

ARBITRATION CLAUSES AS WAIVERS OF IMMUNITY FROM
JURISDICTION AND EXECUTION UNDER THE FOREIGN
SOVEREIGN IMMUNITIES ACT OF 1976

The Foreign Sovereign Immunities Act of 1976 (FSIA)¹ was Congress' first codification of definitive rules governing actions against foreign states. The Act adopted the prevailing trend in international law of restricting a sovereign's immunity to its public acts.²

A primary aim of the FSIA was to provide a comprehensive jurisdictional scheme for initiating suits against foreign states.³ Judicial decisions denying immunity to foreign states under the Act's waiver provision of section 1605(a)(1),⁴ however, have failed to articulate proper grounds for the exercise of personal jurisdiction in the United States. This note examines whether a foreign state's submission to arbitration, that does not explicitly name the United States as the situs of the arbitration, should establish an implied waiver of immunity from both jurisdiction and execution.⁵ The first part of this inquiry analyzes the *in*

McGowan
NYU-S.S.
I & C.L.
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1. Pub. L. No. 94-583, §§ 2(a), 3, 4(a), 5, 6, 90 Stat. 2891-98 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-11 (1982)).

2. H.R. REP. No. 1487, 94th Cong., 2d Sess. 1,7, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604, 6605 [hereinafter cited as House Report]. The restrictive theory of sovereign immunity limits the immunity of a foreign state to suits involving a foreign state's public acts and does not extend to suits based on commercial or private acts. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 490 (1980). Although the FSIA does not define "public acts," section 1603(d) of the Act defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d) (1982). United States courts have broad discretion in determining what constitutes "commercial activity" under the Act. See House Report, *supra*, at 16. See generally 2 G. DELAUME, TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES § 11, at 23-35 (1982) (for a discussion of the characteristics of public acts).

3. See House Report, *supra* note 2, at 6. Section 1330(b) of the Act is in effect a Federal long-arm statute over foreign states. *Id.* at 13. The statutory scheme also provides a procedure for serving notice on defendant states and renders unnecessary the attachment of assets for jurisdictional purposes. *Id.* at 8. Commentators were optimistic that the FSIA would rectify many of the problems previously faced by litigants suing foreign states in United States courts. See, e.g., Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 SW. L.J. 1009, 1065 (1979); von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 66 (1978); Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE J. WORLD PUB. ORD. 1, 48-49 (1976).

4. 28 U.S.C. § 1605(a)(1) (1982).

5. Implied waivers of immunity from attachment in aid of execution and from execu-

Pecuniary obligations arising from the judicial process are similar to those arising from the arbitral process. Arbitral awards are generally binding on the parties.⁵⁵ Indeed, the New York Convention requires contracting states to enforce arbitral awards rendered in the territory of another contracting state.⁵⁶ Thus, according to *Shaffer's* notion of expanded jurisdiction, the *Ipitrade* action to enforce the arbitral award under the New York Convention was in accordance with "traditional notions of fair play and substantial justice."

The jurisdictional aspect of section 1605(a)(1) was directly confronted by the District Court for the District of Columbia in *Libyan American Oil Co. (LIAMCO) v. Socialist People's Libyan Arab Jamahiriya*.⁵⁷ This case involved the nationalization by Libya of certain concession rights and oil drilling equipment of LIAMCO.⁵⁸ The concession agreement between the parties provided for arbitration where the parties agreed or where the arbitrators might agree to locate it.⁵⁹ Petitioner entered this claim, pursuant to the New York Convention, to enforce an arbitration award that was rendered in Switzerland.⁶⁰

The *LIAMCO* court explained that section 1330(b) of the FSIA

55. H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 196 (2d ed. 1976) [hereinafter cited as H. STEINER].

56. See *supra* note 24.

57. 482 F. Supp. 1175 (D.D.C. 1980). LIAMCO attempted to levy execution against Libya's assets in four countries without judicial success. The LIAMCO litigation illustrates the complexity of domestic immunity laws and the difficulty that plaintiffs confront when forced to execute against a sovereign's assets. See G. DELAUME, *supra* note 2, § 12, at 19-20.

In France, attachments on Libya's Parisian bank accounts were vacated under the theory of absolute immunity from execution. *Procurer de la Republique v. Societe LIAMCO*, Trib. gr. inst., Paris, Mar. 5, 1979, cited in G. DELAUME, *supra* note 2, § 12, at 19 n.15 (citing Clunet, 1979 J. DE DROIT INT'L PRIVE 857). The United States District Court for the District of Columbia dismissed LIAMCO's claim on the basis of the act of state doctrine. *LIAMCO*, 482 F. Supp. at 1175. The Swiss Federal Supreme Court declined jurisdiction because the transaction did not have a sufficient nexus with Switzerland. *Socialist Libyan Arabic Popular-Jamahiriya v. Libyan Am. Oil Co.*, Bundesgericht, Judgment of June 19, 1980, reprinted and translated in 20 I.L.M. 151 (1981). See *supra* note 54. Finally, the Court of Appeals of Svea (Stockholm) exercised jurisdiction and denied Libya immunity from execution. *Libyan Am. Oil Co. v. Socialist People's Arab Republic of Libya*, Court of Appeals of Svea, Judgment of June 18, 1980, reprinted and translated in 20 I.L.M. 893 (1981). The Swedish decision, however, was appealed to the Swedish Supreme Court to determine whether LIAMCO could attach Libya's non-commercial as well as commercial assets. See G. DELAUME, *supra* note 2, § 12, at 20. The dispute ended in a settlement. *Id.* See *infra* notes 148-53 and accompanying text.

58. 482 F. Supp. at 1176.

59. *Id.* at 1178.

60. *Id.* at 1176.

incorporated the requirements of minimum jurisdictional contacts⁶¹ and recognized that the immunity provisions of the Act require "some connection between the lawsuit and the United States or an express or implied waiver by the foreign state of its immunity from jurisdiction."⁶² Without explicitly considering the jurisdictional ramifications of a section 1605(a)(1) implicit waiver, the court ruled that "[a]lthough the United States was not named [as the situs of the arbitration], consent to have a dispute arbitrated where the arbitrators might determine was certainly consent to have it arbitrated in the United States."⁶³

In its brief LIAMCO argued for a waiver of immunity based on the defendant's submission to arbitration which might have occurred in the United States.⁶⁴ To establish jurisdiction, LIAMCO asserted that the presence of Libyan assets in the forum was sufficient to satisfy due process because the action sought confirmation of an arbitral award.⁶⁵ Thus, even though *Shaffer's* notion of expanded jurisdiction was introduced, the *LIAMCO* court was willing to exercise its jurisdiction solely on the basis of consent.

Both parties in the *LIAMCO* case appealed the lower court decision to the Court of Appeals for the District of Columbia, but before the appeals were decided the dispute was settled.⁶⁶ In the *LIAMCO* appeal, the United States filed a brief as *amicus curiae* supporting the lower court decision.⁶⁷ The United States argued that "[i]n enacting section 1605(a)(1) of the FSIA, Congress manifestly intended that an arbitration agreement should constitute a waiver of foreign sovereign immunity."⁶⁸ Waivers should exist when the arbitration clause specifically stipulates the United States as the situs of the arbitration and

when the arbitration is held in a country that is a party to the Convention. The United States argued that the Convention States are not bound by the Convention's indication on the situs of arbitration. The Convention is derived in a foreign country. The United States, therefore, is not bound by the Convention's articulated in the Convention.

A more recent decision, *United States v. Southern District of Nigeria*,⁷¹ a case involving *Ipitrade*, the history of the case and its consequences are stated:

The court had found that the arbitration was a particular case and that the arbitration was not an enforcement of an arbitral award. The court stated that the arbitration was not an enforcement of an arbitral award.

61. *Id.* at 1177.

62. *Id.*

63. *Id.* at 1178. The *LIAMCO* court specifically relied on *Ipitrade*, 465 F. Supp. at 824, for its consent ruling. The court ultimately dismissed LIAMCO's action because the act of state doctrine prohibited the court from adjudicating the legality of another sovereign's public acts. 482 F. Supp. at 1178-79; see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). Both parties to the *LIAMCO* dispute appealed the district court decision. See *infra* text accompanying notes 66-70 for a further discussion of the appeals.

64. Memorandum of Libyan American Oil Company in Opposition to Motion to Dismiss and in Support of Petition to Confirm Arbitral Award at 17-31, *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahirya*, 482 F. Supp. 1175 (D.D.C. 1980).

65. *Id.*

66. Delaume, *Foreign Sovereign Immunity: Impact on Arbitration*, 38:2 *ARB. J.* 34, 37 (1983).

67. Brief for United States as *amicus curiae*, *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahirya*, Nos. 80-1207 and 80-1252 (D.C. Cir. filed June 16 and Nov. 7, 1980).

68. *Id.* at 161.

69. *Id.* at 163. The court found that the situs of the arbitration was the United States and that the arbitration was not an enforcement of an arbitral award.

70. *United States v. Southern District of Nigeria*, 488 F. Supp. 103 (1981), *rev'd*, 103 F.3d 103 (1981).

71. 488 F. Supp. 103 (1981), *rev'd*, 103 F.3d 103 (1981). The court found that the arbitration was not an enforcement of an arbitral award.

72. See *supra* notes 69-71. The *LIAMCO* case involved the arbitration of a dispute between the United States and the Nigerian government. The action was based on the Convention's indication on the situs of arbitration. The court found that the arbitration was not an enforcement of an arbitral award.

73. 488 F. Supp. 103 (1981).

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38:2 ARB. J. 34,

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when the arbitration actually takes place or might take place in a state that is a party to the New York Convention.⁶⁹ Finally, the United States argued that contacts between the defendant and the United States are not required when the action before the court is not an adjudication on the merits, but rather "the enforcement of an award rendered in a foreign jurisdiction where the defendant had the opportunity to appear and contest the entry of judgment."⁷⁰ The United States, therefore, also endorses the theory of expanded jurisdiction as articulated in *Shaffer*.

A more restrictive interpretation of the legislative history relating to section 1605(a)(1) was announced by the District Court for the Southern District of New York in *Verlinden B.V. v. Central Bank of Nigeria*,⁷¹ a case factually similar to *Ipitrade*.⁷² In rejecting the holding of *Ipitrade*, the court emphasized the ambiguous nature of the legislative history of section 1605(a)(1) and cautioned against the unforeseen consequences of a literal reading of that history.⁷³ Judge Weinfeld stated:

The comment in the Congressional report. . . [that] the courts had found an implicit waiver "where a foreign state has agreed to arbitration in another country or . . . agreed that the law of a particular country would apply," does not necessarily constitute an endorsement of that result. More importantly, it is by no means clear that Congress intended, in referring to "another country" or a "particular country," to include a *third-party* country the adoption of whose law or forum by a foreign

69. *Id.* at 163. The United States argued that although Libya did not specify the situs of the arbitration, it should have foreseen that the arbitration tribunal would choose a country that is a party to the New York Convention. *Id.*; see also *supra* note 24 (further discussion of the New York Convention).

70. United States Brief, *supra* note 67, at 163.

71. 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd*, 103 S. Ct. 1962 (1983). The Supreme Court held that Congress did not exceed the scope of article III of the Constitution by granting Federal district courts subject matter jurisdiction over actions by foreign plaintiffs against sovereign states. The question of personal jurisdiction was remanded to the court of appeals.

72. See *supra* text accompanying notes 41-48. The underlying transaction in the *Verlinden* case involved two separate contracts. *Verlinden*, a Dutch company, first contracted with Nigeria to purchase and sell cement; this contract provided for arbitration under the rules of the ICC. Subsequently, *Verlinden* entered into an irrevocable letter of credit with the Central Bank of Nigeria; arbitration was not provided for in this contract. The action was commenced on the basis of the letter of credit, however, the court's section 1605(a)(1) ruling is premised on the inoperative contract between *Verlinden* and Nigeria. 488 F. Supp. at 1301.

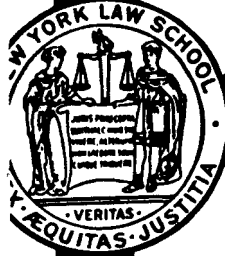
73. 488 F. Supp. at 1301.

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