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Henry T. Berry

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**WAIVER OF FOREIGN SOVEREIGN IMMUNITY:
THE SCOPE OF 28 U.S.C. § 1605(a)(1)**

INTRODUCTION

The passage of the Foreign Sovereign Immunities Act of 1976¹ (hereinafter FSIA) marked completion of many years of effort on the parts of both Congress and the State Department to formulate a coherent approach to the problem of when to grant a foreign state or its agencies² sovereign immunity from the jurisdiction of United States courts.³ Included in the FSIA is a provision for the waiver of the defense of sovereign immunity by a defendant foreign state:

A foreign state shall not be immune from jurisdiction of the courts of the United States in any case in which the foreign state has waived its immunity either explicitly or

1. 28 U.S.C. §§ 1330(d), 1391, 1441(d), 1602-1611 (1976).

2. Hereinafter, the terms foreign state or sovereign will also include the state's agencies and instrumentalities unless there is a need to refer to them specifically.

3. The problem was first addressed in the landmark case of the *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), where Chief Justice Marshall held that foreign sovereigns are immune from the jurisdiction of United States courts. Through the years a 'restrictive' theory of sovereign immunity gained in favor and was given official recognition in the "Tate Letter" of May 19, 1952, 26 DEP'T STATE BULL. 984 (1952). See generally von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. OF TRANSNAT'L L. 33 (1978).

by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.⁴

The purpose of this note is twofold: (1) to examine the principle of waiver as it may apply to situations in which sovereign immunity is pleaded as a defense to the assumption of jurisdiction by a United States court over a foreign sovereign; and (2) to attempt to identify those situations, if any, where the principle of waiver can be extended to obtain *in personam* jurisdiction over foreign sovereigns who plead insufficient minimum contacts to support jurisdiction as defined by *International Shoe Co. v. Washington*⁵ and its progeny.

Although it would seem that the difference between the principles of foreign sovereign immunity and minimum contacts would be clear, there appears to be some confusion on the matter. At least one leading case in the area, *Carey v. National Oil Corp.*,⁶ does not differentiate clearly between the two principles, implying that, to an extent, they are part and parcel of the same doctrine.⁷ This is not the case. The extent to which the United States chooses to grant foreign sovereigns immunity from the jurisdiction of its courts is a matter of political and judicial policy⁸ and is subject at any time to change by Congress or the courts. On the other hand, minimum contacts, as required in order for a court to assert *in personam* jurisdiction over a defendant, are mandated by the constitution and are not similarly subject to legislative change.⁹ This is

4. 28 U.S.C. § 1605 (a)(1). It should be noted that the FSIA includes a second waiver provision, 28 U.S.C. § 1610 (a)(1), which deals with the attachment and execution of property in the United States which is owned by a foreign sovereign. An analysis of this provision is beyond the scope of this paper other than to say that §§ 1609-11, which deal with the issue of attachment and execution of property, severely limit *in rem* and *quasi in rem* jurisdiction over property owned by foreign sovereigns. See *Reading & Bates Corp. v. National Iranian Oil Co.*, 478 F. Supp. 724 (S.D.N.Y. 1979); *Behring International, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 396 (D.N.J. 1979).

5. 326 U.S. 310 (1945).

6. 592 F.2d 673 (2d Cir. 1979).

7. 592 F.2d at 676-77. The court's *per curiam* opinion speaks of "direct effects" and "minimum contacts" as if they were virtually equivalent terms. While the case is actually decided on minimum contacts grounds, the opinion never clearly distinguishes between the two principles.

8. See *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 698-99 (1976).

9. See *World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. 559 (1980); *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957); *Inter-*

a crucial distinction since, in light of the FSIA, it is the constitutional restriction on the courts' jurisdiction¹⁰ that is likely to provide plaintiffs with the most difficulty.

The first part of this note, then, will attempt to define 'waiver' as it is used in the FSIA and will emphasize the possible uses of the principle to defeat the defense of foreign sovereign immunity when raised in suits arising out of contracts between private domestic plaintiffs and foreign sovereigns. Contracts will be examined using a phase/time analysis in which the contractual process is divided into three separate phases: (1) contract formation; (2) after formation but prior to termination or breach; (3) after termination or breach. In each phase there will be an attempt to identify some types of behavior that reasonably could be construed as a waiver of the defense of foreign sovereign immunity.

The second part of this note will then try to determine what types of behavior may amount to waiver of the insufficient minimum contacts defense to *in personam* jurisdiction.

I. THE MEANING OF 'WAIVER' IN THE CONTEXT OF THE FSIA

Perhaps the most important task in attempting to determine the scope of the doctrine of waiver with regard to foreign sovereign immunity is that of defining the term itself. To a large extent, the

national Shoe Co. v. Washington, 326 U.S. 310 (1945). While it is true that *International Shoe* and *McGee* were expansive in terms of the traditional standards of *in personam* jurisdiction, *McGee* is now the case that generally defines the limit of a state's power to extend its long-arm jurisdiction and, as such, it is restrictive. In referring to *International Shoe* and its progeny in his dissent from the clearly restrictive holding in *World-Wide Volkswagen*, Justice Brennan said that "the standards enunciated by those cases may already be obsolete as constitutional boundaries." *World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. 559, 580 (1980) (Brennan, J., dissenting).

10. The FSIA is, in essence, a codification of the restrictive theory of sovereign immunity. See note 32 and accompanying text *infra*. And as Justice White said in *Alfred Dunhill of London, Inc., v. Cuba*, 425 U.S. 682 (1976), the purpose of the restrictive theory "is to assure those engaging in commercial transactions with foreign sovereignties that their rights will be determined in the courts whenever possible." *Id.* at 699. Consequently, it is the due process limitation on *in personam* jurisdiction rather than the sovereign immunity limitation that will defeat plaintiffs in commercial suits.

breadth of the definition will determine the limits of the doctrine.

Professor Corbin has said that there are many definitions of waiver and that no single one of them is correct.¹¹ The Supreme Court has described waiver as "an intentional relinquishment of a known right or privilege."¹² This definition accords well with the concept of express or explicit waiver as used in the FSIA. Explicit waiver must amount to an unambiguous declaration on the part of a foreign sovereign that it will not use the defense of sovereign immunity to avoid any potential legal actions arising from the contract. As the legislative history of the FSIA points out, this can be done either by a treaty between the United States and the foreign state in question or by an express provision of the contract.¹³ In addition, the state might make some official pronouncement of its intention to forgo the defense with respect to certain commercial activities in order, for example, to attract bids on a given project or to facilitate the obtaining of credit.

Explicit waiver yields to definition with relative ease; implicit waiver is a bit more elusive. The legislative history gives three situations where implicit waiver could be found (although it does not imply that the principle is limited to these situations): (1) the foreign state has agreed to arbitration in another country; (2) the foreign state has agreed that the law of another country will govern the contract; (3) the foreign state has filed a responsive pleading without invoking the defense of sovereign immunity.¹⁴

The legislative history further states that "a foreign state which has induced a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, go back on its promises and seek to revoke the waiver unilaterally."¹⁵ The phrase "induced a person into a contract" demonstrates a Congressional intent to inject an element of estoppel into the principle. Moreover, courts have interpreted implicit waiver as being something close to equitable estoppel.¹⁶

11. CORBIN, 3A CONTRACTS § 752 (1960).

12. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

13. [1976] U.S. CODE CONG. & AD. NEWS 6604.

14. *Id.* at 6617.

15. *Id.* See Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930). See also Fed R. Civ. P. 12(b), (h); Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871, 874 (3rd Cir. 1944).

16. See Shephard v. Barron, 194 U.S. 553 (1904) where the Court stated: Provisions of a constitutional nature, intended for the protection of

In summary, explicit waiver is an express manifestation on the part of the foreign state that it will not invoke the defense of sovereign immunity in order to avoid the jurisdiction of United States courts; implicit waiver is drawn from statements or actions from which it reasonably can be inferred that the foreign state did not intend to invoke the defense. This inference can be strengthened if inducement is shown.

II. WAIVER WITHIN THE CONTRACTUAL RELATIONSHIP

A. *Waiver During the Formation of the Contract*

At the outset of this section, it should be noted that, in a minority of jurisdictions, any waiver except those expressed in a treaty or contained in the final integrated writing of the contract may be barred by the parole evidence rule.¹⁷ Most jurisdictions, however, have held that proof of waiver prior to the final formation of a contract will not be barred.¹⁸ The courts so holding have generally relied on a notion of equitable estoppel.¹⁹ With that caveat in mind, the following situations are those in which the courts have found or logically could find waiver of the defense of sovereign immunity:

1. Explicit Waiver

- a. A treaty or other agreement between the United States and the foreign state in which the state agrees not to invoke the defense.²⁰

the property owner, may be waived by him, not only by an instrument in writing, upon good consideration, signed by him, but also by a course of conduct which shows an intention to waive such a provision, and where it would be unjust to others to permit it to be set up.

Id. at 568.

17. See generally J. CALAMARI & J. PERILLO, *CONTRACTS* 446-47 (2nd ed. 1977).

18. W. JAEGER, *WILLISTON ON CONTRACTS* § 750 (3rd ed. 1961).

19. J. CALAMARI & J. PERILLO, *CONTRACTS* 447 (2nd ed. 1977).

20. In *Paterson, Zochonis (U.K.) Ltd., v. Compania United Arrow, S.A.*, No. 77 Civ. 4470 (S.D.N.Y. Jan. 30, 1980), plaintiff maintained that when defendant, a corporation owned by the People's Republic of China, signed an "Application for Certificate of Financial Responsibility" with the United States government and appointed an agent for service of process in the United States, the corporation had waived sovereign immunity. The Court held that the "Appli-

- b. An express clause in the final integrated writing of the contract in which the state promises not to invoke the defense of sovereign immunity.²¹
 - c. A general promise by the state that it will not invoke the defense in specified commercial situations.
2. Implicit Waiver
- a. An agreement to arbitrate any disputes arising out of the contract.²²
 - b. An agreement that the contract will be governed by the law of a particular country.²³
 - c. An agreement regarding the payment of legal fees or other expenses arising from legal disputes relating to the contract.
 - d. The totality of actions of a state's agency if the agency generally acts as if it were any private commercial enterprise participating in the marketplace.²⁴ Various acts indicative of this might be:
 - i. the agency being organized or incorporated as if it were a private venture;
 - ii. the agency claiming it is independent of a direct government control;
 - iii. the government in question disavowing direct control over the agency;
 - iv. the directors of the agency being otherwise not

cation" did not have the breadth of a treaty or similar agreement but was for the very narrow purpose of insuring compliance with federal water pollution standards so that the corporation's ships would be allowed to pass through the Panama Canal. This, the court said, would not support waiver of sovereign immunity for all actions brought against the corporation in the United States.

21. See note 16, *supra*.

22. See *Ipitrade Int'l v. Nigeria*. (D.D.C. 1978). The *Ipitrade* contract contained an arbitration clause and the court held that that brought the case squarely within the ambit of the FSIA waiver provision.

23. *Id.* The contract in *Ipitrade* also contained a provision agreeing that the laws of Switzerland would govern the contract. This too brought the action under the FSIA's waiver provision.

24. See *Trendex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 All E.R. 881. Lord Denning, M.R., found that although the bank was an agency of Nigeria and, in general, behaved as a governmental bank rather than a private one, it had acted as a private concern in the world market and this was sufficient to take the bank from under the umbrella of sovereign immunity.

- connected with the government;
- v. the agency advertising or otherwise soliciting business as would a private concern.²⁵
- e. An extra-contractual indication on the part of the foreign state of its good-faith intention to perform its part of a bargain or suffer the consequences of non-performance. An example might be the posting of a performance bond.²⁶
- f. A showing by the plaintiff that the state had not invoked the defense of sovereign immunity on past occasions when sued in foreign courts in actions arising from commercial agreements. (In this instance, the plaintiff would probably have to plead knowledge and reliance.)

These are merely possible examples of implicit waiver. There are doubtless many others. Basically, these acts amount to a holding out by the state of its intent to behave as if it were a private concern operating in the world marketplace. Presumably, the state indicates such an intent in order to induce private business to enter into commercial contracts where, absent a belief in the state's good faith, they would not enter into such agreements. It is this general premise that supports the implied waiver of sovereign immunity.

B. *Waiver after Formation and prior to Termination or Breach*

1. Explicit Waiver

During this phase of the contractual relationship, any of

25. This type of behavior was held not to constitute waiver of the defense of foreign sovereign immunity in *Harris v. Vao Intourist, Moscow*, 487 F. Supp. 1056 (E.D.N.Y. 1979), when defendant, an agent of the Soviet government, was clearly behaving as a commercial travel agency in the United States. However, the action was one for wrongful death and the site of the alleged tort was in the Soviet Union. The entire tenor of the opinion was that requiring a foreign sovereign to defend a wrongful death action resulting from a hotel fire in the Soviet Union in a United States court might be stretching long-arm jurisdiction a bit too far. It remains to be seen how the courts would construe waiver in a contract action involving a similar "commercial" defendant.

26. See *Trendex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 All E.R. 881. The Nigerian bank had posted a bond and, further, had indicated in a letter that the bond was their guarantee of good faith. While the court did not deal with the issue of waiver, in essence, Lord Denning found that these acts constituted a waiver.

the examples of explicit waiver listed in part 'A' would apply. In essence, the state can explicitly waive the defense of sovereign immunity at any time.

2. Implicit Waiver

In general, the possibilities for implicit waiver during this phase of the contractual relationship are far more limited than in the formation phase. The reason for this is obvious: the plaintiff has already entered into the contract and it is now extremely difficult to show inducement. The principle is now limited to the narrow definition of waiver, where it is held to be merely an intentional relinquishment of a known right. A possible exception is the situation in which the plaintiff could show inducement to continue performance in the face of an anticipatory breach. In such an instance, the acts that would imply waiver in the formation phase would be applicable here. Otherwise, acts that might imply waiver in this phase would be agreements to arbitrate disputes arising in the performance phase when such agreements were not in the original integrated writing.²⁷ Also, an acceptance by the state of a construction based on the laws of another country put on part or all of the contract might imply waiver.

C. *Waiver Subsequent to Breach or Termination*

1. Explicit Waiver

As a practical matter, it is unlikely that a foreign state intending to plead sovereign immunity would explicitly waive the defense in this phase. If, for whatever reason, the state chose not to plead the defense, it would merely fail to enter the plea.

27. The court so found in *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, Misc. No. 79-57 (D.D.C. Jan. 18, 1980). Libya agreed to modify an arbitration clause in a contract with the Libyan American Oil Co. (LIAMCO) more than ten years after the original contract was signed. The original clause called for arbitration only in Libya. The Libyan government later agreed to a clause that provided for arbitration at a place upon which either the parties or the arbitrators agreed. The court said that "[a]lthough the United States was not named, consent to have a dispute arbitrated where the arbitrators might determine was certainly consent to have it arbitrated in the United States. Libya thus waived its defense of sovereign immunity. . . ." *Id.*

2. Implicit Waiver

- a. A failure to enter a timely plea of sovereign immunity (i.e., entering a responsive plea on the merits) is an implied waiver.²⁸
- b. The state availing itself of United States courts as a plaintiff is, insofar as the specific transaction is concerned, a waiver of sovereign immunity.²⁹
- c. The courts might take cognizance of how courts of the foreign state in question deal with the matter in the reverse situation. If they would not allow the plea of sovereign immunity in similar circumstances, it would be a strong indication of that state's intention to waive the defense in the courts of other states.³⁰

In terms of the phase/time analysis, it is clear that waiver is most likely to occur in the initial phase, *i.e.*, prior to the formation of the final integrated writing of the contract. This is true especially in the instance of explicit waiver, if for no other reason than that the foreign state is unlikely to see any advantage in granting an explicit waiver after that phase. Implicit waiver is also most likely to occur in the formation phase of the contract since this type of waiver often is similar to estoppel in that it implies inducement and, as has been noted, inducement can occur after the formation of a contract. Realistically, however, the courts are going to find it far less often than in the pre-formation phase.

Obtaining jurisdiction over a foreign sovereign in a United States court actually presents a plaintiff with two distinct problems: the plaintiff must show that the sovereign is not entitled to immunity from suit; and he must show that there are sufficient minimum contacts to support the court's assumption of *in personam* jurisdiction over the sovereign defendant without violating due process. While waiver, as set out in the phase/time analysis of a contract, seems theoretically valid as a potential means of defeating the defense of sovereign immunity, as a practical matter it will probably be of limited utility. It could, however, be a useful tool in defeating the "inadequate minimum contacts" defense.

The main reason that waiver is unlikely to become an important

28. See note 15 and accompanying text, *supra*.

29. See *National City Bank v. Republic of China*, 348 U.S. 356 (1955).

30. *Id.* Justice Frankfurter regarded this as an important point in the disposition of the *National City Bank* case.

means of defeating the defense of sovereign immunity is that the FSIA contains other provisions better suited for the purpose. Of these, the provision of most importance to contractual actions states:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case—in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.³¹

This provision appears to provide a broad restriction to the defense of sovereign immunity—so broad that it is the conclusion of this note that sovereign immunity is no longer a meaningful defense to the assumption of jurisdiction by United States courts over actions arising out of commercial activities. The only rein on the 'commercial activity' provision of the FSIA is the interpretation of the term 'direct effect' by the courts. If the courts interpret the term narrowly, the exceptions to sovereign immunity in commercial contexts will be limited. On the other hand, if the courts are willing to view direct effects as akin to substantial and foreseeable economic impact, then the restrictions on sovereign immunity will be virtually all-inclusive in the commercial arena.

It is difficult to see what the principle of waiver can actually add to this. Theoretically, of course, a court might find waiver where it would not find direct effects, but in realistic terms it is unlikely that a court construing direct effects narrowly would construe waiver, a more questionable doctrine, broadly. Further, it doesn't appear that the courts should resort to waiver in order to defeat claims of sovereign immunity in suits arising out of commercial activities. It is clear from the legislative history of the FSIA that Congress's intent when passing the act was to make the 'restrictive' theory of sovereign immunity controlling.³²

Further, the Supreme Court has indicated that it, too, embraces the restrictive theory of sovereign immunity, stating unequivocally in

31. 28 U.S.C. § 1605(a)(2) (1976).

32. [1976] U.S. CODE CONG. & AD. NEWS 6604, 6613.

*Alfred Dunhill of London, Inc. v. Cuba*³³ that neither a claim of sovereign immunity nor an act of state will be accepted by United States courts when the state is acting as a commercial entity.³⁴

To reiterate, given such clear statements on the part of both Congress and the Court to the effect that a state acting as a commercial entity cannot successfully invoke the defense of sovereign immunity, it is difficult to see what the waiver provision of the FSIA adds. Unless the provision is regarded as applying only to non-commercial situations (an unlikely reading), it must imply something more. It is reasonable to conclude that the principle of waiver might be used effectively to defeat defenses of insufficient minimum contacts to support *in personam* jurisdiction.

III. WAIVER OF THE DEFENSE OF INSUFFICIENT MINIMUM CONTACTS

It is clear that in the wake of the FSIA, plaintiffs' real barrier to obtaining jurisdiction over foreign sovereign defendants is not that of sovereign immunity, but rather is a matter of showing sufficient minimum contacts to support the *in personam* jurisdiction of the courts. The *Carey v. National Oil Corp.*³⁵ decision is a case in point: although the opinion discusses the FSIA extensively, the rationale of the holding is squarely based on insufficient minimum contacts. It seems clear that the case would have been decided the same way if the defendant had not bothered to plead sovereign immunity and had relied solely on the defense of insufficient minimum contacts.

As mentioned earlier, in contrast to the principle of foreign sovereign immunity, the requirement of adequate minimum contacts with the forum state is constitutional doctrine.³⁶ As the court held in *Hanson v. Denckla*,³⁷ "a defendant may not be called upon [to defend in the courts of a particular state] . . . unless he has had the

33. 425 U.S. 682 (1976).

34. *Id.* at 695, 705. The Court found that the policy of avoiding embarrassment to the Executive Branch in the conduct of foreign relations was no longer controlling in situations where the foreign state was acting as a commercial entity. *Id.* at 697-98.

35. 592 F.2d 673 (2d Cir. 1979).

36. *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

37. 357 U.S. 235, 251 (1958).

'minimal contacts' with that State that are a prerequisite to its exercise of power over him."

It is important to bear in mind, however, that there are two fundamental rationales that underlie the principle of minimum contacts—rationales that are often not applicable to a situation in which a domestic plaintiff is attempting to sue a foreign defendant and that make a mechanical application of the principle to such situations inappropriate. The first rationale is that minimum contacts are mandated by federalism. As the *Hanson* court said, "[minimum contacts] are a consequence of territorial limitations on the power of the respective States."³⁸ The second rationale grows, to an extent, out of the first: in essence, it is presumed that a plaintiff in the United States can always get *in personam* jurisdiction over a United States defendant in at least one state. The state in which the plaintiff can get jurisdiction may not be to his liking, and it might materially affect the outcome of the case, but at least he is guaranteed a forum.³⁹ This is obviously not the case in the situation in which the defendant is a foreign sovereign since it is most probable that if the state is trying to invoke sovereign immunity here, it is going to grant itself sovereign immunity in its own courts. Therefore, if a United States plaintiff is denied a domestic forum, he is effectively precluded from adjudicating his claim. As the Tate Letter said, "the Department [of State] feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts."⁴⁰ This policy

38. *Id.* In fact, it seems clear that if federalism were not a primary consideration in the United States, the 'minimum contacts' doctrine would not exist. Absent the federal system, the United States district courts would be the only courts of original jurisdiction and what are now minimum contacts problems would merely be matters of *forum non conveniens*. Persuasive arguments have been made that minimum contacts need not be a consideration in any actions before federal courts. See *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960). While *Jaftex* was overruled, many feel that the *Jaftex* position was the correct one and believe that if the Supreme Court ever decides the issue squarely, they may agree.

39. The cases in the area, such as *McGee*, *Hanson* and *International Shoe*, discuss notions of "fundamental fairness" and the inequities of making a defendant defend an action in a forum with which he has no minimum contacts. There's never a sense that defendant won't be obligated to defend anywhere.

40. 26 DEP'T STATE BULL. 985 (1952).

must be accorded even greater weight today than in 1952.

As a consequence, a blind invocation of the minimum contacts requirement in the case of foreign defendants, as occurred in the *Carey* decision, is ill-supported by the principles underpinning the doctrine and is inequitable in any practical assessment of the realities of contemporary world order. A way to ameliorate the bad effects of the minimum contacts requirements might be to broaden the application and effect of the principle of waiver.

The Supreme Court has held that constitutional rights can be waived.⁴¹ In particular, it has held that in certain commercial situations, the states can waive their constitutional right to sovereign immunity as guaranteed by the eleventh amendment.⁴² There are several ways in which the minimum contacts requirement could be waived by a foreign defendant: it could expressly waive its *in personam* defenses either by treaty or by an express condition in a contract that any legal actions arising from the contract will be adjudicated in a United States court. And, of course, it could implicitly waive the defense by not pleading it in a timely fashion.

Realistically, however, we are not concerned with situations in which waiver is so readily apparent. Rather, we are concerned with situations where the foreign sovereign has structured its contractual relationships in such a way as to avoid having the requisite minimum contacts with any of the state jurisdictions in the United States. The lengths to which the courts might be willing to go in accepting any of the acts connoting waiver listed earlier in this note are, of course, a matter of conjecture. However, it does seem that the courts could reasonably and justifiably find waiver of the minimum contacts requirement in those situations where the plaintiff can show that the foreign state acted in such a manner as to indicate that the state intended to submit to adjudication any disputes arising from the commercial agreement and the state now refuses to honor such an implied commitment. The courts of this country could fairly find that by such a refusal to defend the action elsewhere, the state has waived its right to not have to defend the action in the United States. Such a finding seems to be equitable

41. See *Johnson v. Zerbst*, 304 U.S. 458 (1948); *Shepard v. Barron*, 194 U.S. 553 (1952).

42. *Parden v. Terminal Ry. Co.*, 377 U.S. 184 (1964), held that a state, by organizing a state-owned railroad as a common carrier after Congress had passed laws regulating common carriers, had effectively waived its sovereign immunity from suit with regard to that railroad.

and not in violation of the spirit or the underlying rationale of the "minimum contacts" doctrine.

CONCLUSION

The principle of waiver has broad possible application to the defense of foreign sovereign immunity. However, in the entire context of the FSIA, other provisions of the act seem more immediately and obviously applicable. Nonetheless, if the courts were willing to construe the principle of waiver broadly, it could be an important tool in establishing *in personam* jurisdiction over foreign sovereigns that rely on the lack of sufficient minimum contacts in order to defeat the jurisdiction of the United States courts.

Henry T. Berry