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Book Review

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BOOK REVIEW

SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS. By Joseph W. Dellapenna, Bureau of National Affairs, Inc., Washington, D.C.: 1988. Pp. 482. $89.00.

*Reviewed by Michael C. Doland**

One court described the Foreign Sovereign Immunities Act of 1976[1] as "a statutory labyrinth that, owing to the numerous interpretative questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boon to the private bar but a consistent bane of the Federal judiciary."[2] In his book dealing with this Act, Professor Dellapenna[3] combines the problem-oriented analysis of the practicing attorney with exhaustive footnotes, a bibliography, and an index for the accommodation of the legal scholar. The result is a single-source volume essential for anyone in the legal profession seriously interested in this subject.

The book is divided into two parts. The first part addresses those subjects that the Foreign Sovereign Immunities Act covers in detail, including the definition of foreign states and foreign government-owned corporations, judicial competence, jurisdiction, immunity, service of process, venue, and execution of judgments. The second part addresses those subjects that the Act covers in a cursory fashion, including burden of proof, rights of discovery, available remedies, and jury trials. In addition, the book treats those topics that received virtually no discussion under the Foreign Sovereign Immunities Act but that are essential to its under-

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1. Pub. L. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.). The FSIA applies to foreign states, their subdivisions, agencies, and instrumentalities. Of related and collateral interest is the International Organization Immunities Act, Pub. L. 79-652, 59 Stat. 669 (codified as amended at 22 U.S.C. §§ 288-288i (1982 & Supp. V 1987)).

2. Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1106 (S.D.N.Y. 1982).

3. Professor of Law, Villanova University.

standing and enforcement, including the act of state doctrine, agreements to arbitrate, choice of law questions, and the enforcement abroad of judgments against foreign states.[4] The analysis proceeds by statutory interpretation as well as by the jurisprudence of decided cases, including every federal and state case reported since the effective date of the Act, together with some cases that were not officially reported.

The introduction discusses the history of absolute immunity and the evolution of the theory of restrictive immunity for the commercial acts of foreign states and their wholly-owned corporations. It then addresses the overall structure of the Foreign Sovereign Immunities Act, highlighting its most confusing aspect: "the decision to make both competence and personal jurisdiction depend upon whether the foreign state is immune under the substantive rules in the Act."[5] Professor Dellapenna separates these confusing issues by reference to the legislative history of the Foreign Sovereign Immunities Act, wherein Congress expressed six specific purposes for the Act in its section-by-section analysis:

> (1) to enact the restrictive theory of immunity for foreign states . . . making United States practice consistent with the current state of international law;
> (2) to depoliticize immunity decisions by vesting them in courts, rather than the State Department, under definite, objective criteria, without seriously embarrassing United States foreign relations;
> (3) to provide definite, appropriate rules on competence, jurisdiction, mode of trial, rules of decision, service of process, and venue, in place of unsettled or ineffective prior law;
> (4) to assure uniform treatment of foreign states in courts in the United States;
> (5) to make the treatment of foreign states in courts in the United States consistent with the treatment of the United States (including its corporations), in courts both here and abroad; and
> (6) to provide a balanced possibility for execution of a judgment against a foreign state.[6]

The author concludes that, to accomplish the above purposes, the Act is structured in the form of a presumption of immunity coupled with a shopping list of seven exceptions, but notes that in practice the exceptions tend to absorb the general rule. The introduction concludes with an analysis of what constitutes a foreign state and its political subdivisions

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4. J.W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS, iv (1988).
5. *Id.* at 9.
6. *Id.* at 10-11.

together with its wholly-owned corporations and also contrasts the treatment accorded to international organizations under the International Organization Immunities Act.

Professor Dellapenna then discusses the concept of judicial "competence," which is traditionally a poorly-defined term, roughly equivalent to the United States concept of subject-matter jurisdiction. He discusses and analyzes issues of both original subject-matter jurisdiction and removal jurisdiction and evaluates the concurrent jurisdiction of the state courts.

Next, Professor Dellapenna discusses "jurisdiction," which he more particularly and properly defines as personal jurisdiction. Professor Dellapenna notes that the personal jurisdiction criteria of the Foreign Sovereign Immunities Act are based on the federal standard of due process, which requires minimum contacts and compliance with the long arm statute of the District of Columbia.[7] He notes that the term "jurisdiction" is confusing enough in domestic legal situations, but when litigation involves international questions, the uncertainty as to the definition of that jurisdiction is even more confusing. Nevertheless, once the language problem is solved, the rules and policies are fundamentally the same despite the unfamiliar vocabulary.[8] Professor Dellapenna pays significant attention to the situs of the act and its impact within the United States in the evaluation of the personal jurisdiction issue.[9] He also discusses the issue of waivers of jurisdictional limitations,[10] as well as issues of personal jurisdiction in the state courts.[11]

Because service of process and venue are made reasonably clear within the express terms of the Act, Profesor Dellapenna pays less attention to those issues in the book. Nevertheless, the few cases interpreting these provisions and the legislative history of those provisions are examined.[12]

In dealing with immunity, the object of the Foreign Sovereign Immunities Act, Professor Dellapenna properly notes that the issue of immunity depends on the nature of the relation between the parties involved in the transaction rather than on the relation of the parties to the court or the allocation of business among the various courts of the United States.[13] The list of exceptions is then analyzed in detail, including ad-

7. *Id.* at 66, 67.
8. *Id.* at 68-69.
9. *Id.* at 85, 101.
10. *Id.* at 102-06.
11. *Id.* at 106-08.
12. *Id.* at 109-13.
13. *Id.* at 144-45.

miralty and maritime claims,[14] commercial acts,[15] counter-proceedings,[16] expropriation claims,[17] property claims,[18] torts,[19] and express and implied waivers.[20] The most important of these exceptions is the exception for commercial activity—the heart of the Foreign Sovereign Immunities Act.[21] The most sophisticated and interesting ramification of the commercial activity exemption from immunity is the issue of nationalization,[22] which contrasts pure nationalization with nationalization arising out of the breach of a contract.[23]

Choice of law, on the other hand, is not explicitly discussed by the Foreign Sovereign Immunities Act. While development of the *Erie* doctrine[24] initially solved the question by distinguishing between procedural and substantive issues,[25] Professor Dellapenna concludes that an evaluation of the jurisprudence justifies the conclusion that a court will often unconsciously manipulate these concepts to arrive at a decision that it perceives as just.[26] Likewise, the Foreign Sovereign Immunities Act does not deal with the act of state doctrine. Nevertheless, it is essential to any understanding of the applicability of the Act. Professor Dellapenna notes that "[t]he Act of State doctrine is simple to state but complex to apply: few legal theories are in such a state of utter confusion as the Act of State doctrine—confusion so complete that the doctrine does not necessarily have anything to do with an act, it does not serve only state interests, and no one but a Supreme Court Justice would have the temerity to label it a doctrine."[27] The foregoing is typical of the engaging prose style of Professor Dellapenna and although much has been written on the act of state doctrine, few expositions are as clear, insightful, or perceptive as that presented in Professor Dellapenna's book.

The greatest stumbling block to the uninitiated of the Foreign Sovereign Immunities Act is not likely to be the substance of the Act but

14. *Id.* at 145-47.
15. *Id.* at 147-64.
16. *Id.* at 164-68.
17. *Id.* at 168-76.
18. *Id.* at 176-81.
19. *Id.* at 181-96.
20. *Id.* at 196-213.
21. *Id.* at 147.
22. *Id.* at 152-154.
23. *Id.* at 153.
24. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
25. Hanna v. Plumer, 380 U.S. 460 (1965).
26. J.W. DELLAPENNA, *supra* note 4, at 215.
27. *Id.* at 268.

rather its procedure. Whereas some authors create more heat than light in their explanation of the procedural labyrinth in the Foreign Sovereign Immunities Act, Professor Dellapenna raises both interesting and philosophical questions and gives clear no-nonsense answers for the practicing attorney regarding procedural issues such as appearances,[28] burdens of proof,[29] evidentiary problems—including discovery[30]—and jury trials.[31]

Finally, since law does not exist in a vacuum—and a right without a remedy for all practical purposes is a nullity—the final three chapters of the book deal with remedies, execution, and enforcement of judgments in other jurisdictions. Professor Dellapenna analyzes the various types of property subject to potential execution, including commercial property, military property, and the property of a foreign state held by an international organization, and by reference both to the past jurisprudence and express terms of the Act gives pragmatic advice for the practicing attorney. Of particular interest, on the subject of enforcing judgments obtained under the Foreign Sovereign Immunities Act in other fora, Professor Dellapenna analyzes the laws regarding the enforcement of foreign judgments generally in eight of the United States principal trading partners including Canada, England, France, the German Federal Republic, Japan, and Mexico.

The only criticism—more properly, a constructive suggestion—for the structure of the book would be to have made the Foreign Sovereign Immunities Act a "pocket part" to the book rather than an appendix.[32] This modification would enable the reader to make more convenient and frequent reference to the terms of the Act while appreciating the analysis and evaluation of Professor Dellapenna. The overall text, however, far surpasses such trivial criticism and is likely to become the "bible" of practicing attorneys and judges in this field of law. It will no doubt be of great interest to legal scholars and students alike.

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28. *Id.* at 321-23.
29. *Id.* at 323-26.
30. *Id.* at 327-32.
31. *Id.* at 333-39.
32. *Id.* at 415-22.