

1984

# Arbitration Clauses as Waivers of Immunity From Jurisdiction and Execution Under the Foreign Sovereign Immunities Act of 1976

Peter M. McGowan

Follow this and additional works at: [https://digitalcommons.nyls.edu/journal\\_of\\_international\\_and\\_comparative\\_law](https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law)



Part of the [Law Commons](#)

---

## Recommended Citation

McGowan, Peter M. (1984) "Arbitration Clauses as Waivers of Immunity From Jurisdiction and Execution Under the Foreign Sovereign Immunities Act of 1976," *NYLS Journal of International and Comparative Law*: Vol. 5 : No. 2 , Article 10.  
Available at: [https://digitalcommons.nyls.edu/journal\\_of\\_international\\_and\\_comparative\\_law/vol5/iss2/10](https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol5/iss2/10)

This Notes and Comments is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of International and Comparative Law by an authorized editor of DigitalCommons@NYLS.

## 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)<sup>1</sup> 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.<sup>2</sup>

A primary aim of the FSIA was to provide a comprehensive jurisdictional scheme for initiating suits against foreign states.<sup>3</sup> Judicial decisions denying immunity to foreign states under the Act's waiver provision of section 1605(a)(1),<sup>4</sup> 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.<sup>5</sup> The first part of this inquiry analyzes the *in*

---

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-

*personam* requirements of a waiver of jurisdictional immunity. The second part examines waivers of immunity from execution in light of the binding nature of arbitration.

## I. SUBMISSION TO ARBITRATION AS A WAIVER OF JURISDICTIONAL IMMUNITY

Section 1604<sup>6</sup> of the FSIA establishes the general principle that foreign states are immune from the jurisdiction of United States courts.<sup>7</sup> Exceptions to the general rule are elaborated in sections 1605-1607.<sup>8</sup> Section 1605(a)(1) provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or 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.<sup>9</sup>

Application of the jurisdictional waiver provision is complicated by the Act's integration of the distinct concepts of subject matter jurisdiction,<sup>10</sup> personal jurisdiction<sup>11</sup> and immunity into the single criterion of

---

tion are codified in § 1610(a)(1) of the FSIA. *Id.* § 1610 (a)(1).

6. Section 1604 states:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

*Id.* § 1604.

7. Sovereign immunity is an affirmative defense that must be pleaded. The burden rests with the foreign state to produce sufficient evidence in support of its claim of immunity. House Report, *supra* note 2, at 17.

8. 28 U.S.C. §§ 1605-1607 (1982). The most significant exception to the general rule of immunity is the commercial activity exception. Section 1605(a)(2) denies immunity 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.

*Id.* § 1605(a)(2).

9. *Id.* § 1605(a)(1).

10. Section 1330(a) of the Act provides:

The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-

section 1605(a)(1).<sup>12</sup> Under the FSIA, subject matter and personal jurisdiction exist over any action in which a foreign state defendant is not entitled to immunity under section 1605 of the Act.<sup>13</sup> Accordingly, subject matter and personal jurisdiction are tied to the immunity exceptions of section 1605. The integration of these concepts is explained in the legislative history of the FSIA as follows:

For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction . . . thus, sections 1330(b) . . . and 1605-1607 are all carefully interconnected.<sup>14</sup>

Although a waiver is similar to the principle of consent to jurisdiction,<sup>15</sup> it is important to remember that jurisdiction and immunity are independent concepts.<sup>16</sup> The concept of sovereign immunity was articulated by Chief Justice Marshall in *The Schooner Exchange v. Mc-*

---

1607 of this title or under any applicable international agreement.

*Id.* § 1330(a).

11. Section 1330(b) of the Act provides: "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." *Id.* § 1330(b).

12. Hill, *A Foreign Policy Analysis of the American Law of Foreign State Immunity*, 50 *FORDHAM L. REV.* 155, 229 (1981); Kahale, *Arbitration and Choice-of-Law Clauses as Waivers of Jurisdictional Immunity*, 14 *N.Y.U.J. INT'L L. & POL.* 29, 30-34 (1981). See House Report, *supra* note 2, at 13. See generally Hill, *supra*, at 212-28. Hill criticizes the Act's fusion of sovereign immunity, subject matter jurisdiction and personal jurisdiction concepts into a single criterion that cannot account for the distinct policies underlying each concept. *Id.* at 221. Regarding personal jurisdiction, Hill recommends, *inter alia*, an independent analysis of the jurisdictional requirements of a "sufficient nexus between the forum and the foreign state, and adequate notice to the latter." *Id.* at 228.

13. See House Report, *supra* note 2, at 13.

14. *Id.* at 13, 14.

15. See Kahale, *supra* note 12, at 39.

16. Hill, *supra* note 12, at 183. See, e.g., *Petrol Shipping Corp. v. Kingdom of Greece*, Ministry of Commerce, 360 F.2d 103, 107 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966) ("[t]he question of immunity does not bear on the question of amenability, or personal jurisdiction").

*Fadden*<sup>17</sup> as a derogation from a court's normal exercise of jurisdiction.<sup>18</sup> Waivers must be interpreted, therefore, both as abdications of sovereign immunity and as consents to jurisdiction.<sup>19</sup> In the absence of consent to jurisdiction, the due process requirements of "minimum contacts" must be satisfied.<sup>20</sup>

The status of arbitration clauses as waivers of jurisdictional immunity has resulted in judicial controversy.<sup>21</sup> This controversy may be illustrated by the following hypothetical situation.<sup>22</sup> Private Company and Nigeria entered into a contract whereby Private Company agreed to supply cement to Nigeria. The contract provided for the arbitration of disputes by the International Chamber of Commerce (ICC). Disputes arose under the contract and the ICC selected Switzerland as the location of the arbitration because the parties failed to agree on a loca-

---

17. 11 U.S. (7 Cranch) 116 (1812).

18. See *id.* at 138; see also House Report, *supra* note 2, at 8 ("[s]overeign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state").

19. See *Chicago Bridge & Iron Co. v. The Islamic Republic of Iran*, 506 F. Supp. 981 (N.D. Ill. 1980), where a jurisdictional waiver under section 1605(a)(1) was asserted on two alternative grounds: (1) the Treaty of Amity between Iran and the United States, which waived sovereign immunity for state entities of either state involved in commercial activities in the other state and (2) arbitration clauses in contracts entered into by the parties. *Id.* at 983. Finding the Treaty of Amity to be an inadequate basis for exercising personal jurisdiction, the court stated:

[T]he waiver provision contained in the Treaty of Amity does not necessarily confer personal jurisdiction. Significantly, at the time the Treaty was signed the law required a plaintiff to demonstrate an independent basis for personal jurisdiction aside from any waiver of sovereign immunity (citation omitted). Under these circumstances there is no basis for assuming that the contracting parties to the Treaty, by their silence, intended to consent to personal jurisdiction.

*Id.* at 985. The court held that the Treaty was not a waiver for purposes of section 1605(a)(1).

20. See House Report, *supra* note 2, at 13 (the necessary contacts for personal jurisdiction are prescribed by sections 1605-1607 of the Act). The legislative history of section 1330(b) indicates that each of the provisions of section 1605 "requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction" (emphasis added).

21. G. DELAUME, *supra* note 2, § 11, at 43. Delaume wrote that

[w]hether the binding character of a waiver should be recognized by a court outside the country of the chosen forum is an issue with regard to which there has been some disagreement among U.S. courts. . . . Suffice it to say for the present that the question calls for an affirmative answer, since a state should honor its contractual commitments regardless of the place of adjudication of the issue.

*Id.* See also Kahale, *supra* note 12, at 45.

22. The hypothetical was derived from a worldwide chain of Nigerian cement cases. For a detailed review of the facts of many of these cases, see *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981).

tion.<sup>23</sup> An award was subsequently rendered in favor of Private Company. After Nigeria refused to liquidate the award, Private commenced an action in the United States to enforce the award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention).<sup>24</sup>

The threshold problem for a company such as Private is to establish personal jurisdiction over Nigeria in the United States courts.<sup>25</sup> The simplest approach is to claim that Nigeria implicitly waived its immunity under section 1605(a)(1),<sup>26</sup> the implied waiver provision, by submitting to arbitration in another country. The legislative history regarding implicit waivers of jurisdictional immunity is directly applicable: "the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract."<sup>27</sup> A literal reading of the phrase "another country" has prompted some United States courts<sup>28</sup> to exercise personal jurisdiction over foreign states in circumstances similar to those of Nigeria in the hypothetical described above.<sup>29</sup> These judicial decisions, however, fail to expound proper bases for exercising personal jurisdiction.

Examination of the pre-FSIA cases, presumably referred to by Congress in the passage quoted above,<sup>30</sup> illustrates that the comment is a misstatement of then existing law.<sup>31</sup> The most significant pre-FSIA case addressing the issue whether an arbitration clause operates as a consent to jurisdiction is *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*.<sup>32</sup> The Court of Appeals for the Second Circuit declined to rule on whether arbitration clauses waive sov-

---

23. Article 12 of the ICC Rules provides that unless otherwise agreed by the parties, the ICC will determine the location of the arbitration. 2 J.G. WETTER, *THE INTERNATIONAL ARBITRAL PROCESS* 152, 292 (1979).

24. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38. The legislation implementing the Convention in the United States is codified at 9 U.S.C. §§ 201-208 (1982) [hereinafter cited as New York Convention]. Art. 3 of the Convention provides: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles." *Id.*

25. See L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 2, at 490.

26. 28 U.S.C. § 1605(a)(1) (1982). See *supra* text accompanying note 9.

27. House Report, *supra* note 2, at 18.

28. See *infra* notes 41-48, 57-70, 81-91 and accompanying text.

29. See *supra* notes 22-24 and accompanying text.

30. See *supra* text accompanying note 27.

31. Kahale, *supra* note 12, at 38.

32. 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

ereign immunity,<sup>33</sup> however, it did hold that the defendant, a branch of the Spanish Ministry of Commerce, consented to personal jurisdiction in New York by agreeing to arbitrate there.<sup>34</sup> *Victory* is representative of the pre-FSIA judicial treatment of arbitration clauses specifying a particular situs for arbitration.<sup>35</sup>

In *Bradford Woolen Corp. v. Freedman*,<sup>36</sup> a slightly different situation existed. The forum of the arbitration was chosen by a third party pursuant to the rules of the American Arbitration Association.<sup>37</sup> The New York State Supreme Court exercised jurisdiction finding that the arbitrator's selection of New York as the situs of the arbitration was effectively the choice of the parties themselves.<sup>38</sup> Thus, the pre-FSIA cases prescribed consent to jurisdiction only if the arbitration clause directly or indirectly related to the United States.<sup>39</sup>

The first decision to deal with arbitration clauses as implied waivers of jurisdictional immunity under section 1605(a)(1)<sup>40</sup> of the FSIA interpreted the legislative history of this section literally. In *Ipitrade International, S.A. v. Federal Republic of Nigeria*,<sup>41</sup> *Ipitrade*, a French

33. *Id.* at 362 n.20. In the wake of the Tate letter of 1952, 26 DEP'T ST. BULL. 984 (1952), *see infra* note 106, the court held that chartering a vessel to transport wheat was more properly characterized as an act *jure gestionis* (private act). The defendant's sovereign immunity, therefore, was denied. *See* 336 F.2d at 361.

34. 336 F.2d at 363.

35. *See, e.g.,* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lecopulos, 553 F.2d 842 (2d Cir. 1977); Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce, 360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966); Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama, S.A., 284 F.2d 419 (2d Cir. 1960), *cert. denied*, 373 U.S. 949 (1963); Farr & Co. v. The S.S. Punta Alice, 144 F. Supp. 839 (S.D.N.Y. 1956), *aff'd sub nom.* Farr & Co. v. Cia Intercontinental de Navegacion de Cuba, S.A., 243 F.2d 342 (2d Cir. 1957); Samincorp South American Minerals & Merchandise Corp. v. Tikvah Mining Co., 43 Misc.2d 27, 250 N.Y.S.2d 151 (Sup. Ct. 1964).

36. 189 Misc. 242, 71 N.Y.S. 2d 257 (N.Y. Sup. Ct. 1947).

37. *Id.* at 244. Although the contract between the parties provided for arbitration, it did not fix a particular site for the arbitration. The court found that "[t]he rules of the American Arbitration Association are by reference made a part of the contract. Under these rules the Association has the power to fix the place of arbitration. . . . [The Association chose New York.] It can thus be said that the parties contracted to fix the place of arbitration in New York." *Id.*

38. *Id.* at 244. *See also* American-British T.V. Movies, Inc. v. KOPR-TV Cooper Broadcasting Co., 144 N.Y.S. 2d 548 (N.Y. Sup. Ct. 1955).

39. Choice-of-law clauses are also referred to in the legislative history of section 1605(a)(1), *see supra* text accompanying note 27. These clauses have generally been rejected in the United States as implied consents to jurisdiction. *See, e.g.,* Galgay v. Bulletin Co., Inc., 504 F.2d 1062, 1066 (2d Cir. 1974) (the court stated that "[i]t is well established that this [New York] choice-of-law provision does not have jurisdictional implications"). *See also* Kahale, *supra* note 12, at 44.

40. 28 U.S.C. § 1605(a)(1) (1982).

41. 465 F. Supp. 824 (D.D.C. 1978).

company, and Nigeria contracted to supply cement to Nigeria.<sup>42</sup> The contract provided for arbitration by the ICC,<sup>43</sup> and provided that Swiss law would govern.<sup>44</sup> In an arbitration held in Switzerland, Ipitrade was granted an arbitral award,<sup>45</sup> and subsequently commenced an action in the District Court for the District of Columbia to confirm the award under the New York Convention.<sup>46</sup> The court held Nigeria in default and reasoned<sup>47</sup> that Nigeria's "agreement to adjudicate all disputes arising under the contract in accordance with Swiss law and by arbitration under ICC Rules constitute[d] a waiver of sovereign immunity under the Act."<sup>48</sup>

The *Ipitrade* court did not consider the *International Shoe Co. v. Washington*<sup>49</sup> "minimum contacts" requirement that was prescribed by the drafters of the FSIA in its legislative history.<sup>50</sup> Due process, according to *International Shoe*, requires that the defendant have certain "minimum contacts"<sup>51</sup> with the forum before such defendant is amenable to suit there. These contacts should be such that the maintenance of the suit would not offend "traditional notions of fair play and substantial justice."<sup>52</sup> In *Shaffer v. Heitner*,<sup>53</sup> however, the Supreme Court recognized that less stringent contacts with the United States could satisfy due process if the defendant's liability had been previously determined by a court of competent jurisdiction. The Court stated:

Once it has been determined by a court of competent ju-

---

42. 465 F. Supp. at 826.

43. *Id.* The arbitration clause did not specify Paris as the situs, rather it stated that disputes were to be "submitted to the arbitration of the International Chamber of Commerce (ICC), Paris, France, in accordance with its Rules at the date thereof." Memorandum of Points and Authorities of Ipitrade International, S.A. in Support of Petition to Confirm Arbitration Award at 2. *Ipitrade International, S.A. v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978). See *supra* note 23.

44. 465 F. Supp. at 826.

45. See *id.*

46. *Id.*

47. *Id.* at 827. Pursuant to 28 U.S.C. § 1608(e) (1982), no judgment by default shall be entered by a Federal court against a foreign state unless the claimant establishes his right to relief by evidence satisfactory to the court. *Id.*

48. 465 F. Supp. at 826.

49. 326 U.S. 310 (1945).

50. See House Report, *supra* note 2, at 13.

51. 326 U.S. at 316. The requirements for adequate notice are set out in 28 U.S.C. § 1608 (1982). Section 1608 establishes the exclusive procedures for filing service on foreign states and is intended to fill the void that existed in Federal and state law. House Report, *supra* note 2, at 24.

52. 326 U.S. at 316.

53. 433 U.S. 186 (1977).



jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.<sup>54</sup>

---

54. *Id.* at 210-11 n.36. The Restatement of Foreign Relations Law comports with *Shaffer's* concept of expanded jurisdiction. In part, section 456 states:

- (b) an agreement to arbitrate is a waiver of immunity from jurisdiction in
- (i) an action or other proceeding to compel arbitration pursuant to the agreement;

- (ii) an action to enforce an arbitral award rendered pursuant to the agreement.

RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 456(2)(b), at 199 (Tent. Draft No. 2, 1981). Comment d to section 456(2)(b) states:

*Waiver implied from agreement to arbitrate.*

Subsection (2)(b) is stated as a rule of United States law, but with some differences in detail appears to be the emerging international law as well. A question still open under international law is whether the waiver implied from an agreement to arbitrate is limited to jurisdiction at the place chosen as the site of the arbitration, or is worldwide.

*Id.* at 201. The notion of expanded jurisdiction in enforcement actions is also supported by section 491 of the revised tentative draft of the Restatement of Foreign Relations Law, which states:

[U]nder prevailing U.S. law a state has jurisdiction to adjudicate on the basis of presence of property in the forum only in respect of a claim reasonably connected with that property. . . . [A]n action *quasi in rem* to enforce a judgment may be brought wherever property of the defendant is found, without any necessary connection between the underlying action and the property, or between the defendant and the forum. The rationale behind the expanded jurisdiction in the case of enforcement of judgments, consistent with the practice of most states, is that once a judgment entitled to recognition has been rendered in a forum having jurisdiction, the prevailing party is entitled to satisfaction of that judgment out of the judgment debtor's assets wherever they may be located.

*Id.* § 491, comment h, at 109 (Tent. Draft No. 4, 1983).

According to the Department of State, waivers should exist whether or not the arbitration clause specifically stipulates the United States as the situs of the arbitration, so long as the arbitration actually takes place or might take place in a state that is party to the New York Convention. See Brief for United States as *amicus curiae*, *Libyan American 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), reprinted in 20 I.L.M. 161, 163 (1981).

Regarding jurisdiction, Swiss law is inconsistent with United States law. In an action to enforce an arbitral award rendered in Switzerland, the Swiss Federal Supreme Court held that before jurisdiction can be exercised under Swiss law, there must be "sufficient contacts between the underlying transaction and Switzerland." In that case "[t]he underlying transaction . . . bore no contact to Switzerland other than the fact that the sole arbitrator had elected to locate the seat of arbitration in Geneva." Thus, the court refused to enforce the award. *Socialist Libyan Arabic Popular-Jamahirya v. Libyan American Oil Co.*, Bundesgericht, Judgment of June 19, 1980, reprinted and translated in 20 I.L.M. 151 (1981).

Pecuniary obligations arising from the judicial process are similar to those arising from the arbitral process. Arbitral awards are generally binding on the parties.<sup>55</sup> Indeed, the New York Convention requires contracting states to enforce arbitral awards rendered in the territory of another contracting state.<sup>56</sup> 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*.<sup>57</sup> This case involved the nationalization by Libya of certain concession rights and oil drilling equipment of LIAMCO.<sup>58</sup> The concession agreement between the parties provided for arbitration where the parties agreed or where the arbitrators might agree to locate it.<sup>59</sup> Petitioner entered this claim, pursuant to the New York Convention, to enforce an arbitration award that was rendered in Switzerland.<sup>60</sup>

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. *Procureur 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 contacts<sup>61</sup> 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."<sup>62</sup> 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."<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> In the *LIAMCO* appeal, the United States filed a brief as *amicus curiae* supporting the lower court decision.<sup>67</sup> 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."<sup>68</sup> Waivers should exist when the arbitration clause specifically stipulates the United States as the situs of the arbitration and

---

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 Jamahiriya*, 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 Jamahiriya*, Nos. 80-1207 and 80-1252 (D.C. Cir. filed June 16 and Nov. 7, 1980).

68. *Id.* at 161.

when the arbitration actually takes place or might take place in a state that is a party to the New York Convention.<sup>69</sup> 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."<sup>70</sup> 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*,<sup>71</sup> a case factually similar to *Ipitrade*.<sup>72</sup> 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.<sup>73</sup> 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.

state as one of the contracting parties would operate as a waiver thereby subjecting the foreign state to jurisdiction in this country. It may be reasonable to suggest that a sovereign state which agrees to be governed by the laws of the United States—which is both “another country” and a “particular country”—has implicitly waived its ability to assert the defense of sovereign immunity when sued in an American court. But it is quite another matter to suggest, as did the Court in *Ipitrade*, that a sovereign state which agrees to be governed by the laws of a third-party country—such as the Netherlands—is thereby precluded from asserting its immunity in an American court.<sup>74</sup>

The *Verlinden* court narrowed the scope of the waiver provision of section 1605(a)(1) to prevent a “vast increase in the jurisdiction of federal courts in matters involving sensitive foreign relations,”<sup>75</sup> and to limit a foreign state’s exposure to personal liability in United States courts when they could scarcely have foreseen such a result.<sup>76</sup>

The concerns of the *Verlinden* court are not warranted. First, the FSIA attempted to reduce the foreign policy implications of immunity

74. *Id.*

75. *Id.* at 1302. The court’s concern was expressed during the congressional hearings when an official from the Justice Department stated:

It should also be stressed that the long-arm feature of the bill will ensure that only those disputes which have a relation to the United States are litigated in the courts of the United States, and that our courts are not turned into small “international courts of claims.” The bill is not designed to open up our courts to all comers to litigate any dispute that any private party may have with a foreign state anywhere in the world.

*Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 24, 31 (1976) (statement of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Div., Justice Dept.). *But cf.* New York Convention, *supra* note 24, art. 3.

A comment to the recently revised tentative draft of the Restatement of Foreign Relations Law states:

A waiver of immunity without reference to a particular court or place of adjudication will be given effect by courts in the United States; the fact that a court in the United States has jurisdiction under the FSIA does not preclude the defense of forum non conveniens, for instance if the plaintiff is not domiciled in the United States and the cause of action has no relation to the United States.

RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 456, comment a, at 200 (Tent. Draft No. 2, 1981). While the Restatement does not address the jurisdictional ramifications of the section 1605(a)(1) waiver provision, it points out a useful principle that the courts could avail themselves of to avoid abusive use of the courts by plaintiffs.

76. 488 F. Supp. at 1302.

decisions by transferring the decisionmaking authority for claims of immunity from the Department of State to the federal courts.<sup>77</sup> Second, by submitting a dispute to arbitration a sovereign state relinquishes its right to invoke immunity.<sup>78</sup> Moreover, if the determination of the arbitration situs is left to a third party,<sup>79</sup> it is likely that a state that is a signatory to the New York Convention would be designated.<sup>80</sup> Consequently, in such a situation, the arbitrating state could reasonably foresee an enforcement action in the United States.

The most recent case to address the implied waiver provision of section 1605(a)(1) was *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*,<sup>81</sup> where MINE, a Liechtenstein corporation, and Guinea entered into a joint venture agreement to transport bauxite.<sup>82</sup> According to the District Court for the District of Columbia, disputes under the agreement were to have been arbitrated by a panel of arbitrators selected by the President of the International Centre for the Settlement of Investment Disputes (ICSID).<sup>83</sup> Rule 13 of ICSID's Rules of Procedure for Arbitration Proceedings, requires sessions of its tribunals to meet in Washington, D.C., the seat of the Centre, unless otherwise agreed upon by the parties and approved by the Centre.<sup>84</sup> Since the parties did not otherwise agree, the court found

---

77. House Report, *supra* note 2, at 7.

A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that ensure due process.

*Id.*

78. See *supra* note 68 and accompanying text; cf. *infra* notes 129-60 and accompanying text.

79. See *supra* note 23.

80. See *supra* note 69 and accompanying text. Although *Ipitrade* and *Verlinden* do not address the question, it is not yet clear whether the New York Convention is applicable where neither party to the arbitration is domiciled in the contracting state which was selected as the site of the arbitration. See *Proposed Amendments Foreign Sovereign Immunities Act of 1976*, N.Y.L.J., Mar. 22, 1985, at 1, col. 1.

81. 505 F. Supp. 141 (D.D.C. 1981), *rev'd*, 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 104 S. Ct. 71 (1983). For a discussion of the court of appeals decision, see *infra* notes 92-96 and accompanying text.

82. 505 F. Supp. at 142.

83. *Id.* ICSID was established by The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090. The legislation implementing the Convention in the United States is codified at 22 U.S.C. §§ 1650-1650(a) (1982) [hereinafter cited as ICSID Convention]. See generally G. DELAUME, *supra* note 2, § 15; Luzzatto, *International Commercial Arbitration and the Municipal Law of States*, 157 RECUEIL DES COURS 9, 94-99 (1977).

84. 505 F. Supp. at 143.

that they contemplated the United States as the situs of the arbitration.<sup>85</sup> Consequently, Guinea was deemed to have waived its immunity and was thereby subject to the court's jurisdiction.<sup>86</sup>

The *MINE* court noted that other district courts had differed regarding the extent to which jurisdiction was prescribed by the House Report passage<sup>87</sup> on jurisdictional waivers of immunity.<sup>88</sup> Judge Gesell considered the nexus with the United States in the *MINE* case as greater than that in *Ipitrade*, *LIAMCO* and *Verlinden*,<sup>89</sup> and without commenting specifically on these cases, held that "by agreeing to arbitration that could be expected to be held in the United States, Guinea waived its immunity before this court within the meaning of 28 U.S.C. § 1605(a)(1) (1976)."<sup>90</sup> The breadth of this holding is consistent with pre-FSIA cases and articulates grounds for exercising jurisdiction over Guinea.<sup>91</sup>

In a complicated factual scenario, the Court of Appeals for the District of Columbia in *MINE*<sup>92</sup> reversed the district court by determining that the parties had in fact contemplated an ICSID arbitration.<sup>93</sup> Recognizing the exclusive and self-executing nature of ICSID arbitrations,<sup>94</sup> the court held that consent to ICSID arbitration does

---

85. *Id.*

86. *Id.* at 142-43.

87. *See supra* note 27 and accompanying text.

88. 505 F. Supp. at 143.

89. *Id.* *See supra* notes 41-48, 57-65, 71-80 and accompanying text.

90. 505 F. Supp. at 143.

91. *See Bradford Woolen Corp.*, 189 Misc. at 242; and *supra* notes 36-38 and accompanying text. *See also American-British T.V. Movies, Inc.*, 144 N.Y.S. 2d at 548.

92. 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 104 S. Ct. 71 (1983).

93. *Id.* at 1101 n.11. According to the court of appeals, the original agreement between *MINE* and Guinea provided for the resolution of disputes by ICSID arbitration. *Id.* at 1101 nn.11-12. Because article 36 of the ICSID Convention requires the parties to the arbitration to execute a valid consent to ICSID arbitration, *MINE* contended that Guinea's failure to consent to ICSID arbitration in writing rendered the ICSID arbitration clause defective. Therefore, *MINE* commenced an action in the District Court for the District of Columbia to compel an American Arbitration Association arbitration. *Id.* at 1096. *See supra* notes 81-91 and accompanying text for a discussion of the district court decision in *MINE*.

94. *See* 693 F.2d at 1102. *See generally* Delaume, *supra* note 66 (ICSID arbitrations and sovereign immunity). ICSID is a self-contained arbitral system operating independently from domestic laws. *Id.* at 35. ICSID arbitrations proceed according to international arbitration rules which contain provisions designed to preclude attempts by one of the parties from frustrating the process. *Id.* at 35-36. Although consent to ICSID arbitration constitutes an irrevocable waiver of jurisdictional immunity, the Convention does not supersede domestic rules of immunity from execution. Pleas of immunity from execution, however, can expose that state to certain penalties under the Convention. *Id.* at 36, 45-47.

not implicitly waive immunity under the FSIA.<sup>95</sup> The international nature of ICSID arbitrations precludes intervention by domestic courts<sup>96</sup> and, therefore, distinguishes them from private arbitrations, such as those conducted by the ICC. Consequently, the court of appeals decision adds little to the body of law regarding private arbitrations as implied waivers of jurisdictional immunity.

The status of arbitration clauses as waivers of jurisdictional immunity under section 1605(a)(1) of the FSIA remains the subject of confusion.<sup>97</sup> *Verlinden* correctly integrates jurisdictional factors into the implied waiver immunity exception,<sup>98</sup> yet its "minimum contacts" requirement is unduly restrictive given the nature of the action.<sup>99</sup> The exercise of jurisdiction by United States courts to enforce arbitration clauses against foreign states is constitutionally permissible and, therefore, should be permitted under section 1605(a)(1) of the Act.<sup>100</sup> A contrary result would frustrate the universal system of dispute resolution that international arbitration was designed to provide.<sup>101</sup>

---

95. 693 F.2d at 1102-04. In holding that consent to ICSID arbitration does not implicitly waive immunity from jurisdiction under the FSIA, the court in *MINE* was apparently persuaded by the Department of State's suggestion that agreements to arbitrate with ICSID do not contemplate the involvement of domestic courts before the enforcement stage. *Id.* at 1103.

96. *See supra* notes 94-95.

97. *See supra* note 21.

98. *See supra* text accompanying note 74.

99. *See supra* notes 53-54, 67-70 and accompanying text.

100. *But see* Kahale, *supra* note 12. Kahale concluded that

[a]rbitration clauses are likely to continue to operate as implied waivers, but it is likely that the courts will carefully delimit the circumstances under which an arbitration clause may be so construed. In particular, it may be anticipated that an arbitration clause will not be held to be a waiver of jurisdictional immunity under § 1605(a)(1) when the clause does not directly or indirectly provide for arbitration in the United States or when the plaintiff's action is not related to arbitration.

*Id.* at 63. The crux of Kahale's argument is that § 1605(a)(1) of the Act, "unlike every other immunity exception contained in § 1605, does not depend upon contacts with the United States." *Id.* at 52. Therefore he claims that the "minimum contacts" theory of jurisdiction cannot be integrated into the section 1605(a)(1) waiver concept of jurisdiction. *Id.*

Kahale's restrictive interpretation is inconsistent with the spirit of the Act's jurisdictional framework. Given the comprehensive nature of the Act's jurisdictional scheme and the complexity of its fusion of the distinct concepts of subject matter and personal jurisdiction and immunity into a single criteria, integrating "minimum contacts" into section 1605(a)(1) appears warranted. *See supra* notes 3, 10-20 and accompanying text. Furthermore, the language in the Act's legislative history regarding the necessary contacts for personal jurisdiction is sufficiently broad to permit such an interpretation. *See supra* note 20.

101. *See* Brower, *Jurisdiction Over Foreign Sovereigns: Litigation v. Arbitration*, 17



## II. SUBMISSION TO ARBITRATION AS A WAIVER OF IMMUNITY FROM EXECUTION

Assuming the plaintiff prevails in overcoming the foreign state's claim of immunity from jurisdiction, immunity from execution would pose an additional obstacle to the plaintiff's enforcement proceedings.<sup>102</sup> The status of arbitration clauses as waivers of immunity from

---

INT'L LAW. 681, 682, 684-85 (1983). If an arbitration award could only be enforced in a jurisdiction where there was already a right to sue, the advantages of arbitration would be considerably diminished. *Id.*

On August 8, 1984 the American Bar Association (ABA) approved proposed amendments to the FSIA. The amendments (recommended by the ABA section of International Law and Practice) attempt to clarify uncertainty where United States companies agree to arbitrate with foreign states in a specific country. Under these circumstances the proposed amendment to section 1605 would deny immunity in an action "brought to confirm, recognize or enforce an award made pursuant to such an agreement to arbitrate, if (i) the arbitration takes place in the United States, [or] (ii) the agreement or award is governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards. . . ."

The New York Convention was contemplated by the second prong of the above amendment. However, where the arbitration agreement does not specify the site of the arbitration the applicability of such treaties under (ii) above is uncertain. This is because it is not yet clear whether one of the parties to the arbitration must be domiciled in the contracting state before the New York Convention will apply. *See generally Proposed Amendments Foreign Sovereign Immunities Act of 1976*, N.Y.L.J., Mar. 22, 1985, at 1, col. 1.

102. Execution and recognition of an award are distinct notions. G. DELAUME, *supra* note 2, § 14, at 37. Sovereign immunity applies to the process of execution which can only ensue after recognition of the award. *Id.* at 36-37. On the other hand, recognition is the "natural complement of the binding character of any agreement to submit to arbitration and should not be impaired by considerations of sovereign immunity. . . ." *Id.* at 37.

The legislative history to section 1610(a), involving execution against property of foreign states, refers to Rule 69 of the Federal Rules of Civil Procedure. *See House Report, supra* note 2, at 28. The rule provides in part:

(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

FED. R. CIV. P. 69.

Although the record of compliance by states with arbitral awards has been good, that record must be viewed in light of "relatively unimportant disputes that have been

execution under the FSIA is unclear.<sup>103</sup> If a foreign state submits its disputes to arbitration, however, the binding nature of arbitral awards should preclude the defense of immunity from execution.

In enacting the FSIA, Congress recognized that the enforcement of judgments against a foreign state's property is a "controversial subject in international law . . ." <sup>104</sup> and noted that there was a "marked trend toward limiting the immunity from execution."<sup>105</sup> The Act significantly reduced the scope of immunity from execution;<sup>106</sup> nevertheless, it remains more extensive than immunity from suit.<sup>107</sup> The incongruity between immunity from jurisdiction and execution reflects the congressional judgment that execution against state assets is more disruptive of governmental functions than amenability to suit.<sup>108</sup> As a result, plaintiffs may find themselves with ineffective jurisdiction because the state's property is immune from attachment.

Section 1609 of the FSIA establishes the general principle of immunity from attachment, arrest and execution<sup>109</sup> for a foreign state's<sup>110</sup>

---

submitted to arbitration or judicial settlement." Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT'L L. 1, 5 (1960). The risk of non-compliance by states is likely to increase as more vital questions are submitted for international adjudication. *Id.*

103. See *infra* notes 123-126 and accompanying text.

104. House Report, *supra* note 2, at 27.

105. *Id.* See generally Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AM. J. INT'L L. 820 (1981) (arguing that international practice does not contradict the restrictive theory of immunity from execution).

Domestic laws of sovereign immunity from execution are less uniform than those concerning immunity from jurisdiction. Some legal systems permit immunity from execution against the property of foreign states notwithstanding their amenability to suit. Other systems require explicit waivers by the executive branch of the government. The complexity and disarray of these rules makes "forum shopping" a distinct reality. See generally Delaume, *supra* note 66, at 45-46. When execution against a foreign state is recognized, the rules of immunity from execution in the international community generally permit execution only against property used for commercial purposes. G. DELAUME, *supra* note 2, § 12.01, at 1-2.

106. Governments traditionally accorded foreign states absolute immunity from jurisdiction and execution. See, e.g., Hill, *supra* note 12, at 162-66; *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). The evolution of bureaucracies and increased participation by governments in international trade, however, has led to a worldwide retrenchment from the absolute theory of immunity. See, e.g., Hill, *supra* note 12, at 168-73; Crawford, *supra* note 105.

The United States modified its immunity laws after the Tate letter of 1952 recommended the adoption of the restrictive theory of immunity from jurisdiction. 26 DEP'T ST. BULL. 984 (1952). Immunity from execution, however, remained absolute in the United States until the enactment of the FSIA. See House Report, *supra* note 2, at 27.

107. Hill, *supra* note 12, at 229.

108. House Report, *supra* note 2, at 26.

109. Section 1609 of the Act provides:

property in the United States. Exceptions to the general rule are developed in section 1610,<sup>111</sup> which differentiates between foreign states and their agencies or instrumentalities.<sup>112</sup> Section 1610(a) applies to foreign states, agencies and instrumentalities<sup>113</sup> and denies immunity to assets used for commercial activity in the United States<sup>114</sup> if (1) the foreign state has waived its immunity explicitly or by implication; (2) the property is or was used for the commercial activity upon which the claim is based; (3) the execution relates to a judgment resulting from a violation of international law; (4) the execution relates to property acquired by gift or succession, or is immovable or (5) the property consists of a contractual obligation or proceeds therefrom, owed to a foreign state under a casualty or liability insurance policy.<sup>115</sup>

---

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment, arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1609 (1982).

110. Section 1603 provides:

(a) A "foreign state," except as used in Section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity-

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in Section 1332(c) and (d) of this title, nor created under the laws of any third country.

*Id.* See generally Triggs, *An International Convention on Sovereign Immunity? Some Problems in Application of the Restrictive Rule*, 9 MONASH U. L. REV. 74, 92-96 (1982) (discussing the problem of distinguishing a state from its agencies and instrumentalities).

111. 28 U.S.C. § 1610 (1982). Section 1611 of the Act provides immunity exceptions for the property of international organizations, central bank funds and military equipment. *Id.* § 1611.

112. See *infra* note 119 and accompanying text.

113. See 28 U.S.C. § 1610(a).

114. Section 1603(e) of the Act provides that "a 'commercial activity carried on in the United States by a foreign state means commercial activity carried on by such state and having substantial contact with the United States.'" *Id.* § 1603(e). For a definition of commercial activity under the Act, see *supra* note 2.

115. Section 1610(a) states:

The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if-

(1) the foreign state has waived its immunity from attachment in aid of exe-

Section 1610(b) relates only to agencies or instrumentalities of foreign states,<sup>116</sup> and denies immunity to the commercial and non-commercial property<sup>117</sup> of agencies or instrumentalities of foreign states engaged in commercial activity in the United States if (1) the entity has waived its immunity explicitly or by implication or (2) the judgment relates to a claim for which the entity has lost its jurisdictional immunity pursuant to section 1605(a)(2), (3) or (5).<sup>118</sup> Thus, the Act distinguishes between the assets of foreign states and those of its agencies or instrumentalities,<sup>119</sup> and does not tie a foreign state's (including its

---

cution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property-

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, that such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

*Id.* § 1610(a).

116. See 28 U.S.C. §§ 1610(a), 1610(b). See *supra* note 110 (definition of "agency or instrumentality of a foreign state").

117. House Report, *supra* note 2, at 29.

118. Section 1610(b) of the Act states:

In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if-

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

28 U.S.C. § 1610(b) (1982).

119. See G. DELAUME, *supra* note 2, § 12, at 11-12. Regarding the distinction drawn by sections 1610(a) and (b) of the FSIA between the assets of a foreign state and its agencies and instrumentalities, Delaume states:

agencies' or instrumentalities') immunity from execution to immunity from jurisdiction under section 1605(a)(1).

The FSIA, unlike the immunity laws in other foreign states,<sup>120</sup> permits implied waivers of immunity from execution.<sup>121</sup> The legislative history pertaining to arbitration clauses as waivers of immunity from execution is ambiguous. The history with regard to section 1610 (a)(1) states:

[E]xplicit and implied waivers [are] governed by the same principles that apply to *waiver immunity from jurisdiction under section 1605(a)(1)* of the bill. A foreign state may waive its immunity from execution, *inter alia*, by the provisions of a treaty, a contract, an official statement, or certain steps taken by the foreign state in the proceedings leading to judgment or to execution.<sup>122</sup>

One of the principles pertaining to waivers of jurisdictional immunity, which the drafters presumably meant to incorporate into the waiver of immunity from execution section,<sup>123</sup> is that United States courts had found implicit waivers of immunity "where a foreign state has agreed to arbitration in another country."<sup>124</sup> Prior to the passage of the FSIA, however, United States courts granted the property of foreign states absolute immunity from execution.<sup>125</sup> Indeed, one of the

---

The non-immunity rule applies in its entirety only to the property of agencies and instrumentalities. Only a "limited" non-immunity rule applies to the property of a foreign sovereign or its political subdivisions, since insofar as these are concerned, immunity prevails unless it is established that there is a link between the property involved and the commercial activity out of which the dispute arose. This difference of treatment appears questionable. It is, in effect, based upon the 'personality' of the foreign party and not on the 'nature' of the act, which should be the determining factor if the basic philosophy of the Act is to be respected.

*Id.*

The ABA's proposed amendments to the FSIA would eliminate this distinction. The proposed amendment to section 1610(a) would deny immunity to all property of a foreign state. *See generally Proposed Amendments Foreign Sovereign Immunities Act of 1976*, N.Y.L.J., Mar. 22, 1985, at 1, col. 1.

120. In Italy, Greece and the Netherlands execution is subject to prior approval by the executive branch of government. G. DELAUME, *supra* note 2, § 12, at 1 n.2. Article 23 of the European Convention on State Immunity denies execution against the property of a foreign state unless the state has expressly waived its immunity in writing. *Id.* § 12, at 17.

121. *See* 28 U.S.C. § 1610(a).

122. House Report, *supra* note 2, at 28 (emphasis added).

123. *See supra* note 122 and accompanying text.

124. House Report, *supra* note 2, at 18.

125. *Id.* at 8. *See also supra* note 106.

primary goals of the Act was to alter the immunity laws governing execution.<sup>126</sup> Thus, in light of the pre-FSIA immunity law governing execution, the legislative history relating to the status of arbitration clauses as implied waivers of immunity from execution is equivocal.

In the absence of clear congressional intent, courts should consider the objectives of the statute and the policy consequences of their decisions in formulating a rule of law.<sup>127</sup> One of the fundamental objectives of the FSIA was to restrict immunity from execution so that plaintiff creditors could satisfy obligations owed to them by foreign states.<sup>128</sup> Classifying arbitration clauses as implied waivers of immunity from execution comports with this objective.

Policy consequences also militate in favor of this interpretation. To promote stability in international trade, United States courts should make arbitral awards binding on foreign states through the waiver provision of immunity from execution under the FSIA. Arbitration is increasingly relied upon in the international commercial community as the contractual means of resolving disputes.<sup>129</sup> The binding nature of arbitral awards is a well established principle<sup>130</sup> which is indispensable to the maintenance of stability and the promotion of the free flow of goods and services in the international commercial community.<sup>131</sup> The United States acknowledged this principle when it signed

---

126. See House Report, *supra* note 2, at 8.

127. See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 n.33 (1976).

128. House Report, *supra* note 2, at 8.

[T]he bill would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. H.R. 11315 seeks to restrict this broad immunity from execution. It would conform execution immunity rules more closely to the jurisdiction immunity rules. It would provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment.

*Id.*

129. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 497, at 153 (Tent. Draft No. 4, 1983) (Reporter's Note 1).

130. H. STEINER, *supra* note 55, at 196. The authors state that "[t]he rule that an arbitral award is final and binding on the parties is well established. . . ." *Id.* See also New York Convention, *supra* note 24, art. 3. Arbitration is often the preferred method of resolving commercial disputes because it is quicker, cheaper and more informal than judicial proceedings and it permits the participants to choose arbitrators who are experts in a particular field of commerce. H. STEINER, *supra*, note 55, at 824. For a brief history of international arbitral tribunals, see *id.* at 193-96.

131. See M. McDUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* 3 (1967). The central role of agreements in maintaining stability is emphasized by the authors who state that "agreements, explicit and implicit, are indispensable for establishing a stability in peoples' expectations which lessens pre-

the New York Convention, which requires contracting states to enforce arbitral awards rendered in the territory of another contracting state.<sup>132</sup>

The status of arbitration clauses, as implied waivers of immunity from execution under section 1610(a)(1), has not been litigated extensively.<sup>133</sup> Recent decisions in the United States and other countries, however, have denied foreign states immunity from execution on the basis of the foreign state's agreement to arbitrate.

The only United States case to address the issue squarely is *Birch Shipping Corp. v. Embassy of United Republic of Tanzania*,<sup>134</sup> decided by the District Court for the District of Columbia. In that case, an American shipowner and the Government of Tanzania contracted for the shipment of corn from New Orleans to Tanzania.<sup>135</sup> The contract provided for arbitration and the parties were obliged to abide by and perform any award.<sup>136</sup> An arbitration award in favor of Birch was rendered in New York and subsequently confirmed by the District Court for the Southern District of New York.<sup>137</sup> The defendant (United Republic) brought this action to quash a writ of garnishment on its United States checking account,<sup>138</sup> claiming immunity from attachment under the FSIA.<sup>139</sup>

In a simple two-step analysis the court upheld the attachment, finding that the defendant had waived its immunity from execution under section 1610(a)(1) and that the property attached was used for commercial purposes.<sup>140</sup> The court stated, "[w]hile an agreement to entry of judgment reinforces any waiver, an agreement to arbitrate standing alone is sufficient to implicitly waive immunity."<sup>141</sup> The court cited the legislative history relating to waivers of immunity from both juris-

---

dispositions for arbitrary resort to violence." *Id.* See also Holtzman, *Achievements of the Sixth International Congress on Arbitration: A Report from Mexico City*, 34:1 *ARB. J.* 31, 33 (1979). The working group on arbitration and the courts at the Sixth International Congress on Arbitration recognized that the support of national courts in enforcing arbitrations promoted economic stability and thereby reinforced world peace. Brower, *supra* note 101, at 682.

132. New York Convention, *supra* note 24.

133. For a possible explanation of the reasons behind the lack of litigation, see *supra* note 102 (comments of Schachter).

134. 507 F. Supp. 311 (D.D.C. 1980).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 312. The court held that it was proper to attach the bank account even though it was not used solely for commercial activity. *Id.* at 313.

141. *Id.*

diction<sup>142</sup> and execution,<sup>143</sup> and *Ipitrade v. Republic of Nigeria*,<sup>144</sup> as support for its holding.<sup>145</sup> This analysis is not persuasive.

As previously discussed,<sup>146</sup> the legislative history regarding arbitrations as waivers of execution is not dispositive of the issue because its precise meaning is unclear. Furthermore, *Ipitrade* is not relevant because it only addressed the question of immunity from jurisdiction in an action to confirm an arbitration, not immunity from execution.<sup>147</sup> The more persuasive reason for denying immunity from execution is the binding nature of arbitration.

The principle that arbitration awards are binding was recognized by the Court of Appeals of Sweden in a case in which Libya was denied immunity from execution on the basis of an arbitration clause. In *Libyan American Oil Company v. Socialist People's Arab Republic of Libya*,<sup>148</sup> the plaintiff (LIAMCO) brought an action to execute a Swiss arbitral award against Libya.<sup>149</sup> The court held that Libya waived its immunity under Swedish law by accepting the arbitration clause in the concession agreement entered into by the parties.<sup>150</sup> In a concurring opinion, Judge Tillinger recognized that sovereign states are increasingly becoming parties to commercial agreements<sup>151</sup> and stated:

If such agreements provide for arbitration, it is shocking *per se* that one of the contracting parties later refuses to participate in the arbitration or to respect a duly rendered award. When a State party is concerned, it is therefore a natural interpretation to consider that said party, in accepting the arbitration clause, committed itself not to obstruct the arbitral proceedings or their consequences, by invoking immunity.<sup>152</sup>

Judge Tillinger concluded that immunity laws should not interfere with the fundamental principles of contract law.<sup>153</sup>

The binding nature of arbitration was also recently recognized in

---

142. House Report, *supra* note 2, at 18. See also *supra* text accompanying note 27.

143. House Report, *supra* note 2, at 28. See also *supra* text accompanying note 122.

144. 462 F. Supp. 824 (D.D.C. 1978).

145. 507 F. Supp. 312; see *supra* notes 41-48 and accompanying text.

146. See *supra* notes 122-126 and accompanying text.

147. 465 F. Supp. at 824.

148. *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).

149. *Id.*

150. *Id.* at 895.

151. *Id.* at 895-96.

152. *Id.* at 896.

153. *Id.*



the arbitration of *S.P.P. (Middle East) Ltd. v. The Arab Republic of Egypt*,<sup>154</sup> where an agreement to develop tourist projects in Egypt was arbitrated before the ICC.<sup>155</sup> The arbitrators rejected Egypt's claim of sovereign immunity by ruling that the principles of *pacta sunt servanda*<sup>156</sup> and just compensation for expropriations must be recognized to "safeguard the interest of the foreign investor without impairing the sovereign prerogatives of the States."<sup>157</sup> The arbitrators also noted that international arbitration was designed to afford private investors greater security, which in turn promotes foreign investment.<sup>158</sup>

The above mentioned decisions<sup>159</sup> involving arbitration clauses as waivers of immunity from execution acknowledge the new role of sovereign states in international trade. Furthermore, they recognize the equity of requiring these states to honor their contractual obligations. To promote stability and growth in international trade private investors must be able to enforce their contract rights against their sovereign counterparts.<sup>160</sup>

The reluctance of states to subject their property to the execution powers of domestic courts is evident in the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.<sup>161</sup> Under this Convention, consent to ICSID arbitration constitutes an irrevocable waiver of immunity from jurisdiction.<sup>162</sup> Article 55 of the Convention, however, reserves the state's right to assert immunity from execution.<sup>163</sup>

154. 22 I.L.M. 752 (1983) (ICC court of arbitration).

155. *Id.* at 757.

156. Agreements and stipulations of the parties to a contract must be observed. BLACK'S LAW DICTIONARY 999 (5th ed. 1979). *Cf.* Vienna Convention on the Law of Treaties, pt. III, § 1, art. 26, U.N. Doc. A/Conf./39/27 (May 23, 1969), reprinted in 8 I.L.M. 679, 690 (1969) ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith").

157. 22 I.L.M. at 774.

158. *Id.* at 763-64.

159. *See supra* notes 134-158 and accompanying text.

160. *See* Luzzatto, *supra* note 83. Luzzatto states:

Sovereign immunity has been frequently invoked by States with a view to getting rid, either of the obligation to arbitrate, or of the duty to execute the award. There should be, however, no doubt, in this connection, that an agreement to arbitrate constitutes an implicit waiver and that therefore international or municipal rules granting sovereign immunity should not apply.

*Id.* at 93.

161. ICSID Convention, *supra* note 83.

162. *See supra* note 94.

163. ICSID Convention, *supra* note 83. Article 55 of the Convention states: "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution." *Id.* art. 55.

The drafters of the FSIA were aware of the controversy surrounding the attachment of a foreign state's assets,<sup>164</sup> and sought to balance the private interest in adjudicating claims with the governmental interest in protecting sensitive sovereign functions.<sup>165</sup> In striking this delicate balance, the drafters recognized the importance of avoiding significant disruptions of vital public interests.<sup>166</sup> Section 1610(c)<sup>167</sup> of the Act permits limited judicial discretion in execution proceedings by prohibiting execution until the court has ascertained that a "reasonable period of time"<sup>168</sup> has passed since the entry of judgment.<sup>169</sup> Through this section, Congress afforded the courts an opportunity to protect compelling state interests by providing flexible statutory guidelines.<sup>170</sup> Exigent state interests may be pleaded by a state defendant, but these factors should be considered by the court independent of the issue of waiver of immunity from execution.

When a foreign state is amenable to suit, the complementary nature of a court's jurisdiction and execution powers<sup>171</sup> also supports the denial of immunity from execution. Over the past two decades a grow-

---

164. House Report, *supra* note 2, at 27. See also *supra* notes 104-105 and accompanying text.

165. See Hill, *supra* note 12, at 204.

166. See *id.* at 236; House Report, *supra* note 2, at 30.

167. 28 U.S.C. § 1610(c) (1982).

168. Section 1610(c) of the Act states:

No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

*Id.*

169. The legislative history relating to § 1610(c) states in relevant part:

In some jurisdictions in the United States, attachment and execution to satisfy a judgment may be had simply by applying to a clerk or to a local sheriff. This would not afford sufficient protection to a foreign state [This subsection contemplates that the courts will exercise their discretion in permitting execution.] Prior to ordering attachment and execution, the court must determine that a reasonable period of time has elapsed following the entry of judgment, or in cases of a default judgment, since notice of the judgment was given to the foreign state under section 1608(c). In determining whether the period has been reasonable, the courts should take into account procedures, including legislation, that may be necessary for payment of a judgment by a foreign state, which may take several months; representations by the foreign state of steps being taken to satisfy the judgment; or any steps being taken to satisfy the judgment; or evidence that the foreign state is about to remove assets from the jurisdiction to frustrate satisfaction of the judgment.

House Report, *supra* note 2, at 30. See also Hill, *supra* note 12, at 236.

170. Hill, *supra* note 12, at 237.

171. See, e.g., H. STEINER, *supra* note 55, at 202, 729.

ing number of decisions in the international community have held that where there is no immunity from suit, there should be no immunity from execution.<sup>172</sup> Moreover, in Belgium, Switzerland, the Netherlands, the Federal Republic of Germany and the United Kingdom, a foreign state engaged in commercial activity enjoys no immunity from either suit or execution.<sup>173</sup> Under the FSIA, however, a foreign state that is subject to suit by the waiver provision of section 1605(a)(1)<sup>174</sup> of the Act may still claim immunity from execution.<sup>175</sup> Classifying arbitration clauses as implied waivers of immunity from execution, therefore, will complement the court's exercise of its jurisdictional power by enabling a plaintiff to exert the full force of the law against an uncooperative debtor. This classification will also bring United States sovereign immunity laws into greater conformity with the immunity laws of other countries.

The major thrust of the FSIA is its denial of immunity to the commercial activities of foreign states.<sup>176</sup> As more foreign states engaging in international trade resort to arbitration,<sup>177</sup> the role of sovereign immunity laws in preserving stability in international trade will become increasingly vital.

Although the FSIA does not link waivers of jurisdictional immunity to immunity from execution,<sup>178</sup> a foreign state's submission to arbitration should constitute an implied waiver of immunity from both jurisdiction and execution. Requiring foreign states to answer proceedings to enforce arbitration awards in United States courts does not offend "traditional notions of fair play and substantial justice."<sup>179</sup> Independent grounds for the exercise of jurisdiction under section 1605(a)(1) of the FSIA, therefore, would exist when a foreign state agrees to arbitrate in another country. Moreover, the binding nature of arbitration should oblige foreign states to fulfill their contractual obligations.<sup>180</sup> The integrity of arbitration agreements is essential to the preservation of stability in international trade and, therefore, such

---

172. See G. DELAUME, *supra* note 2, § 12, at 4.

173. *Id.*

174. 28 U.S.C. § 1605(a)(1) (1982).

175. See *supra* note 119 and accompanying text.

176. House Report, *supra* note 2, at 7-8.

177. See *supra* text accompanying notes 129, 151.

178. See *supra* text accompanying note 119.

179. See *supra* text accompanying notes 51-56.

180. See *supra* notes 130-132 and accompanying text.

agreements should be classified as implied waivers of immunity from execution under section 1610(a)(1)<sup>181</sup> of the FSIA.

*Peter M. McGowan*

---

181. 28 U.S.C. § 1610(a)(1) (1982).

