Immunity and the Foreign Sovereign

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While visiting Florida for a seminar, an employee of the Brazilian oil monopoly, Petrobras, negligently injures a Florida resident in an auto accident. The Malaysian government defaults on its contractual obligation to pay a Florida engineering firm for services rendered in connection with a major environmental cleanup in Kuala Lumpur. A U.S. tourist slips and falls while walking through an airport in Jamaica which is owned and operated by a local airport authority. What do all of these scenarios have in common?

The answer is that they all involve a potential claim against a "foreign state" as that term is defined by the Foreign Sovereign Immunities Act (FSIA or "the act").[1] For the lawyer representing the interest of the injured U.S. citizen, all three scenarios raise the specter of the foreign entity enjoying immunity from suit in a U.S. court under the provisions of the FSIA. This article provides an overview of the FSIA and the immunity problem faced by the U.S. lawyer under the principal provisions of the act. It also examines the primary exceptions to immunity under the act that might allow a suit to proceed against the foreign state in a U.S. court.[2]

Brief History of Immunity

Foreign sovereign immunity has a long history in this country dating back to the landmark case of *Schooner Exchange v. M'Faddon*, 7 Cranch 116, 3 L. Ed. 287 (1812), which was regarded as extending almost absolute immunity to foreign states.[3] Over time, however, the U.S. courts came to adopt the "restrictive theory" of sovereign immunity. Under this theory, the foreign state enjoyed immunity only for its public acts and not for acts arising out of a state's strictly commercial or private activity.[4] Adoption of the theory was viewed as necessary given the ever increasing involvement of governments either directly or indirectly in traditionally private matters such as international commerce.[5] In addition, by adopting the restrictive theory, the U.S. fell in line with many other jurisdictions throughout the world that were already limiting government immunity to public acts.[6]

The U.S. courts found application of the restrictive theory difficult. The courts had problems establishing standards for differentiating between public and private acts.[7] Moreover, the courts routinely deferred to the political branches (namely, the U.S. State Department) on the question of whether immunity should be granted to a particular foreign state.[8] As a result, political considerations and diplomatic pressure often influenced the court's decisions, as opposed to a strict legal application of the restrictive theory.[9]

Congress passed the Foreign Sovereign Immunities Act in 1976 to provide clearer standards for resolving immunity questions and to free the political branches from the diplomatic and political pressures that hampered the resolution of these questions.[10] The FSIA essentially codified the restrictive theory of immunity and established a comprehensive framework for resolving claims of immunity in any civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.[11]

Presumption of Immunity

The cornerstone of the FSIA is a broad grant of immunity to foreign states. The act declares foreign states immune from suit in any civil action in any court of the United States, whether state or federal.[12] However, what the act gives, it is quick to take away. The act carves out significant exceptions to the immunity in several statutorily defined circumstances.[13] As discussed in detail below, these exceptions are far reaching and bring a great deal of foreign sovereign conduct within the cognizance of the U.S. courts.

Once a defendant establishes that it qualifies as a "foreign state" within the meaning of the act, the state is presumed to be immune.[14] The plaintiff must then prove that one of the exceptions to immunity applies under the particular facts of the case.[15] Even if the plaintiff successfully establishes an exception to immunity, the plaintiff will not be entitled to a jury trial under the FSIA.[16]

Sole Basis for Jurisdiction over a Foreign State

It is important to emphasize that the FSIA is the sole basis for obtaining jurisdiction over a foreign state in a civil action in a U.S. court.[17] That is, if the potential defendant qualifies as a foreign state within the meaning of the act and no exception applies, it cannot be sued in a state or federal court in the United States.[18] In short, the court's subject matter jurisdiction depends entirely on the applicability of one of the enumerated exceptions to immunity.[19]

A State is a State . . . and More

The FSIA defines a "foreign state" to include 1) a political subdivision of a foreign state, or 2) an agency or instrumentality of a foreign state.[20] The act then defines "an agency or instrumentality of a foreign state" as an entity 1) which is a separate legal person, corporate or otherwise and 2) which is (a) an organ of a foreign state or political subdivision thereof or (b) a majority of whose ownership interest is owned by a foreign state or a political subdivision thereof.[21] This definition is broad enough to cover foreign government-owned corporations, and such corporations enjoy the broad grant of immunity provided by the act.[22] An individual may also qualify for immunity under the act if the individual's employer is a foreign state and the individual was acting in his or her official capacity and within the scope of his or her authority when he or she engaged the acts which are the subject of the lawsuit.[23]

To illustrate how the definition of a foreign state might be applied, consider the three entities mentioned in the scenarios at the beginning of this article: the Malaysian government, the local airport authority in Jamaica, and Petrobras. The "Malaysian government," assuming the term refers to the state of Malaysia, clearly qualifies as a foreign state.[24] The Jamaican airport authority would also appear to easily qualify for immunity, assuming it is majority owned by the Jamaican state. A more murky issue could arise with respect to Petrobras. Does it qualify as an agency or instrumentality of a foreign state?

To qualify as an agency or instrumentality of a foreign state, Petrobras must first meet the requirement of being a separate legal person.[25] Courts dealing with this provision have applied the "legal characteristics test."[26] Under this test, an entity is a separate legal person if it can function legally independent of the state.[27] This requires that the entity take the form of a corporation, association, foundation, or any other entity which can sue or be sued in its own name, contract in its own name, or hold property in its own name under the law of the foreign state that created it.[28]

Petrobras, as an entity incorporated under the laws of Brazil,[29] would likely have little trouble meeting the above test. However, Petrobras must also prove 1) that it is either majority owned by the foreign state or a political subdivision thereof or 2) that it is an "organ" of the state.

Proving majority ownership by the state would be seem to be a straightforward task. However, difficulties arise when the entity being sued is not directly owned by the foreign state but indirectly owned through an entity that is itself majority owned by the foreign state. The Petrobras enterprise, for example, actually consists of a parent company that is majority owned by the state of Brazil and several subsidiaries that are owned by the parent company.[30] The parent company clearly qualifies as an agency or instrumentality of a foreign state by virtue of Brazil's majority ownership interest. However, the question arises as to whether the subsidiaries qualify as agencies or instrumentalities of a foreign state by virtue of being majority owned by an agency or instrumentality of the state of Brazil.

This situation, known as the "tiering" problem, has caused a split in the federal circuits. The Ninth and Third circuits have held that tiering should not be allowed -- that is, the subsidiary should not qualify as a foreign state simply because its parent qualifies as an agency or instrumentality of a foreign state by virtue of being owned by the foreign state.[31] The Seventh Circuit has allowed tiering and has granted the presumption of immunity for this type of indirectly owned entity.[32]

If the Petrobras subsidiary at issue does not meet the majority ownership test because of the tiering problem or otherwise, it might still qualify as an agency or instrumentality of a foreign state if it is an "organ" of a foreign state or a political subdivision thereof. In determining whether an entity is an organ within the meaning of this provision, courts look to whether the entity's purpose and functions are integral to and controlled by the foreign state.[33] In making this determination, the following factors are considered: 1) whether the foreign state created the entity for a national purpose; 2) whether the foreign state actively supervises the entity; 3) the foreign state hires public employees and compensates them; 4) whether the entity holds exclusive rights to some right in the country; and 5) whether the entity is treated as a part of the government under the laws of the foreign state.[34] These factors allow the courts to take a flexible approach to resolving this issue based on the nature and purpose of the entity and the extent of state involvement in and control of its affairs.[35]

Obviously, more facts would be needed to determine whether a subsidiary of Petrobras would qualify as a foreign state. The example, however, does provide a flavor of the thorny issues that can arise in applying the FSIA's expansive definition of a foreign state to a particular entity. It should also alert counsel to the fact that the definition is quite flexible and covers entities that at first blush might not be thought of as foreign sovereigns.

The Heart of the FSIA: Exceptions to Immunity

At the core of the FSIA lie the several exceptions to immunity that will allow a court to exercise jurisdiction in an action against an entity that qualifies as a foreign state. This article will deal with the following three of these exceptions as they seem to appear most frequently in the case law and appear to be the most relevant to the general U.S. practitioner: 1) waiver of immunity;[36] 2) commercial activities occurring in the U.S. or causing a direct effect in this country ("commercial activities" exception);[37] and 3) noncommercial torts occurring in the U.S. ("noncommercial torts" exception).[38]

Explicit and Implicit Waiver

An exception to immunity arises under Â§1605(a)(1) of the act when the foreign state has waived its immunity "either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver." Courts have suggested that this exception requires proof of the foreign state's subjective intent to waive immunity.[39] Not surprisingly, an explicit waiver is usually found where contract language clearly and unambiguously states that the parties intended a waiver and, therefore, adjudication of the dispute in the U.S.[40]

A more difficult question is that of waiver by implication. Courts have generally construed this waiver narrowly and have found that such a waiver arises in three situations: 1) when the foreign state has agreed to arbitrate in a U.S. forum;[41] 2) when the foreign state has agreed that the law of a U.S. jurisdiction should govern the dispute;[42] 3) when the foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.[43] Courts consider these three situations clear evidence of waiver but have been reluctant to find an implied waiver when the circumstances were not so unambiguous.[44]

Of special note to counsel is the last of the three types of implied waiver: waiver by the failure to preserve the immunity defense in a responsive pleading. Counsel for the foreign state must be extraordinarily careful to raise the sovereign immunity defense at the earliest opportunity in the proceeding.[45]

The Commercial Activity Exception

Consistent with the "restrictive theory" of immunity codified in the FSIA, the primary exception to immunity under the act stems from the foreign state's commercial activities.[46] Under the commercial activity exception, a foreign state is not immune if the plaintiff's action is "based upon" 1) a commercial activity carried on in the U.S. by the foreign state; 2) an act performed in the U.S. in connection with a commercial activity of the foreign state outside the U.S.; or 3) an act outside the U.S. that was taken in connection with a commercial activity of the foreign state outside of the U.S. and that caused a direct effect in the U.S.[47] Thus, the exception actually comprises three distinct clauses that provide independent grounds for exercising jurisdiction over the foreign state.

The threshold question when analyzing the commercial activity exception is whether the activity of foreign state was commercial rather than public. The act's definition of commercial activity reveals little about on the meaning of the phrase.[48] However, it does dictate that it is the nature of an activity that determines its commercial character, not the purpose underlying it. Thus, the fact that the foreign state engaged in an act for a public purpose does not render the act public. The proper focus is whether the particular actions that the foreign state performs, whatever the motive behind them, are the type of action by which a private party engages in trade or commerce.[49] According to the U.S. Supreme Court, whenever "a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions" qualify as commercial under the FSIA.[50]

If the activity is found to be commercial, the next question becomes whether the act fits within one of the three clauses set forth above. The focus of all three of these clauses is the nexus between the foreign state's commercial activity and the U.S. The case law interpreting and applying these clauses is extensive, with the courts routinely engaging in fact intensive analyses of whether the foreign state's commercial conduct had a sufficient nexus with the U.S. to fall within the exception. A recurring theme in these analyses is the requirement that plaintiff's cause of action arise directly from the foreign state's commercial activity in the U.S. or the act outside of the U.S. that causes a direct effect in the U.S.[51]

A typical case might involve circumstances similar to the scenario in which the Malaysian government defaults on its contractual obligation to the Florida engineering firm. Is the Florida engineering firm's action "based upon" the state of Malaysia's commercial activity in the U.S. within the meaning of the exception? Even with the limited facts that the scenario presents, there is a strong argument that the exception applies.

As to the threshold question, it seems fairly certain that a court would find that contracting for engineering services is a commercial act (notwithstanding any public purpose asserted by Malaysia in entering into the contract). Contracting for engineering services is the type of act in which private persons commonly engage and is, therefore, "commercial."[52] Once this threshold is crossed, the question becomes whether the commercial activity falls within one of the three clauses.

Recent case law suggests that the third clause of the exception is broad enough to support jurisdiction.[53] Under this clause, there is jurisdiction if the action is based on an act outside the U.S. that was taken in connection with a commercial activity of the defendants outside of the U.S. and that caused a direct effect in the U.S. The U.S. Supreme Court has ruled that the breach of a contractual

obligation to be performed in the U.S. is a sufficient direct effect to fall within the exception.[54] Thus, as long as the Florida firm could show that Malaysia's breach of the contract amounted to a breach of an obligation to be performed in the U.S., *e.g.*, the obligation to make payment in the U.S., the exception to immunity would likely apply. On the other hand, if the Malaysian government had no duty to perform in the U.S., the mere breach of the contract abroad resulting in financial loss to a Florida corporation in the U.S. would likely be insufficient to establish the exception.[55]

Of course, the foregoing analysis is just one of the many permutations that could arise in the scenario depending on the facts and circumstances. However, it does underscore the far reach of the commercial activity exception and how even limited commercial contact by a foreign state with the U.S. can subject the foreign state to the jurisdiction of the U.S. courts.

Noncommercial Torts

One motivating factor behind enactment of the FSIA was to address injuries suffered by U.S. citizens in traffic accidents caused by employees acting within the scope of their employment with foreign nations or their instrumentalities.[56] Consequently, the FSIA includes an exception for noncommercial tortious acts of a foreign state occurring in the U.S.

Under this exception, a foreign state is not immune for acts, not otherwise encompassed in the commercial activities exception above, in which money damages are sought against a foreign state for personal injury or death or damage to property, occurring in the U.S. and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his or her office or employment.[57] However, the exception does not apply to 1) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or 2) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.[58] Punitive damages are not recoverable against a foreign state under the act but are recoverable against an agency or instrumentality thereof.[59]

The question of whether the tortfeasor was an employee of foreign sovereign for purposes of the exception is governed by state law.[60] The exception applies only when the tortious acts or omissions of a foreign state occur in the U.S. In fact, it has been held that the exception applies only when the entire tort takes place in the U.S.[61] It is clear that the mere fact that the plaintiff suffered injury in the U.S. as a result of tortious acts occurring abroad is not sufficient to bring the action within the exception.[62]

Thus, for the U.S. tourist who slips and falls in the Jamaican airport, the FSIA will likely preclude an action against the government-owned airport authority in a U.S. court. As for the person injured by the employee of Petrobras in a traffic accident in Florida, the result could be different. The tort having clearly occurred in the U.S., the immunity issue would likely boil down to whether the employee was acting within the course and scope of his or her employment with Petrobras at the time of the accident under Florida law[63] (and, as discussed above, whether the particular subsidiary of Petrobras, if any, qualifies as a foreign state within the meaning of the act).

Conclusion

As U.S. citizens become increasingly engaged in international travel and commerce, they will increasingly interact with foreign sovereigns and their agencies and instrumentalities. Attorneys handling tort and contract claims arising from this type of interaction must have a thorough

understanding of the FSIA. On one hand, the act will dictate whether the foreign entity will qualify as a foreign state and, therefore, enjoy the broad grant of immunity from suit in any U.S. court. On the other hand, it will control whether the immunity can be overcome based on state conduct falling within one of the act's far reaching exceptions.

Paramount among these exceptions is the one addressing the foreign state's commercial activity occurring in the U.S. or causing a direct effect in the U.S. This exception is broad enough to reach conduct that was motivated entirely by a public purpose as long as it is the type of conduct in which private persons commonly engage. It is also broad enough to reach commercial conduct that has only a limited nexus to the U.S., such as the mere breach of a contractual obligation to be performed in the U.S.

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[1] 28 U.S.C. Â§Â§1330, 16021611.

[2] The case law and commentary interpreting the FSIA and dealing with the many issues arising thereunder is extensive. The purpose of this article is to serve merely as an introduction to the act and some of the more common issues it presents.

[3] *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). The theory of absolute immunity arose from principles of international grace and comity but was not constitutionally mandated. *Id*.

[4] *Verlinden*, 461 U.S. at 487.

[5] Joseph W. Hardy, Jr., *Wipe Away the Tiers: Determining Agency or Instrumentality Status under the Foreign Sovereign Immunities Act*, 31 Ga. L. Rev. 1121, 1125 (1997).

[6] Karen Geller, *The Interplay Between the Foreign Sovereign Immunities Act and ERISA: The Effects of* Gates v. Victor Fine Foods, 29 U. Miami Inter-Am. L. Rev. 575, 585 (1998). For a century and half, the Executive Branch through the State Department routinely requested immunity in actions against friendly foreign sovereigns. *Verlinden*, 461 U.S. at 486. In 1952, the State Department changed this policy and adopted the restrictive theory of immunity. The issuance of a letter by Jack B. Tate, the acting legal advisor to the Attorney General, commonly known as the "Tate Letter," marked this policy change and initiated the application of the restrictive theory in the U.S. courts. *Id*. at 487.

[7] Danny Abir, *Foreign Sovereign Immunities Act: The Right to a Jury Trial in Suits Against Foreign Government-Owned Corporations*, 32 Stan. J. Int'l L. 159, 165 (1996). Courts are still struggling with this distinction even under the FSIA. *Id*.

[8] *Verlinden*, 461 U.S. at 487488.

[9] *Id*.

[10] *Id.* at 488.

[11] *Id*.

[12] 28 U.S.C. Â§1604; *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 723 (9th Cir. 1997); *Nigerian Air Force v. Van Hise*, 443 So. 2d 273, 275 (Fla. 3d D.C.A. 1983).

[13] 28 U.S.C. Â§1604. The act provides exceptions to immunity for actions based on 1) waiver of immunity by the foreign state; 2) commercial activity of the foreign state having a certain nexus to the U.S.; 3) property rights that were taken by the foreign state in violation of international law; 4) immovable property rights located in the U.S. or property located in the U.S. acquired by gift or succession; 5) certain tortious activity of the foreign state; 6) enforcement or confirmation of certain arbitration awards; 7) certain admiralty acts by the foreign state; and 8) foreign state foreclosure of a preferred mortgage as defined by the Ship Mortgage Act, 46 U.S.C. 911. *See* 28 U.S.C. Â§1605. An issue distinct from whether the foreign state is immune on a particular claim is whether the state's property is immune from

attachment or execution on a judgment. *See* 28 U.S.C. Â§Â§16091611. The property is generally presumed to be immune, subject to statutorily defined exceptions for certain types of property including certain property used for commercial activity in the U.S. *See* 28 U.S.C. Â§1610. Of particular note for plaintiffs is the fact that the proceeds of certain liability and casualty insurance proceeds are not immune from execution. *See* 28 U.S.C. Â§1605(a)(5).

[14] *Dominican Energy Limited, Inc. v. Dominican Republic*, 903 F. Supp. 1507, 1512 (M.D. Fla. 1995).

[15] *Id*. The ultimate burden of persuasion, however, lies on the defendant. *Id*. As explained in *Dominican Energy*, once the defendant establishes that it qualifies as a foreign state, the plaintiff has the burden to prove that the conduct forming the basis of the complaint falls within one of the exceptions to immunity. *Id*. If the plaintiff rebuts the presumption of immunity by such proof, the ultimate burden of persuasion on the issue lies with the *defendant. Id*.

[16] *Arango v. Guzman Travel Advisors*, 761 F.2d 1527 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985); *see* 28 U.S.C. Â§1441(d); *Bailey v. Grand Trunk Lines New England*, 805 F.2d 1097, 1100 (2d Cir. 1986), *cert. denied*, 484 U.S. 826 (1987).

[17] *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 443 (1989). Jurisdiction over foreign states arises through the operation of 28 U.S.C. Â§1330(a) and Â§Â§1602 *et seq*., and is not based on diversity. *Harris v. Polskie Linie Lotnicze*, 641 F. Supp. 94, 95 (N.D. Ca. 1986).

[18] *Dominican Energy*, 903 F. Supp. at 1512. Although an action may be brought against a foreign state in state court under the FSIA, any such action may be removed to the federal district court when the action was initiated pursuant to 28 U.S.C. Â§Â§1441(d), 1608.

[19] *Id*. The act also provides the exclusive means by which service of process may be effectuated on a foreign state. *See* 28 U.S.C. Â§1608; *Seramur v. Saudi Arabian Airlines*, 934 F. Supp. 48, 5152 (E.D.N.Y. 1996).

[20] 28 U.S.C. Â§1603(a).

[21] 28 U.S.C. Â§1603(b). However, the entity does not qualify as an agency or instrumentality of a foreign state if it is a "citizen" of a state of the United States or created under the laws of a third country. *See* 28 U.S.C. Â§1332(c), (d); Â§1603(b)(3).

[22] *See Coastal Cargo, Inc. v. M/V Gustave Sule*, 942 F. Supp. 1082, 1084 (E.D. La. 1996).

[23] *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 679 (S.D.N.Y. 1996).

[24] *See Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir.1987).

[25] 28 U.S.C. Â§1603(b).

[26] *See Hyatt Corp*., 945 F. Supp. at 683684.

[27] *Id.*

[28] *Id.*

[29] *See The Company -- Petrobras* (visited March 6, 1999) < http://www.petrobras.com.br/ingles/lay1ciai.htm >

[30] *Id.*

[31] *Gates v. Victor Fines Foods*, 54 F.3d 1457, 14611462 (9th Cir. 1995); *Fed Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1285 n.12 (3d Cir. 1993).

[32] *In re Aircrash Disaster Near Roselawn*, 96 F.3d 932, 940941 (7th Cir. 1996). *See* Hardy, *supra* note 5, for a detailed discussion of the tiering problem.

[33] *See Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 654655 (9th Cir. 1996); *Southern Seafood Co. v. Holt Cargo Systems, Inc.*, 1997 WL 539763 (E.D. Pa. Aug. 11, 1997).

[34] *See Southern Seafood Co.*, 1997 WL 539763.

[35] *See* Hardy, *supra* note 5.

[36] 28 U.S.C. Â§1605(a)(1).

[37] 28 U.S.C. Â§1605(a)(2).

[38] 28 U.S.C. Â§1605(a)(5).

[39] *See Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for A.W. Galadari*, 12 F.3d 317, 327 (2d Cir. 1993); *Fickling v. Commonwealth of Australia*, 775 F. Supp. 66, 70 (E.D.N.Y. 1991).

[40] *Eaglet Corp. Ltd. v. Banco Central De Nicaragua*, 839 F. Supp. 232, 234 (S.D.N.Y. 1993). The foreign state can also expressly waive immunity by governmental decree or other public act. *Paul v. Avril*, 812 F. Supp. 207, 210 (S.D. Fla. 1993).

[41] *Maritime Ventures International, Inc. v Caribbean Trading & Fidelity, Ltd.*, 689 F. Supp. 1340, 1351 (S.D.N.Y. 1988).

[42] *Eckert Intern., Inc. v. Government of Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 79 (4th Cir. 1994).

[43] *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443444 (D.C. Cir. 1990).

[44] *Commercial Corp. Sovrybflot v. Corporacion de Fomento de la Produccion*, 980 F. Supp. 710, 712 (S.D.N.Y. 1997). A waiver can also be found when a foreign state initiates the suit in the U.S. for those matters incident to the suit such as counterclaims. *See* 28 U.S.C. Â§1607; *Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 79 (3d Cir. 1994).

[45] *But see Drexel*, 12 F.3d at 326327, for a more forgiving view.

[46] Danny A. Hoek, *Foreign Sovereign Immunity and Saudi Arabia v. Nelson: A Practical Guide*, 18 Hastings Int'l & Comp. L. Rev. 617, 621 (1995).

[47] 28 U.S.C. Â§1605(a)(2).

[48] The act states that commercial activity "means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. Â§1603(d).

[49] *Millicom International Cellular, S.A., v. Republic of Costa Rica*, 995 F. Supp. 14, 2021 (D.D.C. 1998).

[50] *Republic of Argentina v. Weltover Inc.*, 504 U.S. 607, 614 (1992).

[51] *See Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993); *Weltover*, 504 U.S. 607, 617619; *Drexel*, 12 F.3d at 330; *Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 324325 (9th Cir. 1996).

[52] *See Dominican Energy*, 903 F. Supp. at 1513.

[53] *See Weltover.*, 504 U.S. at 617619; *Transatlantic Shiffahrtskontor GMBH v. Shanghai Foreign Trade Corp*, 1998 WL 799671 (S.D.N.Y. Nov. 17, 1998).

[54] *Weltover*, 504 U.S. at 617619.

[55] *See Dominican Energy*, 903 F. Supp. at 15131515; *Weltover*, 504 U.S. at 617619.

[56] *Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 324325 (9th Cir. 1996).

[57] 28 U.S.C. Â§1605(a)(5).

[58] *Id.*

[59] 28 U.S.C. Â§1606.

[60] *Randolph*, 97 F.3d at 325.

[61] *Cabiri v. The Government of the Republic of Ghana*, 981 F. Supp. 129, 132 (E.D.N.Y. 1997).

[62] *Id.*

[63] *See Randolph*, 97 F.3d at 327328.

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