the service to its embassy in the State of forum.

It is the position of The Netherlands that process cannot be served on its embassies or other diplomatic representations. In other words, the writ or other documents must be served through the Ministry of Foreign Affairs of the forum State to the appropriate authorities in The Netherlands. In civil cases, Article 48 of the Dutch Code of Civil Procedure applies, which sets out that the service of process should be effected on the attorney-general of the Supreme Court.

The impossibility of serving process on The Netherlands at the premises of one of its embassies or other diplomatic representation follows from the fact that an embassy does not have separate legal personality and cannot be considered to be the domicile of the state as well as from the rules on serving process on a foreign state as reflected in the UN Convention on State Immunity (2004).

The Vienna Convention on Diplomatic Relations is only of secondary importance in this respect. Although Article 22 of the Vienna Convention on Diplomatic Relations does not permit the service of a writ on mission premises, this provision does not, in the view of The Netherlands, in and by itself stand in the way of service of process through the post. As was noted in 1958 by the International Law Commission in its commentary on what was at that time draft Article 20 (Yearbook of the International Law Commission, 1958, vol. II, p. 95):

“A special application of this principle is the rule that no writ may be served within the premises of the mission, and that no summons to appear before a court may be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission. The service of such documents should be effected in some other way. [...] There is nothing to prevent service through the post if it can be effected in that way.”