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## The Position of a Landlord when the Tenant is a Foreign State

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Landlords have often been leery of leasing space to foreign missions because of issues concerning security and insurance. However, due to a recent file with which my firm was involved, I became aware that there are serious limitations on remedies with respect to sovereign or diplomatic entities from a landlord's perspective.

In Canada, the legislative framework is established by the *Foreign Missions and International Organizations Act* ("FMIO Act, S.C. 1991, c.41, s.5(1)(b)"). This statute deals with two types of relationships with foreign entities. Part 1 deals with foreign diplomatic missions and consular posts and Part 2 deals with international organizations. Pursuant to Part 1, various articles of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations are adopted as having the force of law in Canada with respect to all foreign states, regardless of whether those states are parties to those Conventions.

In Part 2, the Governor in Council may by order provide that an international organization shall, to the extent specified in the order, have the privileges and immunities set out in Articles 2 and 3 of the Convention on the Privileges and Immunities of the United Nations. The Governor in Council has passed various orders with respect to the Privileges and Immunities of Certain Entities in Canada which are not considered foreign states, such as the European Community and other bodies.



The FMIO Act in section 3(1) adopts Articles 1 and 22 of the Vienna Convention. Those articles provide as follows:

#### Vienna Convention on Diplomatic Relations

##### Article 1

- (i) The “head of mission” is the person charged by the sending State with the duty of acting in that capacity.
- (ii) The “premises of the mission” are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.

##### Article 22

- (i) The premises of the mission shall be inviolable. The Agents of the receiving State may not enter them, except with the consent of the head of the mission.
- (ii) The receiving state is under a special duty to take appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
- (iii) The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Section 5(1) of the FMIO Act provides that:

5(1)(b)– an international organization shall, to the extent specified in the order, have the Privileges and Immunities set out in Articles 2 and 3 of the Convention on the Privileges and Immunities of the United Nations as set out in Schedule 3 (the United Nations Convention).

The United Nations Convention is Schedule 3 to the FMIO Act. Section 2 and 3 of the United Nations Convention are as follows:



## Section 2

The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

## Section 3

The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

The effect of this statutory framework is to grant immunity from every form of legal process to entities that fit appropriately within the framework. As such, the premises of such entities are inviolable and are immune from interference by administrative, judicial or legislative action. The immunities conferred upon diplomats and their missions can have dire consequences for landlords. In particular, the landlord loses the right to recover possession of the premises in a situation of non-payment of rent. The immunities granted by the Vienna Convention upon diplomats and their missions have been extensively commented on in the case of *767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire to the United Nations*, 988 F.2d 295 (2d Cir. 1993) (“Zaire”). I would suggest that the Zaire decision would currently be the law in Canada as well.

Not only does the immunity affect the landlord’s right to gain possession, but it also affects the landlord in respect to other statutes such as the *Construction Lien Act*. In respect of those entities regulated by the United National Convention, the *Construction Lien Act* would be a statute constituting “legislative action” by the Government of Ontario. Commencement of an action enforcing sale under judgment is a form of “judicial action” within the meaning of section 3 of the UN Convention. Registration of a lien or certificate of action on title to the property of an owner are forms of “administrative action” within the meaning of section 3 of the UN Convention. All of these processes are “legal processes” within the meaning of section 2 of the UN



Convention. In respect of those entities regulated by the Vienna Convention, the exemption from execution and attachment pursuant to Article 22 of the Vienna Convention equally apply to the *Construction Lien Act*.

Most commercial leases provide that if the tenant causes a lien to be registered against the premises, the landlord may, by notice to the tenant, advise the tenant to cause the lien to be vacated within a given timeframe. If the tenant is a body claiming immunity pursuant to either the Vienna Convention or the UN Convention, then the tenant may resist the landlord's demand on the basis of not wishing to give up the immunity. In such case, the tenant may insist on being allowed the opportunity to get a court order declaring the lien to be invalid. Dependent on whether such application is contested or appealed, the lien might not be quickly vacated.

The ability to enforce a construction lien and the role of sovereign immunity was dealt with in the case of *Croatia v. Ru-Ko Inc.* (1998), 37 O.R. (3d) 133, at 136 (G.D.). In this case, the court upheld the concept of Article 22 of the Vienna Convention; however, it found that the property in question had never been used for the purposes of the mission as defined in Article 1 of the Vienna Convention. Neither had the property been used for the purposes of the residence of the head of the mission. As a result, the special protection and immunity provided by Article 22 of the Vienna Convention did not apply to the lands and building in question. However, it is clear that if the facts had been different, and if the mission had been able to conclusively prove that the lands and buildings had been used for the purposes of the mission, then there would have been immunity in respect of the construction lien. It is therefore necessary at the outset to determine the facts in any case. Status is not always obvious and should not always be inferred from the fact that a given tenant may appear to represent a foreign government or claim sovereign immunity.

However, if it can be determined that the tenant has valid diplomatic accreditation and that the premises are indeed premises of the mission, then the option of eviction and recovering possession of the premises are not available under Article 22 of the Vienna Convention or Section 3 of the United Nations Convention. The Landlord is limited to an action in damages. If the landlord were to prevail in such action, the collectability of a money judgment against a foreign sovereign entity may be difficult. Therefore, before a landlord enters into a lease with a



foreign sovereign diplomatic entity, certain matters should be considered:

1. Attempts should be made to include the waiver of both sovereign and diplomatic immunity. In other words, the express consent of the lawful entry upon the premises of the mission for the purposes of enforcing any legal remedy of the landlord with respect to possession thereof could be granted (the ability to obtain this may be difficult in the bargaining process);
2. Obtain the appointment of an agent for service of process for any action arising from the lease or matters ancillary thereto, which will relieve the landlord from the burden of provision for overseas service on a foreign government; such appointment should expressly provide that it survives the term of the lease;
3. Consider obtaining either a security deposit or letter of credit, which by its terms, would survive the lease term to secure all obligations of the tenant under the lease and/or all liabilities arising therefrom (again, this will depend upon the nature of the negotiation);
4. Require the tenant to acquire property damage and liability insurance naming the landlord as an additional insured.<sup>1</sup>

Although the number of missions are probably largely found in Ottawa and Toronto, and the negotiation of leases in respect of same may involve a relatively few number of practitioners, the impact of the application of diplomatic immunity in respect of rights under the *Construction Lien Act* broadens the number of affected parties and may make this rather esoteric discussion of greater interest to the larger real estate bar.

1 Nativ Winiarsky & Abner T. Zelman, "Obstacles Arise When Tenant is a Foreign State" [2002] New York Law