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In This Issue

[Is the Embassy an “Establishment” of the Sending State, for the Purposes of Determining Jurisdiction of EU National Courts?](#)

[Protection des locaux diplomatiques et manifestations](#)



Is the Embassy an “Establishment” of the Sending State, for the Purposes of Determining Jurisdiction of EU National Courts?

The answer is “yes”.

In a judgment of July 19, 2012 the European Court of Justice (ECJ), Grand Chamber, held that the embassy of a non-EU State situated in an EU Member State must be considered an

“establishment” within the meaning of Article 18(2) of EU Regulation No 44/2001 on jurisdiction and enforcement of judgments in civil and commercial matters, in a dispute concerning an employment contract concluded between the sending State and an employee of the embassy who does not carry out functions falling within the exercise of public powers (case C-154/11, available on <http://curia.europa.eu>).

This determination is important as it means that the sending State is deemed to be domiciled in the receiving EU Member State, and that the employee can accordingly sue it in that EU Member State pursuant to Article 19(1) of the abovementioned Regulation.

Facts

Mr Mahamdia, who has Algerian and German nationality, lives in Germany. In 2002 he concluded with Algeria an employment contract for work as a driver at the Algerian embassy in Berlin. That contract provided that the Algerian courts alone would have jurisdiction to hear disputes arising from it. In 2007 Mr Mahamdia brought proceedings against Algeria before the German courts, for unpaid salary and unlawful termination of his contract. At some point in the proceedings, questions concerning the jurisdiction of German courts were referred to the ECJ for a preliminary ruling.

The Concept of “Establishment” and State Immunity from Jurisdiction

First, the Court was requested to decide whether the embassy qualifies as an “establishment” within the meaning of Article 18(2) of Regulation No 44/2001. According to that provision, where an employee concludes a contract of employment with an employer who is domiciled outside the EU but has a branch, agency or other establishment in a Member State, that employer must be regarded as domiciled in that State for

the purpose of determining which court has jurisdiction.

The Court considered that (1) an embassy "may be equated with a centre of operations which has the appearance of permanency and contributes to the identification and representation of the State from which it emanates", and that (2) "it is clear that the subject-matter of the dispute in the main proceedings, namely a dispute in the field of employment relations, has a sufficient link with the functioning of the embassy in question with respect to the management of its staff". Therefore the Court concluded that "as regards contracts of employment concluded by an embassy on behalf of the State, the embassy is an 'establishment' within the meaning of Article 18(2) of Regulation No 44/2001 where the functions of the employees with whom it concludes those contracts are connected with the management activity carried out by the embassy in the receiving State".

In this context, the Court stressed that under international law State immunity from jurisdiction "is not absolute, but is generally recognised where the dispute concerns sovereign acts performed *iure imperii*. It may be excluded, by contrast, if the legal proceedings relate to acts performed *iure gestionis* which do not fall within the exercise of public powers".

Agreement Conferring Exclusive Jurisdiction on Courts Outside the EU

The Court was also requested to determine whether a clause conferring exclusive jurisdiction to courts outside the EU constitutes an agreement on jurisdiction within the meaning of Article 21 of Regulation No 44/2001, whereby the employer and the employee can validly depart from the rules of jurisdiction set out in the Regulation. According to Article 21, for such an agreement to be valid when it is entered into before the dispute has arisen, it must allow the employee to

bring proceedings in courts other than those indicated in the relevant provisions of the Regulation.

The Court held that a clause may confer jurisdiction on courts outside the EU. However this clause may not prohibit the employee from bringing proceedings before the courts which have jurisdiction under Regulation No 44/2001 (e.g., the courts of the EU Member State where the employer is domiciled). In other words, the jurisdiction conferred on courts outside the EU cannot be exclusive.

To Summarize

Based on these findings of the ECJ, it is likely that the German courts will now rule that, pursuant to Regulation No 44/2001:

- they have jurisdiction to hear the case brought by Mr Mahamdia (provided that the functions carried out by Mr Mahamdia are effectively considered as falling outside the exercise of public powers), as the Algerian embassy in Berlin is an "establishment" hence Algeria is an employer domiciled in Germany;
 - Algeria cannot invoke the jurisdiction clause contained in Mr Mahamdia's employment contract to contest the jurisdiction of German courts, as this clause confers exclusive jurisdiction on Algerian courts.
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Protection des locaux diplomatiques et manifestations

Les récentes manifestations ayant fait suite dans plusieurs pays à la publication de caricatures du prophète Mahomet, y compris devant certaines ambassades, rappellent l'obligation de l'État accréditaire de protéger les locaux des missions diplomatiques établies sur son territoire. Cette obligation, dont l'importance a été soulignée par la Cour internationale de Justice notamment dans l'affaire des otages à l'ambassade des États-Unis à Téhéran (arrêt du 24 mai 1980), est formulée de la façon suivante à l'article 22, paragraphe 2, de la Convention de Vienne sur les relations diplomatiques :

« L'État accréditaire a l'obligation spéciale de prendre toutes mesures appropriées afin d'empêcher que les locaux de la mission ne soient envahis ou endommagés, la paix de la mission troublée ou sa dignité amoindrie ».

Cette obligation spéciale de protection appelle avant tout des mesures de prévention, dont le contenu concret est à décider à la lumière de toutes les circonstances pertinentes (contexte de tension internationale impliquant l'État accréditant, attentats ou manifestations récents susceptibles de se répéter, craintes particulières exprimées par la mission, etc.).

Dans la pratique belge:

- L'évaluation de la menace est réalisée par divers services de police et de renseignement, sous la coordination de la Direction Générale Centre de Crise (SPF Intérieur).
- Un dispositif permanent de protection (stationnement ininterrompu de forces de police, blocs de béton, etc.), au-delà d'une surveillance par patrouilles

régulières, n'est mis en place que dans les situations où cela est jugé nécessaire.

- L'éventuelle demande de protection particulière formulée par la mission constitue naturellement un élément important en vue de déterminer la nature et l'ampleur des mesures de protection appropriées. Il est, de manière générale, conseillé à la mission de se mettre en contact à ce sujet avec la Direction du Protocole du SPF Affaires étrangères.
- En vertu de la liberté d'expression, des manifestations pacifiques sont autorisées aux abords de la mission. Elles doivent demeurer ponctuelles, et ne pas se transformer en un « siège » continu des locaux diplomatiques susceptible de troubler la paix de la mission (vacarme incessant, etc.). En pratique, les forces de l'ordre maintiennent les manifestants à une certaine distance des locaux de la mission, et garantissent le libre passage des membres de celle-ci.
- Aucun coût supporté par les autorités belges à raison de la protection des locaux des missions étrangères ne fait l'objet d'une demande de récupération auprès de l'État accréditant, le gouvernement belge ne faisant qu'exécuter une obligation découlant de la Convention.

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