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YB VI (1981) USA no. 33

"Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit."

422 U.S. 490, 511, 95 S.Ct. 2197, 2211, 45 L.Ed.2d 343 (1975) (citations omitted). Here, the complaint alleges that the members of the Foundation, who include epileptics, "have been subjected to discrimination by defendants' policies that deny employment and promotion opportunities. . . ." (¶ 17) Since these allegations state an injury to the members of the Foundation, and since allegations of injury to the members of the organization suffice to give that organization standing, the Foundation has standing to sue.[13]

* * * * * *

The motion to dismiss is denied. The plaintiffs may assert a private right of action under section 503, all available administrative remedies have been exhausted, and the Foundation has standing to sue.

It is so ordered.

LIBYAN AMERICAN OIL COMPANY, Plaintiff,

v.

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRYA, formerly Libyan Arab Republic, Defendant.

Misc. No. 79-57.

United States District Court, District of Columbia.

Jan. 18, 1980.

An oil company brought action to confirm and enforce an arbitration award against Libya. The District Court, John Lewis Smith, Jr., J., held that: (1) the court had jurisdiction; but (2) contract rights from certain petroleum concessions entered into by the oil company and Libya did not constitute "property" for purposes of the Hickenlooper Amendment to the Foreign Assistance Act of 1964, and thus such amendment, providing an exception to application of the act of state doctrine, was not applicable; and (3) Libya's repudiation of contractual obligations, in course of nationalization, was not shown to be in violation of international law merely because the oil company was perhaps not satisfied with the rate at which Libya was prepared to recompense the company, and the act of Libya not having been shown to be in violation of principles of international law, the Hickenlooper Amendment providing exception to act of state doctrine, was inapplicable for such reason also.

Recognition or enforcement declined.

1. Constitutional Law ⇐305(5)

International Law ⇐10.42

Before United States courts may exercise jurisdiction over foreign sovereign, For-

13. The complaint alleges in addition, that the Foundation's patient care programs and medical identification programs have been injured by Con Ed's policies that encourage epileptics to conceal their disease, and that is programs of public education are injured by Con Ed's policies that "perpetuate the stigma and stereotype of epilepsy." (¶ 17) Because the allegations of injury to the members of the Foundation are suf[illegible] standing on the Foundation, we express no view on whether these allegations state a sufficiently concrete injury to confer standing.

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eign Sovereign Immunities Act requires showing not only of peculiar reasons for denying sovereign immunity but also of compliance with traditional requirements for in personam jurisdiction, including requirements of due process. 9 U.S.C.A. §§ 201-208; 28 U.S.C.A. §§ 1330, 1330(a, b), 1332(a)(2-4), 1391(f), 1441(d), 1602-1611, 1603(a), 1604-1608, 1608, 1608(a).

2. International Law ⚬=10.32

Where Libya by special amendment to original concession agreed with oil company to arbitration clause, Libya waived defense of sovereign immunity for purposes of federal jurisdiction statute, and, due process requirements for notice having been met, court had jurisdiction to recognize and enforce award, though question whether to exercise such jurisdiction remained. 28 U.S.C.A. §§ 1330(a, b), 1605(a)(1); 9 U.S.C.A. § 207; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Acts V, V, par. 2(a), 9 U.S.C.A. § 201 note.

3. International Law ⚬=10.8

Practice counseling judicial abstention from passing on effectiveness of acts of foreign sovereigns is termed the "act of state doctrine."

See publication Words and Phrases for other judicial constructions and definitions.

4. International Law ⚬=10.8

Act of state doctrine does not deny courts jurisdiction once it has been acquired. 28 U.S.C.A. § 1330(a, b).

5. International Law ⚬=10.16

Contract rights from certain petroleum concessions entered into by oil company and Libya did not constitute "property" for purposes of amendment to Foreign Assistance Act of 1964 and thus such amendment, providing exception to application of act of state doctrine was not applicable. Foreign Assistance Act of 1964, § 620(e)(2) as amended 22 U.S.C.A. § 2370(e)(2).

6. International Law ⚬=10.16

Libya's repudiation of contractual obligations, in course of nationalization, was not shown to be in violation of international law merely because oil company was perhaps not satisfied with rate at which Libya was prepared to recompense company, and act of Libya not having been shown to be in violation of principles of international law, Hickenlooper Amendment to Foreign Assistance Act of 1964, providing exception to act of state doctrine, was not applicable. Foreign Assistance Act of 1964, § 620(e)(2) as amended 22 U.S.C.A. § 2370(e)(2).

Gerald Goldman, Washington, D. C., for plaintiff.

Preston Brown, Washington, D. C., for defendant.

MEMORANDUM

JOHN LEWIS SMITH, Jr., District Judge.

The Libyan American Oil Company (LIAMCO) brings this action to confirm and enforce an arbitration award rendered on April 12, 1977, in Geneva, Switzerland, against the Socialist People's Libyan Arab Jamahirya (Libya). The arbitral award was rendered pursuant to a clause contained in certain petroleum concessions entered into by LIAMCO and Libya in 1955. In 1973 and 1974 Libya nationalized both LIAMCO's rights under the concessions and certain of its oil drilling equipment. Following unsuccessful negotiations regarding compensation, LIAMCO rejected the terms of the nationalization and initiated proceedings under the arbitration clause. Libya, maintaining that the nationalization superseded the concessions altogether, refused to participate in the Geneva proceedings. The matter is now before the Court upon LIAMCO's petition for confirmation of the award and Libya's opposition, styled a motion to dismiss. LIAMCO invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1330(a) and (b) (actions against foreign states), arguing that Libya is not immune under the Foreign Sovereign Immunities Act of 1976 (FSIA) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), and 1602-1611). LIAMCO further contends

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that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention) (codified at 9 U.S.C. §§ 201–208) requires the confirmation of the award. Service has been complied with in accord with the terms of 28 U.S.C. § 1608. Respondent Libya does not challenge the validity of the underlying award. Instead it mounts a two pronged defense arguing first that this Court is without jurisdiction, and second, that even should the Court find jurisdiction, it should refrain from enforcing the award under the Convention because of the act of state doctrine.

The jurisdictional question

Libya is a foreign state, 28 U.S.C. § 1603(a), and therefore entitled to immunity from the jurisdiction of the United States courts according to the FSIA, 28 U.S.C. § 1604, unless some exception set forth in sections 1605–1607 of the same title applies. If an exception to immunity can be demonstrated, then this Court has jurisdiction pursuant to section 1330, provided all the requirements of subsections (a) and (b) are met.

[1] The legislative history clarifies that before United States courts may exercise jurisdiction over a foreign sovereign, the FSIA requires a showing not only of particular reasons for denying sovereign immunity (§ 1330(a)), but also of the traditional requirements for in personam jurisdiction, including the requirements of due process (§ 1330(b)).

> (b) *Personal Jurisdiction.*—Section 1330(b) provides in effect, a Federal long-arm statute over foreign states . . . . The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605–1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be made under section 1608 of the bill. Thus, sections 1330(b), 1608 and 1605–1607 are all carefully interconnected.

H.R.Rep. No. 1487, 94th Cong., 2d Sess. 13, *reprinted in* [1976] U.S.Code Cong. & Admin.News, p. 6604, at 6612.

Subsection (b) states that "[p]ersonal 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." 28 U.S.C. § 1330(b). Petitioner avers that § 1608 notice has been given and respondent does not contest this point. It remains to determine whether one of the exceptions to immunity under subsection (a) applies.

[2] As noted in the legislative history quoted above, original jurisdiction under subsection (a) may be established either by "some *connection* between the lawsuit and the United States, or an express or implied *waiver* by the foreign state." (emphasis added). Section 1605(a)(1) provides that a foreign state is not immune if it has "waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). Petitioner LIAMCO maintains that Libya implicitly waived its sovereign immunity by expressly agreeing to the arbitration and choice of law clauses negotiated in 1966 and 1967, more than ten years after the concessions were originally entered into. LIAMCO supports its interpretation of the effect of those clauses by reference to another passage in the legislative history of the FSIA.

With respect to implicit waivers, the courts have found such waivers in cases

where a foreign state has agreed to arbitration in another country or where the foreign state has agreed that the law of a particular country should govern a contract. H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. 18, *reprinted in* [1976] U.S.Code Cong. & Admin.News, pp. 6604, 6617.

A recent case in this Court also supports this view. In *Ipitrade Int'l, S.A., v. Federal Republic of Nigeria*, 465 F.Supp. 824 (D.D.C.1978), an action for enforcement of an arbitral award based on breach of contract, the Court held that the foreign sovereign's "agreement to adjudicate all disputes arising under the contract in accordance with Swiss law and by arbitration under International Chamber of Commerce rules constitute[d] a waiver of sovereign immunity under the Act." 465 F.Supp. at 826. As in the present case, the award was granted in a foreign jurisdiction but sought to be enforced here. In the case at bar, the arbitration clause agreed to by Liamco and Libya was a special amendment to the original concession. The 1955 agreement had provided that any eventual arbitration should take place in Libya's capitol, Tripoli. The clause that LIAMCO proposed in 1966, however, provided that arbitration should take place either where the parties agreed, or where the arbitrators might agree. Libya agreed to this provision. 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.

Libya thus waived its defense of sovereign immunity for the purposes of § 1330(a) and because there is no suggestion that the requirements of notice under § 1330(b) have not been met, this Court has jurisdiction to recognize and enforce the award. The question of whether to exercise that jurisdiction remains.

The act of state doctrine

The Convention under which LIAMCO would have this Court confirm the arbitral award plainly favors enforcement of foreign awards in this forum.

> The court *shall* confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention. 9 U.S.C. § 207 (emphasis added)

Of the seven exceptions listed in Article V of the Convention, one is determinative of the issue before the Court. Subsection 2(a) of Article V provides that recognition and enforcement of an award may be refused if the competent authority in the country where enforcement is sought determines that "[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country." 9 U.S.C. § 201.

The "subject matter of the difference" in this case is Libya's nationalization of LIAMCO's assets and the rate at which LIAMCO should be compensated for the assets taken under that nationalization. Should that rate be determined according to the terms of the original concessions (by arbitration), or should it rather be determined according to the provision of the nationalization laws themselves (by Libyan committee)?

[3-6] Had that question been brought before this Court initially, the Court could not have ordered the parties to submit to arbitration because in so doing it would have been compelled to rule on the validity of the Libyan nationalization law. That law by its terms abrogated the concessions entirely and vested exclusive determination of any compensation in a special committee provided for in the same law. The practice that counsels this judicial abstention from passing on the effectiveness of the acts of foreign sovereigns is termed the act of state doctrine. It finds its classic American expression in the Supreme Court case of *Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897).

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. 168 U.S. at 252, 18 S.Ct. at 84.

The doctrine does not deny courts jurisdiction once it has been acquired.

It requires only that when it is made to appear that the foreign government has

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acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned, but must be accepted by our courts as a rule for their decision. *Ricaud v. American Metal Co.*, 246 U.S. 304, 309, 38 S.Ct. 312, 314, 62 L.Ed. 733 (1918).

Since the ruling in *Underhill*, courts have consistently found a foreign state's act of nationalization to be the classic example of an act of state. "Expropriations of the property of an alien within the boundaries of the sovereign state are traditionally considered to be public acts of the sovereign removed from judicial scrutiny by application of the act of state rubric." *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir. 1977), *cert. denied*, 434 U.S. 984, 98 S.Ct. 608, 57 L.Ed.2d 477. Furthermore, other nationalization decrees by the state of Libya identical to the decrees affecting LIAMCO have been considered as sovereign acts for the purposes of the act of state doctrine. As the Court noted in *Hunt*,

> We conclude that the political act complained of here was clearly within the act of state doctrine and that since the disputed pleadings inevitably call for a judgment on the sovereign acts of Libya the claim is non-justiciable. 550 F.2d at 73.

Petitioner argues that even if the act of state doctrine should be applied in this case, the exception embodied in the Hickenlooper Amendment to the Foreign Assistance Act of 1964 would still require this Court to decide this case. The amendment provides that unless the President, for foreign policy reasons, suggests otherwise, courts must not decline on the ground of the act of state doctrine to decide the merits of a

> claim of title or other right to property . . . based upon (or traced though) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law. 22 U.S.C. § 2370(e)(2).

The President has made no suggestion in this matter, but petitioner has failed to show that the amendment's requirements have been met.

The contract rights that lie at the heart of petitioner's claim do not constitute property for purposes of the amendment, *Menendez v. Saks & Co.*, 485 F.2d 1355, 1372 (2d Cir. 1973), *rev'd on other grounds, sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976), nor have courts found that the repudiation of contractual obligations amounts to a "confiscation or other taking," as those terms are employed in the statute. *Occidental of Umm al Qay., Inc. v. Cities Service Oil Co.*, 396 F.Supp. 461, 472 (D.C.La.1975). Finally, petitioner has failed to show that the taking was in violation of international law. The nationalization provisions of Libyan law established means for LIAMCO to recover its investment. Because LIAMCO may not have been satisfied with the rate at which Libya was prepared to recompense the company does not render the original nationalization in violation of international law.

For the reasons set forth above, the Court declines to recognize or enforce the arbitral award. An order consistent with this memorandum follows.

Edward L. KIRKLAND et al., Plaintiffs,

v.

The NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES et al., Defendants,

and

Albert Ribiero and Henry L. Coons, Intervenors-Defendants,

and

Dennis Fitzpatrick et al., Intervenors-Defendants.

No. 73 Civ. 1540.

United States District Court, S. D. New York.

Jan. 21, 1980.

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Plaintiffs and defendants made application in employment discrimination case

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LIBYAN AMERICAN OIL COMPANT v. SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRYA
Brief for the United States Government (1980)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 80-1207 and 80-1252

LIBYAN AMERICAN OIL COMPANY,
Plaintiff-Appellant-Crossappellee,

v.

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRYA,
Defendant-Appellee-Crossappellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE [*]

. . . . .

In enacting section 1605(a)(1) of the FSIA, Congress manifestly intended that an arbitration agreement should constitute a waiver of foreign sovereign immunity. The legislative history expressly mentions as examples of implicit waivers "cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular

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*[The excerpts have been reproduced from the Brief for the United States as *Amicus Curiae*, pp. 32-37, and the entire Supplemental Memorandum for the United States, filed with the U.S. Court of Appeals for the District of Columbia Circuit on June 16, 1980, and November 7, 1980, respectively.]

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country should govern a contract." H. Rep. No. 94-1487 at 18.[30/] To date, only one other court has had occasion to interpret and apply the waiver provision of section 1605(a)(1) with respect to the enforcement of foreign judgments, and it reached the same result as the court below, viz., that an agreement to arbitrate in a third country constitutes a waiver of foreign sovereign immunity. Ipitrade International, A.S. v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978).[30a/]

Furthermore, Congress clearly provided that any attempted withdrawal of the waiver of immunity shall be ineffective unless the withdrawal is in accordance with the terms of the original waiver. The House Report explains section 1605(a)(1)'s limitation on revocations of waivers of immunity by stating that "a foreign state which has induced a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, go back on its promise and seek to revoke the waiver unilaterally." H. Rep. No. 94-1487 at 18.

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 the arbitration, but also where, as here, the arbitration properly 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. Switzerland is such a state.

It is of no moment that the arbitration agreement here involved did not expressly provide for arbitration in the territory of a state which is a party to the New York Convention. Libya should not be heard to contend that it did not foresee that the Convention's enforcement process might be triggered in the United States and that, therefore,

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it did not waive its immunity from enforcement jurisdiction within the meaning of section 1605(a)(1). Though Libya may not have expressly agreed to a specific situs of arbitration, it manifestly agreed to a clear procedure for determining that situs: failing agreement between the parties, the situs would be chosen by the tribunal. Libya must have foreseen that the tribunal might designate as the situs one of the countries that are parties to the Convention,[31] and thus must have foreseen the possibility of enforcement in any state that either was or might become a party, including the United States. Having consented to this method of choosing the situs, Libya cannot now avoid the application of the Convention.[32]

There is no constitutional infirmity in enforcing the arbitral award under these circumstances. "Contacts" between the defendant and the United States are not required where the judgment sought is not an adjudication _ab initio_ on the merits but rather the enforcement of an award rendered in a foreign jurisdiction where the defendant had the opportunity to appear and contest the entry of judgment. _Shaffer_ v. _Heitner_, 433 U.S. 186 (1977), specifically distinguishes between the jurisdictional "contacts" threshold applicable to an adjudication on the merits and a lesser jurisdictional threshold for enforcement of another tribunal's judgment.[33] Although the _Shaffer_ discussion concerned the enforcebility of a sister-state judgment under the Full Faith and Credit Clause of the Constitution, there is no reason not to consider it equally applicable to recognition and enforcement of an arbitral award within a treaty framework.

In sum, Libya's implicit consent to suit in the United States to enforce the arbitral award removes any possible constitutional objection, and there is no obstacle to the exercise of jurisdiction pursuant to the FSIA.

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30/ It is now established international practice that by entering into an agreement to arbitrate a dispute, a state waives its immunity from suit. For example, Section 9 of the United Kingdom State Immunity Act 1978, c. 33, reads as follows:

> (1) Where a State has agreed in writing to submit a dispute which has arise, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.
>
> (2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

30a/ In Verlinden B.V. v. Central Bank of Nigeria, ___ F. Supp.___ (S.D.N.Y., No. 79 Civ 1150, Apr. 21, 1980), a Dutch corporation brought an action for anticipatory breach and repudiation of an irrevocable letter of credit established in its favor by the Central Bank of Nigeria. As one of the jurisdictional bases of suit, plaintiff urged that the Central Bank had implicitly waived its immunity because the contract between the State of Nigeria and the plaintiff - which gave rise to the letter of credit - contained an arbitration clause. The district court held that that jurisdictional basis was unavailing, saying (slip op. 39)

> [P]laintiff * * * has decided not to sue upon its cement agreement with Nigeria. Instead it bases its claim upon the Verlinden letter of credit. But that instrument, unlike the contract, is devoid of any provision accepting foreign law for its interpretation, nor does it name any foreign tribunal for arbitration.

By dictum, the district court questioned whether "a sovereign state which agrees to be governed by the laws of a third-party country - such as the Netherlands - is thereby precluded from asserting its immunity in an American court" (emphasis in original; slip. op. 41-42) citing Ipitrade, supra. - As we submit below, there is a distinction between a waiver of sovereign immunity for purposes of adjudicating a dispute ab initio, and a waiver of sovereign immunity for purposes of enforcing a judgment rendered by a foreign tribunal chosen by the parties. The Ipitrade decision, we submit, is clearly correct.

31/The Convention was adopted at New York on June 10, 1958 and entered into force June 7, 1959, well before the renegotiation of the arbitration clause of the concession agreements. Switzerland became a party effective August 30, 1965 and the United States effective December 29, 1970. Today over 50 states are parties.

32/ The tribunal itself consisted of a sole arbitrator chosen by the President of the International Court of Justice. It is reasonable to assume that the President of the Court - himself an official in the United Nations system and charged with responsibility for neutral dispute settlement - would select an arbitrator experienced in the workings of that system. It cannot have surprised Libya that the arbitrator so selected chose as the situs of the arbitration one of the world's principal centers for arbitral activities, in a state party to the Convention.

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33/ The Court stated (433 U.S. at 210-11, n. 36): "Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter."

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 80-1207 and 80-1252

LIBYAN AMERICAN OIL COMPANY,
Plaintiff-Appellant-Crossappellee,

v.

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRYA,
Defendant-Appellee-Crossappellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM
FOR THE UNITED STATES AS *AMICUS CURIAE*

We submit this supplemental memorandum to address the import on this suit of the judgment rendered by the Swiss Federal Court on June 20, 1980 [1/] -- following the submission of our initial *amicus* brief.

Libya contends in its brief of August 20, 1980 that the Swiss judgment has, in effect, set aside or suspended LIAMCO's arbitral award against Libya and that, in consequence, enforcement of the award in the United States is barred by Article V(1)(e) of the New York Convention (Libya Br. 13). [2/] Libya further suggests that our earlier *amicus* brief supports its contentions (*id.*, at 11, 15).

We do not share Libya's views as to the preclusive effect of the Swiss judgment on these proceedings, nor does

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Libya's characterization of our earlier submissions accurately reflect our position. We address these matters below in further support of our view that the New York Convention requires confirmation of the award by United States courts.

ARTICLE V(1)(e) OF THE NEW YORK CONVENTION DOES NOT BAR CONFIRMATION OF THE AWARD HERE SINCE THE SWISS JUDGMENT TURNED ON THE IMMUNITY OF LIBYA'S ASSETS IN SWITZERLAND AND NOT ON THE VALIDITY OF THE AWARD.

1. In an effort to execute in Switzerland on the arbitral award here in issue, LIAMCO sought - and the Zurich District Court issued - an attachment order permitting LIAMCO to seize "all financial assets of the State of Libya and Libyan governmental organizations" at six banks in Zurich (Tr. Judgment 4). On the authority of that order, the Debt Collection Office of Zurich levied on bank deposits of various Libyan governmental organizations (id.).

Bypassing the Cantonal appellate courts, Libya filed a "constitutional appeal" with the Swiss Federal Court, urging that the attachment and levy were violative of Libya's immunity under international law, and asking the Federal Court to quash the attachment order and to nullify the levy (id.). In its judgment of June 20, 1980, the Swiss Federal Court quashed the attachment order and nullified the levy on the ground that Swiss execution law requires a "sufficient domestic relationship" between the underlying transaction and Switzerland as a predicate to execution action against foreign state-owned property (Tr. Judgment, 12, 16).

Libya now contends that the Swiss court's denial of execution in Switzerland is equivalent to a setting aside or suspension of LIAMCO's arbitral award against Libya within the meaning of Article V(1)(e) of the New York Convention. Libya Br. 10-15. Based on this premise, Libya concludes

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that "since the purported award is not enforceable in Switzerland where it was rendered, it may not be confirmed in the United States pursuant to the Convention." Libya Br. 15.

Libya's argument, we submit, is bottomed on an invalid premise.[3/]

2. Article V(1)(e) provides a defense to enforcement only if the award "has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which * * * that award was made" (emphasis added). The burden of establishing this defense, like all other defenses under the Convention, is on the party resisting enforcement.[4/]

The judgment of the Swiss Federal Court refutes the contention that the conditions specified by Article V(1)(e) have been met. That judgment speaks only to one question: whether measures of execution to enforce an award rendered in Switzerland can be taken in Switzerland against foreign state property under Swiss domestic law (Tr. Judgment 12-13). The operative portion of the judgment does not invalidate the arbitral award but merely annuls the efforts made to levy against Libyan assets in Switzerland. Nowhere does the Swiss judgment vitiate the binding character of the award as between the parties and, in consequence, the judgment does not "set aside" or "suspend" the award within the meaning of Article V(1)(e). Indeed, the Swiss court gives no indication of any Libyan challenge to the validity of the award and treats it as fully binding throughout the judgment (see, e.g., Tr. Judgment at 9, 15).

3. The Swiss judgment does not implicate any international obligation of Switzerland and, specifically, any obligations assumed by Switzerland under the New York Convention. The judgment explicitly recites that it rests

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on Swiss municipal law and not on international law (Tr. Judgment 10, 12-14). Since the award was rendered in Switzerland, its enforceability in Switzerland was not governed by the Convention, which by the terms of Article I, paragraph 1 applies only "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." Furthermore, in ratifying the Convention, Switzerland made a declaration as contemplated by Article I, paragraph 3 of the Convention that it "will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State." 5/ Thus, confirmation and enforcement of this arbitral award under the Convention - in countries other than Switzerland - is an issue which is not affected by the Swiss decision.

The negotiating history of Article V(1)(e) shows that it was not the intent of the drafters to make enforceability in third countries contingent upon actual enforcement in the country where the award was rendered. On the contrary, the conclusion clearly emerges that third countries are under an obligation to enforce an award rendered in the territory of a member state regardless of the action or inaction of the enforcement authorities in that state, except in the narrow circumstances enumerated in Article V.

The drafters of the Convention considered and rejected alternative approaches that would have established a more direct linkage between enforcement action in the state where the arbitration took place ("rendering jurisdiction") and enforcement action in other Contracting States. In particular, the drafters rejected a "double exequatur" system, that is, a requirement that the award be submitted to judicial confirmation first in the rendering jurisdiction before recognition or enforcement could be granted in another

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Contracting State. 6/ Their clear intent was to require enforcement in Contracting States, even though enforcement had not been obtained in the rendering jurisdiction or had been denied there for reasons unrelated to the validity of the award. By rejecting the double exequatur, the drafters intended to minimize the procedural complications and delays that would result from requiring judicial proceedings in a jurisdiction where, for example, there might be no assets available for execution. 7/

Significantly, Switzerland played a major role in the evolution of the present formulation of Article V(1)(e) and the rejection of the competing "double exequatur" approach. The Swiss Government commented on an earlier draft "double exequatur" formulation as follows:

> We would therefore prefer a provision requiring only negative proof, the onus being on the party opposing enforcement. This shift of the burden of proof seems all the more justified as in his suit for recognition and enforcement, the applicant's task is in any case hard enough * * *. [Emphasis in original.] 8/

It is also noteworthy that on several occasions during the deliberations on the draft Convention, Switzerland expressed the view that enforcement in third countries should in no way depend upon enforcement in the rendering jurisdiction. For example, in its general remarks on the draft prepared by the United Nations Economic and Social Council, Switzerland said:

> This draft Convention will serve no useful purpose unless it represents a marked advance over the Convention on the Execution of Foreign Arbitral Awards of 26 September 1927. Such an advance is possible only to the extent that international arbitral awards are made more independent of the law of the country in which the arbitration takes place. [Emphasis added.] 9/

Subsequently, at the United Nations Conference on International Commercial Arbitration the Swiss delegate stated:

> The new Convention had to go much further than the 1927 Convention -- that was the

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> whole purpose of the Conference -- and in particular the requirement of a double *exequatur* had to be eliminated. * * * Therefore, his delegation was submitting an amendment (E/CONF.26/L.30), which omitted any reference to the recourse open to the parties in the country where the award had been made. 10/

Though the exact wording of the formulation ultimately adopted differs somewhat from the Swiss amendment, its submission goes far to negate the Libyan contention that Switzerland would expect the United States to refuse enforcement of the award simply because execution was not granted in Switzerland.

The unequivocal rejection of the "double exequatur" approach by the drafters of the Convention leaves Article V(1)(e) with a clear but limited function. That provision is not triggered where a court in the rendering jurisdiction has not been asked to annul or suspend the award, or has ruled on an issue other than the binding effect of the award on the parties. Rather, it comes into play only where the validity of the award itself has been successfully challenged. In consequence, if no successful challenge to validity of the award is made in the rendering state, the award must be regarded as valid in other Contracting States.

Although, as noted earlier, Libya resisted execution on the award in the rendering jurisdiction, it did not challenge its validity there. Indeed, its failure to attack the validity of the award in Switzerland must be taken as tacit acknowledgement of the unimpeachability of the award and, hence, the inapplicability of Article V(1)(e).

4. In view of the foregoing, Libya's assertion that "there is obviously no treaty obligation to honor an award which is unenforceable in the rendering jurisdiction" and that enforcement would be a "potential affront to Switzerland" (Libya Br. 15) is devoid of substance. The obligation to

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maintain the integrity of the Convention's enforcement framework is not owed to Switzerland on a bilateral basis, but to all members of the system. As a practical matter, the country in which an award is rendered may have only an attenuated relationship to the parties or to the transaction involved in the arbitration. As we have noted earlier (supra, p. 6), the rendering jurisdiction itself - unlike all other Contracting States - assumes no obligation to apply the Convention to an award rendered in its territory.[11/] Contrary to Libya's contention, the United States' treaty obligation is wholly independent of the Swiss court's action under Swiss municipal law.

The reciprocity concept embodied in the Convention[12/] and in the terms of the U.S. accession to the Convention[13/] does not detract from the foregoing conclusion. Clearly, the reciprocity relates to the overall scope of the obligations of the parties and not to the enforcement of any particular award. Since the award was rendered in Switzerland - in the territory of a contracting state that has assumed reciprocal international obligations toward the United States and other Contracting States with respect to arbitral awards granted in the territory of other Contracting States - United States courts must apply the Convention to confirm the award.[14/] Thus, the circumstance that Swiss domestic sovereign immunity law bars execution of the award in Switzerland is irrelevant to the issue whether the award is subject to confirmation here.

CONCLUSION

For the foregoing reasons, we submit that Article V(1)(e) of the Convention has no application to the present case, and that the award should be confirmed as mandated by

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the Congressional Act implementing the New York Convention, 9 U.S.C. 207.

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1/ A copy of the judgment in the German language, together with an English translation, was lodged with the Court by an order issued by the Clerk of this Court on September 10, 1980; we shall hereafter refer only to the translation of the judgment ("Tr. Judgment").

2/ Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997 ("New York Convention"), reads in pertinent part as follows:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> * * * * *
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

3/ We note in passing that, unlike in the proceedings in Switzerland, no issue of execution on the award in the United States is raised in the present posture of these proceedings. LIAMCO's complaint sought a confirmation of the award, i.e., an in personam judgment against Libya on the award. Joint Appendix 7. To the extent that LIAMCO's prayer also sought an order permitting attachment and execution on such judgment (para. 2 of the prayer for relief; ibid.), the grant of such relief would have been manifestly premature in view of the express provision of the Foreign

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Sovereign Immunities Act, 28 U.S.C. 1610(c), which reads as follows:

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

4/ See Brief for the United States as Amicus Curiae, n. 4, and accompanying text. See also Domke, The United Nations Conference on International Commercial Arbitration, 53 Am. J. Int'l L. 414, 416 (1959) ("The burden is now * * * on the losing party to prove that the award has not become 'binding' or has been set aside or suspended.").

5/ A similar declaration was made by the United States at the time of its accession. See n. 13, infra.

6/ As one authoritative commentator has noted, "The text and the preparatory works (Part III.C (E/CONF. 26/SR. 17 and 23 especially)) make it clear that it is not necessary that the award should have been declared to be enforceable according to the law, whether local or not, under which it was made." G. Gaja, International Commercial Arbitration - New York Convention §I.C.4 (1978) (hereafter "Gaja").

7/ In explaining the arguments against double exequatur, the Netherlands delegate said: "such an exequatur was an unnecessary complication, as it involved the requirement that an arbitral award should be operative in a country in which its enforcement had not been requested. * * * The judge in the country of enforcement must be given complete latitude either to grant an exequatur immediately, if he considered that there was no reason to refuse it, or to await the outcome of proceedings for its annulment instituted in the country in which it had been made." E/CONF. 26/SR.11, reprinted in Gaja, supra, at p. III.C.87.

8/ U.N. Doc. E/2822, reprinted in Gaja, supra, at p. III. A.2.16.

9/ Id., at p. III.A.2.5.

10/ U.N. Doc. E/CONF.26/SR.11, reprinted in Gaja, supra, at p. III.C.92. In the same intervention, id. at p. III. C.91, the Swiss delegate supported the position that the burden of proof should be on the party resisting enforcement.

11/ A state applies the Convention to enforcement of an award rendered in its own territory only when some feature of the award is "not considered as domestic" in that state. For example, in some civil law countries (but not in Switzerland) an award rendered in a country's territory might not be considered domestic if the parties were of foreign nationality or if the proceedings were governed by foreign procedural law. McMahon, Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States, 2 J. Mar. L. & Comm. 734, 739-42 (1971).

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12/ Article XIV of the Convention reads as follows:

> A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

13/ At the time of its accession, the United States made the following declaration under Article I, paragraph 3:

> The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.

14/ The United States would similarly expect Switzerland to confirm and enforce awards rendered in this country.

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LIBYAN AMERICAN OIL CO. V. SOCIALIST PEOPLE'S ARAB REPUBLIC OF LIBYA
Svea Court of Appeals June 18, 1980, 20 I.L.M. 893 (1981)
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Transnational Contracts, para. 12.03.

Immunity from Execution; Waiver

Decision of June 18, 1980 in Case No. Ö 264/79

Libyan American Oil Company vs. Socialist People's Arab Republic of Libya

Request for execution of an arbitral award rendered in Switzerland on April 12, 1977

DECISION OF THE COURT OF APPEALS

In accordance with Article 9(3) of the Act (1929:147) concerning Foreign Arbitration Agreements and Awards, the Court of Appeals orders that the arbitral award rendered in Switzerland on April 12, 1977, between the Libyan American Oil Company and the Socialist People's Arab Republic of Libya may be executed as a binding Swedish judgment.

ARGUMENTS

The Libyan American Oil Company, referred to below as Liamco, has requested execution of the arbitral award.

The Socialist People's Arab Republic of Libya, referred to below as Libya, has argued firstly that Liamco's application should be denied on the grounds that it was not correctly served on Libya and that Libya has a right of immunity. Secondly, Libya has contested the application on the grounds that the award disposed of an issue which under Swedish

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