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## The Validity of the Foreign Sovereign Immunity Defense in Suits Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards

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# The Validity of the Foreign Sovereign Immunity Defense in Suits Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Tara A. O'Brien

## **Abstract**

This Note examines the interrelationship between the Convention and the FISA, specifically, whether a sovereign's ratification of the Convention constitutes a waiver of immunity under section 1605(a)(1) of the FISA in actions to enforce arbitration agreements and awards. The development of sovereign immunity law in arbitration enforcement actions, pre-FISA and under the FISA's "waiver" exception, is reviewed in light of the Convention. The confusion over the Convention as it affects sovereign immunity is discussed, and a resolution of the issue is proposed in favor of barring the sovereign immunity defense in actions falling under the Convention.

# THE VALIDITY OF THE FOREIGN SOVEREIGN IMMUNITY DEFENSE IN SUITS UNDER THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

## INTRODUCTION

Commercial arbitration has become an indispensable method of dispute resolution in the international business community.<sup>1</sup> It provides an independent means of settling disputes while avoiding the complex, time-consuming and expensive process of litigation.<sup>2</sup>

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1. M. DOMKE, *COMMERCIAL ARBITRATION* 100-07 (1965). The author states: "Resort to arbitration has become increasingly important in keeping the avenues of trade free of obstructive devices, and businessmen of different countries have come to recognize arbitration as the most successful method of settling commercial disputes arising in the ordinary course of foreign trade." *Id.* at 101. This success is attributed to the fast, efficient and impartial nature of the arbitration process. *Id.* Domke stresses the necessity of arbitration to prevent controversies from extending unsettled for long periods of time, which hampers amicable business relations. *Id.* Allowing these delays in dispute resolution would add to the already too many obstacles of international trade, such as: export and import restrictions, quotas, licensing, foreign exchange control and preferences in favor of domestic merchants. *Id.*

It has become more and more recognized that for the settlement of disputes between parties to an international transaction, arbitration has clear advantages over litigation in national courts. The foreign court can be an alien environment for a businessman because of his unfamiliarity with the procedure which may be followed, the laws to be applied, and even the mentality of the foreign judges. In contrast, with international commercial arbitration parties coming from different legal systems can provide for a procedure which is mutually acceptable. They can anticipate which law shall be applied: a particular law or even a *lex mercatoria* of a trade. They can also appoint a person of their choice having expert knowledge in the field

A.J. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958*, at 1 (1981). "The businessman doing business in several countries has an additional reason for preferring arbitration to local judicial remedies—the fear of discrimination against the foreigner, consciously felt in actual bias or unconsciously exhibited by preference for local principles of law." Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 *YALE L.J.* 1049, 1051 (1961); See also Comment, *International Commercial Arbitration Under the United Nations Convention and the Amended Federal Arbitration Statute*, 47 *WASH. L. REV.* 441, 442 (1972) (stresses the need for an effective arbitral remedy due to increased international trade and commerce).

2. See Quigley, *supra* note 1, at 1049:

From the days of the early English "piepowder" courts, where merchants with the dust of the market still on their feet stepped into a tribunal of merchants for swift resolution of their disputes, businessmen have preferred arbitration, a process which

One recurring problem, however, is enforcement of arbitration agreements and the resulting awards when the recalcitrant party is a government entity and asserts the defense of sovereign immunity.<sup>3</sup> By claiming immunity from the jurisdiction of the United States

they think combines finality of decision with speed, low expense, and flexibility in the selection of principles and mercantile customs to be used in solving a problem, over litigation.

*Id.* See also *Bergeson v. Joseph Muller Corp.*, 710 F.2d 928, 929 (2d Cir. 1983) ("International merchants often prefer arbitration over litigation because it is faster, less expensive and more flexible."); McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. & COM. 735, 735 (1971) ("Arbitration is speedier, more efficient and economical, and better suited to the settlement of disputes involving parties of diverse nationalities . . ."). Arbitration is a self-regulatory method of dispute resolution in the nature of a judicial process, whereby parties to a contract voluntarily agree to submit their disputes to impartial third persons, the arbitrators. M. DOMKE, *supra* note 1, at 2. The decision or award of the arbitrators is based upon evidence and testimony presented at hearings before the arbitral tribunal. *Id.* Principles of law and rules of evidence are not generally applied. *Id.* at 3. The arbitrators' award is final and binding and is not open to review by courts for errors in findings of fact or law. *Id.*

3. See Domke, *The Enforcement of Maritime Arbitration Agreements With Foreign Governments*, 2 J. MAR. L. & COM. 617, 618 (1971). Domke asserts: "Foreign governments are sometimes reluctant to abide by their agreement to arbitrate. In such cases, they are inclined to invoke sovereign immunity from foreign jurisdictions and from execution in a proceeding to enforce the arbitration agreement or an award rendered pursuant thereto." *Id.* "Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state." H.R. REP. NO. 1487, 94th Cong., 2d Sess. 8, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604, 6606 [hereinafter cited as HOUSE REPORT]. Sovereign immunity has also been defined as a doctrine which "precludes a litigant from asserting an otherwise meritorious cause of action against a sovereign or a party with sovereign attributes unless the sovereign consents to suit." *Principe Compania Naviera, S.A. v. Board of Comm'rs*, 333 F. Supp. 353, 355 (E.D. La. 1971). The *Restatement of the Foreign Relations Law* enumerates the exact entities that can be afforded sovereign immunity:

- a) the state itself;
- b) its head of state and those designated by him as members of his official party;
- c) its government;
- d) its head of government and those designated by him as members of his official party;
- e) its foreign minister and those designated by him as members of his official party;
- f) its governmental agencies;
- g) other public ministers, officials and agents of the state with respect to acts performed in their official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state;
- h) a corporation created under its laws and exercising functions comparable to those of a department or agency of the state.

RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 69 (Proposed Official Draft 1962) [hereinafter cited as RESTATEMENT]. The comment to this section defines "agency" as:

[A] body having the nature of a government department or ministry. It does not include every person or entity acting as an agent for the state. The question in each

court where the enforcement action is brought, the sovereign can defeat enforcement.<sup>4</sup>

A significant aspect of this problem involves the interrelation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>5</sup> (Convention) and the Foreign Sovereign Immunities Act of 1976<sup>6</sup> (FSIA). The Convention, adopted in the United States in 1970,<sup>7</sup> provides jurisdiction for actions to enforce foreign arbitration agreements and awards in signatory countries.<sup>8</sup> Under section 1605(a)(1) of the FSIA, a party's agreement to arbitrate in the United States is considered consent to enforcement of that agreement and, therefore, a waiver of sovereign immunity in enforcement actions.<sup>9</sup> Lawsuits concerning the sovereign immunity

case is whether the relationship between the state and the agency, established by the law of the state creating the agency, in fact makes it a part of the government of the state. In determining whether the agency is in fact a part of the government, the views of the government creating the agency are given great weight, but are not necessarily conclusive.

*Id.* comment b.

4. Domke, *supra* note 3, at 618. See also *Maritime Int'l Nominees Estab. v. Republic of Guinea*, 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 104 S. Ct. 71 (1983). *Maritime International* involved a suit to confirm an arbitration award in which the Republic of Guinea asserted the sovereign immunity defense. The court of appeals reversed the lower court decision and held that the suit did not fall under any of the enumerated exceptions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1605, 1607 (1976), and, therefore, the court lacked subject matter jurisdiction to confirm the award. *Maritime Int'l*, 693 F.2d at 1112.

5. *Opened for signature* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter cited as Convention]. The Convention is also known as the New York Convention because it was drafted and adopted at the Conference of International Commercial Arbitration at the United Nations Center in New York.

6. 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1976) [hereinafter cited as FSIA].

7. 9 U.S.C. §§ 201-208 (1982). The Convention entered into force and effect in the United States on December 29, 1970. 21 U.S.T. at 2517.

8. 9 U.S.C. §§ 202-203. Section 202 states that: "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention." *Id.* § 202. Section 203, which confers jurisdiction states:

[A]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

*Id.* § 203.

9. 28 U.S.C. § 1605(a)(1) (1976). This section, called the "waiver exception," 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

defense in arbitration enforcement actions have raised the issue as to whether a sovereign's agreement to arbitration enforcement in signatory countries under the Convention has the same effect as an agreement to arbitrate in the United States as construed under the waiver exception of the FSIA.<sup>10</sup> Repeated reference has been made to the Convention in discussions of the waiver issue in arbitration enforcement actions, although nothing conclusive has been established.<sup>11</sup>

This Note examines the interrelationship between the Convention and the FSIA, specifically, whether a sovereign's ratification of the Convention constitutes a waiver of immunity under section 1605(a)(1) of the FSIA in actions to enforce arbitration agreements and awards. The development of sovereign immunity law in arbitration enforcement actions, pre-FSIA and under the FSIA's "waiver" exception, is reviewed in light of the Convention.<sup>12</sup> The confusion over the Convention as it affects sovereign immunity is discussed,<sup>13</sup> and a resolution of the issue is proposed in favor of barring the sovereign immunity defense in actions falling under the Convention.

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

*Id.* Section 456 of the *Restatement (Revised) of the Foreign Relations Law* states:

(2) Under the law of the United States:

.....

- (b) an agreement to arbitrate is a waiver of immunity from jurisdiction in
- (1) an action or other proceeding to compel arbitration pursuant to the agreement;
  - (2) an action to enforce an arbitral award rendered pursuant to the agreement.

RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 456(2)(b) [hereinafter cited as DRAFT RESTATEMENT]. See *infra* text accompanying notes 151-58.

10. See *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, 482 F. Supp. 1175 (D.D.C. 1980) [hereinafter cited as *LIAMCO*]; *Ipitrade Int'l, S.A. v. Federal Republic of Nig.*, 465 F. Supp. 824 (D.D.C. 1978). Both actions involved petitions to confirm arbitration awards where respondents' assertions of the sovereign immunity defense were denied by the courts. The court's holding in *Ipitrade* apparently rested on two factors: 1) that the parties had agreed to arbitrate in the underlying contract, and 2) that the suits received subject matter jurisdiction from the Convention. 465 F. Supp. at 826. The *LIAMCO* court rested its holding on the agreement to arbitrate citing *Ipitrade* for support. 482 F. Supp. at 1178. The language of both decisions, *Ipitrade*, 465 F. Supp. at 826-27; *LIAMCO*, 482 F. Supp. at 1178, however, is rather unclear, leaving room for speculation as to the courts' exact rationale. DRAFT RESTATEMENT, *supra* note 9, § 456, reporters' note 1. See *infra* text accompanying notes 159-205.

11. See *infra* notes 159-211 and accompanying text.

12. See *infra* notes 85-205 and accompanying text.

13. See *infra* notes 170-211 and accompanying text.

## I. ARBITRATION ENFORCEMENT

Arbitration is a self-regulatory process by which parties to a contract voluntarily agree to submit their disputes to an impartial third party, the arbitrator.<sup>14</sup> An arbitrator's decision or award is binding on the parties and is not open to judicial review for errors in findings of law or fact.<sup>15</sup> Nonetheless, an arbitration agreement and resulting award can be worthless unless enforced.<sup>16</sup>

The most common obstacles to successful arbitration stem from this procedural aspect of it, specifically, the initiation of the proceedings and enforcement of the award.<sup>17</sup> For resolution of these problems a court action may be instituted.<sup>18</sup> In the United States, subject matter jurisdiction over such actions is granted under either the United States Arbitration Act<sup>19</sup> (Arbitration Act) or the Convention.<sup>20</sup> The Arbitration Act covers enforcement of domestic arbitration agreements and awards arising from commercial or maritime disputes,<sup>21</sup> and the Convention covers enforcement of foreign agree-

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14. See M. DOMKE, *supra* note 1, at 2.

15. *Id.* at 3; see *infra* note 36 and accompanying text.

16. See McMahon, *supra* note 2, at 735. "Arbitration is speedier, more efficient and economical, and better suited to the settlement of disputes involving parties of diverse nationalities only so long as specific performance of an agreement to arbitrate will be readily ordered and arbitral awards receive the benefit of summary enforcement proceedings and are not extensively reviewed." *Id.* See also Comment, *supra* note 1, at 442-43. The author sets forth three elements necessary for effective arbitration: 1) an agreement to arbitrate; 2) a generally recognized system for arbitration; and 3) a method for enforcing and recognizing awards resulting from arbitration. *Id.* In stressing the third factor he states:

The third element requires the development of judicial machinery which will provide a reasonable opportunity for enforcement of the arbitral remedy with a minimum of distinction between foreign and domestic arbitration. It is this requirement which has been the most troublesome . . . . It must be fulfilled both at the national and international levels.

*Id.* at 443.

17. See M. DOMKE, *supra* note 1, at 61-66, 94-99.

18. See *id.*

19. 9 U.S.C. §§ 1-14 (1982). The purpose of the Arbitration Act, as explained in the *House Report*, is "to make valid and enforceable [sic] agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or [sic] admiralty, or which may be the subject of litigation in the Federal courts." H.R. REP. No. 96, 68th Cong., 1st Sess. 1, 1 (1924). The *House Report* continued: "The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement." *Id.* at 2.

20. 9 U.S.C. § 203 (1982).

21. 9 U.S.C. § 2 (1982).

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part

ments or awards involving commercial disputes.<sup>22</sup> The same procedure is followed under both statutes due to a provision in the Convention that the enforcing court follow the procedure customarily used in that forum.<sup>23</sup>

Under United States law, the procedure for enforcement of arbitration agreements is very similar to that of enforcement of arbitration awards. To enforce an arbitration agreement a petition is filed in the appropriate court for an order directing arbitration.<sup>24</sup>

thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

*Id.*

22. 9 U.S.C. § 202 (1982). Section 202 states:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

*Id.* See *infra* notes 46-48, 72-77 and accompanying text. The Convention applies to awards made in a state other than that in which enforcement is sought and those not considered domestic. Convention, *supra* note 5, art. I(1). Also, upon ratification of the Convention, the United States adopted a reservation which limits United States application of the Convention to commercial disputes. Convention, *supra* note 5, art. I(3).

23. See *infra* notes 54-57 and accompanying text.

24. See M. ДОНКЕ, *supra* note 1, at 61-62.

When one party refuses to proceed to arbitration, the party claiming the right to arbitrate may apply to an appropriate court for an order directing arbitration in accordance with the terms of the contract . . . .

The enforcement of the agreement by a court is a result of statutes in the leading commercial states which specifically stipulate the validity, enforceability, and irrevocability of such agreements.

*Id.* The statutory authority for such relief is under section 4 of the Arbitration Act, 9 U.S.C. § 4 (1982), which provides in pertinent part:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement . . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

*Id.*



The petitioner must show that an agreement to arbitrate was in fact made,<sup>25</sup> a dispute arose,<sup>26</sup> and that the other party has failed to comply with a demand for arbitration.<sup>27</sup> The merits of the dispute are not at issue but are left for determination by the arbitrator.<sup>28</sup>

To enforce an arbitration award, a petition for an order directing judgment to be entered on the award is filed.<sup>29</sup> This judgment has the same force and effect as an ordinary judgment.<sup>30</sup> To insure such court control of the arbitral process, many arbitration agreements expressly provide that "judgment upon the award by the arbitrator may be entered in any court having jurisdiction

25. 9 U.S.C. § 4 (1982).

26. See *M. Домке*, *supra* note 1, at 63-64. "An arbitration must have an actual dispute as its basis. The requirements for an arbitrable dispute are generally not as strict as for cases brought before a court . . . However, what has been termed a 'bona fide' dispute must have arisen." *Id.* at 63.

27. 9 U.S.C. § 4 (1982).

28. See *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960) (function of the court is limited to ascertaining whether party seeking arbitration is making claim that, on its face, is governed by contract in issue); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 360 F.2d 315 (2d Cir. 1966) (court is required to order arbitration when satisfied that making of agreement for arbitration or failure to comply therewith is not in issue), *aff'd*, 388 U.S. 395 (1967); *Sumitomo Corp. v. Parakopi Compania Maritima, S.A.*, 477 F. Supp. 737 (S.D.N.Y. 1979) (claim that petitioners do not have arbitral claim because there was no breach of contract clearly goes to the merits and thus does not constitute grounds for dismissing the petition). See also *M. Домке*, *supra* note 1, at 64. Domke states: "A dispute that the opposing party thinks rests on a frivolous demand will not be removed from the arbitration process. The court will not decide in advance whether the claim is meritorious or not, but will leave the question to the arbitrator." *Id.*

29. 9 U.S.C. § 9 (1976). Statutory authority for confirmation of an arbitration award is pursuant to section 9 of the Arbitration Act, which provides in pertinent part:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

*Id.*

30. 9 U.S.C. § 13. This section states:

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

thereof.”<sup>31</sup> In fact, section 9 of the Arbitration Act<sup>32</sup> expressly requires that the parties agree in their contract that a judgment shall be entered upon the arbitral award.<sup>33</sup> The only other requirements for judicial confirmation are production of the award<sup>34</sup> and that the action be brought within one year after the award is made.<sup>35</sup> Similar to the enforcement of an arbitration agreement, the merits of the dispute are not at issue nor are the legal or factual findings of the arbitrator.<sup>36</sup> The only grounds upon which a court may vacate or refuse to confirm an arbitral award involve bias, misconduct or bad faith on the part of the arbitrator.<sup>37</sup>

*Id.* See M. DOMKE, *supra* note 1, at 95.

31. See M. DOMKE, *supra* note 1 at 95. For example, the New York Produce Exchange Arbitration Clause contains the following language: “[The arbitrators’] decision, or that of any two of them, shall be final and for the purposes of enforcing any award this agreement may be made a rule of the Court.” New York Produce Exchange Form Time Charter (Code Name: ASBATIME), reprinted in M. WILFORD, T. COGLIN, N.J. HEALY JR. & J.D. KIMBALL, *TIME CHARTERS* 489 (1982) [hereinafter cited as *TIME CHARTERS*]. Whereas the STB Tanker Time Charter Arbitration Clause provides: “Awards pursuant to this Clause may include costs, including a reasonable allowance for attorney’s fees, and judgment may be entered upon any award made hereunder in any Court having jurisdiction in the premises.” *Id.* at 484. Both clauses serve the same purpose to allow for court confirmation of the award under the Arbitration Act, 9 U.S.C. § 9 (1982).

32. 9 U.S.C. § 9.

33. *Id.* Section 9 states that the parties must have agreed in the contract that judgment shall be entered upon the award in order to apply to a court for confirmation of the award. *Id.* Nevertheless, courts have not strictly interpreted this provision. See, e.g., *Marine Transp. Co. v. Dreyfus*, 284 U.S. 263, 276 (1932) (judgment entered on award even though arbitration agreement did not provide for it); *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 427 (2d Cir. 1974) (judgment was entered on award absent specific provision for it in the contract; however, parties were held to have consented to jurisdiction of the court for confirmation by moving to vacate the award).

34. 9 U.S.C. § 9

35. *Id.*

36. See, e.g., *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) (interpretation of collective bargaining contract is for the arbitrator and not within the court’s power to review); *Rossi v. Trans World Airlines*, 507 F.2d 404, 405 (9th Cir. 1974) (court will not second guess arbitrators’ application of common law). Domke states that:

When an award is challenged, one trend in modern arbitration law is apparent: courts will not review the facts found by the arbitrator, his interpretation of the contract terms, or his application of the law. Courts do not wish to reopen an arbitration proceeding in another forum, by reviewing the merits of an award. Such a review would lead to a second proceeding with legal technicalities that the parties intended to avoid. It would substitute the court’s judgment for that of the arbitrators and destroy the very aim of arbitration, which is to have a speedy determination of the issues submitted to experts in whom the parties had expressed confidence.

M. DOMKE, *supra* note 1, at 98-99.

37. 9 U.S.C. § 10 (1982). This section states the grounds upon which an award can be vacated. The statute provides in pertinent part:

## II. THE CONVENTION

The Convention was conceived in response to the international business community's need to expedite the flow of international trade through prompt resolution of disputes.<sup>38</sup> Because previous international agreements on arbitration<sup>39</sup> had proven ineffective with respect to enforcement,<sup>40</sup> representatives of forty-five nations convened in 1958 at the United Nations Conference on International Commercial Arbitration to devise an enforcement mechanism.<sup>41</sup> The purpose of the Convention was to promote enforcement

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(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

*Id.*

38. U.N. Doc. E/Conf.26/SR.21, at 3 (1958).

39. These agreements are the Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 157, and the Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301, otherwise known as the Geneva Protocol and 1927 Geneva Convention respectively. For a discussion of these treaties, see Quigley, *supra* note 1, at 1054-55.

40. See Quigley, *supra* note 1, at 1054. There were a number of reasons for the ineffectiveness of these treaties: 1) The treaties were not self-executing and, therefore, enacting legislation varied from country to country, leaving doubt as to the extent to which each country carried out its obligations under the treaties; 2) the burden of proof was placed on the party seeking enforcement thereby making resistance easier; and 3) the treaties require diversity of citizenship which caused confusion due to the varying national policies with regard to defining nationality. *Id.* See also *Bergesen v. Joseph Muller Corp.* 710 F.2d 928 (2d Cir. 1983). In *Bergesen*, the court stated:

International merchants often prefer arbitration over litigation because it is faster, less expensive and more flexible. But previous international agreements had not proved effective in securing enforcement of arbitral awards; nor had private arbitration through the American Arbitration Association, the International Chamber of Commerce, the London Court of Arbitration and the like been completely satisfactory because of problems in enforcing awards.

*Id.* at 929.

41. See Quigley, *supra* note 1, at 1059-60.

of arbitration agreements and awards in international contracts through liberalization and unification of enforcement standards.<sup>42</sup>

The Convention was drafted to allow for: 1) broad application; 2) avoidance of the complexities and varieties of national legal systems; and 3) acceptance of full universality of international provisions relating to arbitration.<sup>43</sup> This was accomplished by provid-

42. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). The goal of the Convention, and the purpose underlying United States adoption of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which they are observed and the resulting awards are enforced in signatory countries. *Id.* See also *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier*, 508 F.2d 969 (2d Cir. 1974). The *Parsons & Whittemore* court stated:

The 1958 Convention's basic thrust was to liberalize procedures for enforcing foreign arbitral awards: While the Geneva Convention placed the burden of proof on the party seeking enforcement of a foreign arbitral award and did not circumscribe the range of available defenses to those enumerated in the convention, the 1958 Convention clearly shifted the burden of proof to the party defending against enforcement and limited his defenses to seven set forth in Article V.

*Id.* at 973.

43. U.N. Doc E/Conf.26/4, at 18-19 (1958). At the United Nations Conference on International Commercial Arbitration, the following factors were listed as major obstacles to the progress of arbitration as a means of dispute settlement in international commerce:

- (a) Differences in national laws with respect to arbitration procedures;
- (b) Uncertainty regarding the exclusion of the Court's jurisdiction where there is an arbitration agreement;
- (c) Difficulties in determining the law applicable to the validity of an arbitration agreement, the arbitration procedure and the determination of the issue;
- (d) Uncertainty regarding the powers of the arbitral tribunal to decide on such matters, as:
  - (i) its own competence with respect to the matter in dispute, and in particular, its competence to determine whether the issue is arbitrable; (ii) the extent to which it may decide *ex aequo et bono* rather than on the basis of a given law;
- (e) Requirements in some countries as to the nationality of arbitrators;
- (f) Difficulty of enforcement of foreign arbitral awards;
- (g) Uncertainty as to whether and to what extent the courts have the power to view the validity of arbitral awards for alleged incompetence of the arbitral tribunal or for other reasons;
- (h) Lack of uniformity in the rules of arbitral tribunals;
- (i) Lack of a standard arbitration clause or inadequacy of arbitration clauses generally used in dealing with such problems as the procedure to be followed where the parties are unable to agree on the designation of the arbitral tribunal or the fixing of the place of arbitration;
- (j) Insufficient arbitration facilities;
- (k) Obstacles to the transfer of currency for the payment of arbitral awards and costs.

*Id.* In response to these obstacles, Delegate Haight of the International Chamber of Commerce (ICC) proposed that the Conference, in drafting the Convention, adopt a simple and flexible system for enforcement. U.N. Doc. E/Conf.26/SR.3, at 6-7 (1958). This system

ing a simple procedure for enforcement and placing a significantly heavier burden on the resisting party.<sup>44</sup> The scope of the Convention is very broad.<sup>45</sup> It encompasses awards made in a state other than the judicial forum and awards “not considered as domestic”<sup>46</sup>

would cover the “widest possible area” of international disputes, avoid difficulties inherent in reference to municipal laws of a country, provide for swift enforcement on the basis that the award was final and limit the grounds for refusal of enforcement. *See id.* Delegate Holleaux of France encouraged efforts to render international arbitration as universally effective as possible by simplifying the formalities of enforcement. *Id.* at 3.

44. U.N. Doc. E/Conf.26/SR.25, at 2 (1958). The Secretary-General of the 1958 United Nations Conference stated of the Convention’s anticipated advantages:

[I]t was already apparent that the document represented an improvement on the Geneva Convention of 1927. It gave a wider definition of the awards to which the Convention applied; it reduced and simplified the requirements with which the party seeking recognition or enforcement of an award would have to comply; it placed the burden of proof on the party against whom recognition or enforcement was invoked; it gave the parties greater freedom in the choice of the arbitral authority and of the arbitration procedure; it gave the authority before which the award was sought to be relied upon the right to order the party opposing the enforcement to give suitable security.

*Id.*

45. A.J. VAN DEN BERG, *supra* note 1, at 12. “[A]n award made in *any* foreign country, whether in a Contracting State or not, falls under the New York Convention.” *Id.* For a synopsis of the Conference discussions on the scope of the Convention, see U.N. Doc. E/Conf.26/2, at 2-4 (1958).

46. Convention, *supra* note 5, art. I(1). The corresponding section of the United States implementing legislation, 9 U.S.C. § 202 (1982), states:

An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

*Id.* Construction of the Convention’s language “not considered as domestic” has been a source of controversy in cases where the arbitral award was rendered in this country, yet involved foreign parties or the application of foreign law. For example, in *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co.*, 480 F. Supp. 352 (S.D.N.Y.), *aff’d mem.*, 614 F.2d 1291 (2d Cir. 1979), *cert. denied*, 445 U.S. 930 (1980), the court confirmed an award under the Convention which was rendered in New York involving foreign parties. *Id.* at 353. Whereas, in *Diapulse Corp. of Am. v. Carba Ltd.*, No. 78-3263, slip op. at 2 (S.D.N.Y. June 28, 1979), *rev’d on other grounds*, 626 F.2d 1108 (2d Cir. 1980), the court held that the Convention did not apply to a New York award involving a United States corporation and a foreign corporation. *Id.* In 1983, however, the Court of Appeals for the Second Circuit held that an award rendered in New York where the parties involved were foreign did come within the scope of the Convention. *Bergesen*, 710 F.2d at 932. The court held:

We adopt the view that awards “not considered as domestic” denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business

in the forum state.<sup>47</sup> It covers all written agreements in which parties agree to arbitrate any dispute arising in a defined legal relationship.<sup>48</sup>

There are few requirements to be met by the party seeking enforcement under the Convention.<sup>49</sup> Article IV requires production of either the original or a certified copy of the arbitration agreement and award.<sup>50</sup> Such production establishes a prima facie case, and the burden then shifts to the party opposing enforcement.<sup>51</sup> Placing the burden of proof on the resisting party is significant because it shifts the affirmative to respondent and thus makes resistance more difficult.<sup>52</sup> Another deterrent to resistance is that under article VI the enforcing court may order the opposing party to post security in an amount suitable to the circumstances of the dispute.<sup>53</sup>

outside the enforcing jurisdiction. We prefer this broader construction because it is more in line with the intended purpose of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards.

*Id.* (citations omitted)

47. See Convention, *supra* note 5, art. I(1). This article provides that:

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

*Id.*

48. See *id.* art. II(1). This article provides that:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

*Id.*

49. See, e.g., *Parsons & Whittemore Overseas Co. v. Societe de l'Industrie du Papier*, 508 F.2d 969, 973 (2d Cir. 1974).

50. Convention, *supra* note 5, art. IV(1). This article provides that:

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to in article II or a duly certified copy thereof.

*Id.*

51. See Quigley, *supra* note 1, at 1066.

52. See *id.*

53. Convention, *supra* note 5, art. VI. This article provides that:

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which

The only procedural guideline given in the Convention is in article III.<sup>54</sup> This section authorizes the enforcing court to follow the procedure customarily used in that forum.<sup>55</sup> Thus, United States courts may invoke the procedure followed under the Arbitration Act.<sup>56</sup> More importantly, this enables enforcing courts to avoid the complexities of following another nation's procedural system.<sup>57</sup>

The delegates who drafted the Convention sought a precise definition of judicial control to prevent a party from objecting without adequate justification.<sup>58</sup> They limited the number of grounds for withholding enforcement to avoid any unnecessary frustration of the arbitral process.<sup>59</sup> As set forth in article V(1), these grounds are as follows: 1) the parties were under some incapacity or the agreement is otherwise invalid; 2) proper notice of the proceeding or the appointment of the arbitrator was not given to the party against whom enforcement is sought; 3) the award deals with differences not contemplated by the terms of the submission to

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the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

*Id.*

54. Convention, *supra* note 5, art. III.

55. *Id.* Article III provides that:

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. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

*Id.*

56. *See supra* notes 24-37 and accompanying text.

57. At the United Nations Conference, Delegate Haight of the ICC referred to the complexities and varieties of national legal systems as a major barrier to the free flow of international trade. U.N. Doc. E/Conf.26/SR.3, at 5-6 (1958). *See also supra* note 43 (the first of a number of obstacles to the progress of arbitration, listed at the Conference, was differences in national laws with respect to arbitration procedures).

58. U.N. Doc. E/Conf.26/2, at 5-6 (1958). The extent of judicial control over the recognition and enforcement of arbitral awards must be defined with precision, so as to avoid the possibility that a losing party could invoke without adequate justification a multiplicity of possible grounds for objections in order to frustrate the enforcement of awards rendered against it. *Id.* at 5.

59. *Id.* at 5-6. The Secretary-General of the Conference stated: "[T]he general tendency of the [Delegates'] comments is to seek a reduction of the grounds on which recognition and enforcement of an arbitral award can be refused." *Id.*

arbitration; 4) the arbitral tribunal or procedure fails to conform to the agreement of the parties; and 5) the award has not yet become binding or has been set aside or suspended by a competent authority in the jurisdiction where the award was made.<sup>60</sup> Jurisdictional defenses such as foreign sovereign immunity were clearly not contemplated.

The grounds upon which a court or "competent authority" may refuse enforcement are somewhat broader in scope. Article II(3) provides, in pertinent part: "The court of a Contracting State, . . . [shall], at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."<sup>61</sup> In addition, article V(2) states:

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the laws of that country, or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.<sup>62</sup>

It is likewise doubtful that either of these grounds would encompass the sovereign immunity defense. Sovereign immunity would neither render an agreement "null and void, inoperative or incapable of being performed,"<sup>63</sup> nor would it render the subject matter of the dispute incapable of settlement by arbitration.<sup>64</sup>

60. Convention, *supra* note 5, art. V(1). An important aspect of this section is the opening language which states that enforcement "may be refused," creating a permissive tone whereby refusal is placed in the discretion of the court. A.J. VAN DEN BERG, *supra* note 1, at 265. Furthermore, the grounds provided in article V are exhaustive. They are the only grounds upon which a resisting party can defeat enforcement. *Id.* at 265.

61. Convention, *supra* note 5, art. III.

62. *Id.* art. V(2).

63. *Id.* art. II(3). See *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v. Lauro*, 712 F.2d 50 (3d Cir. 1983). The Court of Appeals for the Third Circuit held that an agreement is "null and void" only when "it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, or when it contravenes fundamental policies of the forum state. The 'null and void' language must be read narrowly, for the signatory nations have jointly declared a policy of enforceability of agreements to arbitrate." *Id.* at 53 (citations omitted). In an earlier case, the first circuit stated: "[T]he clause must be interpreted to encompass only those situations—such as fraud, mistake, duress, and waiver—that can be applied neutrally on an international scale." *Ledee v.*



The public policy exception is the only ground that might feasibly encompass the sovereign immunity defense.<sup>65</sup> Courts, however, narrowly construe this exception,<sup>66</sup> stressing the need to prevent the recalcitrant party from defeating enforcement merely by raising general policy principles that have been transgressed by the award.<sup>67</sup> In addition, narrow construction is encouraged in order to support the pro-enforcement policy behind the Convention.<sup>68</sup> As a result, the public policy exception has been successfully invoked

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Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir. 1982). See also *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75, 77 (4th Cir. 1981).

64. A.J. VAN DEN BERG, *supra* note 1, at 369. Van den Berg states in reference to this section: "The non-arbitrability of a subject matter reflects a special national interest in judicial, rather than arbitral resolution of disputes. Classic examples of non-arbitral subject matters are anti-trust, the validity of intellectual property rights (patents, trademarks, etc.), family law and the protection of certain weaker parties." *Id.*

65. See Convention, *supra* note 5, art. V(2)(b).

66. See *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975). The court held: "[W]e have recently indicated that the 'public policy' limitation on the Convention is to be construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice." *Id.* at 516. See also *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier*, 508 F.2d 969, 973 (2d Cir. 1974); *Saxis Steamship Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967); *Sea Dragon, Inc. v. Gebr. Van Weelde Scheepvaartkantoor B.V.*, 574 F. Supp. 367, 372 (S.D.N.Y. 1983). One commentator writes: "Pursuant to the notion of international public policy, a violation of public policy is to be deemed present in very serious cases only . . . . Article V(2) (a) and (b) can be said to refer to international public policy as has been expressly or implicitly affirmed by a substantial number of courts." A.J. VAN DEN BERG, *supra* note 1, at 382.

67. *Revere Copper & Brass Inc. v. Overseas Private Inv. Corp.*, 628 F.2d 81 (D.C. Cir.), *cert. denied*, 446 U.S. 983 (1980). The court held that the public policy exception is "not available for every party who manages to find some generally accepted principle which is transgressed by the award. Rather, the award must be so misconceived that it 'compels the violation of law or conduct contrary to accepted public policy.'" *Id.* at 83 (quoting *Union Employers Div. of Printing Indus., Inc. v. Columbia Typograph Union No. 101*, 353 F. Supp. 1348, 1349 (D.D.C. 1973), *aff'd mem.*, 492 F.2d 669 (D.C. Cir. 1974)).

68. *Parsons & Whittemore*, 508 F.2d at 973-74. The court stated:

Perhaps more probative, however, are the inferences to be drawn from the history of the Convention as a whole. The general pro-enforcement bias in forming the Convention and explaining its supersession of the Geneva Convention points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement.

*Id.* at 973. In a report on *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v. Lauro*, 712 F.2d 50 (3d Cir. 1983) in the *American Journal of International Law*, the author states: "The decision in this case is consistent with the overwhelming endorsement by National Courts of the arbitration process and the essential purpose of the Convention. Here, the court sensibly refused to frustrate that purpose on the basis of a parochial rule merely technical in nature." 78 AM. J. INT'L L. 219 (1984).

only in cases involving more substantive issues, such as the legality of the Securities Act<sup>69</sup> or antitrust violations,<sup>70</sup> rather than jurisdictional issues.<sup>71</sup>

Furthermore, under article I(3) of the Convention, signatories are permitted to qualify their accession to the Convention by adopting certain reservations.<sup>72</sup> The first, the "reciprocity" reservation, limits a state's obligation under the Convention to enforcement of awards made in another contracting state.<sup>73</sup> The second reservation limits application of the Convention to differences which are considered *commercial* under the law of the ratifying state.<sup>74</sup> The United States adopted both reservations.<sup>75</sup> In doing so, it limited application of the Convention in the United States to "commercial legal relationships,"<sup>76</sup> an area traditionally excepted from the sovereign immunity defense under United States and international law.<sup>77</sup>

69. 15 U.S.C. § 77(a)(aa) (1982). *See, e.g.*, *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (questions concerning the legality of the Securities Act were held nonarbitrable as against public policy).

70. *See, e.g.*, *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 828 (2d Cir. 1968) (questions concerning alleged antitrust violations held nonarbitrable as against public policy). *See generally* Aksent, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 Sw. U.L. Rev. 1, 13 (1971). The author states:

According to competent authority, the provision denying enforcement because of local public policy was "unavoidable," even though it has the effect of relegating the ultimate decision on the applicability of the Convention to the good faith of the contracting countries. This is so because there really is no practical limit to the types of situations which each country would include within its own public policy.

*Id.*

71. "[I]n 100 cases applying the New York Convention, enforcement has been refused for reasons of public policy only three times.' The three cases denying enforcement dealt with violations of the forum's states public policy that were far more substantive than procedural." 78 AM J. INT'L L. 219, 219 n.9 (1984) (quoting Sanders, *A Twenty Years Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW. 269, 271 (1979).

72. Convention, *supra* note 5, art. I(3).

73. *Id.*

74. *Id.*

75. 9 U.S.C. § 202 (1982).

76. *Id.*

77. Following the lead of the international community, the United States adopted the restrictive theory in 1952, which excepted from sovereign immunity all disputes arising from the commercial or public acts of a foreign state. Letter from Jack B. Tate, Acting Legal Advisor, Dep't of State, to Phillip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952) [hereinafter cited as Tate Letter]. This theory was adopted in order to protect the interests of private individuals engaging in business transactions with foreign governments and their agencies, by enabling them to have their rights determined in the courts. *Id.* at 985. *See infra* text accompanying notes 88-94.

When the United States acceded to the Convention in 1970,<sup>78</sup> Congress felt it was in the best interests of United States businessmen involved in international trade.<sup>79</sup> Because the Convention provides for enforcement in both United States and foreign courts,<sup>80</sup> Congress believed accession to the Convention would encourage Americans doing business abroad to submit their disputes to arbitration.<sup>81</sup> Unfortunately, due to its broad terms, the Convention has frequently been a source of confusion for courts attempting to construe it.<sup>82</sup> Nevertheless, these general terms are also considered

78. 9 U.S.C. §§ 201-208 (1982).

79. H.R. REP. NO. 1181, 91st Cong., 2d Sess. 2, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 3601, 3602.

80. Convention, *supra* note 5, arts. I(1), II(1). As van den Berg notes: [T]he advantages [of arbitration] are only potential until the necessary legal framework can be internationally secured. This legal framework should at least provide that the commitment to arbitrate is enforceable and that the arbitral decision can be executed in many countries, precluding the possibility that a national court review the merits of the decision.

One finds such framework in the New York Convention. The Convention has been adhered to in 56 states . . . among which are almost all important trading nations from the Capitalist and Socialist world as well as many developing countries.

A.J. VAN DEN BERG, *supra* note 1, at 1.

81. See H.R. REP. NO. 1181, 91st Cong., 2d Sess. 2, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 3601, 3602.

82. See, e.g., *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v. Lauro*, 712 F.2d 50 (3rd Cir. 1983). In *Rhone Mediterranee*, the issue was raised as to what law determines whether the agreement is "null and void, inoperative or incapable of being performed" under article II of the Convention. *Id.* The court stated:

It thus appears that the ambiguity in Article II section 3 is deliberate. How it should be resolved has been a matter of concern to commentators, who suggest, variously, that the forum state should look to its own law and policy, to the rules of conflicts of laws, or to the law of the place of execution of the agreement.

*Id.* at 53. The court concluded that under United States law the agreement to arbitrate was not null and void, and therefore affirmed the lower court order staying the action pending arbitration. *Id.* at 55. See also *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983). The issue in *Bergesen* was whether the Convention applies to a New York arbitration award arising between two foreign parties. *Id.* The court stated:

In resolving the question presented on this appeal, we are faced with the difficult task of construing the Convention. The family of nations has endlessly—some say since the Tower of Babel—sought to breach the barrier of language. As illustrated by the proceedings at this conference, the delegates had to comprehend concepts familiar in one state that had no counterpart in others and to compromise entrenched and differing national commercial interests. Concededly, 45 nations cannot be expected to produce a document with the clear precision of a mathematical formula. Faced with the formidable obstacles to agreement, the wonder is that there is a Convention at all, much less one that is serviceable and enforceable.

*Id.* at 929. The court held, affirming the district court decision, that the Convention did encompass such awards. *Id.* at 934.

to be the Convention's greatest virtue because they allow for wide and successful application.<sup>83</sup> As one proponent of the Convention stated:

The Convention is an attempt to create a streamlined procedure for enforcing foreign arbitral awards, which, as might be expected of a multilateral convention on a subject where national laws differ so greatly, is phrased in general terms to which the courts or other competent authorities of the contracting states must give meaning. The record suggests that the convention may well prove to be the most useful weapon yet in the swift resolution of international commercial disputes.<sup>84</sup>

### III. THE DEVELOPMENT OF THE SOVEREIGN IMMUNITY DEFENSE IN ARBITRATION ENFORCEMENT ACTIONS

#### A. *Pre-FSIA: The Restrictive Theory*

The sovereign immunity defense was originally recognized in the United States according to the "absolute" theory.<sup>85</sup> Foreign governments were completely protected from private suit regardless of the nature or purpose of the underlying transaction.<sup>86</sup> The theory was that the King could do no wrong and would be offended by actions which impinged on his dignity and power.<sup>87</sup> With the shift toward more impersonal government bureaucracies, however, the treatment of the sovereign immunity defense also changed.<sup>88</sup> In 1952, in the widely published *Tate Letter*<sup>89</sup> the United States

83. See *supra* notes 43-71 and accompanying text.

84. Quigley, *Convention on Foreign Arbitral Awards*, 58 A.B.A. J. 821, 826 (1972).

85. *Victory Transp., Inc. v. Comisariá Gen. de Abastecimientos y Transp.*, 336 F.2d 354, 357 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). For a detailed discussion of the development of the principle of sovereign immunity, see *id.* at 357-62. See also von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 34-43 (1978); Note, *Defenses to International Antitrust Suits: An Aggregate Approach*, 5 FORDHAM INT'L L.J. 441, 451 (1982) [hereinafter cited as *Defenses to International Antitrust*].

86. See Sklaver, *Sovereign Immunity in the United States: An Analysis of S. 566*, 8 INT'L LAW. 408, 410 (1974).

87. *Victory Transp.*, 336 F.2d at 357.

88. See von Mehren, *supra* note 85, at 36-37; *Defenses to International Antitrust*, *supra* note 85, at 451.

89. *Tate Letter*, *supra* note 77. The rationale behind this narrowing of the foreign sovereign immunity policy was explained as follows:

adopted the "restrictive"<sup>90</sup> theory of sovereign immunity, which was becoming the prevailing rule of international law.<sup>91</sup> Under this theory, a distinction was drawn between public acts (*jure imperii*) and private acts (*jure gestionis*) of a state.<sup>92</sup> Immunity was granted only in cases involving disputes arising from public acts of a sovereign.<sup>93</sup> Commercial activities were considered private, and there-

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[T]he Department 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. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

*Id.* at 985.

90. See HOUSE REPORT, *supra* note 3, at 6605.

Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since. Moreover, it is regularly applied against the United States in suits against the United States government in foreign courts.

*Id.* See *infra* notes 91-94.

91. HOUSE REPORT, *supra* note 3, at 6605. In his letter to the Acting Attorney General, Tate pointed out that the Netherlands, Sweden, Argentina, Belgium, Italy, Egypt, Switzerland, France, Austria, Greece, Romania, Peru and Denmark either followed the restrictive theory in 1952 or had indicated an intention to follow it. Furthermore, Brazil, Chile, Estonia, Germany, Hungary, the Netherlands, Norway, Poland, Portugal, Sweden and the United States had, by treaty or through practice, retreated from the absolute theory by denying immunity with regard to government owned or public operated merchant vessels. Tate Letter, *supra* note 77, at 984-85. See RESTATEMENT, *supra* note 3, § 72 reporters' note 1. See also von Mehren, *supra* note 85, at 38-39:

Prior to the passage of the Immunities Act in October 1976, all of the important trading and industrial countries of the Western world, with the sole exception of the United Kingdom, had adopted some form or other of the restrictive doctrine of foreign sovereign immunity. This is confirmed by the decisions of many national courts. Moreover, the restrictive doctrine had been incorporated in a number of important international conventions, for instance the European Convention on State Immunity, the Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, and the Treaty of Peace with Germany.

*Id.* at 38.

92. HOUSE REPORT, *supra* note 3, at 6605. See *supra* note 90. For a discussion of the importance of these distinctions in practice, see Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901, 906-07 (1969).

93. HOUSE REPORT, *supra* note 3, at 6605. Public or political acts are generally limited to five categories:

(1) Internal administrative acts, such as expulsion of an alien.

fore, the sovereign immunity defense was unavailable in actions involving commercial disputes.<sup>94</sup>

Where the sovereign immunity defense was raised in arbitration enforcement actions arising from commercial disputes, United States courts sustained jurisdiction over the foreign sovereign by fashioning a two-tier analysis.<sup>95</sup> The sovereign immunity defense was rejected under the restrictive theory, and personal jurisdiction over the sovereign was held proper<sup>96</sup> on the consent theory.<sup>97</sup>

The consent theory was drawn from a long line of cases which held that a party's selection of a forum for arbitration constitutes consent to jurisdiction there.<sup>98</sup> The courts in the arbitration enforce-

(2) Legislative acts, such as nationalization.

(3) Acts concerning the armed forces.

(4) Acts concerning diplomatic activity.

(5) Public loans.

*Victory Transp., Inc. v. Comisariá Gen. de Abastecimientos y Transp.*, 336 F.2d 354, 360 (2d Cir. 1964).

94. HOUSE REPORT, *supra* note 3, at 6605. *See supra* note 90 ("immunity does not extend to suits based on its private or commercial acts"). *See also* Tate Letter, *supra* note 77.

95. *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103, 110 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966); *Victory Transp., Inc. v. Comisariá Gen. de Abastecimientos y Transp.*, 336 F.2d 354, 362 (2d Cir. 1964); *Pan Am. Tankers Corp. v. Republic of Vietnam*, 296 F. Supp. 361, 364 (S.D.N.Y. 1969). *See infra* text accompanying notes 103-23.

96. *Victory Transp.*, 336 F.2d at 363. The court held: "By agreeing to arbitrate in New York, where the United States Arbitration Act makes such agreements specifically enforceable, the Comisariá General must be deemed to have consented to the jurisdiction of the court that could compel the arbitration proceeding in New York." *Id.* *See infra* note 117.

97. "Parties may agree in advance to submit their controversy to a given forum, in which case the forum is the consent jurisdiction." BLACK'S LAW DICTIONARY 277 (5th ed. 1979). In 1964, the United States Supreme Court approved the concept of consent jurisdiction in *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964). "[I]t is settled, as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court." *Id.* So long as "traditional notions of fair play and substantial justice" are not offended, a court has power to assert personal jurisdiction over a defendant who has agreed in advance to confer such power upon the court. *National Equip. Rental, Ltd. v. Dec-Wood Corp.*, 51 Misc. 2d 999, 274 N.Y.S.2d 280 (App. Term 1966), *quoting* *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *See* 2 J. MOORE, J. D. LUCAS, H. FINK & C. THOMPSON, MOORE'S FEDERAL PRACTICE § 4.25[8] (2d ed. 1948) [hereinafter cited as J. MOORE].

98. *See, e.g.*, *Orion Shipping & Trading Co. v. Eastern States Petro. Corp. of Pan.*, 284 F.2d 419, 421 (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 Navegación de Cuba*, 243 F.2d 342, 346 (2d Cir. 1957); *S.M. Wolff Co. v. Tulkoff*, 9 N.Y.2d 356, 362, 174 N.E.2d 478 (1961); *Gantt v. Felipe Y. Carlos Hurtado & Cia.*, 297 N.Y. 433, 439, 79 N.E.2d 815, *cert. denied*, 335 U.S. 843 (1948); *Bradford Woolen Corp. v.*

ment actions relied specifically on two previous cases, *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama*<sup>99</sup> and *Farr & Co. v. Cia. Intercontinental de Navegación*.<sup>100</sup> Both involved actions to compel arbitration pursuant to the Arbitration Act. The Court of Appeals for the Second Circuit held that an agreement to submit disputes to arbitration in New York constituted consent to jurisdiction in New York.<sup>101</sup> The courts reasoned that by consenting to arbitrate in New York, the sovereign respondents had also consented to the New York courts' jurisdiction for purposes of enforcement under the Arbitration Act.<sup>102</sup>

The arbitration enforcement action in which the court first analyzed the sovereign immunity defense under the restrictive theory and invoked this two-tier analysis,<sup>103</sup> was *Victory Transport, Inc. v. Comisaría General*.<sup>104</sup> This was an action to compel arbitration of a dispute under a charter party<sup>105</sup> for the transport of wheat purchased by the Comisaría General of Spain.<sup>106</sup> The Spanish Gen-

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Freedman, 189 Misc. 242, 244, 71 N.Y.S.2d 257 (Sup. Ct. 1947). See Kahale, *Arbitration and Choice-of-Law Clauses as Waivers of Jurisdictional Immunity*, 14 N.Y.U. J. INT'L L. & POL. 29, 40 (1981).

99. 284 F.2d at 419 (appeal from an order compelling the parties to proceed to arbitration over respondent's repudiation of a contract of affreightment). The court of appeals vacated the stay of arbitration proceedings and affirmed the district court order compelling arbitration. *Id.*

100. 243 F.2d at 342. (appeal from an order compelling the parties to arbitration). The court of appeals affirmed, holding that the agreement to arbitrate in New York and service of process by registered mail satisfied personal jurisdictional requirements. *Id.*

101. *Orion*, 284 F.2d at 421; *Farr*, 243 F.2d at 346.

102. *Orion*, 284 F.2d at 421; *Farr*, 243 F.2d at 346. These holdings rested on the fact that the forum stipulated was New York where the Arbitration Act, 9 U.S.C. §§ 1-14 (1982), makes such agreements specifically enforceable. *Orion*, 284 F.2d at 421; *Farr*, 243 F.2d at 346. The legislative history on the Arbitration Act states: "The bill declares that such agreements shall be recognized and enforced by the courts of the United States. The remedy is founded also upon the Federal control over interstate commerce and over admiralty." H.R. REP. No. 96, 68th Cong., 1st Sess. 2 (1924).

103. *Id.* See *infra* note 117. The Court of Appeals for the Second Circuit explained that a sovereign's amenability to suit does not bear on the issue of sovereignty. *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966).

104. 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

105. "The term 'charter party,' often shortened to 'charter,' designates the document in which are set forth the arrangements and contractual engagements entered into when one person (the 'charterer') takes over the use of the whole of a ship belonging to another (the 'owner')." G. GILMORE & C. BLACK, JR., *THE LAW OF ADMIRALTY* § 4-1 (1975).

106. *Victory Transp.*, 336 F.2d at 356. The charter party provided for a voyage charter by appellant, Comisaría General of the S.S. Hudson, from owner-appellee, Victory Trans-

eral Counsel argued that as an arm of the Spanish Government,<sup>107</sup> the Comisaria General could not be sued without its consent.<sup>108</sup> Relying on the restrictive theory, the court rejected the sovereign immunity defense stating that the underlying business transaction, had "all the earmarks of a typical commercial transaction."<sup>109</sup> In a separate jurisdictional analysis, the court held that the Comisaria General had consented to the jurisdiction of the court by agreeing to arbitrate in New York.<sup>110</sup> The court concluded that "[i]mplicit in the agreement to arbitrate is consent to enforcement of that agreement."<sup>111</sup>

The *Victory Transport* analysis was reflected in *Petrol Shipping Corp. v. Kingdom of Greece*.<sup>112</sup> This was an action to compel arbitration<sup>113</sup> where the Court of Appeals for the Second Circuit

port, to transport a cargo of surplus wheat purchased pursuant to the Agricultural Trade Development and Assistance Act, 7 U.S.C. §§ 1691-1736(n) (1982), from Mobile, Alabama to one or two safe Spanish ports. *Victory Transp.*, 336 F.2d at 356. The ship sustained hull damage while discharging its cargo in Spanish ports allegedly unsafe for a ship of the Hudson's size for which the owner claimed damages. *Id.* The charter contained the New York Produce Exchange Arbitration Clause, *id.*, from the New York Produce Exchange Charter, one of the more commonly used charter party forms. Domke, *supra* note 3, at 617. The clause states:

Should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two of them, shall be final and for the purpose of enforcing any award this agreement may be made a rule of the Court. The arbitrators shall be commercial men . . .

336 F.2d at 356 n.2 (quoting New York Produce Exchange Charter, *reprinted in* TIME CHARTERS, *supra* note 31, at 489).

107. Appellant, Comisaria General, was a branch of the Spanish Ministry of Commerce. *Victory Transp.*, 336 F.2d at 356.

108. *Id.* at 357.

109. *Id.* at 360. These "earmarks" included:

- 1) the fact that the charter party was executed by the head of appellant's commercial division;
- 2) the wheat was consigned to and shipped by a private commercial concern;
- 3) the inclusion of the arbitration clause.
- 4) the purchasing had been conducted through private channels of trade; and
- 5) that the contract was for maritime transport—an area traditionally regarded as commercial.

*Id.* at 360-61.

110. *Id.* at 363.

111. *Id.* at 364.

112. 360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966).

113. Petitioner-appellee, Petrol Shipping, brought suit under section 4 of the United States Arbitration Act, 9 U.S.C. § 4 (1982), seeking an order compelling respondent-appellant, Kingdom of Greece, proceed to arbitration. 360 F.2d at 106.



rejected the Kingdom of Greece's defenses of lack of jurisdiction and sovereign immunity.<sup>114</sup> The dispute concerned damage sustained by petitioner-appellee's ship while under charter to appellant for the transportation of grain.<sup>115</sup> The charter party contained a clause providing for arbitration of disputes in New York.<sup>116</sup> The court, citing *Victory Transport*, held that the agreement to arbitrate constituted consent to jurisdiction.<sup>117</sup> The court then rejected the sovereign immunity defense under the restrictive theory analysis because the acts on which suit was brought constituted private transactions.<sup>118</sup>

*Pan American Tankers Corp. v. Republic of Vietnam*<sup>119</sup> was another action to compel arbitration in which the sovereign immunity defense was asserted. The claim involved a breach of a commercial contract for the transportation of cement.<sup>120</sup> The court rejected respondent's assertion of sovereign immunity because of the intrinsically commercial nature of the dispute.<sup>121</sup> Invoking the

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114. *Petrol Shipping*, 360 F.2d at 109-10.

115. *Id.* at 105. As in *Victory Transport*, 336 F.2d at 354, the charter party was for transportation of surplus wheat purchased under the Agricultural Trade Development and Assistance Act, 7 U.S.C. §§ 1691-1736(n) (1982), by appellant from the United States government. *Id.*

116. *Petrol Shipping*, 360 F.2d at 105. The *Petrol Shipping* charter, like the *Victory Transport* charter, contained the New York Produce Exchange Arbitration Clause. It generally provides for arbitration of all disputes to be held in New York by three commercial men to be chosen by the parties. *Id.* See *supra* note 106 (setting forth the language of the New York Produce Exchange Arbitration Clause).

117. *Petrol Shipping*, 360 F.2d at 107. In its discussion, the court emphasized the distinction between the personal jurisdiction and sovereign immunity questions. It stated:

The fact that one party is a branch of a foreign sovereign does not affect the conclusion that by entering into an arbitration agreement containing a submission such as here, the sovereign becomes amenable to suit. The question of immunity does not bear on the question of amenability, or personal jurisdiction. What *Farr* and *Orion* compel is that the Kingdom be treated as if it is physically present.

*Id.*

118. *Id.* at 110. The basis for this holding was two-fold: 1) the underlying transaction was identical to that in *Victory Transport* in that it was under the Agricultural Trade Development and Assistance Act, 7 U.S.C. §§ 1691-1736(n), and the voyage charter contained the same arbitration clause; 2) there was in evidence a letter from the State Department to appellant's representative rejecting the Kingdom's claim of sovereign immunity on the ground that the acts on which the suit was brought were private. 360 F.2d at 110.

119. 296 F. Supp. 361 (S.D.N.Y. 1969).

120. *Id.* at 362.

121. *Id.* at 364. The Republic of Vietnam argued that it was entitled to immunity because the role it played in the transaction was that of a governmental supervisor over the expenditure of foreign exchange which was political or sovereign in nature. *Id.* at 363. The

*Victory Transport* analysis, the court held that under the restrictive theory the breach of contract constituted a private act, not one of such a nature "that the interests of private litigants must be sacrificed to the interest of international comity."<sup>122</sup> The jurisdictional defense was not raised by respondent and, therefore, personal jurisdiction was assumed by the court.<sup>123</sup>

Two long-standing principles were relied on in these cases: 1) that a sovereign should not be immune from suits arising from its commercial or private activities,<sup>124</sup> and 2) an agreement to arbitrate in a forum is consent to jurisdiction in that forum.<sup>125</sup> By invoking both the restrictive theory of sovereign immunity and the consent theory of jurisdiction, the courts sustained arbitration enforcement actions against foreign sovereigns.<sup>126</sup>

## B. *The Foreign Sovereign Immunities Act*

### 1. Codification of the Restrictive Theory

With the enactment of the FSIA, Congress attempted to preserve the restrictive and consent theories by incorporating them into statutory exceptions.<sup>127</sup> Under the FSIA,<sup>128</sup> immunity from jurisdic-

court found, however, that Vietnam actively participated in the transaction based on the following factors: Vietnam's selection of the winning bidder for the contract; its negotiations relating to the Fixture Note; its modification of delivery dates; its role as payee of the performance bond; and, its involvement in negotiations after the alleged breach. *Id.* at 364.

122. *Id.* at 363.

123. *Pan Am. Tankers Corp. v. Republic of Vietnam*, 291 F. Supp. 49, 52 (S.D.N.Y. 1968). This was the original suit to compel arbitration where the court reserved its decision pending further submission of papers on the sovereign immunity issue. *See id.* at 53. Here also the court emphasized the separateness of the jurisdiction and sovereign immunity issues. The court stated:

[T]echnically speaking, sovereign immunity is not a jurisdictional defect but rather a substantive defense like incapacity or incompetency. However, The Republic of Vietnam, in its special appearance, has not raised the question of lack of personal jurisdiction, though there are some inferences that such a position might be taken in the maritime attachment action. Thus, for purposes of disposition of this issue, personal jurisdiction is assumed.

*Id.* at 52.

124. HOUSE REPORT, *supra* note 3, at 6607; RESTATEMENT, *supra* note 3, § 72 reporters' note 1; *see supra* notes 89-94 and accompanying text.

125. DRAFT RESTATEMENT, *supra* note 9, § 456 (2)(b); *see id.* comment c. *See also supra* notes 98-102 and accompanying text (case law development on issue of agreements to arbitrate in New York as consent to jurisdiction).

126. *See supra* text accompanying notes 103-23.

127. *See* HOUSE REPORT, *supra* note 3, at 6605 (purpose of the FSIA is to codify the so-called restrictive theory); *id.* at 6617 (implicit waivers are found where a foreign state has agreed to arbitration in another country); *infra* notes 136-42 and accompanying text.

128. 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1976).

tion of United States courts is generally granted to foreign states unless the suit falls under an express exception.<sup>129</sup> In enacting the FSIA, Congress' intent was to codify the restrictive theory.<sup>130</sup> In addition, the FSIA provided for personal jurisdiction, thereby eliminating the need for the two-tier analysis of *Victory Transport*.<sup>131</sup>

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129. These exceptions to sovereign immunity under the FSIA are codified at 28 U.S.C. §§ 1605-1607 (1976). In brief, section 1605 provides that a foreign state is not immune from the jurisdiction of United States courts in any case where: 1) the state has waived its immunity; 2) the action is based upon a commercial activity carried on in or having a direct effect in the United States; 3) rights in property taken in violation of international law are in issue and that property is present in the United States or owned by a state engaged in commercial activity in the United States; 4) rights in property in the United States acquired by gift or immovable property present in the United States are in issue; 5) damages are sought against a foreign state for personal injury or death occurring in the United States; and 6) a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of a foreign state. 28 U.S.C. § 1605. Section 1607 extends these exceptions to counterclaims. 28 U.S.C. § 1607. Section 1606 covers the extent of a foreign state's liability in suits falling under sections 1605 and 1607. 28 U.S.C. § 1606.

130. See HOUSE REPORT, *supra* note 3, at 6605. Another purpose of the FSIA is to transfer the role of determining the immunity question from the executive branch to the judicial branch. *Id.* at 6606. Sovereign immunity assertions were an area traditionally handled by the Department of State which would make formal recommendations to the courts. These recommendations were generally considered binding. *Republic of Mex. v. Hoffman*, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."). *But cf.* *Ocean Transp. Co. v. Republic of Ivory Coast*, 269 F. Supp. 703, 705 (E.D. La. 1967). ("While I may not be bound by the State Department's finding that the contractual transaction involved in the case was private rather than public, it is highly persuasive and the authorities dictate that it must be given great weight.") This transfer of power to the courts was effected to free the executive branch from diplomatic pressures by foreign governments and to insure that the immunity question would be decided on purely legal grounds. See HOUSE REPORT, *supra* note 3, at 6606. See *Verlinden B.V. v. Central Bank of Nig.*, 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).

131. 28 U.S.C. § 1330 (1976). This section states, in pertinent part:

(a) 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 1605-1607 of this title or under any applicable international agreement.

(b) 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.* See *Victory Transport v. Commiseriá Gen.*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

Section 1330(a) provides that United States courts shall have original subject matter jurisdiction to hear any claim involving a foreign sovereign not entitled to immunity under either the statute or any other international agreement.<sup>132</sup> Section 1330(b) provides for personal jurisdiction in cases within subsection (a) where service of process has been effected in accordance with section 1608.<sup>133</sup> Qualifying under one of the FSIA exceptions satisfies both subject matter and personal jurisdiction and eliminates the need for the separate analyses used in the pre-FSIA arbitration enforcement cases.<sup>134</sup> With the merging of these two analyses, the availability of the sovereign immunity defense is now considered a jurisdictional question.<sup>135</sup>

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132. *Id.*

133. 28 U.S.C. § 1608 (1976). *See* 28 U.S.C. § 1330(b). The *House Report* stated: “[T]his bill would for the first time in U.S. law, provide a statutory procedure for making service upon, and obtaining *in personam* jurisdiction over, a foreign state. This would render unnecessary the practice of seizing and attaching the property of a foreign government for the purpose of obtaining jurisdiction.” HOUSE REPORT, *supra* note 3, at 6606.

134. *See, e.g.*, *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966); *Victory Transp.*, 336 F.2d 354; *Pan Am. Tankers Corp. v. Republic of Vietnam*, 291 F. Supp 49, 296 F. Supp 361 (S.D.N.Y. 1968). The Supreme Court of the United States addressed this issue in *Verlinden*, 103 S. Ct. 1962, stating: “Under the Act, . . . both statutory subject matter jurisdiction . . . and personal jurisdiction turn on application of the substantive provisions of the Act . . . Thus, if none of the exceptions to sovereign immunity set forth in the Act applies, the District Court lacks both statutory subject matter jurisdiction and personal jurisdiction.” *Id.* at 1697 n.5.

135. *See* Kahale, *supra* note 98, at 30-33.

In considering any of the immunity exceptions of section 1605, it is essential to bear in mind the statutory framework integrating the immunity and jurisdictional issues, especially since this feature of the FSIA contrasts sharply with prior law. Unlike the law before the FSIA, a denial of immunity plus service of process now equals *in personam* jurisdiction. It is no longer possible to consider the immunity issue in a vacuum, divorced from its jurisdictional ramifications.

*Id.* at 32. Controversy has arisen, however, with regard to whether the jurisdictional requirements are sufficiently satisfied under section 1330 in cases falling under the commercial activity exception. The Court of Appeals for the Second Circuit discussed this question in depth in the context of constitutional due process analysis in *Texas Trading & Milling Corp. v. Federal Republic of Nig.*, 647 F.2d 300 (2d Cir. 1981). This was an action for breach of contract and related letters of credit arising from transactions with the government of Nigeria for the purchase and sale of cement. *Id.* at 302. Regardless of the provisions of section 1330, the court maintained a two-step analysis to determine subject matter and personal jurisdiction. *See id.* at 312. It held that the effect of the commercial activity was sufficiently “direct” because the money from the contracts was to be collected in the United States and because the beneficiaries of the contracts were American. *Id.* Thus, subject matter jurisdiction existed under the provisions of the FSIA, 28 U.S.C. §§ 1330(a), 1605(a)(2) (1976). *Texas Trading*, 647 F.2d at 313. In addition, the court scrutinized the extent of defendant’s contacts with the

Congress incorporated modified versions of both the restrictive and consent theories into the FSIA exceptions.<sup>136</sup> A narrower version of the restrictive theory is clearly codified at section 1605(a)(2),<sup>137</sup> which bars the sovereign immunity defense in cases involving commercial activities of a foreign state which either have been carried on or have a direct effect in the United States.<sup>138</sup> The consent theory emerges in section 1605(a)(1)<sup>139</sup> which provides that a foreign state is not immune from United States jurisdiction in any case where “the foreign state has waived its immunity either explicitly or by implication.”<sup>140</sup> Congressional intent to codify the consent theory in this section is reflected in the *House Report*, which states that “the courts have found such waiver in cases *where a foreign state has agreed to arbitration in another country* or where a for-

United States for a separate finding of personal jurisdiction under the “minimum contacts” standard established by the Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310, 313-15 (1945); *Texas Trading*, 647 F.2d at 314-15. See also Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 391-93 (1982). The author states:

The courts disagree as to whether section 1330 was intended to be the exclusive source of jurisdiction for cases brought under the Act. Those finding exclusivity argue that Congress meant the procedures set forth in the statute to govern in all suits against foreign sovereigns and that it therefore is necessary to limit jurisdiction to section 1330. Courts that have allowed suits outside section 1330 have declined to preclude jurisdiction in the absence of a more explicit command from Congress. . . . The decisions of courts on both sides of the issue reveal the confusion that arises from the blend of substantive and procedural criteria in the Act.

*Id.* at 392.

136. See 28 U.S.C. §§ 1605(a)(1)-(2) (1976). The restrictive theory now comes under section 1605(a)(2), the commercial activity exception. The difference, however, is the requirement that the activity have a direct effect in the United States. 28 U.S.C. § 1605(a)(2). The consent theory has been incorporated into section 1605(a)(1), the waiver exception, under which an agreement to arbitrate in a specific forum is deemed an implicit waiver of sovereign immunity with respect to that forum. 28 U.S.C. § 1605(a)(1).

137. 28 U.S.C. § 1605(a)(2) (1976).

138. *Id.* This section 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—

. . .

(2) 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.*

139. 28 U.S.C. § 1605(a)(1) (1976). See *supra* note 9.

140. *Id.*

eign state has agreed that the law of a particular country should govern a contract."<sup>141</sup> Thus, what was previously considered to be consent to jurisdiction became a waiver of sovereign immunity under the FSIA.<sup>142</sup>

The impact of the codification of these theories is twofold. First, many petitioners in arbitration enforcement actions are precluded from invoking section 1605 (a)(2), regardless of the commercial nature of the underlying transaction, because there is no "direct effect" in the United States.<sup>143</sup> This is particularly true in cases where petitioners are seeking enforcement of *foreign* arbitration agreements and awards.<sup>144</sup> Consequently, contrary to Congress' intent,<sup>145</sup> petitioners in most arbitration enforcement actions are precluded from invoking the commercial activity exception.<sup>146</sup>

141. HOUSE REPORT, *supra* note 3, at 6617 (emphasis added). See DRAFT RESTATEMENT *supra* note 3, § 456 comment d. The standards imposed by the waiver exception are parallel to those imposed for jurisdiction in pre-FSIA arbitration enforcement actions. See *supra* notes 148-50 and accompanying text. The *House Report* explicitly refers to both arbitration clauses that stipulate a forum and forum selection clauses; two offshoots of the consent theory as espoused in *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964). See also J. MOORE, *supra* note 96, § 4.25[8]. As a result, a waiver of sovereign immunity will be found on the same facts and circumstances that would have sufficed for personal jurisdiction prior to the FSIA.

142. From the legislative history of this section, it appears that Congress has adopted the consent theory formula, previously used to determine *in personam* jurisdiction, and incorporated it into the waiver exception analysis of the FSIA. HOUSE REPORT, *supra* note 3, at 6617. The waiver exception is the only exception to immunity under the FSIA which does not require some contact between the suit and the United States. 28 U.S.C. §§ 1605, 1607 (1976). "In the absence of a requirement of contacts with the United States, it seems clear that the waiver provision is based on the theory of jurisdiction by consent." Kahale, *supra* note 98, at 34 n.20. See J. MOORE, *supra* note 96, § 4.25[2.-1].

143. See, e.g., *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 505 F. Supp. 141 (D.D.C. 1981), *rev'd*, 693 F.2d 1094 (5th Cir 1982), *cert. denied*, 104 S. Ct. 71 (1983) (dispute arose from a contract formed under the laws of Guinea between a Liechtenstein corporation and the Republic of Guinea and was referred to arbitration under the International Centre for Settlement of Investment Disputes, a group affiliated with the World Bank); *LIAMCO*, 482 F. Supp. 1175 (D.D.C. 1980) (involved transaction between Libyan company and Libyan government, carried on in Libya, which led to a dispute which was arbitrated in Geneva, Switzerland); *Iptrade Int'l, S.A. v. Federal Republic of Nig.*, 465 F. Supp. 824 (D.D.C. 1978) (dispute arose from transaction between French company and Nigerian government to be performed in Nigeria and was arbitrated according to Swiss law before the ICC).

144. See, e.g., *LIAMCO*, 482 F. Supp. at 1175 (action to confirm Swiss arbitral award); *Iptrade*, 465 F. Supp. at 824 (action to confirm a Swiss arbitral award rendered before the ICC between foreign parties).

145. See *supra* note 130 and accompanying text.

146. See, e.g., *Iptrade*, 465 F. Supp. at 826 (relying on the waiver exception successfully defeated sovereign immunity claim). *Maritime Int'l*, 505 F. Supp. at 141. Although the

Second, under the waiver exception, what was previously construed as consent to jurisdiction<sup>147</sup> is now deemed a waiver of foreign sovereign immunity.<sup>148</sup> By invoking the jurisdictional consent theory a party may successfully defeat sovereign immunity.<sup>149</sup> The result is that petitioners in arbitration enforcement actions who are now precluded from invoking the commercial activity exception plead instead, under section 1605(a)(1), that the foreign sovereign-respondent has waived sovereign immunity by agreeing to arbitrate in the underlying contract.<sup>150</sup>

## 2. The Waiver Exception

This transition in approach to the sovereign immunity defense, compounded by the vague and ambiguous language of the waiver exception,<sup>151</sup> and its legislative history,<sup>152</sup> has given rise to extensive controversy.<sup>153</sup> Courts initially interpreted the *House Report* literally, rejecting the sovereign immunity defense whenever parties had merely agreed to arbitration in general, without specifying the forum.<sup>154</sup> In recent years, however, the *House Report* has been increasingly criticized as overbroad and ambiguous.<sup>155</sup> Courts, ex-

sovereign immunity defense was denied by the district court under the waiver exception, the court of appeals reversed, holding that the agreement between the parties to submit future disputes to arbitration conducted by the International Center for Settlement of Investment Disputes was not a waiver since the agreement "did not foresee such a role for United States courts." *Maritime Int'l*, 693 F.2d at 1104.

147. See *supra* note 98-102 and accompanying text.

148. See, e.g., *LIAMCO*, 482 F. Supp. at 1175; *Ipirtrade*, 465 F. Supp. at 824. Both courts relied specifically on the agreements to arbitrate in the underlying contract, holding these agreements to be a consent to jurisdiction and therefore waiver of sovereign immunity. *LIAMCO*, 482 F. Supp. at 1178; *Ipirtrade*, 465 F. Supp. at 826.

149. See *supra* notes 139-42 and accompanying text.

150. See, e.g., *Maritime Int'l.*, 505 F. Supp. at 141; *LIAMCO*, 482 F. Supp. at 1175; *Ipirtrade*, 465 F. Supp. at 824.

151. 28 U.S.C. § 1605(a)(1) (1976).

152. See *supra* note 141 and accompanying text.

153. See *infra* text accompanying notes 170-211. See generally Kahale, *supra* note 98.

154. See, e.g., *LIAMCO*, 482 F. Supp. at 1175 (agreement to arbitrate where either the parties or arbitrators agreed); *Ipirtrade*, 465 F. Supp. at 824 (agreement to arbitrate before the ICC in accordance with Swiss law).

155. *Verlinden*, 488 F. Supp. at 1300. The district court referred to this statement as the "cryptic language of the Congressional report . . ." *Id.* It stated further: "The Congressional history cited by the plaintiff is not dispositive of this issue, indeed, it is at most ambiguous." *Id.* at 1301. In *Ohntrup v. Firearms Center Inc.*, 516 F. Supp. 1281 (E.D. Pa. 1981), the court stated: "The quoted passage from the House Report does not mandate a contrary conclusion, as it is unclear whether, in referring to 'another country,' Congress intended to

aming the pre-FSIA analysis,<sup>156</sup> began requiring that the forum be stipulated in the arbitration agreement.<sup>157</sup> As a result, a waiver will be found only if the forum where the agreement or award is sought to be enforced is stipulated in the arbitration clause.<sup>158</sup>

#### IV. CASE LAW DEVELOPMENT OF THE WAIVER EXCEPTION

##### A. Ipitrade International S.A. v. Federal Republic of Nigeria

The first case in which this issue was raised was *Ipitrade International S.A. v. Federal Republic of Nigeria*.<sup>159</sup> Plaintiff Ipitrade, a French company, brought suit in the District Court for the District of Columbia to enforce a Swiss arbitral award against the defendant, the Republic of Nigeria.<sup>160</sup> The underlying dispute arose out of a written commercial contract for the purchase and sale of cement.<sup>161</sup> Provision was made in that contract for resolution of all disputes to be in accordance with Swiss law and submitted to arbitration before the International Chamber of Commerce, Paris, France (ICC).<sup>162</sup> Defendant first asserted the sovereign immunity

include a third-party country." *Id.* at 1285. Kahale, *supra* note 98, at 35, 38. See Note, *Maritime International Nominees Establishment v. Republic of Guinea: Effect on U.S. Jurisdiction of an Agreement by a Foreign Sovereign to Arbitrate before the International Centre for the Settlement of Investment Disputes*, 16 GEO. WASH. J. INT'L L. & ECON. 451, 464 (1982).

156. See *Maritime Int'l. Nominees Estab. v. Republic of Guinea*, 693 F.2d 1094 (D.C. Cir. 1982); *Verlinden*, 488 F. Supp. at 1284.

157. See *supra* notes 98-102 and accompanying text. The *Draft Restatement* states: d. *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 arbitrator, or is world-wide.

DRAFT RESTATEMENT, *supra* note 9, § 456 comment d.

158. See generally Kahale *supra*, note 98.

159. 465 F. Supp. 824 (D.D.C. 1978).

160. Petitioner, *Ipitrade International*, filed a petition to confirm the arbitration award under the provisions of the Convention, *supra* note 5. *Ipitrade*, 465 F. Supp. at 826.

161. *Ipitrade*, 465 F. Supp. at 826.

162. *Id.* The clause stated that disputes were to be submitted to the ICC, in accordance with its rules. Memorandum of Points and Authorities of *Ipitrade International, S.A.* in Support of Petition to Confirm Arbitration Award at 2, *Ipitrade*, 465 F. Supp. at 824. This did not necessarily mean that the arbitration was to take place in Paris. The rules provide that if the parties do not agree on a place of arbitration it will be fixed by the ICC. Therefore, the choice of forum was left open. ICC RULES, art. 12.



defense in the arbitration proceeding before the ICC,<sup>163</sup> but the defense was rejected by the arbitrator, who found that under Swiss law the Republic of Nigeria was bound by "the obligations it voluntarily entered into."<sup>164</sup> In the action to enforce the award in the district court, the Republic of Nigeria again asserted the sovereign immunity defense.<sup>165</sup> The district court held that defendant had implicitly waived sovereign immunity.<sup>166</sup> This holding apparently rested on the above mentioned language of the *House Report*, in conjunction with the fact that the dispute fell under the Convention, as France, Nigeria and the United States were all signatories.<sup>167</sup> The court's line of reasoning, however, is difficult to discern, and provides little guidance on the issue.<sup>168</sup> Consequently, courts have interpreted *Ipitrade* inconsistently.<sup>169</sup>

### B. *Subsequent Treatment of Ipitrade*

In *Ipitrade*, the court concluded:

No judgment by default shall be entered by a federal district court against a foreign state unless the claimant establishes his right to relief by evidence satisfactory to the Court. 28 U.S.C. § 1608(e). In the instant case, Petitioner is entitled to such relief because the provisions of the Convention on the Recognition and

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163. *Ipitrade*, 465 F. Supp. at 826. Relying on this defense, respondent refused to participate in the arbitration proceeding. *Id.*

164. *Id.* The arbitrator proceeded with the arbitration and on April 25, 1978, rendered an award that under Swiss law was final and binding on the respondent. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* The court stated:

The legislative history of this section expressly states that an agreement to arbitrate or to submit to the laws of another country constitutes an implicit waiver. Consequently, Respondent's agreement to adjudicate all disputes arising under the contract in accordance with Swiss law and by arbitration under International Chamber of Commerce Rules constitutes a waiver of sovereign immunity under the Act. This waiver cannot be revoked by a unilateral withdrawal.

*Id.* (citation omitted). With respect to the Convention, the court stated: "Article V of the Convention specifies the only grounds on which recognition and enforcement of a foreign arbitration award may be refused. None of the enumerated grounds exist in the instant case."

*Id.* (citations omitted). The court concluded: "Petitioner is entitled to . . . relief because the provisions of the [Convention] and of The Foreign Sovereign Immunities Act are satisfied."

*Id.* at 827.

168. See *infra* note 172 and accompanying text.

169. See *infra* text accompanying notes 174-205.

Enforcement of Foreign Arbitral Awards and of the Foreign Sovereign Immunities Act are satisfied.<sup>170</sup>

Numerous speculative comments have been made on the portent of this holding.<sup>171</sup> For example, one commentator states:

The court appeared to attach some significance to the fact that Nigeria was a party to the U.N. Convention . . . although it is not clear whether its reference to this fact was in connection with the jurisdiction issue or the merits, i.e., the recognition of the award. . . . It is therefore conceivable that Nigeria's adherence to the U.N. Convention was seen as having some jurisdictional significance. However, any such relevance was neither explained by the court nor argued by counsel.<sup>172</sup>

This passage is representative of the confusion in various courts' analyses of the foreign sovereign immunity defense.<sup>173</sup> For example, in *Verlinden B.V. v. Central Bank of Nigeria*,<sup>174</sup> a suit for anticipatory breach of an irrevocable documentary letter of credit,<sup>175</sup> respondent Nigeria asserted the sovereign immunity defense.<sup>176</sup> The district court dismissed the case for lack of *in personam* jurisdiction, holding that the action did not fall under any of the FSIA exceptions.<sup>177</sup> Plaintiff argued that Nigeria had waived its

170. *Ipirade Int'l S.A. v. Federal Republic of Nig.*, 465 F. Supp. 824, 827 (D.D.C. 1978).

171. *See, e.g., Verlinden B.V. v. Central Bank of Nig.*, 488 F. Supp. 1284, 1300 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd*, 103 S. Ct. 1962 (1983).

172. Kahale, *supra* note 98, at 46-47 n.72 (citations omitted).

173. *See infra* text accompanying notes 174-205.

174. 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).

175. 488 F. Supp. at 1287. The dispute in *Verlinden* arose from the same series of cement contracts underlying the *Ipirade* dispute which Nigeria entered into in 1975. *Ipirade*, 465 F. Supp. at 824. There was a total of 109 contracts involving 68 suppliers entered into by the Nigerian Ministry of Defense as part of a program to purchase up to 18 million metric tons of cement. When the Nigerian ports became severely congested due to the multitude of ships delivering the cement, the Nigerian Government ordered an embargo in order to allow for delivery of vital consumer goods. *See Verlinden*, 103 S. Ct. at 1966 n.2. Other suits arising from these contracts include: *Texas Trading & Milling Corp. v. Federal Republic of Nig.*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *Decor by Nikkei Int'l, Inc. v. Federal Republic of Nig.*, 497 F. Supp. 893 (S.D.N.Y. 1980).

176. 488 F. Supp. at 1288.

177. 488 F. Supp. at 1302. The Court of Appeals for the Second Circuit affirmed but on different grounds; the FSIA exceeded the scope of article III of the Constitution because neither the diversity clause nor the "arising under" clause of article III was broad enough to

immunity by agreeing to arbitrate in the underlying cement contract.<sup>178</sup> The court rejected plaintiff's argument because the suit was over a letter of credit, not the cement contract which contained the arbitration agreement.<sup>179</sup> More importantly, the *Verlinden* court distinguished *Ipirtrade* because that was an action to enforce an arbitration award whereas *Verlinden* was a suit for breach of a letter of credit.<sup>180</sup> This distinction was premised on the idea that *Ipirtrade* drew its subject matter jurisdiction from the Convention.<sup>181</sup> The court stated: "The treaty explicitly federalizes all such enforcement actions and sharply constricts the scope of review of arbitral awards. By signing the treaty Nigeria had explicitly waived its objection to such enforcement actions."<sup>182</sup>

The *Verlinden* court's analysis is echoed in *Ohntrup v. Firearms Center Inc.*,<sup>183</sup> in which the court held that sovereign immunity had not been waived.<sup>184</sup> The court distinguished *Ipirtrade* as an action to enforce an award with jurisdiction provided by the Convention.<sup>185</sup> In *Ohntrup*, the claim was for breach of warranties, product liability and negligence. The plaintiff-buyer was injured when a gun, purchased from defendant, malfunctioned.<sup>186</sup> Defend-

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confer subject matter jurisdiction over actions by foreign plaintiffs against foreign defendants. 647 F.2d at 328. It concluded, therefore, that Congress lacked the power to confer jurisdiction over this case. *Id.* at 330. The Supreme Court reversed and remanded, holding that the grant of jurisdiction in the FSIA is consistent with the Constitution. 103 S. Ct. at 1973. Thus, the case was remanded to the court of appeals for examination of the jurisdictional question under the FSIA to determine whether it falls under any of the enumerated exceptions. *Id.*

178. 488 F. Supp. at 1300.

179. *Id.* at 1301. The court stated:

Plaintiff seeks to blur the distinctions between two separate obligations binding between different parties. The cement contract was signed by Nigeria's Minister of Defense on behalf of the Nigerian government; Central Bank is not a party to that agreement, which binds only *Verlinden* and Nigeria . . . . This is not a hypertechnical distinction. The contract indicates that to whatever extent, if at all, Nigeria waived its immunity by reason of the arbitration provision, it did so only with respect to the contract, not the credit.

*Id.*

180. *Id.* at 1300 n.84.

181. *Id.*

182. *Id.*

183. 516 F. Supp. 1281 (E.D. Pa. 1981).

184. *Id.* at 1285.

185. *Id.*

186. *Id.* at 1283.

ant-seller impleaded the manufacturer, a Turkish corporation whose stock was wholly owned by the Turkish government.<sup>187</sup> Plaintiffs then amended their complaint to include claims against the manufacturer.<sup>188</sup> Relying on *Iptrade*, plaintiffs attempted to establish that a forum selection clause in the underlying sales agreement referring all disputes to the Paris International Court constituted a waiver of sovereign immunity.<sup>189</sup> The court disagreed with this position holding that a waiver of immunity as to one jurisdiction cannot be interpreted as a general waiver.<sup>190</sup> In addition, the waiver in the sales contract did not encompass the third party dispute at issue.<sup>191</sup> The *Ohntrup* court distinguished *Iptrade* on the ground that in that case arbitration was the subject of the dispute and the arbitration clause had been specifically invoked.<sup>192</sup> Citing *Verlinden*, the *Ohntrup* court pointed out that jurisdiction over the enforcement action in *Iptrade* was provided by the Convention since all parties were signatories.<sup>193</sup> Because *Ohntrup* was not an arbitration enforcement action and did not fall under the Convention, there was no basis for a finding that sovereign immunity had been waived.<sup>194</sup>

187. *Id.*

188. *Id.*

189. *Id.* at 1284. The clause read: "Any dispute between the parties, arising in connection with the application of the agreement, will be handled and solved by [the] Paris International Court." *Id.*

190. *Id.* at 1285. The court stated:

While it is reasonable to conclude that an agreement by a foreign country to either arbitrate disputes in or be governed by the laws of the United States constitutes an implicit waiver by that state of the defense of sovereign immunity in the courts or the United States, it is much more difficult to infer such a waiver from the agreement of a foreign state to submit itself, in the same manner, to the jurisdiction of a state other than the United States.

*Id.*

191. *Id.*

192. *Ohntrup*, 516 F. Supp. at 1285. The fact that *Iptrade* was an action to confirm an arbitration award, *Iptrade*, 465 F. Supp. 825, placed it under the jurisdiction of the Convention. *Id.* The arbitration clause had been invoked and was within the subject matter jurisdiction of the court under the Convention thereby placing it within the ambit of the waiver exception. *Id.* The *Ohntrup* dispute, however, involving negligence and products liability, was related to arbitration merely because of the existence of the clause. It was never actually invoked nor relied on for any purpose other than to defeat sovereign immunity under the waiver exception. *Id.*

193. *Ohntrup*, 516 F. Supp. at 1285 (citing *Verlinden B.V. v. Central Bank of Nig.*, 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 329 (2d Cir. 1981), *rev'd*, 103 S. Ct. 1962 (1983)).

194. *Ohntrup*, 516 F. Supp. at 1285.

Another case which relied upon *Ipitrade* was *LIAMCO*<sup>195</sup> an action to enforce a Swiss arbitral award under the Convention. The District Court for the District of Columbia held that the arbitration clause, which provided that "arbitration should take place either where the parties agreed, or where the arbitrators might agree,"<sup>196</sup> constituted consent by the parties to have it arbitrated in the United States and was, therefore, a waiver under section 1605(a)(1).<sup>197</sup> The court made no mention of the applicability of the Convention and apparently attached no significance to it either in *LIAMCO* or in its earlier decision in *Ipitrade*.<sup>198</sup> The *LIAMCO* court relied solely on the arbitration clause as the waiver, invoking the reasoning of courts in cases where the Convention does not apply.<sup>199</sup>

In its brief on appeal to the District of Columbia Circuit Court, the United States as *amicus curiae*<sup>200</sup> placed great emphasis on Libya's accession to the Convention in arguing that Libya had waived sovereign immunity.<sup>201</sup> The United States argued the prevailing theory that an agreement to arbitrate in the United States is a waiver of sovereign immunity.<sup>202</sup> Thus, Libya, in undertaking the treaty commitment of the Convention, "manifestly agreed to a clear procedure"<sup>203</sup> for determining the situs of arbitration which could be any member state of the Convention, including the United States.<sup>204</sup> Having consented as such, the United States contended,

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195. 482 F. Supp. 1175 (D.C. Cir. 1980).

196. *Id.* at 1178.

197. *Id.* The case was dismissed, however, under the act of state doctrine. The court held that the "subject matter of the dispute, nationalization of LIAMCO's assets, was an act of state, and constituted 'subject matter not capable of settlement by arbitration under the law of that country' under article V of the Convention." *Id.* (citations omitted).

198. *Id.*

199. *Id.* "Although 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." *Id.*

200. Brief for the United States as *amicus curiae*, *LIAMCO*, 482 F. Supp. 1175 (D.D.C. 1980), reprinted in 20 I.L.M. 161, 163 (1981) [hereinafter cited as United States Brief].

201. *Id.*, reprinted in 20 I.L.M. at 162-64.

202. *Id.*, reprinted in 20 I.L.M. . at 162. See *supra* notes 156-58 and accompanying text.

203. United States Brief, *supra* note 200, reprinted in 20 I.L.M. at 163.

204. *Id.*, reprinted in 20 I.L.M. at 162-63. The United States Government argued: Section 1605(a)(1) must be applied by the courts not only where the arbitration agreement explicitly stipulates the United States as the situs of arbitration properly

Libya could not avoid application of the Convention and enforcement of the award in the United States.<sup>205</sup>

A private settlement was reached between the parties in *LIAMCO*.<sup>206</sup> Nevertheless, the argument as set forth by the United States in its brief presents the most coherent analysis of the issue. It is comparable to the pre-FSIA jurisdictional analysis under the consent theory used in cases falling under the Arbitration Act: by agreeing to arbitrate where the Arbitration Act made such agreements enforceable, a sovereign consented to that jurisdiction in an action to enforce it.<sup>207</sup> By ratifying the treaty which provides for enforcement in signatory countries,<sup>208</sup> a sovereign is consenting to jurisdiction in those countries and thereby waiving its immunity with respect to enforcement actions.<sup>209</sup> The jurisdiction conferred by the Convention places a suit in a separate category whereby enforcement becomes virtually automatic<sup>210</sup> where signatory countries are involved.<sup>211</sup> A sovereign's ratification of the Convention, therefore, should be deemed consent to the enforcement mechanism that it provides.

### CONCLUSION

On accession to the Convention in 1970, the United States chose to adopt both reservations available to signatory countries.

takes place in any state which is party to the New York Convention. This is so because the United States has undertaken a treaty commitment in the Convention to recognize and enforce in United States courts foreign arbitral awards made in the territory of states who are members of the Convention.

*Id.*, reprinted in 20 I.L.M. at 162.

205. *Id.*, reprinted in 20 I.L.M. at 163.

206. See *Kahale*, *supra* note 98, at 49 n.83. On motion by the amicus curiae parties, the district court decision dismissing the case was vacated as moot, no opposition having been made, on May 6, 1981. *Id.*

207. See *supra* notes 98-102 and accompanying text.

208. See *supra* notes 45-48.

209. If under the consent theory a sovereign is deemed to have consented to jurisdiction by agreeing to arbitrate in the United States, it follows that agreement to enforcement under the Convention which extends to the United States should also be construed as consent to jurisdiction. See DRAFT RESTATEMENT, *supra* note 9, § 456 reporters' note 2. See *supra* notes 200-05 and accompanying text.

210. Convention, *supra* note 5. The grounds for resisting enforcement are narrow and the scope of review granted the enforcing court is very limited, thereby making resistance to enforcement difficult. See *supra* notes 49-71 and accompanying text.

211. See *supra* notes 72-80. The reciprocity reservation, for those countries who adopt it, further limits the application of the Convention, to awards made in the territory of another contracting state. See Convention, *supra* note 5, art. I(3).

One result of this is that the Convention applies only to arbitrations involving *commercial* legal relationships.<sup>212</sup> From the inception of the restrictive theory, parties to commercial disputes have been precluded from asserting the sovereign immunity defense.<sup>213</sup> The second circuit, in *Victory Transport Inc. v. Comisariá General de Abastecimientos y Transportes*, upheld the restrictive theory as “accommodat[ing] the interests of individuals doing business with foreign governments in having their legal rights determined by the courts”<sup>214</sup>—an interest compatible with and reflecting the purpose of the Convention. The subsequent enactment of the FSIA, which was intended to codify the restrictive theory, should be construed to promote this purpose, not frustrate it. Although suits under the Convention may be precluded from invoking the commercial activity exception of the FSIA due to the direct effect clause,<sup>215</sup> the waiver exception<sup>216</sup> provides a viable alternative.

Case law under the waiver exception supports the view that an agreement to arbitrate in the United States is an implied waiver of a sovereign’s immunity under the theory that implicit in these agreements is also agreement to their enforcement. This view is premised on the pre-FSIA consent theory analysis that an agreement to arbitrate in a forum where the Arbitration Act has jurisdiction to enforce that agreement constitutes consent to that jurisdiction for such enforcement actions. It should follow that a country’s ratification of a Convention which provides jurisdiction for enforcement actions in signatory countries constitutes consent to jurisdiction in those countries with respect to arbitration enforcement actions. A country’s accession to the Convention, conceived of, drafted and implemented toward enforcement of arbitration agreements and ensuing awards, should therefore preclude assertion of the sovereign immunity defense in enforcement actions under the Convention.

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212. See *supra* notes 72-77 and accompanying text.

213. See *supra* notes 89-94 and accompanying text.

214. 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

215. See *supra* notes 143-46 and accompanying text.

216. 28 U.S.C. § 1605(a)(1) (1976).