

# SOVEREIGN IMMUNITY ISSUES IN U.S. CASES INVOLVING INSURANCE AND REINSURANCE

By Edward K. Lenci<sup>1</sup>

## I. Introduction

It may come as something of a surprise to those attending this conference that the sovereign immunity of agents and instrumentalities of foreign states is a “hot” topic in transnational insurance and reinsurance disputes.<sup>2</sup> In fact, several of the key judicial decisions concerning sovereign immunity in international commercial arbitrations involving foreign sovereigns arose from reinsurance disputes.<sup>3</sup> Moreover, it is fitting that this presentation is taking place in South America because most of the cases which will be discussed below, in Section III, involved insurers or reinsurers which were instrumentalities of South American nations, predominantly Argentina, Brazil, and Uruguay. Before turning to those cases, however, an introduction to the topic of sovereign immunity and the U.S. Foreign Sovereign Immunities Act (“FSIA”) is necessary, and that follows now in Section II.

## II. Sovereign Immunity and FSIA

### A. The Absolute and Restrictive Views of Sovereign Immunity

The “absolute view” of sovereign immunity, to which the U.S. adhered until the 1950s, was set forth in the early days of the republic in the U.S. Supreme Court’s decision in *The Schooner Exchange v. M’Fadden*, 11 U.S. (7 Cranch) 116 (U.S. 1812), authored by the eminent Chief Justice John Marshall. In that case, a naval vessel owned by the Empire of France had been seized, while it was in port in Philadelphia, pursuant to a court order issued at the request of two persons who claimed that the ship was theirs and had been unlawfully seized by the French navy several years before. The U.S. Attorney for Philadelphia appeared in the case on behalf of the U.S. government to request that the writ of attachment be quashed on the grounds that it was improper to attach the property of a foreign sovereign nation. Ultimately, the case came before the Supreme Court, which agreed with the U.S. government and elaborated, in the florid language of the time, the principles underlying absolute sovereign immunity:

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<sup>1</sup>©2015 Edward K. Lenci. All Rights Reserved. Lenci is a partner in the New York City office of Hinshaw & Culbertson LLP and a Co-Chair of the Insurance/Reinsurance Committee of the New York State Bar Association’s International Section. He received his J.D. from Columbia Law School. He represented U.S. parties in cases discussed later in this article, namely, *Banco de Seguros del Estado v. Mutual Marine Office, Inc. et al.*, 344 F.3d 255 (2d Cir. 2003), and *Skandia America Reinsurance Corporation v. Caja Nacional de Ahorro y Seguro*, 1997 WL 278054 (S.D.N.Y. 1997).

<sup>2</sup>This paper is presented in conjunction with the panel entitled “Hot Topics in Transnational Insurance/Reinsurance” at the N.Y. State Bar Association’s International Section Seasonal Meeting, São Paulo, Brazil, October 14-17, 2015.

<sup>3</sup>See, e.g., J.H. Carter & J. Fellas, eds., *International Commercial Arbitration in New York*, Ch. 13, “Enforcing Awards Involving Foreign Sovereigns,” at 425-428 (Oxford Univ. Press 2010).

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

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This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

In 1949, in his 4<sup>th</sup> edition of *The Law of Nations*, the eminent Prof. James L. Brierly explained the absolute view to which England, too, adhered. He began his discussion as follows:

Reference has already been made to the immunities enjoyed by foreign public ships, but the immunities of a foreign sovereign are not confined to ships. There are, at any rate in the British view, two distinct rules on the matter: (1) that a foreign sovereign cannot be impleaded in any legal proceedings either against his person or for the recovery of specific property or damages, and (2) that property which he owns or which is in his possession or control cannot be seized or detained by legal process, whether he is a party to the proceedings or not.<sup>4</sup>

After addressing several relevant cases, Prof. Brierly concluded as follows:

...[I]t is probable that the rule of complete immunity is a more workable rule than any other. Some states, *e.g.* Belgium, distinguish between acts done in a sovereign and those done in a non-sovereign capacity, but this distinction is necessarily to some extent arbitrary and uncertain. Others, *e.g.* Italy, are apparently ready to infer a voluntary submission to the jurisdiction from equivocal acts such as the making of contracts within the jurisdiction, but there

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<sup>4</sup>James L. Brierly, *The Law of Nations*, at 194 (4<sup>th</sup> ed. Oxford Univ. Press 1949).

are dangers in acting on a merely ‘constructive’ submission. The real justification for the rule of the complete immunity of states from the jurisdiction of a foreign court, except in the event of a submission which is not only *real*, but is also made in the proceeding actually before the court, is that, generally speaking, the courts of one state cannot coerce another, nor, for reasons of public policy, is it desirable that they should try.<sup>5</sup>

Global developments at the time Prof. Brierly wrote this were, however, putting the traditional view to the test. By the second half of the 20<sup>th</sup> century, national governments the world over had become increasingly involved in activities of a decidedly commercial nature. Accordingly, after the Second World War, a “restrictive view” of sovereign immunity began to find favor outside the communist bloc. The most significant development came in 1952 when Jack B. Tate, Acting Legal Adviser of the U.S. State Department, distributed what is commonly known as “the Tate Letter,” in which the U.S. announced that, henceforth, it would follow a restrictive view of sovereign immunity. The Tate Letter stated in pertinent part as follows:

It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

The restrictive view of sovereign immunity would later be codified into U.S. law in 1976 in FSIA.

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<sup>5</sup>Id. at 197 (*italics in original*).

## **B. Key Provisions of FSIA**

### **1. What is a “Foreign State”?**

The appropriate starting point of this discussion is the definition of “foreign state” as used in FSIA. That definition is set forth in 28 U.S.C. § 1603(a-b), as follows:

For purposes of this chapter—

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

(b) An “agency or instrumentality of a foreign state” means any entity—

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

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

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

### **2. Subject Matter Jurisdiction**

Subject matter jurisdiction, as its name suggests, is the authority of a court to hear cases of a particular sort, *i.e.*, subject matter. Federal courts are of limited jurisdiction, so they cannot and will not hear a dispute if it does not fit within one of the statutory bases for subject matter jurisdiction set forth in Title 28 of the U.S. Code.

There are two provisions of Title 28 involving subject matter jurisdiction which expressly mention foreign states. One is 28 U.S.C. § 1330, which provides in pertinent part as follows:

(a) The [federal] district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

The other is 28 U.S.C. § 1332(a), which involves the type of subject matter jurisdiction which in the U.S. is called “diversity jurisdiction” because it requires diversity of citizenship between or among the parties to the lawsuit. 28 U.S.C. § 1332(a) provides as follows:

(a) The [federal] district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of [U.S.] \$75,000, exclusive of interest and costs, and is between--

(1) citizens of different States [*i.e.*, States of the United States];

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.<sup>6</sup>

### **3. Immunity**

#### **a. FSIA's Purpose**

As noted, FSIA codifies the restrictive view of sovereign immunity, and the statute's purpose is set forth in 28 U.S.C. § 1602, which provides as follows:

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

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<sup>6</sup>A further consideration when suing in a federal court is venue, which narrows the range of where a federal case can be brought. With reference to cases against a foreign state, 28 U.S.C. § 1391(f) provides as follows: “(f) Civil actions against a foreign state--A civil action against a foreign state as defined in section 1603(a) of this title may be brought-- (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; (2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title; (3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.”

**b. Immunity from Jurisdiction, and Exceptions to It**

Even if the court has subject matter jurisdiction under one of the foregoing provisions, that jurisdiction is further subject to 28 U.S.C. § 1604, which provides as follows:

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

For purposes of cases involving insurance and reinsurance, the most pertinent of the provisions referenced in 28 U.S.C. § 1604 is 28 U.S.C. § 1605(a), which provides exceptions to jurisdictional immunity. Those exceptions include situations where a foreign state, or an agent or instrumentality of one, has waived immunity, either expressly or implicitly, where the dispute arises from the foreign state's or its agent's or instrumentality's commercial activities,<sup>7</sup> and where the claimant seeks to enforce an agreement to arbitrate. 28 U.S.C. § 1605(a) provides in pertinent part as follows:

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

(1) in which the foreign state has *waived its immunity either explicitly or by implication* (italics supplied) notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a *commercial activity* (italics supplied) carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

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(6) in which the action is brought, either to *enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties* (italics supplied) with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for

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<sup>7</sup>The term "commercial activity" is set forth in 28 U.S.C. § 1603(d): "A '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."

the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

**c. Immunity from Attachment and Execution of Property, And Exceptions to It**

Among lawyers, the conventional wisdom is that obtaining a money judgment is one thing, but actually collecting a money judgment is quite another. Accordingly, in many cases, the plaintiff or claimant will seek attachment of assets before a judgment has been obtained. In that regard, 28 U.S.C. § 1609 provides as follows with respect to attaching the property, assets, *etc.*, of foreign states and their agents and instrumentalities:

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

As explained in further detail in Section III below, in the insurance and reinsurance context an important “existing international agreement[] to which the United States [was] a party at the time of enactment of [FSIA]” is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, commonly known as the New York Convention.<sup>8</sup> Additionally, 28 U.S.C. § 1610(a-b) provides other exceptions to immunity from attachment which are relevant to the instant discussion, as follows:

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

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

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

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

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or

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<sup>8</sup>21 U.S.T. 2517, 330 U.N.T.S. 38. The U.S. legislation enabling the New York Convention is set forth 9 U.S.C. § 201, *et seq.*

execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

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

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

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

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

As shown in Section III below, there is conflicting authority concerning whether the provisions of the New York Convention and the Inter-American on International Commercial Arbitration, commonly known as the Panama Convention,<sup>9</sup> dealing with posting of security in post-arbitral judicial proceedings constitute a waiver of immunity from attachment.

Finally, 28 U.S.C. § 1611(b)(1) needs to be kept in mind:

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if--

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver.

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<sup>9</sup>14 I.L.M. 336. The U.S. legislation enabling the Panama Convention is set forth 9 U.S.C. § 301, *et seq.*



#### **4. Service of Process**

Another consideration when suing a foreign state is service of process, which is addressed in 28 U.S.C. § 1608(b):

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

#### **5. Default Judgments**

FSIA provides that foreign states and their agents and instrumentalities are subject to entry of judgment by default, as provided in 28 U.S.C. § 1608(e):

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

#### **6. Extent of Liability**

Under 28 U.S.C. § 1606, foreign states and their agents and instrumentalities can be found “liable in the same manner and to the same extent as a private individual under like circumstances,” though they cannot be found liable for punitive damages:

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like

circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

### **III. Insurance/Reinsurance Cases**

#### ***International Surplus Lines Ins. Co. v. Certain Underwriters and Underwriting Syndicates at Lloyd's of London, 868 F. Supp. 923 (S.D. Ohio 1994)***

By way of background, in most states of the U.S. there is a statute which requires an insurer, and often a reinsurer, which is unauthorized to engage in the insurance business in that state to post money, bonds, or other security in an amount sufficient to satisfy a final judgment rendered against it before it will be allowed to enter an appearance, answer a pleading, move to dismiss, *etc.*, in a lawsuit brought against it in that state. Such statutes are modeled on the Unauthorized Insurers Process Act which the National Association of Insurance Commissioners, or NAIC, promulgated in 1948. Their purpose is to avoid requiring a successful plaintiff to pursue collection of a final judgment in a foreign nation where myriad obstacles could potentially be, and often are, placed in the path of collection.

Section 1213 of the New York State's Insurance Code is one such statute. In subsection Section 1213(a), "the [New York State] legislature declare[d] that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies." Section 1213(c)(1) sets forth the security requirement intended to remedy the problem:

(c) (1) Before any unauthorized foreign or alien insurer files any pleading in any proceeding against it, it shall either: (A) deposit with the clerk of the court in which the proceeding is pending, cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure payment of any final judgment which may be rendered in the proceeding, but the court may in its discretion make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding, or (B) procure a license to do an insurance business in this state. ...

Section 1213(d) of the New York Insurance Law puts the "teeth" into the foregoing security requirement:

(d) ...if the [unauthorized foreign or alien] insurer has failed for thirty days after demand prior to the commencement of the action to make payment pursuant to

the contract, and it appears to the court that such refusal was vexatious and without reasonable cause, the court may allow plaintiff a reasonable attorney's fee and include such fee in any judgment rendered in such action. Such fee shall not exceed twelve and one-half percent of the amount the court finds the plaintiff is entitled to recover against the insurer nor be less than twenty-five dollars. Failure of an insurer to defend any such action shall be prima facie evidence that its failure to pay was vexatious and without reasonable cause.

Another state statute based on the Unauthorized Insurers Process Act is Ohio Revised Code § Sec. 3901.18(A). It requires that “[b]efore any unauthorized foreign or alien insurer may enter an appearance in any court action ..., [it] shall: (1) Deposit with the clerk of the court ... cash or securities or file with such clerk ... a bond with good and sufficient sureties, ... in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in any such court action; (2) Procure a certificate of authority to transact the business of insurance in [Ohio].”

The Ohio statute was involved in the case now under consideration. There, Plaintiff International Surplus Lines Insurance Company (“ISLIC”), which had insured Owens Corning Fiberglass, sued a number of its reinsurers for reimbursement of their shares of the substantial sums it paid under the policies issued to Owens Corning. Among other issues, the Ohio federal district court considered a motion by three Latin American reinsurers – Banco de Seguros del Estado, Instituto Nacional de Reaseguros, and Instituto Resseguros de Brazil (“IRB”) -- which claimed that they were instrumentalities of foreign states and should be immune from posting security pursuant to Section 1609 of FSIA, that is, the section of FSIA that provides that instrumentalities of foreign states are immune from “attachment[,] arrest and execution” unless some exception to that immunity applies.

ISLIC did not dispute that Banco de Seguros del Estado and Instituto Nacional de Reaseguros were instrumentalities of foreign states and were immune from the reach of the Ohio statute. The court did not discuss why the requirement of Sec. 3901.18(A) of the Ohio Revised Code was an “attachment,” though it is likely it did not engage in a discussion of that issue because ISLIC seemed to have agreed it was. ISLIC disputed, however, IRB’s claim that it was an instrumentality of the government of Brazil because IRB’s evidence of such status was limited to a sworn declaration. The court agreed with ISLIC that a declaration alone failed to establish that IRB was “an organ of a foreign state or a political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof” (28 U.S.C. § 1603(b)(2)). Accordingly, IRB was required to post security.

***Concord Reins. Co. v. Caja Nacional de Ahorro y Seguro, 1994 WL 86401***  
**(S.D.N.Y. 1994)**

In this case, plaintiff Concord Insurance Company obtained an arbitral award by default against its reinsurer, Caja Nacional de Ahorro y Seguro (“Caja”), an instrumentality of the government of Argentina. Concord then commenced an action in federal district court in New York City and obtained, *ex parte*, an order of attachment of a bank account which Caja maintained at Banco de la Nación de Argentina in New York City. When the court issued the order of attachment, it apparently was unaware that Caja was an instrumentality of the

government of Argentina. One of Caja's officers thereafter wrote a letter to the court, advising that Caja was an instrumentality of Argentina. In consequence, the court gave Caja additional time to answer Concord's complaint, and Caja took the opportunity to move to vacate the order of attachment and dismiss the action for lack of subject matter jurisdiction.

The court began its analysis by rejecting Caja's claim of immunity from prejudgment attachment pursuant to Section 1611(b) of FSIA, which provides for the absolute immunity from attachment of a foreign state's "central bank" or "monetary authority." The court found that Caja "appeared to be an insurance and economic development agency, rather than a central banking agency[.]"

The court agreed with Caja, however, that it was immune from prejudgment attachment under Section 1610(d) of FSIA and had not waived that immunity. In so doing, the court rejected Concord's assertion that Article VI of the New York Convention, to which Argentina was a signatory, constituted a waiver of immunity from prejudgment attachment.<sup>10</sup> The court held that Article VI "concerns a situation in which the party against whom an [arbitral] award has been entered seeks affirmative relief from the court[,] [but] [t]hat situation is not at all the same as that here, in which the party that obtained an award seeks prejudgment security in a court of its own choosing." Accordingly, the court vacated the order of attachment and did not require Caja to post any security.

Finally, the court decided that, even though it had subject matter jurisdiction under 28 U.S.C. § 1330(b), because Section 1605(b) of FSIA provides that a foreign state lacks jurisdictional immunity in a case brought under the New York Convention to confirm an arbitral award, it lacked personal jurisdiction over Caja because Concord had not complied with the service requirements of Section 1608. Based on the finding that that it lacked personal jurisdiction over Caja, the court dismissed the action.

***Stephens v. National Distillers & Chem. Co., et al.*, 69 F.3d 1226 (2d Cir. 1995), amended (Jan. 11, 1996)**

In this case, the Kentucky Commissioner of Insurance, as Liquidator of Delta American Re Insurance Company, brought an action in a Kentucky state court against Delta's retrocessionaires seeking reinsurance recoverables. Among the retrocessionaires were several which were instrumentalities of foreign states. The case was removed to federal court in Kentucky and, on motion, the venue of the lawsuit was transferred to the federal district court in New York City. Upon transfer, the Liquidator requested that all the retrocessionaires post security under Section 1213(c) of the New York Insurance Law. The magistrate judge decided that the retrocessionaires other than those which were instrumentalities of foreign states had to post security, but that FSIA forbade imposing the security requirement on the instrumentalities of foreign states. The magistrate rejected the Liquidator's arguments that pre-answer security requirement was not an attachment forbidden by FSIA Section 1609 and that the McCarran-

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<sup>10</sup>Article VI provides as follows: "If an application for the setting, aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

Ferguson Act, which leaves insurance regulation primarily to the states,<sup>11</sup> pre-empted FSIA. The district judge accepted the magistrate's decision, and the Liquidator appealed to the U.S. Court of Appeals for the Second Circuit.

With respect to the Liquidator's first argument, that the pre-answer security requirement was not an attachment forbidden by Section 1609, the Second Circuit first found that there was no relevant international agreement pre-dating the enactment of FSIA and that none of the exceptions of FSIA Sections 1610-11 applied. As to the whether the security was an attachment for purposes of Section 1609, the Second Circuit held that it was, reasoning as follows:

...In *S & S Machinery [v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir.)], we explained that the "FSIA would become meaningless if courts could eviscerate its protections merely by denominating their restraints as injunctions against the negotiation or use of property rather than as attachments of that property," and we indicated that the FSIA's ban on pre-judgment attachment of assets should preclude "any other means to effect the same result." *Id.* .... The pre-judgment security requirement before us would force foreign sovereign retrocessionaires to place some of their assets in the hands of the United States courts for an indefinite period. During that time, the retrocessionaires would have no access to those assets. All this is precisely the same result that would obtain if the foreign sovereign's assets were formally attached. There is, therefore, no significant distinction between New York's security requirement and an attachment of the property.

The Second Circuit next rejected the Liquidator's contention, which was based on a footnote in the court's earlier decision in *Sperry International Trade, Inc. v. Government of Israel*, that New York's security was merely an enforcement mechanism for collecting judgments and not an attachment.<sup>12</sup> The Second Circuit's answer to the Liquidator's effort to draw this distinction was as follows:

Neither *Sperry* nor the FSIA ... makes this distinction. Rather, the FSIA forbids any "attachment[,] arrest or execution" of a foreign sovereign's property subject only to the exceptions set forth in §§ 1610-1611. And we are not at liberty to create other exceptions, not in the statute. We ought not, moreover, readily ignore our conclusion in *S & S Machinery* -- which postdated *Sperry* -- that the principle behind the prohibition against attachments should apply broadly. For, as we noted in that case, "such a measure could only result[ ] in the disingenuous flouting of the FSIA ban on prejudgment attachment of assets." *S & S Machinery*, 706 F.2d at 418.

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<sup>11</sup>15 U.S.C. §§ 1011-1012. As explained in *Stephens*, McCarran-Ferguson leaves regulation of insurance primarily to the individual states. *Stephens*, 69 F.3d at 1227-28. It provides, *inter alia*, that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

<sup>12</sup>*Sperry International Trade, Inc. v. Government of Israel*, 689 F.2d 301, 305-06 n. 7 (2d Cir.1982).

With respect to the Liquidator’s argument that the McCarran-Ferguson Act pre-empted FSIA, the Second Circuit decided that, despite the wide recognition of McCarran Ferguson’s broad reach, FSIA nonetheless trumped it. The Second Circuit advanced two reasons for this view. First, it likened the importance and pre-emptive effect of FSIA to that of Title VII of the U.S. Civil Rights Act of 1964, which was held already to pre-empt McCarran-Ferguson:

The Supreme Court, like every circuit that has considered the question, has read the FSIA as providing the exclusive means for suing a foreign state, and thus as preempting all other laws purporting to set forth rules for suits against foreign sovereigns. [citations omitted]. ... The FSIA’s language, moreover, supports the interpretation that it means to preempt state law. *See, e.g.*, 28 U.S.C. § 1602 (“Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.”); *id.* § 1604 (“Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.”). And the preemptive intent of this language is confirmed by the report of the House Judiciary Committee on the FSIA, which states that the statute “sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity,” and “to preempt any other State or Federal law ... for according immunity to foreign governments.” 1976 U.S.C.C.A.N. at 6610.

The court added that just as “it would defy common sense and congressional policy to exempt the insurance industry from the[] reach [of civil rights laws],” so, too, there are limits to McCarran-Ferguson’s application vis-à-vis FSIA, which “reflects an equally important concern – foreign policy.”

The second reason for the court’s holding that FSIA pre-empts McCarran-Ferguson was that, when the latter was enacted in 1946, the absolute view of sovereign immunity still held sway in the U.S. and the court could find nothing in McCarran-Ferguson or its legislative history to suggest an intent to change that:

Prior to the enactment of the FSIA ..., a foreign sovereign retrocessionaire would have been exempt from the requirements of New York Insurance Law § 1213(c)(1) because of the international law rule, accepted by federal common law, that the property of foreign sovereigns was absolutely immune from attachment. The FSIA did not alter that rule, other than to create the exceptions contained in §§ 1610-1611. The McCarran-Ferguson Act, by its plain terms, provides that “[n]o act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . unless such Act specifically relates to the business of insurance.” 15 U.S.C. § 1012(b) (emphasis added). But it was not an “act of Congress” that superseded New York insurance law. International law, accepted by federal common law, had already done that before the FSIA came into being. And the McCarran-Ferguson Act did not by its terms or in its history purport to overturn any pre-existing international or common law. ...

***Skandia America Reins. Corp. v. Caja Nacional de Ahorro y Seguro, 1997 WL 278054 (S.D.N.Y. 1997)***<sup>13</sup>

In this case, Skandia America Re commenced arbitration against its retrocessionaire, Caja, the same defendant from the *Concord* case discussed earlier. Caja ignored the arbitration demand, so Skandia exercised its right under the contracts to appoint Caja's arbitrator. Once the panel was in place, it scheduled a hearing, but Caja failed to appear. The panel entered an arbitral award by default and Caja failed to pay the amount due under it. Skandia then petitioned the U.S. District Court for the Southern District of New York for confirmation of the award and the entry of judgment.

At this point, Caja attempted to file with the court an opposition to Skandia America Re's petition. Skandia requested that, under Section 1213(c) of the N.Y. Insurance Law, Caja must post security in an amount equal to what the panel awarded and that, under Section 1213(d), if Caja failed to do so, it should be deemed to have defaulted and be required to pay a portion of Skandia's attorneys' fees.

Caja responded that, under the Second Circuit's holding in *Stephens*, it was immune from posting security. Skandia had two answers to that. The first was that because both the U.S. and Argentina were parties to the New York Convention, which was an "existing international agreement[]" to which the United States [was] a party at the time of enactment of [FSIA]," Caja's immunity was "subject to" the Convention, including Article VI which permits a court to require pre-judgment security. The second was that Article VI of the Convention as well as Article 6 of the Panama Convention<sup>14</sup> (Argentina and the U.S. were parties to the latter also) constituted express waivers of immunity.

The Court first recognized that, under New York law, an insurer or reinsurer which fails to post security in accordance with Section 1213(c) can be found in default, *i.e.*, to have, in the language of Section 1213(d), "fail[ed] ... to defend any such action," which is "prima facie evidence that its failure to pay was vexatious and without reasonable cause." The Court then addressed Caja's contention that, under *Stephens*, it was immune from the requirement of Section 1213(c). The court distinguished *Stephens* because it "did not involve an arbitration action, and the court in *Stephens* specifically stated that there was no relevant treaty that predated the FSIA or that would preempt the provisions of the FSIA. 69 F.3d at 1229. Section 1609 of the FSIA explicitly states that the FSIA is 'subject to existing international agreements to which the United States is a party at the time of enactment of this Act.'"

With *Stephens* distinguished, the court moved to "the question [of] whether the New York Convention, to which both Argentina and the United states are signatories, was an 'existing' international agreement, and, if so, whether it allows this Court to order the posting of

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<sup>13</sup>As noted earlier, the author represented Skandia America Re in this case.

<sup>14</sup>Article 6 of the Panama Convention provides as follows: "If the competent authority mentioned in Article 5. 1. e has been requested to annul or suspend the arbitral decision, the authority before which such decision is invoked may, if it deems it appropriate, postpone a decision on the execution of the arbitral decision and, at the request of the party requesting execution, may also instruct the other party to provide appropriate guaranties."

pre-judgment attachments.” The court found that the New York Convention was indeed an “existing international agreement[ ]to which the United States [was] a party at the time of enactment of [FSIA]” and that “Article VI of the New York Convention allows me to require sovereigns to post pre-judgment security if they move to set aside or suspend an arbitration award, which would allow me to order the posting of pre-judgment security pursuant to N.Y. Ins. Law § 1213(c).”

As noted earlier, the same court (though not the same judge of that court) had held in *Concord Insurance* that Article VI “concerns a situation in which the party against whom an award has been entered seeks affirmative relief from the court” but not a “situation ... in which the party that obtained an award seeks prejudgment security in a court of its own choosing.” This time around, the court found that Caja’s own submissions in opposition to Skandia America Re’s petition to confirm the award were tantamount to seeking affirmative relief from the court, namely, suspension of the award:

Article VI of the New York Convention ... allows a competent authority to order the respondent to post suitable security only if the respondent makes an “application for the setting aside or suspension of the award...” In one of respondent’s later letters, respondent argues that it is not moving for the “setting aside or the suspension of the award” as required by Article VI of the New York Convention. ... On this point, respondent’s papers are internally inconsistent. In one part of respondent’s objection to the petition respondent appears to challenge only the prejudgment interest and attorney’s fees. However, elsewhere, respondent argues that petitioner’s petition is *per se* deficient because petitioner failed to submit the original award or a duly certified copy thereof as required under Article IV(1) of the New York Convention. Finally, in another section of its opposition, respondent argues that “judgment on the petition must be denied because Skandia seeks relief that may not be granted in this proceeding.” ... Therefore, in light of these contradictory statements, the fact that respondent has failed to pay the award as ordered, and the Second Circuit Court of Appeals’ direction to interpret the New York Convention broadly, I find that respondent has in effect moved to suspend the award.

Because the district court found that the New York Convention permitted it to require a pre-judgment attachment by way of security, the court did not actually reach Skandia’s other argument, that Article VI of the Convention constituted an actual express waiver of immunity from such an attachment. The court suggested in a footnote, however, that it would not find that Article VI was an express waiver of immunity.

As a post-script to the court’s decision, Caja did not post security as the court ordered and so the federal court entered a judgment by default which stated in pertinent part as follows:

RESPONDENT, Caja, having failed vexatiously and without reasonable cause to pay the amount awarded by the arbitration panel and to answer, respond or otherwise move with respect to the Petition, despite timely and proper service thereof; it is hereby



ORDERED, ADJUDGED AND DECREED that Odyssey<sup>15</sup> shall recover of Caja the sum of US\$394,462.19, plus interest of 9% simple interest per annum from August 11, 1995, or US\$96,486.53 as of today; and it is further hereby

ORDERED, ADJUDGED AND DECREED that Odyssey shall recover of Caja cost of US\$120; and it is further hereby

ORDERED ADJUDGED AND DECREED that Odyssey shall recover of Caja the sum of US\$61,016, being 12.5% of the amount of the award plus 9% simple interest per annum form August 11, 1995, as attorneys' fees pursuant to Section 1213(d) of the New York Insurance Law....<sup>16</sup>

The court's finding that Caja had "failed vexatiously and without reasonable cause to pay the amount by the arbitration panel and to answer, respond or otherwise move with respect to the Petition" authorized the court to award attorneys' fees in accordance with Section 1213(d) of the New York Insurance Law. That statute, as noted, provides that if an unauthorized foreign insurer refuses to make payment pursuant to an insurance, or reinsurance, contract and the court, in the action thereafter commenced against the foreign insurer or reinsurer, finds "that such refusal was vexatious and without reasonable cause," a finding which may be based simply on the "[f]ailure ... to defend any such action," the court may award a reasonable attorney's fee as part of the judgment.

***Employers Ins. of Wausau v. Banco de Seguros del Estado, 199 F.3d 937 (7th Cir. 1999)***

Here, the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's decision, made pursuant to the Panama Convention, to confirm an arbitral award which was entered by default against Banco de Seguros del Estado of Uruguay. The district court held that, by complying with the "service of suit" provisions of the reinsurance contract, which designated both a law firm and the Wisconsin Commissioner of Insurance as the reinsurers' agents for the service of process, service was made "in accordance with any special arrangement for service" (28 U.S.C. § 1608(b)(1)). On appeal, Banco de Seguros apparently conceded that the motion to confirm the award complied with FSIA's service requirements, but continued to dispute, *inter alia*, compliance with FSIA vis-à-vis notice of the arbitration itself and the petition to compel arbitration. The Seventh Circuit addressed the issue of FSIA's service requirements as follows:

Banco's attempts to shield itself beneath the procedural requirements of the FSIA merely obfuscate the real issue of notice. Banco seems to believe that any improprieties in Wausau's service of the motion to compel arbitration relieve

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<sup>15</sup>By the time judgment was entered, Skandia America Re had become Odyssey America Reinsurance Corporation.

<sup>16</sup>A copy of this Judgment is included with the materials the author has submitted for this conference. By way of providing an interesting contrast of approaches to the issue of attorney's fees awardable under Section 1213(d), also included with the materials the author has submitted for this conference is an earlier decision from the bench, in *Skandia America Reinsurance Corporation v. Seguros La Republica*, 96 Civ. 2289 (SS) (S.D.N.Y. September 20, 1996), by then District Judge Sonia Sotomayor, who is now a Justice of the U.S. Supreme Court and, moreover, the first person of Latin American ancestry to hold that esteemed office. The author represented Skandia America Re in the *Seguros La Republica* case.

Banco of notice of the arbitration. Instead, such an impropriety would render Banco immune to the action compelling parties to arbitrate. Wausau admittedly did not serve Banco with a summons, so might not have been able to compel Banco into arbitration.

... By agreeing to the arbitration provision in its [reinsurance] [t]reaty, Banco agreed to submit itself to the decision made by any arbitrators empaneled pursuant to the arbitration clause. Banco is bound to the arbitral award not by the motion to compel arbitration, but by the language of the [contract] that it made with Wausau.

Banco, of course, could have retained immunity from any proceedings to confirm the award had Wausau not served notice of the motion to confirm an arbitration award. However, Wausau properly served notice of the motion to confirm, and we must confirm the award regardless whether Banco could have been forced to participate in the arbitration. See 9 U.S.C. § 207 ... We have already determined that Banco had notice as required by Article V(1)(b) of the [Panama] Convention, and any fault in Banco's inability to appear at the arbitration rests with Banco's designated agents, not with Wausau. Absent any grounds for refusal of recognition of the award, we are compelled by the [Panama] Convention to confirm it.

Banco de Seguros argued also that the award was defective because it was entered by default without compliance with the default provision of FSIA, set forth at 28 U.S.C. § 1608(e). The Seventh Circuit answered as follows:

Banco also obfuscates the issue of notice by claiming that the arbitration award was, in effect, a default judgment, so the requirements of §1608(e) of the FSIA must be met. Section 1608 requires that any claimant of a default judgment establish his right to relief "by evidence satisfactory to the court." §1608(e). However, § 1608(e), like the rest of the FSIA, refers to judicial proceedings. Wausau never sought a default judgment against Banco; instead it seeks to confirm an arbitral award in the manner provided by the FSIA. Section 1608(e) does not apply.

***Home Ins. Co. v. Banco de Seguros del Estado*, 1999 U.S. Dist. Lexis 22478 (S.D.N.Y. 1999)**

In this case, the arbitration panel issued an interim arbitral award that, *inter alia*, required Banco de Seguros, the reinsurer of the Home Insurance Company, to post security to secure any final award which could ultimately be issued in favor of Home. Banco de Seguros refused to comply with the security requirement. Home then sought confirmation of that award under the Inter-American Convention, and Banco de Seguros cross-petitioned for vacatur of the award.

One of the bases for vacatur which Banco de Seguros advanced was that the award requiring security was in "manifest disregard of the law." The district court answered as follows:

As the question before the Court is whether the arbitrators acted in “manifest disregard of the law,” the Court need not pronounce authoritatively upon respondent’s claim. Instead, the role of the Court is to evaluate whether “the governing law alleged to have been ignored by the arbitrators [was] well defined, explicit, and clearly applicable.” *Merrill Lynch[, Pierce, Fenner & Smith v. Bobker]* 808 F.2d [930,] 934 [2d Cir. 1986]. Respondent’s FSIA arguments do not meet this standard. Although respondent points to one decision holding that it falls under the immunity provisions of the FSIA, see *Internantional Surplus Lines Ins. Co. v. Certain Underwriters & Underwriting Syndicates at Lloyd’s, London*, 868 F. Supp. 923, 927 (S.D. Ohio 1994) (“Thus, the Court finds that Banco Seguros Del Estado . . . [has] submitted sufficient evidence to establish [its] status as [a] foreign sovereign [] pursuant to the FSIA.”), there is countervailing authority on this point. See *Employers Insurance of Wausau v. Banco Seguros del Estado*, 34 F. Supp. 2d 1115, 1119, 1999 WL 26483, at \*5 (E.D. Wisc. 1999) (“under the [FSIA], a foreign state has no immunity from a proceeding to confirm an arbitral award where the arbitration ‘is intended to take place in the United States.’”) (citing § 1605 (a)(6)(A)). As *Employers Insurance of Wausau* suggests, respondent waived its immunity by agreeing to arbitrate. Having agreed to enter arbitration, respondent cannot unilaterally control the terms of the arbitration by asserting FSIA immunity.

Furthermore, the Second Circuit has noted that “doubt exists” as to whether an order requiring posting of security is an “attachment” prohibited by the FSIA. See *Caribbean Trading & Fidelity Corp. v. Nigerian Nat’l Petroleum Corp.*, 948 F.2d 111, 114 (2d Cir. 1991). Analogous law allows pre-judgment attachments even against entities alleging a defense under the FSIA. See *Skandia America Reinsurance Corp. v. Caja Nacional de Ahorro y Segoro*, 1997 U.S. Dist. LEXIS 7221, 96 Civ. 2301 (KMW), 1997 WL 278054, at \*3-\*6 (S.D.N.Y. May 23, 1997). To be sure, *Skandia* examined the applicability of the New York Convention, rather than the Inter-American Convention. However, “Congress intended the Inter-American Convention to reach the same results as those reached under the New York Convention.” *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2d Cir. 1994). Because it is far from clear that the FSIA bars the relief ordered by the panel, the Court declines to find that the arbitrators acted in “manifest disregard” of the law.

***Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine*, 158 F. Supp. 2d 377 (S.D.N.Y. 2001), *aff’d sub nom. In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002)**

In this case, a reinsurer which was subrogated to the rights of its cedent filed a petition to confirm an arbitral award which had been issued against, *inter alia*, a state-owned entity. With respect to the issue of sovereign immunity, the district court held that FSIA’s arbitration exception did not, and was not intended to, abrogate the doctrine of *forum non conveniens* in the context of cases brought pursuant to the New York Convention. The district court considered, therefore, the various factors relevant to whether or not to dismiss based on *forum non*

*conveniens* and decided that dismissal was warranted.

The district court began the relevant analysis with the recognition that, “[a]t first glance, a plausible argument might be made that the [New York] Convention as applied under the FSIA -- requiring signatory countries to recognize and enforce foreign arbitral awards between private parties and sovereign states -- might limit in some way the authority of a federal court to decline jurisdiction on the basis of *forum non conveniens*.” The court concluded, however, that “the FSIA and *forum non conveniens* not only are compatible, they are complementary. ... If *forum non conveniens* were not applicable to actions under the FSIA, the federal courts would effectively be stripped of one tool that helps prevent this country’s judicial system from becoming the courthouse to the world, or an international court of claims.”

As to arbitration in particular, the district court explained:

The amendment of the FSIA in 1988, when Congress added the arbitration exception codified in § 1605(a)(6), has not altered the doctrine of *forum non conveniens* in FSIA cases. Section 1605(a)(6) states that a party may bring an action to confirm an award made pursuant to an agreement to arbitrate between a sovereign state and a private party if the award is or may be governed by a treaty or other international agreement in force in the United States calling for the recognition and enforcement of arbitral awards. *See* 28 U.S.C. § 1605(a)(6).

The Convention, as implemented by chapter two of the FAA, is exactly the kind of treaty which the arbitration exception contemplates. *See Cargill Int’l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1018 (2d Cir.1993). Chapter two requires that signatory states recognize and enforce foreign arbitral awards granted in other signatory states, unless there exists in the treaty one of the enumerated grounds for refusal of enforcement. *See* 9 U.S.C. § 201; Convention, Art. V.

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Moreover, actions arising under the Convention itself may be dismissed on the ground of *forum non conveniens*. (citations omitted). Considering that the Convention does not affect the application of *forum non conveniens*, it would be highly peculiar if the practical inclusion of chapter two of the FAA into the FSIA somehow worked to alter the apparently comparable harmony between the FSIA and the *forum non conveniens* doctrine.

The district court observed also that:

... FSIA’s arbitration exception was simply not intended to alter the FSIA so that one component of the Act abrogated the doctrine of *forum non conveniens* while other provisions, invested with no less standing and applicability, did not. Such a construction of the statute, would be extraordinary. To the contrary, the purpose of the 1988 amendment was not to fundamentally change the statute but to “fill the gaps” in the FSIA and “perfect the jurisdiction of the court”. 131 Cong. Rec. S5363–04 (statement of Senator Mathias on S. 1071).

***International Ins. Co. v. Caja Nacional de Ahorro y Seguro*, 293 F.3d 392 (7th Cir. 2002)**

Procedurally, this case involved facts similar to those involved in *Skandia America Re v. Caja*. International Insurance Company (“IIC”) obtained a default arbitral award against Caja and then sought confirmation of that award in a U.S. District Court in Illinois. Caja filed an answer with affirmative defenses. IIC moved for an order requiring Caja to post pre-judgment security pursuant to 215 ILCS 5/123(5), which is Illinois’s enactment of the Unauthorized Insurers Process Act, and Caja responded that it was immune from such a requirement under FSIA. The district court struck Caja’s answer and ordered it to post security and file a new answer. When Caja did not post security, the district court entered a default judgment, which Caja appealed.

The Seventh Circuit first addressed whether it had subject matter jurisdiction over the case. It concluded that while the Federal Arbitration Act itself does not provide an independent basis for federal subject matter jurisdiction, the Panama Convention, which is codified at 9 U.S.C. § 301 *et seq.*, provided the court with subject matter jurisdiction.

The court next addressed Caja’s claim that, as an instrumentality of a foreign state, it was immune from suit despite the court’s subject matter jurisdiction under the Panama Convention. The court rejected that claim, holding as follows:

Section 1605(a)(6)(A) of the FSIA provides that a foreign state or instrumentality is not immune from the jurisdiction of American courts in any proceeding to confirm an arbitral award where that foreign state or instrumentality agreed to submit to arbitration and the arbitration takes place in the United States. ... By agreeing to a contract designating Chicago, Illinois as the site of arbitration, even if it is a foreign instrumentality, Caja waived its immunity in a proceeding to confirm the arbitral award. *See* § 1605(a)(6)(A); *Employers Ins. of Wausau v. Banco De Seguros Del Estado*, 199 F.3d 937, 941 (7th Cir.1999). Accordingly, we conclude that we have federal question jurisdiction over this case under 28 U.S.C. § 1331, and that, if Caja is considered an instrumentality of a foreign state, we have jurisdiction under 28 U.S.C. § 1330(A).

The Seventh Circuit rejected, too, Caja’s claim that it had established a *prima facie* case that it was indeed an instrumentality of the government of Argentina. Caja had relied in the district court upon an affidavit of its U.S. attorney and an un-notarized affidavit of an Argentinean attorney, who both stated that Caja was an agency of the government of Argentina, and a document in Spanish, with an English translation, which purportedly indicated that the administration of Caja had been transferred to the government of Argentina. Despite finding that Caja had not established that it was an instrumentality of Argentina through such submissions, the Seventh Circuit, like the district court, assumed for the sake of argument that Caja was an instrumentality of Argentina for purposes of addressing, and ultimately rejecting, Caja’s arguments vis-à-vis its immunity from posting security.

With respect to immunity from posting security, the Seventh Circuit held that, by virtue of Argentina’s agreement to both the New York and Panama Conventions, Article VI of the

former and Article 6 of the latter constituted express waivers from immunity from posting of security. The Seventh Circuit first observed that, pursuant to Section 1610(d) of FSIA:

“[t]he property of a foreign state ... used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States ... if—(1) the foreign state has explicitly waived its immunity from attachment prior to judgment ..., and (2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.”

The court then turned to the Conventions themselves and held as follows:

...Article VI of the New York Convention states, “[i]f an application for the setting aside or suspension of the award has been made to a competent authority ... the authority before which the award is sought to be relied upon may, if it considers it proper, ... on the application of the party claiming enforcement of the award, *order the other party to give suitable security.*” 9 U.S.C. § 201, art. VI [emphasis in original]. Similarly, Article 6 of the Panama Convention states, “[i]f the competent authority ... has been requested to annul or suspend the arbitral decision, the authority ... at the request of the party requesting execution, may also *instruct the other party to provide appropriate guaranties.*” 9 U.S.C. § 301, art. 6 [emphasis in original]. The emphasized language of these Conventions allowing a court to impose a security requirement is very explicit. Thus the court-ordered pre-judgment deposit of security is clearly appropriate. *Cf., Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A.*, 210 F.3d 1309, 1312 (11th Cir.2000) (simple reference in contract to “attachment” covers both pre-judgment and post-judgment attachment, and therefore constituted explicit waiver under Section 1610(d)). Because Argentina signed the New York and Panama Conventions, it has waived the immunity protections of the FSIA for their [sic] instrumentalties.

The court held also that Section 1610(d)(2), too, was satisfied:

Section 1610(d)(2) requires that the purpose of attachment be to obtain security, not to obtain jurisdiction. As we have noted, personal jurisdiction over Caja was never an issue before the district court. Additionally, IIC’s motion for an order requiring Caja to post pre-judgment security expressly stated that it was seeking to “secure payment of any final judgment that may be rendered.” Finally, in light of the stated purpose of the Illinois statute in question that requires security sufficient to secure the payment of final judgment, *see* 215 ILCS 5/123(5), it is clear that the district court’s order complied with the requirement of Section 1610(d)(2).

Finally, the court concluded that the district court had acted within its discretion in requiring Caja to post security.

***Banco de Seguros del Estado v. Mutual Marine Office, Inc. and Mt. McKinley Ins. Co.*,  
344 F.3d 255 (2d Cir. 2003)**<sup>17</sup>

This decision of the U.S. Court of Appeals for the Second Circuit arose from two separate lawsuits. Both lawsuits concerned decisions by separate arbitration panels which ordered Banco de Seguros to post security in an amount sufficient to satisfy any final award against it. In both arbitrations, Banco de Seguros, despite the earlier holding against it in the *Home Insurance* case, again claimed that it was immune from that security requirement under *Stephens* and *S&S Machinery* and refused to post security, instead commencing the lawsuits for review of the arbitral orders. The district courts found against Banco de Seguros and it appealed to the Second Circuit. The Second Circuit consolidated the appeals and heard them as one because, although two different U.S. cedents and separate reinsurance contracts were involved, in both lawsuits Banco de Seguros was the reinsurer and the relevant contract language and the issues were the same.

The first issue the Second Circuit addressed was Mt. McKinley's assertion that sovereign immunity does not even apply in private commercial arbitration but, instead, only where a party seeks to sue a foreign state or an agent or instrumentality of a foreign state in the courts of another sovereign state.<sup>18</sup> The Second Circuit agreed that "[t]he language of [FSIA] and its legislative history do not suggest that the FSIA was intended to apply to private commercial arbitration[.]" but the court added that, "[w]e need not decide this issue, however, because Banco expressly waived any immunity it may have enjoyed to an award of pre-hearing security."

The Second Circuit began its analysis of the waiver issue by acknowledging that, under *Stephens*, requiring pre-answer security is an attachment for purposes of FSIA Section 1609 and that FSIA Section 1610(d)(1) requires that any waiver of that immunity be "explicitly" made. The court observed, however, that under its decision in *S&S Machinery*,

Section 1610(d)(1) does not require recitation of "the precise words 'prejudgment attachment' in order to waive immunity." ... Rather, a waiver of immunity from prejudgment attachment must be explicit in the common sense meaning of that word: "the asserted waiver must demonstrate unambiguously the foreign state's intention to waive its immunity from prejudgment attachment in this country."

The Second Circuit then held that the following clause of the reinsurance contracts – a clause, in fact, which is commonly found in the arbitration provisions of reinsurance contracts – constituted an explicit waiver of Banco de Seguros's immunity from attachment: "[t]he arbitrators shall consider this Treaty an honourable engagement rather than merely a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law." The Second Circuit found that, "[c]ourts have read such clauses generously, consistently finding that arbitrators have wide discretion to order remedies they deem appropriate." It elaborated:

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<sup>17</sup>The author represented Mt. McKinley Ins. Co. in this case.

<sup>18</sup>A copy of Mt. McKinley's appellate brief is among the materials submitted for this conference. The argument that sovereign immunity does not apply in private commercial arbitrations can be found at pp. 14-17 of it.

In *Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019 (9th Cir.1991), the Ninth Circuit held that an arbitral panel may order pre-hearing security in the form of an escrow account where the arbitration clause states, as here, that the arbitrators are “relieved of all judicial formalities and may abstain from following the strict rules of law.” *Id.* at 1025. Several district courts have agreed that such language confers a wide spectrum of powers on arbitral panels, including the power to award pre-hearing security. *See, e.g., British Ins. Co. of Cayman v. Water St. Ins. Co.*, 93 F.Supp.2d 506, 516 (S.D.N.Y.2000) (citations omitted) (confirming an arbitration panel’s interim order requiring reinsurer to post security before arbitration hearing); *St. Paul Fire & Marine Ins. Co. v. Eliahu Ins. Co. Ltd.*, 96 Civ. 7269, 1997 WL 357989, at \*7, 1997 U.S. Dist. LEXIS 8916, at \*25 (S.D.N.Y. June 26, 1997) (reading such language as enabling arbitrators to be “free to disregard New York substantive law”).

The Second Circuit held also that the panels did not exceed their authority, act in “manifest disregard of the law,” or violate public policy, all matters Banco de Seguros raised on appeal. As to the panel’s authority, the Second Circuit observed, *inter alia*, that, “[w]here an arbitration clause is broad, as here, arbitrators have the discretion to order remedies they determine appropriate, so long as they do not exceed the power granted to them by the contract itself. It is not the role of the courts to undermine the comprehensive grant of authority to arbitrators by prohibiting an arbitral security award that ensures a meaningful final award.”

With respect to Banco de Seguros’s claim of “manifest disregard of the law,” it was, as in *Home Insurance*, based again on the holding in *Stephens*. Here, in holding that the arbitration panels did not ignore a law which was “well defined, explicit and clearly applicable to the case[.]” the Second Circuit reconciled *Sperry* and *Stephens* with the explanation that *Stephens* “did not disavow the outcome in *Sperry* allowing the panel’s escrow award to stand,” noted that *Stephens*, as the federal district court had observed in *Skandia America Re v. Caja*, did not involve an arbitration, and cited *IIC v. Caja* and *Home* as cases where an arbitration panel’s interim award of security was upheld.

Finally, as to Banco de Seguros’s argument that the panels’ awards violated public policy and thus ran contrary to Article V of the New York Convention, the Second Circuit was “not persuaded” and agreed with one of the district court decisions under consideration that “the Panels’ interim orders did not ‘explicitly conflict’ with law and legal precedent” and that “Banco has simply recycled its contention that the Panels acted in manifest disregard of the law, this time as a public policy claim.”

***Allstate Insurance Co. v. Banco do Estado do Rio Grande do Sul*, 2004 WL 1398437 (S.D.N.Y. 2004)**

If the Second Circuit’s *Banco de Seguros v. MMO* decision represents something of a high water mark for the use of arbitration in thwarting assertions of sovereign immunity by foreign reinsurers, *Allstate Insurance Company v. Banco Do Estado do Rio Grande do Sul* demonstrates the limits to that approach.



In *Allstate*, a U.S. insurer had entered into a series of reinsurance contracts with a Brazilian entity, União Novo Hamburgo Seguros, S.A. (“União”). Those contracts required arbitration of any disputes arising from them in Illinois, where Allstate was based. At the time Allstate and União entered those contracts, Banco Do Estado do Rio Grande do Sul, S.A. (“Banrisul”), an instrumentality of the Federal Republic of Brazil, owned 88% of União’s stock, but Banrisul was not a party to the reinsurance contracts. About twenty years after Allstate and União entered those contracts, Banrisul, as part of a larger government program of privatization, sold its shares in União by public auction to a Brazilian insurer which was not state-owned. The agreements by which Banrisul sold its shares of União provided that Banrisul would reimburse the purchaser for any liabilities arising under various reinsurance contracts União had entered, including those with Allstate. The sale agreement apparently stated also that Banrisul had, prior to the sale, enjoyed “almost absolute power to control” União by virtue of its ownership of 88% of União’s shares.

Allstate initiated arbitration against União several years after Banrisul sold its União shares. União defaulted in those arbitrations, resulting ultimately in the entry of federal judgments against União based on the arbitral awards. When Allstate sought to collect on the judgments, União advised that Banrisul was responsible for payment of the judgments, referencing the terms of the União’s sale. Allstate then sued Banrisul and, after some procedural wrangling, Banrisul moved to dismiss for lack of subject matter jurisdiction based on its immunity to suit as an instrumentality of a foreign state.

In opposing Banrisul’s motion to dismiss, Allstate neither disputed that Banrisul was an instrumentality of a foreign sovereign nor asserted that the “commercial activity” exception of FSIA applied. Instead, it argued that União had acted as Banrisul’s agent when it entered the reinsurance contracts with Allstate and that União’s own waiver of sovereign immunity, by way of the arbitration provisions of those agreements, should be imputed to Banrisul. Allstate argued also that, because Brazil was a signatory to the Panama Convention, Brazil, and thus Banrisul, had waived sovereign immunity with respect to enforcement of the judgments that had been entered on the arbitral awards. The court rejected all these arguments.

With respect to Allstate’s argument that União was merely Banrisul’s agent, the court began with the observation that, under FSIA, agents and instrumentalities of foreign states “are accorded a presumption of independent status” which “...may be defeated ‘where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created[,]’ but that “stock ownership alone is insufficient to show that a subsidiary is an agent of its parent.” The court noted also that “[s]ufficient control can also be found through normal agency principles[.]” The court then found that Allstate did not adduce sufficient evidence to demonstrate either that Banrisul exercised extensive control over União or that the União was Banrisul’s agent. In particular, the court rejected Allstate’s citation to the statement in the agreement of sale that Banrisul had had “almost absolute power to control” because control via stock ownership alone “is not evidence of the type of control that is necessary to rebut the presumption of corporate separateness.” The court likewise rejected Allstate’s argument that Banrisul’s oversight of the privatization of its subsidiary demonstrated that Banrisul exercised the sort of control necessary to overcome the presumption of separateness because such oversight is similar to the conduct of any majority shareholder and is not out of the ordinary.

As to Allstate's argument premised on Brazil's agreement to the Panama Convention, the court rejected that argument for a variety of reasons. First, the court rejected Allstate's reliance on the Panama Convention for the simple reason that Banrisul was not a party to the reinsurance contracts which contained the agreements to arbitrate. Second, the court viewed Allstate's suit against Banrisul as merely an effort to by-pass the agreements of sale under which another entity was the owner of União and Banrisul was merely obligated only to indemnify the new owner. Third, the court discerned that Allstate was not attempting to confirm or enforce an arbitral award but, instead, was seeking to enforce a judgment, albeit one based on arbitral awards. Finally, the court distinguished the Seventh Circuit's decision *IIC v. Caja* because Allstate was not seeking to assert jurisdiction through an attachment and made no claim that Banrisul expressly waived immunity under Section 1610(d).

***Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek (Persero)*, 600 F.3d 171 (2d Cir. 2010)**

In this case, Anglo-Iberian Re sued Indonesia's state-owned social security insurer (Jamsostek) and the Republic of Indonesia, alleging negligence of the insurer's employees who perpetrated a reinsurance fraud which worked to Anglo-Iberia Re's detriment. The district court concluded that it lacked subject matter jurisdiction because the insurer's activities were not commercial in nature for the purposes of FSIA and did not fall within any other immunity under the statute. The Second Circuit agreed that Anglo-Iberian Re did not meet its burden to demonstrate that defendants were involved in a "commercial activity" as used in FSIA.

The Second Circuit began its analysis with the following explanation of what Anglo-Iberia Re had to prove:

In *Republic of Argentina v. Weltover*, 504 U.S. 607, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992), the Supreme Court explained that a foreign state engages in commercial activity "when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it," and thus, that sovereign immunity does not bar a suit "based upon a foreign state's participation in the marketplace in the manner of a private citizen or corporation." 504 U.S. at 614, 112 S.Ct. 2160. The Supreme Court reiterated this principle in *Saudi Arabia v. Nelson*, 507 U.S. 349, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993), wherein it explained that "a state engages in commercial activity [under the FSIA] where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns. Put differently, a foreign state engages in commercial activity for purposes of [the FSIA] only where it acts in the manner of a private player within the market." 507 U.S. at 360, 113 S.Ct. 1471 (internal quotation marks omitted); see also *Hanil Bank v. PT. Bank Negara Indonesia (Persero)*, 148 F.3d 127, 131 (2d Cir.1998).

Thus, to determine the nature of a sovereign's act, we ask not "whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives" but rather "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'"

*Weltover*, 504 U.S. at 614, 112 S.Ct. 2160; *see also Nelson*, 507 U.S. at 360-61, 113 S.Ct. 1471. We begin this inquiry by examining the act of the foreign sovereign that serves as the basis for the plaintiff's claim. *See Garb v. Republic of Poland*, 440 F.3d 579, 586 (2d Cir.2006) (identifying this as “a threshold step in assessing [a party's] reliance on the ‘commercial activity’ exception”).

The Second Circuit then concluded that Indonesia's state-owned social security insurer had not engaged in such “commercial activity”:

As the district court correctly found, Jamsostek “does not sell insurance to workers or to employers in any traditional sense” and does not otherwise compete in the marketplace like a private insurer. ...Rather, as the default health insurer under Indonesia's national social security program, Jamsostek “provides a general ‘floor’ for health insurance for all workers in Indonesia” and ensures that “Indonesian employers with at least ten employees” comply with the governmental mandate that they provide, at a minimum, basic health insurance coverage to their workers.

Thus, we agree with the district court that, for purposes of our analysis under *Weltover*, the nature of Jamsostek's hiring, supervision, and employment of Sartono and other employees is directly concerned with “employment in the provision of a governmental program of health benefits through collection of employer contributions and payroll deductions” and that “such employment is by nature non-commercial.”

The Second Circuit concluded also that, even had the insurer been engaged in a commercial activity, *Anglo-Iberian Re* “ha[d] not shown a sufficient nexus between [the insurer]'s alleged negligent supervision and its commercial activity for purposes of abrogating [the insurer]'s presumptive sovereign immunity under the FSIA.” The court explained:

We have made clear that “[t]he statutory term ‘in connection,’ as used in the FSIA, is a term of art, and we interpret it narrowly.” *Garb*, 440 F.3d at 587. As such, “acts are ‘in connection’ with ... commercial activity so long as there is a ‘substantive connection’ or a ‘causal link’ between them and the commercial activity.” *Id.* (internal quotation marks and alterations omitted); *see also Drexel Burnham Lambert Group Inc. v. Comm. of Receivers for A.W. Galadari*, 12 F.3d 317, 330 (2d Cir.1993) (declining to read § 1605(a)(2)'s “connection” language “to include tangential commercial activities to which the ‘acts’ forming the basis of the claim have only an attenuated connection”).

Here, we cannot conclude that [the insurer]'s alleged negligent supervision of Sartono and his colleagues was “in connection with” its provision of basic health insurance in Indonesia. The commercial reinsurance scheme that is said to have injured *Anglo-Iberia* was Sartono's alone and wholly unrelated to any negligent supervision by [the insurer] with respect to its insurance activities in Indonesia. Indeed, during the relevant time period, Sartono was relieved of his regular employment responsibilities, was unauthorized to conduct any

commercial reinsurance activities, and was prohibited from conducting Jamsostek business in Monaco, the United States, or elsewhere abroad. ... In addition, whatever assistance Sartono's [insurer]-based colleagues rendered to Sartono was provided solely at the direction of Sartono, primarily occurred off-premises, did not involve Jamsostek's business accounts, and was plainly unrelated to Jamsostek's administration of Indonesia's social security program. In essence, Anglo-Iberia faults [the insurer] for failing to stop Sartono from enlisting the help of a few of his [insurer] colleagues, some of whom claimed to be acting unwittingly, in establishing a fraudulent side business. The record, however, demonstrates nothing more than the barest connection between Anglo-Iberia's alleged injuries by Sartono and [the insurer]'s alleged negligent supervision of Sartono and others with respect to its social insurance activities in Indonesia.

***Moreira v. Ministerio de Economia y Produccion de la Republica Argentina, et al., 2012 WL 6178220 (S.D.N.Y. 2012)***

Jorge Moreira, Esq., was the New York lawyer who had represented a number of the Latin American insurers which had raised sovereign immunity in some of the aforementioned cases. After Mr. Moreira had won an arbitral award against his client, Argentinean reinsurer Instituto Nacional de Reaseguros ("INDER"), for unpaid attorneys' fees incurred in his representation of INDER in the United States, the Ministerio de Economia y Produccion de la Republica Argentina and INDER, which was owned by the Argentine government, caused criminal charges to be brought against him in Argentina, alleging that he overcharged them and engaged in fraudulent billing practices. Mr. Moreira responded to those charges by suing them in New York federal court for malicious prosecution. They successfully moved to dismiss based on FSIA.

The defendants' position was that, based on Mr. Moreira's allegations, which they did not actually dispute, their actions in Argentina against him involved purely a criminal prosecution and that, in fact, under Section 1605(a)(5)(B) of FSIA, foreign states and their instrumentalities are immune from suits in the United States for malicious prosecution. Mr. Moreira responded that his suit was "based upon a commercial activity carried on in the United States" because the criminal prosecution arose out of fees that INDER incurred in the United States. The court rejected Mr. Moreira's argument, explaining that "[t]he Supreme Court of the United States has ... interpreted the phrase 'based upon' very narrowly, focusing upon whether the particular activity at issue in the lawsuit is one that would be undertaken by a private party in a commercial transaction, rather than on the alleged motivation of the foreign state actor in engaging in the activity." The court held that "a state-initiated prosecution of which Plaintiff complains here is an activity that is not one that could have been undertaken by a private commercial entity."

Mr. Moreira argued also that the prosecution was "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]" The court rejected this argument because INDER's retention of Mr. Moreira occurred in the United States, not in Argentina, and INDER's decision in Argentina not to pay Mr. Moreira's invoices did not affect that fact. Furthermore, the court

reasoned, the act of which Mr. Moreira was complaining was not the refusal to pay his bills but, rather, the decision to prosecute him, which was not a commercial activity.

The court rejected, too, Mr. Moreira's claim that the earlier arbitration between him and INDER over the fee dispute, in which he prevailed, constituted an implicit waiver of immunity under Section 1605(a)(1) of FSIA. The court noted that that provision of FSIA must be construed narrowly and that any waiver must be "'unmistakeable' and 'unambiguous'" and held that "Defendants' consent to arbitrate the question of whether Plaintiff had overbilled in the context of his collection action is hardly an unmistakable and unambiguous waiver of their immunity from a separate tort suit seeking damages on account of Defendants' later initiation of a criminal prosecution relating to the billing in the Argentine courts."

***Pine Top Receivables of Illinois, LLC v. Banco de Seguros del Estado*, 771 F.3d 980 (7th Cir. 2014), cert. denied, 135 S. Ct. 2891 (2015)**

In this decision, the U.S. Court of Appeals for the Seventh Circuit held that the security requirement of Illinois's statute 215 ILCS 5/123, which, as noted, is an enactment of NAIC's Unauthorized Insurers Process Act, is an attachment for purposes of Section 1609 of FSIA. In reaching its decision, the Seventh Circuit discussed and agreed with the Second Circuit's decisions in *Stephens* and *S&S Machinery*, though the Seventh Circuit saw fit also to analyze independently the language of Sections 1609 and 1610 of FSIA in coming to the conclusion that Illinois's pre-answer security requirement, like New York's and Ohio's, is an attachment for purposes of FSIA. The Seventh Circuit concluded as follows:

We agree with the Second Circuit that the statutory term "attachment" has a broader meaning than that urged by Pine Top. In addition to our independent statutory analysis, we acknowledge, as the Second Circuit did, that not unlike many federal statutes incorporating different state procedures, a single unified term or group of terms stands as a placeholder for a generic understanding rather than a reference to a particular state-law procedural vehicle or historical practice. For that reason, *Stephens*' holding that the matter of whether a procedural requirement is barred by FSIA immunity should turn on that requirement's effect—rather than its procedural particulars—is one that makes sense of the statutory language. Accordingly, we conclude that the prejudgment security requirement of 215 ILCS 5/123(5) is an "attachment" under the FSIA.

As in *Stephens* and the Ohio district court's decision in *ISLIC*, the Seventh Circuit did not find that any exception to immunity from attachment applied. Nor did the Seventh Circuit agree that Banco de Seguros had waived immunity on the grounds that it had agreed in the reinsurance contracts to the posting of reserves and had transacted business in Illinois. In fact, the following observation stands somewhat in contrast with the more expansive view of waiver taken by the Second Circuit in *Banco de Seguros del Estado v. MMO*:

[A]ny "waiver" that we could discern either from the transacting of business with an entity in Illinois or from reserves clauses that do not speak to orders of preanswer security in judicial proceedings would not be "explicit," and therefore would not come within the statute's exemption. See

1610(d)(1); *S & S Machinery*, 706 F.2d at 416 (“[A] waiver of immunity from prejudgment attachment must be explicit in the common sense meaning of the term: the asserted waiver must demonstrate unambiguously the foreign state’s intention to waive its immunity from prejudgment attachment in this country.”).

In fact, the Seventh Circuit found plaintiff’s citation of the Second Circuit’s decision in *Banco de Seguros del Estado v. MMO* “unavailing” because

*Mutual Marine* reviewed an order by an arbitrator that Banco post security during arbitration proceedings. Banco challenged the order under the FSIA. The Second Circuit found an explicit waiver of immunity from attachment in contract language authorizing the arbitrator to abstain from following strict rules of law and to proceed without judicial formalities. Further, the contract at issue in *Mutual Marine* required Banco to obtain a letter of credit from a financial institution in order to secure its obligations. The court read these two provisions as demonstrating a “clear and unambiguous intent to waive all claims of immunity in all legal proceedings.” *Id.* at 261. *Mutual Marine* is also not analogous to our situation because the Second Circuit was employing a different standard of review: it could not overturn the arbitrator’s security requirement if there was any justification for the arbitrator’s decision. See *id.* at 260.

Finally, the Seventh Circuit rejected plaintiff’s assertion that the McCarran-Ferguson Act trumped FSIA, not because the court disagreed with that argument but, instead, because plaintiff apparently raised it too late. The Seventh Circuit gave no indication that it would have agreed with the Second Circuit’s holding in *Stephens* that it was FSIA that trumped McCarran-Ferguson.