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Transnational Law and Procedure: Decisions of the U.S. Court of Appeals for the Seventh Circuit

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In its many years of providing a review of decisions of the Seventh Circuit, the Chicago-Kent Law Review has never included a section dealing with decisions of the court in the area known as transnational or international law. Each year, however, the Seventh Circuit is compelled to take up a number of cases in this area, cases which in one way or another involve the legal systems of more than one country. These decisions merit some discussion.

At the outset, it should be noted that the terms "transnational law" and "international law" are misleading. Virtually all of the decisions in this area, in fact, involve issues of United States law. What distinguishes them, however, is their international or transnational aspects or ramifications.

During recent terms, the Seventh Circuit has decided a number of cases with a multinational dimension, involving issues of the proof of foreign law, subject matter jurisdiction over activities outside of the United States, extradition, sovereign immunity, international commercial arbitration and letters of credit.¹ This article will review those decisions of the Seventh Circuit. Unlike other articles in this symposium issue, this article will examine decisions from the last several terms of the court, to take account of the absence of an analysis of these cases from prior Seventh Circuit reviews.

I. JURISDICTIONAL MATTERS

During the past few terms, the Seventh Circuit has decided two cases that raised the question of the court's jurisdiction. *Tamari v. Bache & Co. (Lebanon) S.A.L.*,² was an action in which both the plaintiffs and the defendant were not citizens of the United States. The plaintiffs were citizens and residents of Lebanon. The defendant, a wholly owned sub-

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¹ A number of these decisions are in the area of immigration law; those decisions are not within the scope of this article and are consequently not included here.
sidiary of Bache & Co., Inc., a Delaware corporation, was a Lebanese corporation with its sole office in Beirut. The defendant received futures orders from the plaintiffs in Lebanon and transmitted them by wire to its parent corporation for execution on the Chicago Board of Trade and the Chicago Mercantile Exchange. The parent corporation, a member of both exchanges, then executed the contracts. All communications and meetings between the plaintiffs and the defendant regarding commodity futures contracts traded in the United States took place in Lebanon.

The plaintiffs filed suit in 1975 against both the parent corporation and the defendant subsidiary, claiming damages resulting from alleged fraud and the mismanagement of their commodity futures trading accounts. The action against the parent corporation was dismissed because of a pending arbitration proceeding before the Chicago Board of Trade; this proceeding ultimately resulted in a decision for Bache Delaware, which was subsequently defended in a court action to vacate the arbitration award.3

In ruling on the motion of the subsidiary for judgment on the pleadings or, in the alternative, for summary judgment, the district court had held that it had subject matter jurisdiction over the matter.4 The Seventh Circuit affirmed Judge Getzendanner's decision regarding the subject matter jurisdiction of the court over the dispute.5

The plaintiffs' suit had been brought under the Commodity Exchange Act, 7 U.S.C. sections 6(b) and 6(c). Initially, the court had to decide whether the antifraud provisions of the CEA were intended by Congress to apply to foreign brokers or agents of commodity exchange members whenever they facilitate futures trading on United States exchanges. After reviewing the act and its legislative history, the Seventh Circuit found nothing to indicate that Congress did not intend the CEA to apply to foreign agents. This determination freed the court to discuss subject matter jurisdiction according to the principles that have been developed in this country regarding the extraterritorial application of statutes.

Two tests have been developed by U.S. courts to determine whether or not subject matter jurisdiction exists over a dispute: the so-called "conduct" and "effects" tests. The court cited sections 17 and 18 of the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE

5. 730 F.2d at 1109.
United States (1965) (hereinafter referred to as the "Reprintement (Second)"") as its authority for these tests.

According to the Restatement (Second):

A state has jurisdiction to prescribe a rule of law
(a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside of the territory. . . . (Section 17)

* * *

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
(b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems. (Section 18)

The Seventh Circuit held that the acts complained of in Tamari met both tests, explicitly adopting the analysis of the district court. The court noted only that the transmission of commodity futures orders to the U.S. would be an "essential step" in the consummation of any scheme to defraud through futures trading on U.S. exchanges—thus apparently satisfying the "conducts" test. The "effects" test was satisfied because the transactions initiated abroad directly implicated the pricing and hedging functions of domestic markets; "prices and trading volumes in the domestic marketplace [would] be artificially influenced, and public confidence in the markets could be undermined."7

In the second of the jurisdictional cases, Pfeiffer v. Wm. Wrigley Jr.,8 the Seventh Circuit applied other provisions of the Restatements

6. The American Law Institute is in the process of preparing a Restatement of the Foreign Relations Law of the United States (Revised), hereinafter referred to as the "Restatement (Revised)." (It should be noted that the Restatement (Second) was actually the first and that the Restatement (Revised) will be the second; "Developments, Restatement II," 77th Ann. Proc. Am. Soc. Int. L. 74 (1983).) The provision in the Restatement (Revised) analogous to §§ 17 and 18 appears as § 402 in Tentative Draft No. 6 (1985), which provides as follows:

[A] state has jurisdiction to prescribe law with respect to
(1)(a) conduct a substantial part of which takes place within its territory; . . .
(b) the status of persons, or interests in things, present within its territory;
(c) conduct outside its territory which has or is intended to have substantial effect within its territory; . . .

7. 730 F.2d at 1108.
8. 755 F.2d 554 (7th Cir. 1985).
The plaintiff was a U.S. citizen employed by the defendant company as its Director for the Soviet Union and Eastern Europe. The plaintiff was based solely in Munich and, after four years, was placed on the rolls of the defendant's wholly owned West German subsidiary. Five years later, when he reached the age of 65, the plaintiff was let go. He brought suit in the Northern District of Illinois contending that his dismissal violated the Age Discrimination in Employment Act (ADEA). The district court held that ADEA had no extraterritorial reach and dismissed the complaint; the Seventh Circuit affirmed.

ADEA itself was silent as to Congress's intention regarding its territorial reach. The Act, however, had incorporated provisions of the Fair Labor Standards Act (FLSA), including an indirect reference to section 213(f), which prohibits the extraterritorial application of FLSA. The plaintiff, however, contended that the appropriate analogy for ADEA was not FLSA but rather Title VII of the Civil Rights Act of 1964, which act has been held to apply extraterritorially.

The district court, however, followed the few cases which had rejected the Title VII analogy and had held that ADEA did not apply to U.S. citizens working for U.S. companies in foreign countries. The court found no intention on the part of Congress that ADEA should apply in such circumstances. The Seventh Circuit agreed, but its reliance on the prior cases was much less forceful; its analysis was based primarily on Congressional intent.

The Seventh Circuit raised another consideration: the possibility

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11. 755 F.2d at 554.
12. The Seventh Circuit noted that, after argument in this case, Congress passed the Older Americans Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1767 (1984) which extends coverage of the ADEA to U.S. citizens employed abroad by American corporations or their subsidiaries. The court stated that the amendment statute was not clear as to whether it was changing or clarifying ADEA; in any event, the court refused to apply it retroactively and drew no conclusion from its enactment to alter the result. The court also noted that the plaintiff might not have benefitted from the amendment in any event since it excepted situations where ADEA would violate the law of the country where the U.S. citizen was employed; see the discussion accompanying footnote 18). 755 F.2d at 559-60.
17. The Seventh Circuit cited one recent case not used by the district court, Thomas v. Brown & Root, Inc., 745 F.2d 279 (4th Cir. 1984), but it noted a "sense of unease about the literal approach" to the incorporation of the explicit non-extraterritorial provision of FLSA into ADEA. 755 F.2d at 556.
that, if the defendant were subject to ADEA, it might find itself in a position of being compelled to follow two possibly inconsistent laws: ADEA and a West German mandatory-retirement law. The court cited a number of reasons why courts should avoid "outright collisions between domestic and foreign law—collisions both hard on the people caught in the cross-fire and a potential source of friction between the United States and foreign countries":

1) the presumption against the extraterritorial application of federal statutes;
2) the potential complications of such a precedent applied to other situations;
3) and the considerations proposed by the Second and Revised Restatements.

The Restatement (Second) attempted to articulate the factors and circumstances under which a state is "required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction" in order to prevent a direct conflict. These factors include the vital national interests of each state, the extent and nature of the hardships that would be imposed by inconsistent enforcement actions, the place where the required conduct would have to take place, the nationality of the parties, and the potential efficacy of such enforcement. The Restatement (Revised) takes a slightly different approach, characterized by the Seventh Circuit as "a slight movement away from reliance on territoriality as the touchstone of jurisdiction." The proposed rule is one of reasonableness. Although a basis for jurisdiction may be present, the assertion of such jurisdiction is improper when it is unreasonable; what is unreasonable is determined by the evaluation of "all relevant factors," of which eight are specified.

18. The court treated the existence of such a West German law as hypothetical. The plaintiff's own lawyer had apparently admitted to its existence in oral argument (a "very damaging [admission] to his cause," according to the court), and the court's "own perhaps halting efforts" to research the West German law of retirement were inconclusive. 755 F.2d at 557.
19. Id.
20. Id., citing cases including the Tamari decision (for the proposition that the presumption is not absolute).
21. The court betrayed nostalgia for "the old days" when conflicts of law rules mandated a clear answer (e.g., the application of the substantive law of the jurisdiction where the last act necessary to make the defendant's conduct tortious had occurred), as opposed to the "more complex" modern conflicts rules. Id.
22. Id. at 558.
23. Restatement (Second), § 40.
24. 755 F.2d at 558.
25. Restatement (Revised) § 403 (Ten. Draft No. 6 1985), provides as follows:
§ 403. Limitations on Jurisdiction to Prescribe
(1) Even when one of the bases for jurisdiction under Sec. 402 is present, a state may not exercise jurisdiction to prescribe law with respect to the activities, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable.
(2) Whether the exercise of jurisdiction is reasonable or unreasonable is judged by evaluating all the relevant factors, including, where appropriate,
II. EXTRADITION

The Seventh Circuit decided two major cases involving extradition. Both cases came to the Seventh Circuit on appeal from the denial of a writ of habeas corpus by the district court; in each case, the appellate court upheld the denial.

The first case, *David v. Attorney General of the United States*,26 involved the unique claim that, because the petitioner had been kidnapped from Brazil by agents of the United States and thus his presence in this country was not voluntary, the United States' courts lacked jurisdiction over him. According to his claim, he was arrested in 1972 by Brazilian officials who acted as, or with, agents of the United States. He was allegedly held captive in Brazil for a month, subjected to "barbarous" treatment and then forcibly transported to New York where he was arrested by federal agents on drug trafficking charges. He pled guilty to those charges and was sentenced to twenty years incarceration.

While in jail, the government of France filed a request for his extradition on charges of wilful homicide and attempted wilful homicide of police officers. Prior to 1974, what little law there was on the subject in the United States suggested that the physical presence of a person was sufficient cause for personal jurisdiction to attach (assuming valid subject matter jurisdiction), notwithstanding the manner in which that physical presence was secured. This principle was recognized in the maxim *mala captus bene detentus*.27

(a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;
(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;
(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
(d) the existence of justified expectations that might be protected or hurt by the regulation in question;
(e) the importance of the regulation in question to the international political, legal or economic system;
(f) the extent to which such regulation is consistent with the traditions of the international system;
(g) the extent to which another state may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by other states.

(3) When more than one state has a reasonable basis for exercising jurisdiction over a person or activity, but the prescriptions by two or more states are in conflict, each state is expected to evaluate its own as well as the other state's interest in exercising jurisdiction in light of all the relevant factors, including those set out in Subsection (2); and to defer to the other state if that state's interest is greater.

27. The maxim *mala captus bene detentus* ("bad capture, good detention") recognizes the assertion of personal jurisdiction over a defendant without inquiring into the means by which his/her
In 1974, however, the Second Circuit rejected that standard in *United States v. Toscanino*. In that case, the defendant claimed that he had been abducted in Uruguay, tortured and involuntarily brought to the United States to stand trial on drug trafficking charges. The defendant was found guilty at trial, but the Second Circuit concluded that the government had violated his constitutional right to due process: "[W]e view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." The Seventh Circuit has characterized this holding as "intended to act as a deterrent to illegal conduct on the part of [United States] law enforcement officials, much like the well-known exclusionary rule, see *Mapp v. Ohio*. . . ." Given the similarity of facts between the *Toscanino* case and those alleged in the present case, the defendant asserted the lack of the court's jurisdiction over him.

The Seventh Circuit first noted that the *Toscanino* principle has not been accepted by the Seventh Circuit in a federal criminal proceeding. In any event, the Seventh Circuit ruled that it would be clearly inapplicable in the present case since the only issue before the court was the propriety of the extradition hearing, through a habeas corpus review. The purpose of *Toscanino*, as noted, was to deprive the government of the fruits of its own illegal conduct. As the Seventh Circuit stated, "[t]o require the extradition magistrate to divest himself of jurisdiction would not serve to deter illegal conduct on the part of United States' officials since the fruit of that alleged conduct, i.e. the guilty plea and subsequent sentence, would be unaffected." Even the Second Circuit itself, like other circuits, has held that the exclusionary rule is inapplicable in extradition proceedings. In fact, the entire history of *Toscanino* has been one of distinguishing it and rejecting its concern for the rights of the individual defendant.

presence was secured. The "landmark" decisions in this regard are Ker v. Illinois, 119 U.S. 436 (1886), and Frisbie v. Collins, 342 U.S. 519 (1952).

28. 500 F.2d 267 (2d Cir. 1974).
29. 500 F.2d at 275.
30. 699 F.2d at 414.
32. 699 F.2d at 414.
33. Id. (citing Simmons v. Braun, 627 F.2d 635 (2d Cir. 1980)).
34. This treatment of *Toscanino* has led a prominent commentator to conclude that "[t]he position of the U.S. thus remains linked to the Ker-Frisbie doctrine which has been followed rather consistently, even though with some erosion." Bassiouni, *International Extradition: United States Law and Practice*, pp. V, 4-6-8 (1983). Bassiouni devotes Chapter 5 of his two-volume work to "Abduction and Unlawful Seizure as Alternatives to Extradition." He notes that the United States
The court noted that the effect of the petitioner's argument would be to penalize France for the allegedly illegal conduct of United States agents. The petitioner, however, also suggested that France itself was indirectly involved in his kidnapping in that it was aware of the plan and intended to arrange a trade of prisoners with the United States upon his arrival in this country. The Seventh Circuit dismissed this argument, stating that the defendant's allegations did not implicate France in any unconstitutional conduct within the United States. Any impropriety by French officials outside the United States would be a matter solely for the French courts or other authorities to consider.

The second case in this area decided by the Seventh Circuit, *In re Burt*,35 involved an unusual set of facts. On March 21, 1965, a West German cab driver was murdered on the outskirts of Schweinfurt, West Germany. Shortly thereafter, Burt (who was at that time a member of the U.S. Army serving in West Germany) and another serviceman left West Germany without army authorization and travelled to Madison, Wisconsin. There, both men were picked up for a local armed robbery and murder in July 1965. Although the Army questioned them while in custody (with both men confessing their involvement in the West German murder), the Army took no further action pending the results of the state criminal proceeding for the Wisconsin murder. Both men pled guilty to various Wisconsin charges, Burt to charges of first degree murder and armed robbery, and his codefendant to third degree murder.

Although the Army had Burt's confession in 1965 to the murder of the West German cabdriver, it was only in 1966 that it charged him with that murder. On June 13, 1966, the U.S. Supreme Court handed down its decision in *Miranda v. Arizona*.36 Based on that decision, Army pros-
ecutors concluded that Burt could not be successfully courtmartialed because his confession had not been obtained in a matter entirely consistent with the requirements announced in the *Miranda* decision. The Army subsequently gave Burt a dishonorable discharge based on his civilian conviction in Wisconsin.

In the meantime, the Army had notified West Germany about Burt's alleged involvement in the West German killing. Under the treaties then in existence between the United States and West Germany regulating crimes committed by American servicemen against West German citizens, the technical primary right of West Germany to exercise jurisdiction over the matter, pursuant to the NATO Status of Forces Agreement, was automatically waived (by virtue of a supplementary agreement between the United States and West Germany). West Germany, however, could recall such waiver in a case in which the exercise of jurisdiction was considered imperative by the West German government; such waiver could be exercised by giving notice to U.S. officials.

As a result, when the Army notified West Germany in December 1965 about the alleged involvement of Burt in the West German killing, the Army automatically became vested with the primary right to exercise jurisdiction over him. After the Army decided not to prosecute Burt, however, that decision was conveyed to West German officials, who sought to recall West Germany's waiver of jurisdiction. The U.S. Departments of State and Defense, however, jointly made a decision not to return Burt to West Germany because they did not want to set a precedent of allowing West Germany to recall a waiver at such a late date and after the Army had exercised its prosecutorial discretion. The family of the West German cabdriver was compensated by the United States government.

Once Burt had been dishonorably discharged from the Army, he could not be returned to West Germany because he was no longer subject to American military authority. In addition, since he was a U.S. citizen, Burt could not then be extradited to West Germany as a civilian because the treaty, pursuant to customary U.S. practice, did not allow the extradition of a country's own citizens.

In 1978, however, the United States and West Germany entered into

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a new extradition treaty which became effective on August 29, 1980.\textsuperscript{39} This treaty contained no obligation on the part of either country to refuse extradition of its own citizens. In addition, it explicitly provided the obligation to extradite persons found within one country who had committed crimes in the other, including crimes committed before, as well as after, the date the treaty became effective. On September 1, 1980, West Germany issued a warrant for the arrest of Burt and formally requested his extradition on February 12, 1981. The U.S. Department of State accepted that request on March 23, 1981, and on May 11, 1981, the U.S. Attorney for the Eastern District of Wisconsin filed a complaint before a magistrate for that district seeking Burt's arrest and certification of extraditability. The magistrate subsequently certified Burt to the Secretary of State for extradition and ordered his arrest.

Burt filed a petition for a writ of habeas corpus to challenge the magistrate's order, alleging a number of violations of his due process rights. The district court rejected the petitioner's arguments.

Initially, the Seventh Circuit had to decide the scope of habeas corpus review of an extradition order. The court rejected the narrow scope of review prescribed in \textit{Fernandez v. Phillips},\textsuperscript{40} and held that federal courts "have the authority to consider not only procedural defects in the extradition procedures that are of constitutional dimension, but also the substantive conduct of the United States in undertaking its decision to extradite if such conduct violates constitutional rights."\textsuperscript{41} The court cited with approval the recent decision in \textit{Plaster v. United States},\textsuperscript{42} which stated:

\begin{quote}
It is well-settled, however, that the United States government must, in carrying out its treaty obligations, conform its conduct to the requirements of the Constitution, and that treaty obligations cannot justify otherwise unconstitutional governmental conduct. . . . [A]lthough the Secretary of State and the President have the discretion \textit{not} to extradite an individual for any reason whatsoever, . . . they may not choose to extradite an individual where such extradition would, in the opinion of the judiciary, violate the individual's constitutional rights.\textsuperscript{43}
\end{quote}

Having resolved the scope of habeas corpus review, the Seventh Circuit examined both the 1966 decision not to extradite Burt under the NATO-SOFA Treaty and the decision to extradite under the 1978 Treaty. The appellate court affirmed the lower court's rejection of all of

\textsuperscript{40} 268 U.S. 311 (1925).
\textsuperscript{41} 737 F.2d at 1484.
\textsuperscript{42} 720 F.2d 340 (4th Cir. 1983).
\textsuperscript{43} \textit{Id.} at 348-49.
Burt’s arguments, primarily because the court adhered to a basic distinction between prosecution and extradition. Were the government to attempt to prosecute Burt, the long delay would have implicated constitutional rights. Not so, however, where the government merely extradites (the district court having analogized the government’s role to that of a process server for West Germany). The Seventh Circuit proclaimed:

We hold that no standards of fair play and decency sufficient to trigger due process concerns are automatically implicated when, in undertaking its foreign policy mission, a governmental extradition decision subjects a citizen accused of committing crimes in a foreign jurisdiction to prosecution in the foreign state after a substantial time has elapsed since the commission of the crime.

The foreign state, not the United States, is the instigator of the extradition; the court must be respectful of the government’s foreign policy decisionmaking; the 1978 Treaty itself explicitly states that it is to be applied retroactively; and even if Burt were entitled to the “prompt and speedy trial” guaranteed by the NATO-SOFA Treaty, his right would be enforceable only in the West German courts. The court did admit, however, that this situation may result in a “hardship” to Burt.

III. HUMAN RIGHTS

The Seventh Circuit has decided two cases in recent terms in which a wife has sued because of the detention of her husband in a foreign country. Both presented fairly novel uses of accepted doctrine. In the first case the defendant was the U.S. Secretary of State, and in the second it was the Soviet Union. I have called these “human rights” cases, even though they both concern primarily the interpretation of federal statutes.

The former, *Flynn v. Shultz*, involved the much publicized case of an American businessman, Richard Flynn, convicted and jailed in Mexico on charges of criminal fraud. The suit by the wife sought an order of mandamus or injunction to compel the Secretary of State, George Shultz, to authorize the testimony of a State Department consular official and to take other actions under the Hostage Act. The district court

44. 737 F.2d at 1482.
45. Id. at 1487.
46. Id. at 1486.
47. 748 F.2d 1186 (7th Cir. 1984), cert. denied, 106 S. Ct. 94 (1985).
48. The facts of the case were widely publicized, particularly in the Chicago area, and were the subject of many commentaries. See, e.g., Weisberg, *The Untold Story of Richard Flynn*, Chicago Lawyer, vol. 7, no. 9 (Sept. 1984), at 1, col. 1.
granted summary judgment for the defendant, and the appellate court affirmed that judgment.

A consular official at the U.S. embassy in Mexico, Philip Battaglia, attended certain meetings between Flynn and Mexican corporate and government officials, held to resolve a contract dispute between Flynn's American business firm and a recently-nationalized Mexican corporation. While the facts of the matter are not completely clear, Flynn was ultimately charged with criminal fraud in connection with his participation in the corporate contract dispute. He was tried, convicted and sentenced to six years in prison and the payment of over one million U.S. dollars in reparations. That decision was appealed to the Mexican Supreme Court.

Mrs. Flynn sought, by her action in Chicago, to compel Battaglia to testify before the Mexican Supreme Court about his participation in the contract negotiations. The State Department had refused to authorize his testimony, citing its standard practices and procedures. Only if the Mexican government had requested such testimony would the State Department have considered allowing Battaglia to so testify.

While limited consular immunity has long been an accepted international standard, the rules governing the role of consuls were not clarified until the adoption of the Vienna Convention on Consular Relations in 1963. The United States eventually became a party to that convention in 1969. Article 44(3) of that convention provides that "[m]embers of consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions." The United States/Mexican consular convention provides a similar immunity. Article 45 of the Vienna Convention also provides, however, an exception whereby the state sending the consular agent (and only that state) may waive the immunity by express written waiver. According to the State Department's practice, this waiver would be granted only upon a formal written request from the host government.

In spite of the absence of a request for Battaglia's testimony from the Mexican government, Mrs. Flynn contended that the State Department was obliged to authorize the testimony by the specific Congressional mandate found in the Hostage Act and by the sixth amendment. The Hostage Act provides as follows:

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under

51. 57 Stat. 800, T.S. No. 985, 9 Bevans 1076 (effective July 1, 1943).
the authority of any foreign government, it shall be the duty of the
President forthwith to demand of that government the reasons of such
imprisonment; and if it appears to be wrongful and in violation of the
rights of American citizenship, the President shall forthwith demand
the release of such citizen, and if the release so demanded is unreasona-
bly delayed or refused, the President shall use such means, not
amounting to acts of war, as he may think necessary and proper to
obtain or effectuate the release; and all the facts and proceedings rela-
tive thereto shall as soon as practicable be communicated by the Presi-
dent to Congress.\textsuperscript{52}

The Seventh Circuit engaged in a long, detailed discussion of the
political question doctrine, to ascertain if the plaintiff's claim was justici-
able. The court acknowledged that scrutiny of executive or legislative
action in areas touching on the sensitive area of foreign relations is not
automatically barred, but stated that the "standard of review applied in
those cases is nonetheless a very deferential one."\textsuperscript{53} Based on several
similar cases,\textsuperscript{54} the court held that the case "is characterized by a lack of
judicially discoverable and manageable standards for resolution"\textsuperscript{55} and
thus it fell within the "judicially unmanageable" category of the political
question doctrine because "resolution of the issues . . . would . . . require
ascertainment of facts and standards of decision that are beyond judicial
discovery and management" and "would interfere with the Executive's
constitutionally committed discretion to conduct foreign relations."\textsuperscript{56}

The court found that most of the forms of relief sought by Mrs.
Flynn (that the State Department be compelled to demand reasons for
Flynn's imprisonment from the Mexican government, demand his re-
lease, etc.) were not contemplated by the Hostage Act in this kind of
situation. It found that it had no standard whereby to judge whether
Flynn had been "unjustly deprived" of his liberty by the foreign govern-
ment, a preliminary determination to be made by the President before the
Hostage Act mandated action. The court found insufficient facts were
alleged even assuming \textit{arguendo} that there was an objective standard by
which to measure them.

It was only one form of relief sought by the plaintiff (that the de-
fendant inquire into the question of whether Flynn's deprivation of lib-
erty was unjust) that the court agreed was proper. Since, according to

\textsuperscript{52} 22 U.S.C. § 1732.
\textsuperscript{53} 748 F.2d at 1191.
\textit{cert. denied}, 467 U.S. 1251 (1984); Dumas v. President of the United States, 554 F. Supp. 10 (D.
Conn. 1982); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), \textit{cert. denied}, 416 U.S. 936
(1974).
\textsuperscript{55} 748 F.2d at 1192.
\textsuperscript{56} \textit{Id.} at 1193.
the court, such an order (being internal) would not interfere with the
President's conduct of foreign relations and since such review by the
court would not involve the court in applying standards that were be-

eyond judicial management or discovery, the Seventh Circuit held that
"the political question doctrine does not bar our consideration of plain-
tiff's claims that the Hostage Act requires defendant to inquire whether
Flynn's deprivation of liberty was unjust..."57 The court, however,
found that the State Department had satisfied its obligation.

The court reviewed the legislative history of the Hostage Act, passed
by Congress in reaction to the detention of U.S. citizens in Iran, to deter-
mine if it had any application at all to the present case. The decision of
the U.S. Supreme Court in Dames and Moore v. Regan58 appeared to
limit the application of the Hostage Act to situations where U.S. citizens
are held because of a lack of recognition of their U.S. citizenship. The
legislative history convinced the Seventh Circuit to adopt a broader read-
ing of the statute, making it applicable to all U.S. citizens imprisoned by
foreign governments.59 Following Redpath v. Kissinger,60 the court held
that "when the President is informed that a United States citizen is im-
prisoned abroad, the Hostage Act requires the Executive to undertake a
meaningful inquiry into the circumstances of the detention in order to
determine whether the citizen is unjustly deprived of liberty."61 Con-
trary to plaintiff's allegation, however, the court concluded that the gov-
ernment's actions in the case had fully satisfied its obligations under the
statute.

The court also dismissed the plaintiff's claims under the fifth and
sixth amendments, which had sought to find a deprivation of Flynn's
constitutional rights by the U.S. government in a situation in which the
court found the wrongs (if any) to have been perpetrated by the Mexican
government or simply to be nonjusticiable under the political question
doctrine.

The second of the so-called "human rights" cases was Frolova v.
Union of Soviet Socialist Republics.62 The plaintiff, a U.S. citizen, met
and married a Russian in Moscow while she was pursuing her graduate
studies in the Soviet Union. A month later she returned to this country.
Her husband's requests for permission to leave the U.S.S.R. were denied.

57. Id. at 1195.
59. See Note, United States Citizen in Foreign Prison Cannot Compel the Testimony of a Consu-
60. 415 F. Supp. 566 (W.D. Tex.), aff'd, 543 F.2d 167 (5th Cir. 1976).
61. 748 F.2d at 1196.
62. 761 F.2d 370 (7th Cir. 1985).
After almost a year of separation, the husband (with other Soviet citizens in similar situations) began a hunger strike in Moscow. The plaintiff filed an action in the U.S. District Court for the Northern District of Illinois seeking an injunction and damages from the Soviet Union. Soon thereafter, the husband was granted an exit visa and joined his wife in the United States. The plaintiff discontinued her request for injunctive relief but maintained her action for damages.

Judge Rozkowsi of the district court, acting *sua sponte*, dismissed the action on the ground that the denial of the exit visa was an act of state and that the court was consequently precluded from passing judgment on it.63 The Seventh Circuit affirmed, in a *per curiam* decision, but on a different ground. Without ever reaching the act of state issue, the court held that the U.S.S.R. was entitled to sovereign immunity.64

The plaintiff alleged that the Soviet Union's adherence to the United Nations Charter and to the Helsinki Accords of 197565 either precluded its claim of sovereign immunity or constituted a waiver thereof. With regard to the former, the court applied the traditional rule that treaties, regardless of their international effect and regardless that they are "the law of the land" under the Constitution, must be self-executing in order to provide the basis for litigation in this country. Whether a treaty is self-executing or not is an issue for judicial interpretation.66 The court had no difficulty in determining that the UN Charter was not self-executing; this has been the virtually unanimous decision of courts faced with the question.67

Similarly, the court held that the Helsinki Accords were not self-executing—although this issue appears not to have reached the federal courts before. The court's decision was based on the language of the Accords themselves and on President Ford's statement before signing them.

With regard to the plaintiff's argument that the Soviet Union's adherence to these two treaties constituted a waiver of its sovereign immunity, the court was forced to examine the Foreign Sovereign Immunities Act (FSIA) of 1976.68 The statute does allow for the possibility of a

63. 558 F. Supp. 358 (N.D. Ill. 1983), aff'd, 761 F.2d 370 (7th Cir. 1985).
64. Id.
66. RESTATEMENT (SECOND), § 154 (1).
67. See, e.g., Sei Fujii v. State, 38 Cal. 2d 718, 242 P. 2d 617 (1952); see also the cases cited by the court, 761 F.2d at 374 n.n. 5 & 6.
country's waiving its sovereign immunity, but such waiver (it has been held) must be express or convincing evidence must be adduced to show that a state intended to waive its immunity implicitly by its actions. The court found no evidence whatsoever that the U.S.S.R., in signing either the UN Charter or the Helsinki Accords, intended to waive its immunity.

The court also did not find a waiver in the failure of the Soviet Union to defend the plaintiff's action against it. (The Soviet Union's defense was provided by the U.S. Attorney's office. In fact, in a footnote, the court raises the intriguing possibility that the U.S.S.R. was never served properly in the first place; this issue was apparently never argued and the court refused to consider the case solely on this issue lest the plaintiff merely re-serve the defendant properly.) There is no precedent that a simple failure to defend constitutes a waiver of sovereign immunity.

Finally, the plaintiff pointed to another provision of FSIA § 1605(a)(5), which provides that sovereign immunity is waived in cases:

in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission [sic] of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

The plaintiff alleged her loss of consortium as her injury in this country. The court examined the legislative history of the FSIA and its subsequent interpretation by the courts and found no basis for the plaintiff's assertion. The court particularly noted that other portions of the statute were adopted in accordance with the jurisdictional principles of section 18 of the Restatement (Second), the "effects" standards, but that any "reference to Section 18 is conspicuously absent from the sections of the committee reports discussing" the portion of the statute quoted above. The court thus adopted a cautious interpretation of this provision of FSIA, one probably intended by Congress.

69. Id. at § 1605(a)(1).

70. The plaintiff argued that FSIA gave the U.S. courts jurisdiction if the injury occurred in this country, regardless of where the tortious act causing the injury took place (in or out of the U.S.). Although the Seventh Circuit appeared to concede this interpretation of sec. 1605(a)(5) "at first blush," it rejected it because all other courts that had considered it (except one) had rejected it. The one exception was Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980); the court also cited a similar interpretation in a concurring and dissenting opinion in Persinger v. Islamic Republic of Iran, 729 F.2d 835, 844 (D.C. Cir.), cert. denied, 105 S. Ct. 247 (1984). 761 F.2d at 379 n.3.

71. See supra note 6 and accompanying text.

72. 761 F.2d at 380.

73. See Note, "Foreign Sovereign Immunities Act—tortious act exception—implied waiver of im-
As noted, the Restatement is in the process of being revised. The plaintiff cited Tentative Draft No. 2 of the Restatement (Revised) to buttress her position, since that revision of section 18 would have granted jurisdiction if the tortious act or omission causing injury in this country occurred elsewhere. (The Seventh Circuit noted that this is "an interpretation which . . . has been almost uniformly rejected by the courts."74) But, the court pointed out, the very next sentence of the Tentative Draft cut against her argument: "Indirect effects in the United States, such as loss of consortium resulting from injury to a claimant's spouse by the foreign state outside the United States, are not within the jurisdiction of courts in the United States under this section."75

IV. SOVEREIGN IMMUNITY

The issue of the sovereign immunity of a foreign government was raised in Frolova v. Union of Soviet Socialist Republics, discussed above.76 The issues of sovereign immunity, as well as that of service of process on a foreign government (alluded to in Frolova), were also raised in Alberti v. Empresa Nicaraguense de la Carne.77

The plaintiffs in Alberti, an individual and a corporation of unidentified nationality (although it was apparently incorporated somewhere in the United States), owned 35% of the stock of a Nicaraguan corporation which was later nationalized by the Nicaraguan government. The government then operated the business through its agent, Empresa Nicaraguense de la Carne (ENCAR). The plaintiffs received no compensation for their interest in the nationalized company (which they valued at over one million dollars), nor did they seek any relief through Nicaraguan channels.

After the nationalization, the plaintiffs ordered products (frozen beef) from ENCAR but refused to pay for them after their delivery in Florida. Instead, the plaintiffs filed suit in an Illinois state court against ENCAR and the Republic of Nicaragua seeking a declaratory judgment that they could offset the value of their stock in the nationalized company against the amount they owed for the beef they purchased. They also sought recovery for the wrongful conversion of their Nicaraguan stock. ENCAR filed suit in a Florida state court for the unpaid debt

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74. 761 F.2d at 380 n.14.
75. Restatement (Revised) § 454 comment e (Tent. Draft No. 2 1985).
76. See supra note 62 and accompanying text.
77. 705 F.2d 250 (7th Cir. 1983).
(which case was stayed pending the outcome of the litigation in Illinois). It also removed the plaintiffs' Illinois suit to the District Court for the Northern District of Illinois. ENCAR then moved in federal court to dismiss the suit because of improper service of process, lack of personal jurisdiction and the act of state doctrine. The plaintiffs did not respond to the motion and Judge Parsons, without a written opinion, granted the motion on all grounds. The Seventh Circuit affirmed, primarily on grounds of the Foreign Sovereign Immunities Act.

The appellate court found that personal jurisdiction over the defendants was lacking, because of the plaintiffs' improper service of process. Rather than allowing the plaintiffs the opportunity to effect service properly, the Seventh Circuit addressed the question as to whether, regardless of service, there would be proper subject matter jurisdiction. The resolution of this issue depended on whether there was any exception to the immunity granted to the defendants under the FSIA. The court summarily dismissed two of the plaintiffs' arguments, noting that the plaintiffs had deliberately and artificially manufactured a "commercial" controversy and had maneuvered the defendants into court.

More significant, however, was the plaintiffs' claim based on section 1605(a)(3) of FSIA, which provides 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 . . .

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agent or instrumentality is engaged in a commercial activity in the United States . . .

The issue raised by the plaintiffs was whether Nicaragua's nationalization was a violation of international law, in light of its failure to pay compensation to the plaintiff. The parties to the dispute disagreed as to the standards to be applied to compensation for nationalizations. The plaintiffs (according to the court) demanded prior payment, while the defendants contended that they need only establish reasonable provisions for the determination and payment of just compensation. (There appeared to be few facts about exactly what had transpired between the parties in this regard.)

Although the Seventh Circuit opted for the traditional U.S. stan-

78. Section 1608(a)(3) of FSIA sets forth a procedure requiring service to be sent "to the head of the ministry of foreign affairs of the foreign state concerned." The plaintiffs had served only the Ambassador of Nicaragua in Washington. 705 F.2d at 252.
standard of "prompt, adequate and effective" compensation (thus rejecting the prior compensation standard urged by the plaintiffs), the court based its decision on the plaintiffs' failure to meet their burden of proof. The defendants satisfied their initial burden of showing that they fit within the definition of a foreign state under the FSIA and that the suit relates to a public, governmental act (nationalization). They were thus prima facie entitled to immunity, unless the plaintiffs could demonstrate that a statutory exemption was applicable. This they failed to do.

V. Arbitration

The Seventh Circuit has decided one case, Sauer-Getriebe KG v. White Hydraulics, Inc. involving international commercial arbitration which deserves mention, since this is a common form of dispute settlement in international business transactions.

The defendant White, an Indiana corporation, entered into an agreement with Sauer, a West German limited partnership, whereby White gave Sauer an exclusive right to sell its motors in a number of other countries, plus associated trade secrets and other rights, in exchange for a royalty. The contract contained an arbitration clause, both parties agreeing that "[a]ny and all disputes arising out of and in connection with" the agreement would be settled by arbitration under the rules of the International Chamber of Commerce (ICC). The arbitration was to take place in London.

After White attempted to repudiate the contract by selling its assets (including the rights granted to Sauer) to a third party, Sauer filed a diversity action in the District Court for the Northern District of Indiana in order to enjoin White from selling any such rights pending resolution of Sauer's claim through arbitration. White responded that the filing of the suit waived Sauer's right to arbitrate; White also sought a declaration that the contract was unenforceable for vagueness and want of considera-

79. 705 F.2d at 255. Section 187 of the Restatement (Second) concurs in this formulation of the standard. The "black letter" of the Restatement (Revised) initially appeared to avoid the issue, although Comment e to § 712 (Tent. Draft No. 3) confirmed the traditional U.S. formulation of the standard. Tent. Draft No. 6 (1985) appends a standard in § 712(1): "for compensation to be just... it must... be in an amount equivalent to the value of the property taken and must be paid at the time of taking, or within a reasonable time thereafter with interest from that date, and in a form economically usable by the foreign national;..." See Editorial Comment, Compensation for Expropriation, 78 Am. J. Int'l L. 121 (1984); Note, Expropriation in the Restatement (Revised), 78 Am. J. Int'l L. 176 (1984); Agora: What Price Expropriation?, 79 Am. J. Int'l L. 414, 420 (1985).


81. The court translated "KG" as a limited partnership, the usual translation of Kommanditgesellschaft. Sauer, 715 F.2d at 349. See II Manual of German Law 71 (Cohn ed. 1971).
tion, that the terms were unconscionable and inequitable, and that it violated the Sherman Act.

After a bench trial, the district court denied Sauer's requested injunction, and it enjoined Sauer from proceeding with the arbitration. (Sauer had filed its request for arbitration with the ICC in Paris, not London; the court gave Sauer leave to refile in London but stated that its findings would be binding in any subsequent arbitration proceedings.) The Seventh Circuit reversed and directed the district court to enter the injunction requested by Sauer. Portions of the opinion not bearing on the international commercial arbitration aspect of the case will not be discussed here.

The appellate court rejected White's contention that, before an arbitration clause can be enforced, a court must pass on the validity of the contract which contains that clause. The court noted that the validity of the contract was itself an issue ("any and all disputes") that could be settled by the arbitration.

The more important issue was whether Sauer's filing suit constituted a waiver of the right to arbitrate. (The lower court had not found such a waiver, although it did enjoin arbitration because of the filing in Paris.) White asserted two prior Seventh Circuit decisions to buttress its allegation of waiver, but the court rightly noted that these cases were clearly distinguishable. Sauer's suit was in no way inconsistent with its interest in arbitrating (unlike the prior cases), and Sauer had consistently asserted its intention to utilize and abide by the arbitration clause in the contract. The relief sought by Sauer was simply the preservation of the status quo pending such arbitration.

Finally, the Seventh Circuit noted that Sauer's filing in Paris was not a violation of the provision for arbitration in London, since the place of filing is not necessarily the place where the arbitration would be held. Sauer, in fact, had chosen an arbitrator who resided in London. The appellate court overturned the lower court's order directing Sauer to select a new arbitrator.

The Seventh Circuit made a statement of policy about arbitration although, strangely enough, it did not relate it to the international context: "[T]he public interest is served by granting this injunctive relief because there is a strong policy in favor of carrying out commercial arbitration when a contract contains an arbitration clause. Arbitration lightens courts' workloads, and it usually results in a speedier resolution of

Although the issues were different, compare the tone of the statement of Justice Stewart in *Scherk v. Alberto-Culver Co.*: "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages."  

VI. LETTERS OF CREDIT

A recent decision of the Seventh Circuit involves the use of a letter of credit (a traditional means of financing sales, particularly in transnational situations) as a guarantee of performance, a "standby" letter of credit. This use of letters of credit has become quite common in recent years and received notoriety in the legal community as a result of the revolution in Iran and the subsequent rupture of political and commercial relations with the United States.

In *Banque Paribas v. Hamilton Industries International, Inc.*, a U.S. corporation, Hamilton, had bid for a subcontract with Saudi Medcenter (SMC), a Saudi Arabian corporation that had bid on a contract to do construction work in Saudi Arabia. Since SMC required that Hamilton guarantee its bid, Hamilton obtained a standby letter of credit from American National Bank in Chicago. The letter of credit named the Bahrain branch of the Banque de Paris et des Pays-Bas (Paribas) as the advising bank, although the court suggested that Paribas was more likely a confirming bank; the choice of classification would not affect the outcome, however.

American National, under the letter of credit, would pay Paribas the amount of the letter of credit if Paribas certified that it had paid SMC under Paribas's own guarantee of Hamilton's bid. Paribas followed the form of guarantee supplied with American National's letter of credit and undertook to pay SMC "forthwith following demand made . . . in writing (which writing shall refer to the number and date of this letter of guaran-
The guarantee was to be construed in accordance with Saudi Arabian law.

Before the expiration of the letter of credit, Paribas demanded payment from American National under the letter of credit, since it had to pay SMC pursuant to the guarantee. SMC's demands had taken the forms of a telephone call and a subsequent (and somewhat ambiguous) telex. The latter, however, did not contain the number and date of the guarantee, as required by the terms of the guarantee. American National refused to honor Paribas's request. Instead, it filed suit in the Northern District of Illinois, interpleaded Hamilton, SMC, and Paribas, and asked the court who was entitled to payment. The district court granted Hamilton's motion for summary judgment on the ground that, since the guarantee was part of the letter of credit, American National was not bound to pay since Paribas had failed to comply with the terms of the guarantee.

In an opinion by Judge Posner, reminiscent in style of a treatise on the law of letters of credit, the Seventh Circuit reversed and remanded the matter for further consideration. The majority of the court believed that the matter was simply inappropriate for resolution on summary judgment, there being factual questions unresolved without a trial. Senior District Judge Edward Dumbauld of the Western District of Pennsylvania, sitting by designation, agreed with the reversal and apparently would have been willing to grant judgment to Paribas, although he stated that "if my interpretation is sound, it will rest on all the stronger ground if the facts are fully developed at trial."

The court noted that the requirement in the guarantee that a demand specify the number and date of the guarantee might conceivably ("although improbably") not be a condition precedent but merely present in the guarantee for Paribas's own protection and therefore waivable by it. The court discussed the "long tradition" of requiring strict compliance with the terms of letters of credit and the need to continue that tradition. A second unresolved question, however, was that the guarantee was said to be governed by Saudi Arabian law, which was not in

88. Since Hamilton had agreed to hold American National harmless in the event the U.S. bank had to pay Paribas, the real dispute over the letter of credit funds was between Hamilton and Paribas. 767 F.2d at 383.
89. 767 F.2d at 386 (Dumbauld, J., concurring).
90. Judge Posner refers to this as "a tradition which, though challenged [citations omitted], as so many of the strict requirements of the law are challenged nowadays, has managed to retain its vitality." Id. at 384. This nostalgia is reminiscent of his reference to the "old days" in Pfeiffer v. Wm. Wrigley Jr. Co., supra note 21.
evidence\textsuperscript{91} and which needed to be taken into account. (It was suggested, for example, that Saudi Arabian law requires only substantial compliance with the terms of guarantees in letters of credit.) Likewise, there was no allegation of, and certainly no proof of, Paribas's collusion with SMC\textsuperscript{92} to defraud Hamilton. Finally, there was also the unresolved question as to whether the guarantee was intended to be incorporated in the letter of credit, so that the requirements for one would be part of the requirements for the other.

\textsuperscript{91} The court hinted at the difficulties of discovering foreign law, referring to “what little we have been able to learn about the commercial law of Saudi Arabia on our own,” citing one law review article. 767 F.2d at 384. A similar difficulty in discovering foreign law was referred to Pfeiffer v. Wm. Wrigley Jr. Co., supra note 18.

\textsuperscript{92} To use Judge Posner's phrase, Paribas “[being] in cahoots with SMC.” 767 F.2d at 385; see also id. at 384.