Jurisdiction over Foreign Sovereigns: Litigation v. Arbitration

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The choice between litigation and arbitration where sovereigns are involved frequently is more apparent than real. A reasoned choice can be made only when dispute settlement provisions are consciously being negotiated in good faith between willing parties, either as part of a prospective contract for which both sides hope or to clarify established relations which they fervently wish to continue. Otherwise fate or happenstance, depending on your philosophical predisposition, has already determined the disputants' course.

To assist the decisional process in the all too rare instances in which it is permitted to flourish I would like today to discuss three problems that have arisen in international arbitration in recent years, particularly affecting the United States or its interests. They are concrete problems that I have been required to address in the course of actually arbitrating and litigating both for and against foreign sovereigns, working under ICC Rules,[1] in ICSID—the International Centre for Settlement of Investment Disputes,[2] and pursuant to the slightly modified UNCITRAL Rules provisionally adopted by the Iran-United States Claims Tribunal.[3] In discussing them I would like also to propose how the American Bar Association might contribute to their solution. The three problems are (1) enforcement of foreign awards under the Foreign Sovereign Immunities Act (FSIA),[4] (2) pre-award attachment in the United States under the New York Convention,[5] and both provisional attachment and enforcement under the New York Convention wherever the conventional municipal jurisdictional predicates are absent.

Let us turn to the distinctly United States problems first.

1. *Enforcement of foreign arbitral awards in the United States under the*

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[1]5 J.WETTER, THE INTERNATIONAL ARBITRAL PROCESS 89-104 (1979).

[2]Convention on the Settlement of Investment Disputes, *done at Washington* Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (*entered into force for the United States* Oct. 14, 1966).

[3]*Declaration of Government of Algeria concerning the Settlement of Claims by the United States and Iran*, initialed on Jan. 19, 1981, art. III, *reprinted in* C. BROWER, L. MARKS & J. OLSON, AFTER ALGIERS: PROTECTING AND PERFECTING AMERICAN CLAIMS AGAINST IRAN 10 (Law & Business, Inc. 1981).

[4]Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330, 1391, 1491, 1602-111 (Supp. 1982).

[5]Convention on Recognition and Enforcement of Foreign Arbitral Awards, *done at New York* June 10, 1958. 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. (*entered into force for the United States* Dec. 29, 1970).

FSIA. It is common knowledge that the *Liamco* case[6] raised but did not finally resolve the issue of whether a foreign arbitral award obtained by a domestic American corporation against a foreign sovereign can be enforced in the United States solely on the basis of the implied waiver provision of the FSIA.[7] Previously such an award had been enforced on that basis without any question, in the *Ipitrade* case.[8] The same question was posed, but also was not decided by the District of Columbia Circuit in the *Republic of Guinea* case.[9]

Whether or not it is decided, and regardless of which way it is decided, is this not an issue which is eminently susceptible of—indeed cries out for—final resolution by legislative action? Since the Supreme Court reversed the Second Circuit in *Verlinden*,[10] one is not constitutionally precluded from correcting the situation as to awards issued in foreign arbitrations involving only aliens, and corrective legislation could be attempted there as well as for the benefit of our own nationals. Of course other constitutional limitations—specifically that of due process[11]—may, as has also been argued,[12] limit our reach, but should we not ask Congress to make it clear that we intend to reach as far as we can? Does not the fact that the United States is a party to the New York Convention bolster our ability to reach far, as we have done to implement the ICSID Convention?[13]

Since international arbitration, particularly involving sovereigns, is designed to provide a sort of "universal" system of dispute resolution, unlimited by individual nations' jurisdictional concepts, does not such arbitration best prosper where enforcement is correspondingly universal, unconstrained by municipal jurisdictional limitations? I submit that the cause of international arbitration would indeed be advanced, especially the sovereign arbitrations essential to increased international investment and trade, if the United States would legislatively clarify that to the fullest

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[6]Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175 (D.D.C. 1980), *vacated*, Nos. 80-1207, 80-1252 (D.C. Cir. May 6, 1980).

[7]28 U.S.C. § 1605(a)(1) (Supp. 1982).

[8]Ipitrade International, S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978).

[9]*In re* Maritime International Nominees Establishment v. Republic of Guinea, 693 F.2d 1094 (D.C. Cir. 1982).

[10]Verlinden B.V. v. Central Bank of Nigeria, 103 S. Ct. 1962 (1983).

[11]U.S. CONST. amend. V.

[12]*See* Brief for the United States as *Amicus Curiae* at 35-37, Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya, Nos. 80-1207, 80-1252 (D.C. Cir. 1980), *reprinted in*, 20 I.L.M. 161, 163-64 (1981).

[13]22 U.S.C. § 1650(a) provides, without further jurisdictional requirements, that

> [A]n award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID] convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) shall not apply to enforcement of awards rendered pursuant to the convention.

extent constitutionally permissible a foreign arbitral award is enforceable in the United States.

2. *Pre-award attachment in the United States under the New York Convention.*[14] The second problem I address is likewise, I submit, one that the United States can legislate away, even though a treaty is involved.

While foreign courts have held without exception that the New York Convention does not preclude pre-award attachment,[15] a result in which recent academic authority concurs,[16] there is an unfortunate split of authority in the United States, with the Third Circuit taking the lead against such remedy in the *McCreary* case[17] and the principal contrary authority, the *Uranex* case,[18] issuing out of the Northern District of California. Unpredictability on this score is heightened by the fact that authorities differ even within the important Southern District of New York.[19]

While the point may be of somewhat limited value as to sovereigns, given the fact that under the FSIA "prejudgment" attachment is obtainable only if there is an express waiver,[20] it is nonetheless important: where an arbitration clause can be negotiated, perhaps a waiver can be obtained, too (albeit only before a dispute arises); furthermore, immunity waivers in United States FCN treaties[21] may be held either to be applicable in place of the FSIA[22] or to meet the standard of explicitness.[23] Given the potential importance of preliminary attachment in the pursuit of remedies against sovereigns, particularly in light of their extensive ability to immunize their assets,[24] it would be in the interests of American claimants that they clearly

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[14]The question of whether such attachment is permitted by the ICSID Convention is beyond the scope of this paper.

[15]Judgment of May 12, 1977, Corte cass. Italy, 17 Rassenga dell' Arbitrato 149 (unpublished); *The Rena K*, 1 L.R. 545 (Q.B. 1978).

[16]A. JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 139-44 (1981).

[17]McCreary Tire & Light Co. v. CEAT S.p.A., 501 F.2d 1032 (3rd Cir. 1974); *see also* I.T.A.D. Associates, Inc. v. Podar Brothers, 636 F.2d 75, 77 (4th Cir. 1981); Cordoba Shipping Co. v. Maro Shipping Ltd., 494 F. Supp. 183, 188 (D. Conn. 1980).

[18]Carolina Power & Light Co. v. URANEX, 451 F. Supp. 1044 (N.D. Cal. 1977); Cooper v. Ateliers De La Motobecane, S.A., 456 N.Y.S. 2d 728 (N.Y. Ct. App. 1982).

[19]*Compare* Andros Compania Maritima, S.A. v. Andre & CIE, S.A., 430 F. Supp. 88, 91-92 (S.D.N.Y. 1977), Compania de Navegacion y Financiera Bosnia, S.A. v. National Unity Marine Salvage Corp., 457 F. Supp. 1013 (S.D.N.Y. 1978), Atlas Chartering Services, Inc. v. World Trade Group, Inc., 453 F. Supp. 861, 863 (S.D.N.Y. 1978), Paramount Carriers Corp. v. Cook Industries, Inc., 465 F. Supp. 599, 602 (S.D.N.Y. 1979), Filia Compania Naviera, S.A. v. Petroship, S.A., No. 81 Civ. 7515, Slip op. at 11 (S.D.N.Y. March 19, 1982) *with* Metropolitan World Tanker Corp. v. P.N. Pertambangen Minjak Dan Gas Bumi Nasional, 427 F. Supp. 2 (S.D.N.Y. 1975).

[20]28 U.S.C. § 1610(d)(1) (Supp. 1982).

[21]*E.g.*, Treaty of Amity, *done* Aug. 8, 1955, United States-Iran, U.S.T. 899, T.I.A.S. No. 3853 (*entered into force* June 16, 1957).

[22]28 U.S.C. § 1604 (Supp. 1982) makes the FSIA "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act. . . ." *See* Behring Int'l., Inc. v. Imperial Iranian Air Force, 699 F.2d 657 (3d Cir. 1983).

[23]*Cf.* Libra Bank Ltd. v. Banco Nationale Costa Rica, 676 F.2d 47 (2d Cir. 1982).

[24]*E.g.*, 28 U.S.C. § 1611(b)(1) (Supp. 1982) immunizes "the property . . . of a foreign central bank or monetary authority held for its own account. . . ."

have the right to obtain pre-award attachments.

The issue here is one of interpretation of the New York Convention, hence one might think that the proper remedy is to amend or add a clarifying protocol to the convention. In fact this has been considered,[25] but the effort involved and the time lost in revising a convention to which the United States became a party only twelve years after its adoption is justifiably intimidating. Moreover, it seems unnecessary, since only American courts—and only some of those—have disallowed pre-award attachment.

If the view of foreign courts and qualified academicians alike is that pre-award attachment is wholly compatible with the convention, cannot the United States by amending chapter 2 of the Federal Arbitration Act, which implements the convention, clarify the situation domestically without breaching its international obligations?

I respectfully suggest that a very limited "International Arbitration Improvements Act of 1982" could speedily and correctly fill both gaps just discussed.

3. *Enforcement and provisional attachment where the municipally prescribed jurisdictional predicates for a plenary action are absent.* The third problem I have mentioned is not so readily solved.

In pursuit of sovereigns around the world I have made an interesting discovery. In a number of countries parties to the New York Convention (including the United States) courts ordinarily will not entertain a plenary action solely on the basis of presence of the prospective defendant's assets. If neither the plaintiff nor the sovereign defendant has any connection with the forum, and the matter giving rise to the dispute is likewise wholly detached from forum state interests, jurisdiction simply does not exist, or will not be exercised. If no plenary action can be entertained, then no provisional attachment is available. By extension of these principles, such states may well refuse to entertain an action to enforce an arbitral award under the New York Convention and likewise refuse provisional attachment.

This makes familiar sense in a judicial context, but does it where international arbitration is involved? I think not. A sovereign and an alien agree to arbitrate as a kind of universal, non-national means of resolving a dispute. The point of the New York Convention, where it applies, is to ensure fulfillment of the arbitrating parties' expectations by guaranteeing worldwide enforcement of a legitimate award. Under the circumstances just iterated those expectations in fact would be frustrated: a claimant could pursue a sovereign arbitral respondent only in those fora where he could

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[25] In 1976 the Asian-African Legal Consultative Committee invited the United Nations Commission on International Trade Law to consider a Protocol clarifying and complementing the convention. U.N. Doc. A/CN.9/127. *See also* A. JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 1-2 (1981).

have reached him anyhow, in the absence of an arbitration agreement.

Is this what the New York Convention contemplated? It certainly does not appear so from the text of the convention. Article III explicitly provides:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon under the conditions laid down in the following articles.

The "conditions laid down" subsequently in the convention include nothing remotely resembling satisfaction of traditional municipal jurisdictional requirements. Therefore a nonenforcing state as I have described it would be justified only if its jurisdictional rules are deemed subsumed under the rubric "rules of procedure." I have searched high and low for any authority which would either confirm or refute the conclusion that failure to enforce in the described circumstances constitutes a breach of the convention. Amazingly, at least to me, I have not even found any discussion of the issue. The little relevant commentary, however, confirms that the reference to "rules of procedure" was intended to mean things such as "the form of request" for enforcement and designation of the "competent authority" to which to apply for enforcement,[26] and not municipal jurisdictional principles.

If the situation I have described persists, is not the advantage of international arbitration diminished, perhaps dissipated? If a party can only enforce where he could have sued anyhow, has he gained enough advantage through consent to arbitration to outweigh having added a further procedure, i.e., enforcement, without expanding his access to assets out of which to satisfy the award?

I realize this is an area in which the United States is not pure, as the earlier discussion of the "*LIAMCO* problem" acknowledges. I think, however, a suggestion for the future is in order. Assuming that the United States were to succeed in setting its own course correctly, as previously discussed, could we not also seek to persuade others to do the same? If it is indeed concluded that the New York Convention requires "universal" enforcement, irrespective of the usual jurisdictional principles applied by a state party, could not the same "International Arbitration Improvements Act of 1982" direct the president or his delegate to so inform other states parties diplomatically and seek to build support for this interpretation of the convention?

Obviously, many questions are raised by such a proposal. Its object, on all three points, is to provoke thought, discussion, and eventually action. It is important that the process begin. I know of no organization better placed

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[26] A. JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 236-43 (1981).

to initiate that process than the American Bar Association, especially its Section of International Law and Practice, and most particularly that Section's Committee on International Commercial Arbitration, whose sponsorship of this program I applaud.