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German Sovereign Immunity Defense (Interpretation by the German Courts)

Christopher John Oehrle

NOTE: GERMAN SOVEREIGN IMMUNITY DEFENSE (INTERPRETATION BY THE GERMAN COURTS)*

I. INTRODUCTION

The purpose of this note is to produce a useful guide to the German Sovereign Immunity Defense by analyzing both what German courts are currently deciding and are likely to decide in the future about a sovereign entity's ability to claim immunity from jurisdiction or judg-

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*The author, Christopher J. Oehrle, is associated with the law firm of Kirschner, Main, Petrie, Graham & Tanner in Jacksonville, Florida. J.D., University of Florida, 1991. The author gratefully acknowledges the helpful commentary of wife and colleague Amy Sandlin Oehrle, Esq. (J.D., Ohio State University, 1991; LL.M., University of Florida, 1992).

ment. In order to better predict whether suit in German courts will be fruitful for the plaintiff or harmful to the defendant, this note's analysis draws heavily on German court decisions and persuasive German treatises.

This note begins with a history of the German restricted theory of both jurisdictional and execution immunity. The note provides a procedural analysis that demonstrates when a suit in Germany may be valid. Whether jurisdiction will be granted and whether execution will be considered proper are then analyzed, with discussion of both the "nature of the activity" and the "purpose of the activity" tests. Finally, recommendations are made for predicting the outcome of transactions with foreign sovereigns and suits involving these transactions.

The German sovereign immunity defense is not merely an historical academic theory.[1] Sovereign immunity may be granted to a foreign sovereign, precluding German domestic courts from having jurisdiction over that foreign entity.[2] If sovereign immunity is granted to an entity, then plaintiffs may not adjudicate their claim in Germany.[3] Accurately determining if Germany is the proper forum for claim adjudication impacts on the cost of an action and may determine whether one will prevail.[4]

Until shortly after World War II, most countries subscribed to the theory of absolute immunity of a sovereign state.[5] The theory of abso-

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1. *See* Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 (1982); State Immunity Act, 1979, ch. 33 (U.K.); *see also* Judgment of Apr. 12, 1983 (National Iranian Oil Co. Revenues from Oil Sales Case), Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], 64 BVerfGE 1, 65 I.L.R. 215 (1984) (F.R.G.).

2. Helmut Steinberger, *State Immunity*, *in* 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 428 (Rudolf Bernhardt et al. eds., 1987); HELMUT DAMIAN, STAATENIMMUNITAT UND GERICHTSZWANG (1985). *See generally* Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302 (1986); Jeffrey N. Martin, Note, *Sovereign Immunity — Limits of Judicial Control*, 18 HARV. INT'L L.J. 429 (1977).

3. Other matters go into determining the proper German forum. Some of these matters will be discussed tangentially, but this article focuses primarily on a sovereign's ability to claim immunity from jurisdiction and execution.

4. In many circumstances, Germany will be the only forum which will provide the private plaintiff with redress. *See, e.g.*, Judgment of May 4, 1982 (National Iranian Oil Co. Pipeline Contracts Case), Oberlandesgericht in Zivilsachen [OLGZ], Frankfurt, 28 RIW 439 (1982), 65 I.L.R. 215 (1984) (F.R.G.). A claim brought in Iran is unlikely to provide the plaintiff with a fully unbiased process, if any at all, when dealing with an entity related to the Iranian state. *Id.*

5. Leo J. Bouchez, *The Nature and Scope of State Immunity from Jurisdiction and Execution*, 10 NETH. Y.B. INT'L L. 3, 3-8 (1979). *See generally* Steinberger, *supra* note 2, at 397-410 (in-depth historical review).

lute immunity placed greater risk and stress on private parties dealing with sovereign entities. A party with sovereign status could claim absolute sovereign immunity, forcing the opposing party to litigate the dispute within the original party's own territory. As the world economy expanded in the 1960's and 1970's, more states restricted the use of absolute immunity in various circumstances.[6]

German law incorporates evolving customary international law.[7] Under Article 25 of the Basic German Code, customary international law is Germany's substantive law.[8] In two separate opinions, *X v. Yugoslavia*[9] and *X v. Empire of Iran*,[10] the Federal Constitutional Court of Germany found that absolute immunity was no longer the law of Germany[11] and adopted the restrictive theory of sovereign immunity.[12] Although Germany is a civil law system in which lower courts are not bound by the opinions of higher courts,[13] opinions of the Federal Constitutional Court are binding in areas other than the interpretation of domestic code law.[14]

The German courts and commentators generally divide sovereign immunity into two distinct areas. The first area deals with jurisdiction.[15] The second area deals with execution or attachment proceedings once a court grants jurisdiction and/or renders a judgment.[16]

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6. *See* Judgment of Jan. 31, 1969 (Yugoslav Military Mission Case), BVerfGE, 15 BVerfGE 25 (1964), 38 I.L.R. 162 (1969) (F.R.G.); Judgment of Apr. 30, 1963 (X v. Empire of Iran), BVerfGE, 16 BVerfGE 27 (1964), 45 I.L.R. 57 (1972) (F.R.G.). These Federal Constitution Court cases provide extensive analysis of international cases applying restricted sovereign immunity in both situations.

7. *See* cases cited *supra* note 6.

8. GRUNDGESETZ [CONSTITUTION] [GG] art. 25 (F.R.G.).

9. *Yugoslav Military Mission*, 38 I.L.R. at 162.

10. *Empire of Iran*, 45 I.L.R. at 57.

11. *Yugoslav Military Mission*, 38 I.L.R. at 168; *Empire of Iran*, 45 I.L.R. at 57, 63.

12. *See Yugoslav Military Mission*, 38 I.L.R. at 162; *Empire of Iran*, 45 I.L.R. at 57. The Federal Constitutional Court in both of these cases reviewed current international law to reason that Germany must follow this trend of restricted sovereign immunity.

13. *See* SYMEON SYMEONIDES, LOUISIANA CIVIL LAW SYSTEM 263-307 (4th ed. 1988) (providing several articles which make distinctions between the civil law systems and the common law system).

14. *See* GG art. 100, ¶ 2; Law Concerning the Fed. Const. Court, art. 13(12), art. 31, ¶ 2 (decisions of the Federal Constitutional Court are binding and must be followed by all courts of Germany except in the interpretation of domestic code law).

15. Some primary Federal Constitutional Court cases provide binding law in disputes over immunity from jurisdiction. *E.g.*, *Yugoslav Military Mission*, 38 I.L.R. at 162; *Empire of Iran*, 45 I.L.R. at 57.

16. Some primary Federal Constitutional Court cases provide binding law in disputes over immunity from execution. *E.g.*, Judgment of Dec. 13, 1977 (Philippine Embassy Bank Account

The Federal Constitutional Court has divided a sovereign's acts into two categories,[17] distinguishing between *acts juri imperii* and *acts juri gestionis*.[18] *Acts juri imperii* arise from actions that could only be taken by a sovereign state (public acts), whereas *acts juri gestionis* are actions that could only be taken by a private party (private acts).[19] Only public acts enable a foreign sovereign to claim immunity from jurisdiction.[20] While this distinction is clear, other issues muddy whether a German court will have jurisdiction.

German domestic law usually determines whether a foreign entity's actions are to be considered public or private.[21] German courts must determine whether the foreign entity's activities are classified by their nature or by their purpose.[22] Because the Federal Constitutional Court cannot issue binding opinions on domestic code law, each individual court has the authority to render its own interpretation of Code law.[23] Analysis of whether sovereign immunity will negate jurisdiction is, therefore, injected with uncertainty.

Further difficulties arise in determining the status of the entity claiming sovereign immunity and the effect of that entity's status.[24] These difficulties cause uncertainty for either counsel in a transaction with a potentially sovereign entity. Since Germany, unlike the United States[25] and the United Kingdom,[26] has not codified the sovereign immunity defense, foreign counsel is left to evaluate these uncertainties in German case law.

Case), BVerfGE, 46 BVerfGE 342 (1977), 65 I.L.R. 146 (1984) (F.R.G.); Judgment of Apr. 12, 1983 (National Iranian Oil Co. Revenues from Oil Sales Case), BVerfGE, 64 BVerfGE 1, 65 I.L.R. 215 (1984) (F.R.G.).

17. *Empire of Iran*, 45 I.L.R. at 57, 63-64.

18. *Id.*

19. *See* I. Seidl-Hohenveldern, *State Immunity: Federal Republic of Germany*, 10 NETH. Y.B. INT'L L. 55, 60-61 (1979) (discussing this difference between public and private acts).

20. *Yugoslav Military Mission*, 38 I.L.R. at 162, 168-69; *Empire of Iran*, 45 I.L.R. at 63-64.

21. C.H. Paussmeyer, *Current Trends in German Court Practice on Sovereign Immunity*, 10 NETH. Y.B. INT'L L. 417, 423 (1979); *Empire of Iran*, 45 I.L.R. at 64.

22. *See* Paussmeyer, *supra* note 21, at 422 (discussing the distinction between nature and purpose of the sovereign's activity pertaining to a determination of jurisdiction); *see also Empire of Iran*, 45 I.L.R. at 64 (stating that it must be conceded that the nature of the activity is the test).

23. *See* GG art. 25. This article only applies to international law decisions.

24. *See* CHRISTOPH H. SCHREUER, STATE IMMUNITY: SOME RECENT DEVELOPMENTS 93-124 (1988) (comparing various sovereign state uses of either a functional basis or a structural basis in determining sovereign immunity).

25. Foreign Sovereign Immunities Act, 28 U.S.C. § 1601 (1988).

26. State Immunity Act, 1979, ch. 33, art. 5 (U.K.).

II. GERMAN HISTORY OF THE RESTRICTED THEORY

As the absolute theory of sovereign immunity became less feasible in the emerging world economy, more states began deviating from this inflexible standard. Before World War II, German courts followed the decision of the German Supreme Court in *The Ice King*, adhering to the absolute immunity theory.[27] After the war, some German courts began to deviate from this holding, although no binding authority eliminated absolute immunity as German law.[28]

It was not until the early 1960's that the Federal Constitutional Court determined the scope of international law and, thus, the general scope of German law.[29] The Court established the restrictive theory of sovereign immunity. This decision bound all German courts.[30]

The German cases dealing with sovereign immunity have generally been divided for simplicity[31] into two related issues: the domestic court's jurisdiction over the foreign entity; and the domestic court's power to execute any judgment related to that jurisdiction. Some systems of law apply restricted immunity to foreign states but will not allow execution.[32] Those systems that permit both restricted immunity for jurisdictional issues and execution proceedings apply what is called "doubly restricted" immunity.[33]

A. *Jurisdictional Immunity*

In the October, 1962 case *X v. Yugoslavia*, the Federal Constitutional Court accepted questions submitted pursuant to Article 100(2) of the Basic Law[34] pertaining to the scope and ramifications of a rule

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27. Judgment of Dec. 10, 1921 (The Ice King Case), Reichsgericht in Zivilsachen [RGZ], 103 RGZ 275 (1919-22) (F.R.G.).

28. 1949 Soviet Ministry of Foreign Trade Case, Kammergericht [KG], Berlin, 3 Juristische Rundschau [JR] 118 (1949); 1950 Hungarian Danube Shipping Co. Case, Landesarbeitsgericht [LAG], 1950-51 IPRspr., No. 21; Judgment of Dec. 21, 1959 (*In re* The Charkow), Landgericht [LG], Bremen, 1964-65 IPRspr. No. 59, 65 I.L.R. 100 (1985) (F.R.G.).

29. *See supra* note 6.

30. *See* GG art. 100, ¶ 2.

31. Bouchez, *supra* note 5, at 7.

32. *Id.* at 17-18.

33. *See* GEORG DAHM, VOLKERRECHT I 238 (1958) (discussing the ramifications of "doubly restricted" immunity).

34. Article 100, ¶ 2 of the Basic Law (Constitution) for the Federal Republic of Germany is as follows: "(2) If, in the course of litigation, doubt exists whether a rule of public international law is an integral part of federal law and whether such rule directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court." GG art. 100, ¶ 2.

of international law.[35] The private plaintiff sought the land register's rectification of who owned property originally sold to the Federal Peoples's Republic of Yugoslavia for use as an embassy.[36] The plaintiff considered the contract for the sale of the land and its possession void.[37] The Court evaluated what constituted a general rule of international law under Article 25.[38] The Court reasoned that a general rule must be a rule of customary international law of universal validity: one that is "indissolubly bound up with the question of their general validity."[39] After analyzing foreign authority,[40] the Court held that sovereign immunity could not be granted in all cases relating to a foreign country's embassy unless necessary for the diplomatic mission to function.[41]

A year later, in *X v. Empire of Iran*, the Federal Constitutional Court expanded the analysis and authority articulated in *X v. Yugoslavia* and established more conclusively that German courts were no longer bound by the absolute theory of sovereign immunity.[42] In *X v. Empire of Iran*, the plaintiff sought payment for repair work on the Iranian embassy's heating system.[43] The district court held that immunity applied, but on appeal the Lander court turned to the Federal Constitutional Court,[44] submitting a significantly broader question than that submitted in *X v. Yugoslavia*.[45] The question submitted was whether a purely private-law claim, arising from a sovereign foreign state's purely private-law activity, was entitled to immunity.[46] The

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35. *See* Judgment of Jan. 31, 1969 (Yugoslav Military Mission Case), BVerfGE, 15 BVerfGE 25 (1964), 38 I.L.R. 162 (1969) (F.R.G.). The lower court entertained doubts regarding the scope of a rule of international law and questioned whether federal law allowed jurisdiction against a foreign state relating to its embassy premises in all cases. *Id.*

36. 38 I.L.R. at 165.

37. *Id.*

38. *Id.*

39. *Id.* at 164-65.

40. *Id.* at 165-70.

41. *Id.* at 169-70.

42. Judgment of Apr. 30, 1963 (X v. Empire of Iran), BVerfGE, 16 BVerfGE 27 (1964), 45 I.L.R. 57 (1972) (F.R.G.).

43. *Yugoslav Military Mission*, 38 I.L.R. at 173.

44. *Id.*

45. *Id.* at 168-69 (answering a narrow question confined to the changing of a land register which the Court stated did not really effect the diplomatic mission because it was merely a paper change reflecting the actual positions of the parties).

46. Even after the Federal Constitutional Court decision in *Yugoslavia* the land court felt the question was still open for doubt. *Id.*

Court responded that there was no general rule of international law proscribing domestic jurisdiction over actions relating to a foreign state's non-sovereign activities.[47]

In *Empire of Iran*, the Federal Constitutional Court further defined emerging international law.[48] Among extensive citation to and analysis of international treaties, governmental institutions, foreign courts and non-governmental institutions, the Court singled out an Austrian Supreme Court decision that emphatically stated that "it can no longer be said that, under recognized international law, [private acts] are excluded from domestic jurisdiction."[49]

Empire of Iran articulates German law on jurisdictional immunity. Once jurisdiction and a judgment have been obtained, a plaintiff must determine how to execute the claim. Much of the analysis relied on to determine jurisdiction also applies in analyzing whether execution or attachment is proper.

B. *Execution Immunity*

Implicit in execution or attachment proceedings is the fact that a domestic court has already obtained jurisdiction and even judgment. Execution or attachment of a foreign state's assets, however, is considered more directly intrusive upon a state's separateness.[50] The German courts analyze execution or attachment proceedings with greater deference to the foreign entity.[51]

The development of the restrictive theory of sovereign immunity in judgment execution proceedings echoes evolution of the restrictive theory of sovereign immunity in jurisdictional cases. It was not until 1977, in *Philippine Embassy Bank Account*,[52] that the Federal Constitutional Court produced a binding ruling on this theory as a defense in execution proceedings. In the *Philippine* case, the private-plaintiff landlord obtained a default judgment from the provincial court against

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47. *Id.* at 170.

48. *See Empire of Iran*, 45 I.L.R. at 57 (reviewing considerable international law court decisions, treaties, and non-governmental authority).

49. *Id.* at 64 (citing the Judgment of May 10, 1950, Oberster Gerichtshof [supreme court], 23 SZ 304, 322 (Aus.)).

50. Bouchez, *supra* note 5, at 18-20.

51. *See id.* (discussing the effect of denial of jurisdictional immunity on the courts' analysis in execution proceedings); *see also* Judgment of Dec. 13, 1977 (Philippine Embassy Bank Account Case), BVerfGE, 46 BVerfGE 342 (1977), 65 I.L.R. 146 (1984) (F.R.G.); Judgment of Apr. 12, 1983 (National Iranian Oil Co. Revenues from Oil Sales Case), BVerfGE, 64 BVerfGE 1, 65 I.L.R. 215 (1984) (F.R.G.).

52. *Philippine Embassy Bank Account*, 65 I.L.R. at 146.

the embassy for arrears of rent and repair costs.[53] The district court then ordered attachment on accounts designated "Embassy of the Philippines" at the Deutsche Bank in Bonn.[54] The embassy's operating costs were paid with the funds in this account.[55] As a result of the attachment, the embassy could no longer meet its financial obligations.[56]

The Federal Constitutional Court held that although the judgment had been issued on a foreign state's private, non-sovereign action, attachment would not be proper "if at the time of the initiation of the measure of execution, such property served a sovereign purpose of the foreign state."[57] The Court also concluded that attachment more directly and drastically impacted on the foreign sovereign and violated the Vienna Convention of Diplomatic Relations.[58]

The tone of the Federal Constitutional Court differed distinctly from that in the early 1960's cases.[59] Yet, the *Philippine* case is of limited value as an analytical tool due to the clearly sovereign nature of the embassy's account.[60] A clearer historical picture develops when the *Philippine* case is viewed in the context of a series of cases naming the Central Bank of Nigeria,[61] especially in light of the provincial court of Frankfurt's 1975 decision involving that defendant.[62]

Nada Trust v. Central Bank of Nigeria arose amidst a fiasco achieving worldwide notoriety.[63] In 1974 and 1975, the Nigerian government contracted for the delivery of a vast portion of the world's cement supply.[64] The government provided standard international letters of credit to ensure payment for delivery and payment of any demurrage resulting from delay.[65] Unfortunately, delivery of the ce-

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53. *Id.* at 147.
54. *Id.* at 148.
55. *Id.*
56. *Id.*
57. *Id.* at 169.
58. *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3230, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter Vienna Convention].
59. *See supra* note 6.
60. SCHREUER, *supra* note 24, at 153-56.
61. *See generally* Texas Trading & Milling Corp. v. Nigeria, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); Trendtex Trading Corp. v. Central Bank of Nigeria, 2 W.L.R. 356 (1975) (U.K.).
62. Judgment of Aug. 25, 1976 (Nada Trust v. Central Bank of Nigeria), LG, Frankfurt, 1975 NJW 1044 (1976), 65 I.L.R. 131 (1984) (F.R.G.).
63. *See* cases cited *supra* notes 61-62.
64. *Nada Trust*, 65 I.L.R. at 131-34.
65. *Id.*

ment became virtually impossible due to the small size of the port at Lagos and the many ships arriving simultaneously from around the globe.[66] Realizing its predicament, the government canceled all outstanding letters of credit.[67] In December 1975 and August 1976, the Landgericht of Frankfurt held that jurisdiction was permissible due to the private, non-sovereign nature of the Nigerian government's actions. The court went on to hold that attachment and execution upon the Nigerian government's assets located in Germany were permissible.[68]

The diametrically opposite holdings in the *Philippine* case and *Central Bank of Nigeria* demonstrate the difficulties arising in execution and attachment proceedings, that require determining the defendant's status and classification of assets.[69] Factual differences distinguish these two cases.[70] The *Philippine* case demonstrates a factual situation most beneficial to the foreign state.[71] Furthermore, the *Philippine* case dealt with assets that the Philippine embassy used to meet operation obligations.[72] In contrast, *Central Bank of Nigeria* dealt with a very important international commercial tool: a transaction dealing exclusively with the refusal to pay on a letter of credit.[73] Notwithstanding the differences between these execution cases, the handling of execution cases by the German courts differs significantly from their handling of jurisdictional cases.[74]

The historical and legal significance of the jurisdictional cases and execution cases demonstrates the beginning of the German courts' movement towards the restrictive theory of sovereign immunity. Many legal and factual issues distinguish these cases. However, understanding them provides a helpful basis for further analysis.

III. PROCEDURAL ANALYSIS

The following analysis provides a basic guide for determining whether a suit in Germany against a foreign sovereign state or entity

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66. *Id.*

67. *Id.*

68. 45 I.L.R. at 132.

69. *See* SCHREUER, *supra* note 24, at 149-60 (discussing classification of certain types of assets in several countries including Germany).

70. *See Philippine Embassy Bank Account*, 65 I.L.R. at 146; *Nada Trust*, 65 I.L.R. at 131. These two cases demonstrate factual situations strongly in favor of, and strongly against, immunity from the outset.

71. *Philippine Embassy Bank Account*, 65 I.L.R. at 146-48.

72. *Id.*

73. *Nada Trust*, 65 I.L.R. at 131.

74. *See* Paussmeyer, *supra* note 21, at 426-28 (discussing enforcement of judgments).

will be valid. The analysis is general by design and is meant as a basis for beginning most cases. As such, it should provide the practicing attorney with preliminary research and direction. The note analyzes areas tangential to the issue of sovereign immunity only when they provide a context for evaluating the German sovereign immunity defense. Tangential issues, such as service of process and personal jurisdiction, while certainly important, are provided in broad terms and do not include a full analysis. Of course, a practitioner should fully prepare by referring to specific provisions of German domestic law. This note's major thrust is to determine the extent to which German courts have interpreted the sovereign immunity defense.

A. *Constitutional Jurisdiction*

Before a German court can even proceed on a claim, there must be some "domestic connection" between the foreign state and Germany.[75] Nearly any asset located in Germany, even one of nominal value, will meet this contact requirement.[76] Further, any German court may obtain jurisdiction over a non-domiciliary person for a monetary claim when the foreign person has any asset in that court's jurisdiction.[77] Seemingly, this rule will also apply to foreign sovereign entities.[78] Thus, personal jurisdiction over a foreign sovereign entity with little contact in Germany is likely under Section 23 of the German Rules of Civil Procedures.[79]

B. *Service of Process*

German courts always have jurisdiction to determine whether proper service of process has been made on a sovereign entity.[80] However, this is only a threshold determination. A German court's determination that service has been proper does not estop a sovereign entity from claiming immunity.[81]

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75. *Nada Trust*, 65 I.L.R. at 131; Law of Jan. 30, 1877, Zivilprozessordnung [German Rules of Civil Procedure] [ZPO] § 23, 1877 Reichsgesetzblatt [RGBl.] 83 (F.R.G.), *amended by* Law of Sept. 12, 1950, 1950 Bundesgesetzblatt [BGBl.] 533 (F.R.G.); *see also* Seidl-Hohenveldern, *supra* note 19, at 60-61.

76. ERNST J. COHN, MANUAL OF GERMAN LAW 173 (2d ed. 1971).

77. Seidl-Hohenveldern, *supra* note 19, at 56.

78. *See* W. Schaumann & W. Habscheid, *Die Immunitat auslandischer Staaten nach Volkerrecht und deutschem Zivil prozessrecht*, 8 BERDGVR 159-281 (1968) (discussing the immunity of foreign states according to public international and German procedural law).

79. ZPO § 23, 1877 RGBl. 83, *amended by* 1950 BGBl. 533.

80. *Id.*

81. Steinberger, *supra* note 2, at 437.

In Germany, service of process upon a foreign sovereign entity must be effected pursuant to international law.[82] International law requires that service of process must be properly made upon the competent authority of any sovereign entity.[83] Even if the foreign entity is uncooperative in accepting service of process, the forum state may effect service by public notice.[84] Even service of process by authorized process servers or by mail may violate international law.[85] An example of a violation is service of process within the embassy of a foreign state. Service of process upon an embassy, even when made by mail, violates international law because it infringes upon the inviolability of diplomatic missions.[86] Once service of process is properly accomplished,[87] the forum state must allow for the examination of the question of immunity.

C. *Waiver*

The practitioner should first examine whether the foreign sovereign has waived its right to claim immunity. Of course, if the foreign sovereign has waived its right of immunity from jurisdiction, the following analysis would be costly and unnecessary. However, determining whether the waiver was valid and binding may be difficult. First, the waiver must originate from the correct and competent organ of the foreign sovereign.[88] Secondly, the waiver must be in a form legally acceptable to a German court.[89]

There are two basic forms of waiver: express and implied. An express waiver can be included in a treaty or a contract between the parties.[90] While a private party should attempt to obtain a foreign sovereign's express waiver prior to any dealings, the foreign sovereign may not grant this waiver.[91] A thorough examination of any express

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82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *See* Vienna Convention, *supra* note 58.

87. There may be other ways to effect service, including consent by the foreign entity or through diplomatic channels, such as a public act by the forum state on the territory of the foreign state. *Id.*

88. Steinberger, *supra* note 2, at 435-37.

89. *Id.*

90. Even if the foreign entity is ultimately unable to claim sovereign immunity, obtaining a waiver may avoid costly litigation of this issue. *See id.*

91. Absolute immunity has traditionally governed the relationships between private parties and a foreign sovereign. Many sovereign states still may find a waiver provision unacceptable.

or implied waiver of immunity by the foreign entity could save considerable cost.

A more difficult issue is determining whether a foreign entity has implicitly waived its right to claim sovereign immunity.[92] Waiver may be implied from the actions of a foreign state.[93] By contrast, contract provisions selecting German law to govern the contract will not implicitly waive the right to claim immunity.[94] German courts generally will only imply the waiver if international law does not prohibit it.[95]

D. *Implied Waiver and Status*

German courts have held that a sovereign state implicitly waives immunity over any of its entities that actually engage in extra-territorial transactions.[96] The rationale for these decisions appears to be that if a sovereign state creates an entity by its own laws for the purpose of engaging in extra-territorial relations, then that entity should be treated separately from the sovereign state.[97] By its own laws, the foreign sovereign waives the right to claim immunity for its entity's transactions.[98] Most commentators discuss such a denial of immunity in the context of the entity's status.[99]

See id. The bargaining positions of a foreign sovereign and a private party make it difficult for a private party to demand such a protective provision. *See id.*

92. Bouchez, *supra* note 5, at 21-25.

93. *See* Steinberger, *supra* note 2, at 435 (waiver may be found from a foreign entity's participation in court proceedings in the forum state excepting participation in questions about immunity).

94. Justice Steinberger states that this is part of general international law. *Id.* at 435.

95. *Id.* at 436, 437.

96. *See generally* Judgment of Aug. 25, 1976 (Nada Trust v. Central Bank of Nigeria), LG, Frankfurt, 1975 NJW 1044 (1976), 65 I.L.R. 131 (1984) (F.R.G.); Judgment of Oct. 21, 1980 (National Iranian Oil Co. Legal Status Case), OLGZ, Frankfurt, 26 RIW 874 (1980), 65 I.L.R. 199 (1984) (F.R.G.); Judgment of Mar. 26, 1981 (Foreign Trade Institute Bank Account Case), LG, Hamburg, 27 RIW 712 (1981), 65 I.L.R. 209 (1984) (F.R.G.); Judgment of May 4, 1982 (National Iranian Oil Co. Pipeline Contracts Case), OLGZ, Frankfurt, 28 RIW 439 (1982), 65 I.L.R. 215 (1984) (F.R.G.). All of these cases discussed the status of the defendant as an entity of the foreign state. Even so, each of these cases held in favor of jurisdiction.

97. *See* Fritz Enderlein, *The Immunity of State Property from Foreign Jurisdiction and Execution: Doctrine and Practice of the German Democratic Republic*, 10 NETH. Y.B. INT'L L. 111, 114-15 (1979). In actuality, this is unlikely to be the case for many socialist and third world countries.

98. *See, e.g., Nada Trust*, 65 I.L.R. at 131; *National Iranian Oil Co. Legal Status*, 65 I.L.R. at 199.

99. Seidl-Hohenveldern, *supra* note 19, at 59; *see also* Steinberger, *supra* note 2, at 433-34 (discussing status in terms of subdivisions of state).

In *Central Bank of Nigeria*, the provincial court stated categorically that "separate legal entities of a foreign state enjoy no immunity."[100] Three years later the Superior Court of Frankfurt, in *NIOC Legal Status*, reinforced *Central Bank of Nigeria* by determining that Iran's own laws designated the National Iranian Oil Company as independent. This independent legal personality did not enjoy the right to claim sovereign immunity.[101] In both *Central Bank of Nigeria* and *NIOC Legal Status*, the courts found the status-determination unnecessary because the foreign entities' activities were non-sovereign.[102] Other courts dealing with the *Central Bank of Nigeria* cases[103] have also held no immunity to exist without discussing status.[104]

German courts have held that status is irrelevant in jurisdictional cases because the entity would not be immune even if the foreign sovereign itself is the defendant.[105] Since the decision of the Federal Constitutional Court in *Empire of Iran*,[106] general international law requires and limits German courts to accept immunity only for the sovereign activities of the sovereign state.[107] Thus, considering status is discretionary for German courts.

Once initial procedural matters are considered, the next important step is determining what criteria German courts will apply when ruling on a sovereign entity's immunity claim.[108] Under Article 25 of the Basic Law of Germany, general international law automatically becomes Germany's law.[109] International law should apply.

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100. *See Nada Trust*, 65 I.L.R. at 131. The court listed the criteria for determining whether an entity is separate. The list includes: (i) creation of a juridical person; (ii) capacity to sue; (iii) capacity to hold property; (iv) dependence on government instructions; and (v) general discharge of sovereign functions. *Id.*

101. *National Iranian Oil Co. Legal Status*, 65 I.L.R. at 202.

102. *See Nada Trust*, 65 I.L.R. at 139 (stating that an investigation into the criteria for determining an entity's status was unnecessary because even if the entity was a sovereignty under new international law, no immunity would have been afforded anyway).

103. *See* cases cited *supra* notes 61-62.

104. *Id.*

105. Judgment of Apr. 12, 1983 (National Iranian Oil Co. Revenues from Oil Sales Case), BVerfGE, 64 BVerfGE 1, 65 I.L.R. 215 (1984) (F.R.G.) (discussing status, but determined it to be irrelevant for jurisdictional purposes).

106. Judgment of Apr. 30, 1963 (X v. Empire of Iran), BVerfGE, 16 BVerfGE 27, 45 I.L.R. 57 (1972) (F.R.G.).

107. *Id.*

108. *But see* SCHREUER, *supra* note 24, at 223-24 (finding it highly relevant when dealing with a German court to determine the legal status of an entity).

109. GG art. 25.

IV. IMMUNITY ANALYSIS

A. *General International Law — Article 25*

Article 25 of the Basic Law of Germany states: "The general rules of public international law shall be an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory."[110]

The Federal Constitutional Court has interpreted general international law as being equivalent to the customary international law of universal validity.[111] Stated another way, general international law is synonymous with rules recognized by the "overwhelming majority of states."[112] The cornerstone decision determining the extent of this emerging general international law of restrictive sovereign immunity was *X v. Empire of Iran.*[113] After extensive analysis of the law existing in the international community,[114] the Federal Constitutional Court held that general international law affords immunity only to a foreign sovereign's public actions.[115] Correspondingly, the Court held that a foreign sovereign's purely private activities are not entitled to immunity.[116] The Court's 1963 decision has been continuously reiterated and cited as the binding law of Germany.[117] In this sense, German law is clear. A German court, under the auspices of international law, merely needs to determine whether a foreign sovereign's activities are public or private.[118]

B. *Public Acts vs. Private Acts: Domestic Determination*

International law permits a forum state to apply domestic law so long as the results conform to the general obligations imposed by

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110. *Id.*

111. Judgment of Jan. 31, 1969 (Yugoslav Military Mission Case), BVerfGE, 15 BVerfGE 25 (1964), 38 I.L.R. 162, 168 (1969) (F.R.G.).

112. Judgment of Apr. 30, 1963 (X v. Empire of Iran), BVerfGE, 16 BVerfGE 27 (1964), 45 I.L.R. 57, 63 (1972) (F.R.G.). This "overwhelming majority" does not necessarily include Germany's law. *Id.*

113. *Id.*

114. *Id.* at 60-68.

115. *Id.* at 70-71.

116. *Id.*

117. *See, e.g.*, Judgment of Apr. 12, 1983 (National Iranian Oil Co. Revenues from Oil Sales Case), BVerfGE, 64 BVerfGE 1, 65 I.L.R. 215 (1984) (F.R.G.); Judgment of Dec. 13, 1977 (Philippine Embassy Bank Account Case), BVerfGE, 46 BVerfGE 342 (1977), 65 I.L.R. 146 (1984) (F.R.G.); Judgment of Aug. 25, 1976 (Nada Trust v. Central Bank of Nigeria), LG, Frankfurt, 1975 NJW 1044 (1976), 65 I.L.R. 131 (1984) (F.R.G.).

118. *See supra* note 117.

TABLE 1

CHART —> INTERNATIONAL AND DOMESTIC RELATIONSHIPS

PERSONAL JURISDICTION
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‖
V
SUCCESS OF PROCESS
‖
‖
V
WAIVER
(Status)
‖
‖
GENERAL INTERNATIONAL LAW
(German law- Article 25)
(Other sovereign's decisions)
‖
‖
V

PUBLIC	VS.	PRIVATE
‖		‖
‖		‖
V		V
IMMUNITY		NON-IMMUNITY

international law.[119] The Federal Constitutional Court defined in broad terms what constitutes a private act and what constitutes a public act.[120] A private act may be carried out by any private or commercial party.[121] Conversely, a public act may only be carried out by a sovereign.[122]

The concept of distinguishing between public and private acts is broad. In solidifying such a concept, it was important to provide the courts with a practical and useful guide to be applied on a consistent basis.[123] The Federal Constitutional Court realized this and provided a formula for the German courts to use.[124]

119. Steinberger, *supra* note 2, at 438.

120. Judgment of Apr. 30, 1963 (X v. Empire of Iran), BVerfGE, 16 BVerfGE 27, 33 (1964), 45 I.L.R. 57, 63 (1972) (F.R.G.).

121. 45 I.L.R. at 61-62.

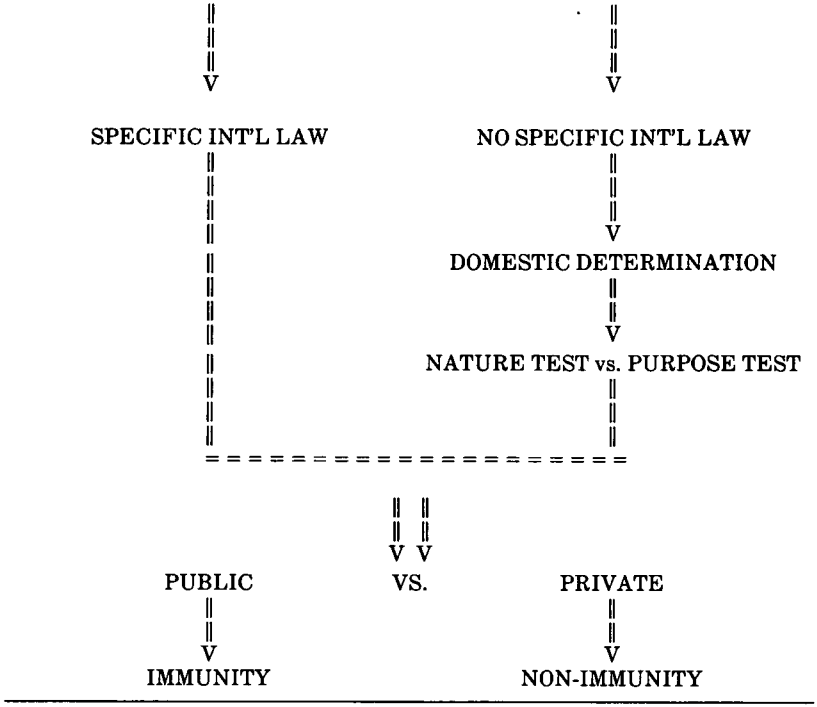
122. *Id.*

123. The terms "public acts" and "private acts" are ambiguous until some specific criteria is provided to make them meaningful. *Id.* at 62.

124. *Id.*

TABLE 2

DETERMINATION OF PRIVATE OR PUBLIC



The Federal Constitutional Court held that the distinction between public and private acts can be made by resorting to German domestic law.[125] The Court reasoned that the majority of nation states are unable to provide legal principles, excluding certain treaties,[126] sufficiently consensual and specific to guide a court in making determinations of whether activities should be considered public or private.[127] By default, domestic law should make the determination. As a safeguard, domestic law is, in turn, limited by general international law.[128]

Although the Federal Constitutional Court's decision to apply domestic law is binding on German courts, the lower courts are left

125. *Id.*

126. *See, e.g.*, Vienna Convention, *supra* note 58.

127. *See* Judgment of Apr. 12, 1983 (Philippine Embassy Bank Account Case), BVerfGE, 46 BVerfGE 342 (1977), 65 I.L.R. 146 (1984) (F.R.G.) (discussing generally that international law will apply if generally acceptable specific provisions are available).

128. Judgment of Apr. 30, 1963 (X v. Empire of Iran), BVerfGE, 16 BVerfGE 27 (1964), 45 I.L.R. 57 (1972) (F.R.G.).

to interpret domestic law.[129] Uncertainty may stem from the German courts' flexibility in determining whether a foreign sovereign's act is public or private. Thus, lower courts decide whether a foreign sovereign's acts are entitled to immunity.

Unlike the United States[130] and the United Kingdom,[131] Germany never codified the law of sovereign immunity. This lack of codification creates a further difficulty because Germany is a civil law system which looks first to statutory law and second to case law.[132] German courts are not bound by precedent interpreting domestic code law,[133] creating greater uncertainty. In evaluating German case law, attorneys must realize that future courts may deviate from any precedential pattern. Yet, the best analytical tool available to the practitioner is still German case law which, despite the lack of statutory authority, has been consistent in many areas.

The question remains how to distinguish between public acts accorded immunity and private acts not accorded immunity. The Federal Constitutional Court, in *Empire of Iran*, set binding precedent by distinguishing between the private and public acts of a foreign sovereign based upon the "nature" of the foreign entity's activity that is subject to litigation.[134]

C. *"Nature of the Activity Test" — Jurisdictional*

Prior to the adoption of the "nature of the activity" test, courts examined the activity's designated purpose.[135] In determining whether the activity was public or private, the "purpose of the activity" test looks to the ultimate goal of the sovereign entity.[136] The German courts discounted the "purpose of the activity" test, finding it unacceptable.[137] Under the "purpose of the activity" test, courts could always find a

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129. *Id.* The Federal Constitutional Court did not prescribe what the domestic law specifically states. In fact, it varies from case to case and it would have been impossible to prescribe the exact formula. *See also* GG art. 100(2).

130. Foreign Sovereign Immunities Act, 28 U.S.C. § 1601 (1988).

131. State Immunity Act, 1979, ch. 33, art. 5 (U.K.).

132. *See* SYMEONIDES, *supra* note 13.

133. *See id.*

134. Judgment of Apr. 30, 1963 (X v. Empire of Iran), BVerfGE, 16 BVerfGE 27, 32 (1964), 45 I.L.R. 57, 62 (1972) (F.R.G.).

135. *See* Seidl-Hohenveldern, *supra* note 19, at 60-65 (discussing the history of the application of the "nature" or the activities test).

136. *See* Paussmeyer, *supra* note 21, at 422-23 (discussing the distinction between the nature test and the purpose test in determining the immunity of a sovereign).

137. *Empire of Iran*, 16 BVerfGE at 33, 45 I.L.R. at 63.

sovereign purpose for the transaction giving rise to the dispute, thereby denying jurisdiction.[138] This reasoning led to the absurd result that jurisdictional immunity could always be granted.[139]

Increasing world trade made a foreign sovereign's complete commercial protection from the consequences of its transactions unfeasible.[140] Increased trade required a balancing of private and sovereign interests.[141] This balance is implicit in some German court decisions that demonstrate consideration of fairness to the private-party plaintiff and of economic conditions.[142] For example, in *Central Bank of Nigeria*, a very important underlying concern was preserving the integrity of international letters of credit.[143]

German courts have traditionally refrained from intruding upon the legal boundaries of other foreign states. More recently, however, German courts have recognized the forum state's interest or right in adjudicating a claim relating to its own territory.[144] A conflict affecting two sovereignties may well justify a change of analysis.[145] Thus, the "nature" of the foreign entity's activities became the dividing line.[146]

Adopting the restrictive theory required that the German courts examine the activity between litigants. The *Arms Sales Commission Agreement* court determined that a distinction had to be made between a transaction involving commissions on the sale of military arms and a sovereign state's establishment of its own militia.[147] When the "nature" of the activity is deemed a contract for a commission, the transaction is considered private and is subject to German jurisdiction.[148] In contrast, if the purpose underlying the activity is considered, then

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138. *Id.*

139. *See* Paussmeyer, *supra* note 21, at 423 (discussing the purpose test as "doomed to failure").

140. *See* Judgment of Aug. 25, 1976 (Nada Trust v. Central Bank of Nigeria), LG, Frankfurt, 1975 NJW 1044 (1976), 65 I.L.R. 131, 138 (1984) (F.R.G.) (discussing the economic expansion around the globe). *But see* Enderlein, *supra* note 97, at 111-15 (discussing that the reasoning used to preclude immunity does not work fairly on socialist governments).

141. Paussmeyer, *supra* note 21, at 418.

142. *See Nada Trust*, 65 I.L.R. at 136 (discussing global economic expansions and changes).

143. *Id.*

144. Paussmeyer, *supra* note 21, at 418-19.

145. *Id.*

146. *See* Judgment of Apr. 30, 1963 (X v. Empire of Iran), BVerfGE, 16 BVerfGE 27 (1964), 45 I.L.R. 57 (1972) (F.R.G.) (stating that the difficulty in establishing a dividing line is no reason to abandon making the distinction).

147. *See generally* Judgment of Oct. 10, 1972 (Arms Sales Commission Agreement Case), Case No. 6 U 520/68, OLGZ, Coblenz, 1971-75 Fontes Iuris Gentium, Series A, Sectio II, Tomus 7, at 267, 1975 OLGZ 379, 65 I.L.R. 119 (1984) (F.R.G.) (implicitly considering such a distinction).

148. *Id.*

the activity is deemed a public act of a sovereign state providing for its military.[149]

Analyzing a sovereign's acts by the intrinsic nature of the activity, or the resulting legal relationship, allows for a balancing of interests. Unlike the traditional application of absolute immunity, German courts may now consider the interests of both parties to a law suit. German courts may also evaluate the nature of the interaction between the parties.

Recently, German courts have consistently held for jurisdictional purposes that the classification of a foreign sovereign's activity as private or public has to be made according to the activity's "nature."[150] Several German courts have expressly held that the "nature" rather than the "purpose" of the act in question is the decisive factor.[151] Thus, German courts will scrutinize the type of transaction taking place, including the inherent "nature" of the activity or resulting legal relationship, in determining whether a sovereign defendant is entitled to immunity. The "nature of the activity" test provides a greater ability for the court to recognize equity.

D. *Jurisdictional Window*

Although judicial opinions do not carry the same weight in Germany as in common law countries, German opinions tend to be well-reasoned and persuasive. While precedent is cited, each court tends to provide an independent justification for its holding. Areas in which multiple individual German courts have reasoned the same way indicate that the line of reasoning is accepted and generally sound.[152] The following sections point out areas where German courts are in accord regarding

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149. *See id.* (considering this reasoning, but stating that the contract for commission was too far attenuated to be at issue in this case); *see also* Bouchez, *supra* note 5, at 3-8. The author correctly lists acts on behalf of a country's military as a public activity accorded immunity. *See id.*

150. *See* Spanish Consular Bank Accounts Case, LG, Stuttgart, 1971 IPRspr., No. 129, at 389, 1973 AWD 104, 65 I.L.R. 114 (1984) (F.R.G.) (citing the *Empire of Iran* holding).

151. Judgment of Sept. 26, 1969 (Hungarian Embassy Case), Case No. V ZR 122/65, Bundesgerichtshof [BGH], 1968-69 IPRspr., No. 197, at 498, 1969 WM 1348, 65 I.L.R. 110 (1984) (F.R.G.) (for an earlier stage in the proceedings see 28 I.L.R. 392); Judgment of Oct. 10, 1972 (Arms Sales Commission Agreement Case), Case No. 6 U 520/68, OLGZ, Coblenz, 1971-75 Fontes Iuris Gentium, Series A, Sectio II, Tomus 7, at 267, 1975 OLGZ 379, 65 I.L.R. 119 (1984) (F.R.G.); Judgment of Aug. 12, 1975 (Oder-Neisse Property Expropriation Case), Case No. 1 W 1347/75, OLGZ, Munich, 28 NJW 2144, 65 I.L.R. 127 (1984) (F.R.G.); Judgment of June 30, 1977 (Spanish State Tourist Office Case), OLGZ, Frankfurt, 23 RIW/AWD 721 (1977), 65 I.L.R. 140 (1984) (F.R.G.); Judgment of Mar. 4, 1981 (Caonrades v. United Kingdom Labour Court), Case No. 2 Ca. 10/80, 65 I.L.R. 205 (1984) (F.R.G.).

152. *See* cases cited *supra* note 151.

jurisdictional immunity. These areas are windows through which a practitioner can be relatively certain of whether a party will be accorded immunity from jurisdiction.[153]

1. German Courts — Jurisdictional Immunity Available

Certain actions of a foreign sovereign may be considered public by nature.[154] For example, legislative actions of a foreign state are considered public activity.[155] In *Oder-Neisse Property Expropriation*, the court held that the expropriation of property being administered by the Polish state is an activity providing the Polish government the right to claim sovereign immunity.[156] This rule applies even when the plaintiff has no other avenue for bringing the action in the state concerned.[157] Other public acts include those concerning armed forces,[158] police power,[159] and certain diplomatic activities.[160]

2. German Courts — Jurisdictional Immunity Unavailable

Nonetheless, German courts will not always accept a claim of jurisdictional immunity. The courts have held that foreign sovereigns are not entitled to claim immunity for certain private commercial transactions even though they are related to a necessary state function, such as the establishment of an embassy in another state. Such transactions include purchasing land,[161] obtaining land brokerage commissions,[162]

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153. Implicit in some of the German execution decisions is a previous determination of jurisdiction. *See supra* note 151.

154. Bouchez, *supra* note 5, at 12-13 (listing the opinion of several commentators regarding which acts of a foreign sovereign should be considered public by their nature).

155. *See* Judgment of Aug. 12, 1975 (Oder-Neisse Property Expropriation Case), OLGZ, Munich, 28 NJW 2144 (1975), 65 I.L.R. 127 (1984) (F.R.G.) (holding that expropriations were the legislative actions of the foreign sovereign entitled to immunity).

156. *Id.*

157. *Id.*

158. *See generally* Judgment of Oct. 10, 1972 (Arms Sales Commission Agreement Case), Case No. 6 U 520/68, OLGZ, Coblenz, 1971-75 Fontes Iuris Gentium, Series A, Sectio II, Tomus 7, at 267, 1975 OLGZ 379, 65 I.L.R. 119 (1984) (F.R.G.) (stating in dicta that the holding may have been different if the facts were less attenuated from the sovereign's military).

159. Judgment of Sept. 26, 1978 (X v. The Head of Scotland Yard), BGH, 32 NJW 1101 (1979) (F.R.G.).

160. *See* Judgment of Apr. 12, 1983 (Philippine Embassy Bank Account Case), BVerfGE, 46 BVerfGE 342 (1977), 65 I.L.R. 146 (1984) (F.R.G.); Judgment of Mar. 4, 1981 (Caonrades v. United Kingdom Labour Court), Case No. 2 Ca. 10/80, 65 I.L.R. 205 (1984) (F.R.G.).

161. *See* Bouchez, *supra* note 5, at 12-13.

162. *See* Judgment of Dec. 19, 1974 (Land Purchase Broker's Commission Case), Case No.

assuming mortgages,[163] installing or repairing heating systems,[164] and carrying out the general business of the embassy.[165] This presents a paradox because these actions are done solely to establish and maintain an extra-territorial place. Despite this, German courts have held that most of these private law transactions extinguish the foreign sovereign's right to claim immunity.[166]

In the earliest Federal Constitutional Court case supporting restricted sovereign immunity, *X v. Yugoslavia*, a private plaintiff requested a ruling that a sales contract for the previous embassy premises be considered void and the German land register be rectified.[167] The Court held that since an action for rectification of the land register does not adversely affect the functions of the diplomatic mission, a judgment altering the land register in favor of the private plaintiff would merely reflect the true legal positions of the parties.[168] In the cornerstone restricted immunity case, *X v. Empire of Iran*, the Federal Constitutional Court held that a transaction for the repair of the embassy's heating system was a purely private-law transaction not to be accorded immunity.[169] Moreover, the Superior Provincial Court of München held that the taking of copyrighted materials was a private

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1 U 3951/74, OLGZ, Munich (using the same reasoning as the *Arms Sales* case to hold that a transaction for fees did not relate to the purchase of the embassy grounds itself).

163. *See* Judgment of Sept. 26, 1969 (Hungarian Embassy Case), Case No. V ZR 122/65, BGHZ, 1968-69 IPRspr., No. 197, at 498, 1969 WM 1348, 65 I.L.R. 110 (1984) (F.R.G.) (allowing no immunity in defense of a mortgage on embassy grounds, although the building had been destroyed). For an earlier stage in the proceedings see 28 I.L.R. 392.

164. Judgment of Apr. 30, 1963 (X v. Empire of Iran), BVerfGE, 16 BVerfGE 27 (1964), 65 I.L.R. 57 (1972) (F.R.G.).

165. *See* Judgment of Mar. 4, 1981 (Caonrades v. United Kingdom Labour Court), Case No. 2 Ca. 10/80, 65 I.L.R. 205 (1984) (F.R.G.) (dealing with an employee contract dispute which the court held was entitled to immunity).

166. *See* sources cited *supra* notes 159-63.

167. Judgment of Jan. 31, 1969 (Yugoslav Military Mission Case), BVerfGE, 15 BVerfGE 25 (1964), 38 I.L.R. 162 (1969) (F.R.G.).

168. *Id.; see also* Judgment of Oct. 16, 1973 (Land Sale Authorization Case), Case No. 1 W 744/73, KG, West Berlin, 1971-75 Fontes Iuris Gentium, Series A, Sectio II, Tomus 7, at 375, 1974 NJW 1627 (1973), 65 I.L.R. 122 (1984) (F.R.G.). A related question was whether the plaintiff could require the Ambassador to prove his authority to sell land. The court held that the sale of land not connected to the diplomatic mission was a private law transaction and authority could be requested. *Id. But see* Judgment of Oct. 10, 1972 (Arms Sales Commission Agreement Case), Case No. 6 U 520/68, OLGZ, Coblenz, 1971-75 Fontes Iuris Gentium, Series A, Sectio II, Tomus 7, at 267, 1975 OLGZ 379, 65 I.L.R. 119 (1984) (F.R.G.).

169. Judgment of Apr. 30, 1963 (X v. Empire of Iran), BVerfGE, 16 BVerfGE 27, 32 (1964), 45 I.L.R. 57, 62 (1972) (F.R.G.).

appropriation, and therefore, the entity, a section of the Spanish Consular-General dealing with tourism to Spain, was not afforded immunity.[170]

Arms Sales Commission Agreement demonstrates how German courts apply domestic German law to transactions. The German courts tend to attenuate the transaction from the foreign sovereign itself.[171] In *Arms Sales Commission Agreement*, the Superior Provincial Court of Coblenz held that although the defense and maintenance of armed forces were sovereign functions, the plaintiff based the claim on an agreement for a commission for finding sellers of military arms.[172] The court made a distinction, however, between a commission agreement and an actual arms-sales contract. The court qualified this holding by stating that a sales agreement might have a public nature.[173]

In another Superior Provincial Court of München case, the court distinguished the land broker's commission for the foreign state's consulate as being a private transaction not within the sphere of sovereign activities.[174] Finally, a third superior provincial court justified characterizing taking copyrighted material as a private transaction by reasoning that if the material had been sold properly, the transaction would have been private.[175]

German domestic law provides flexibility in determining whether a state's activity is considered public or private, and that determination predicates whether the foreign state is entitled to claim immunity.[176] This flexibility also indicates the discretion under domestic law for courts to provide varying interpretations. The cases discussed, however, do provide some indication of how German courts will view certain transactional areas. Many of these cases address issues such as foreign embassies, which are treated with greater caution by Ger-

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170. Judgment of June 30, 1977 (Spanish State Tourist Office Case), OLGZ, Frankfurt, 23 RIW/AWD 721 (1977), 65 I.L.R. 140 (1984) (F.R.G.).

171. *See Empire of Iran*, 45 I.L.R. at 57; *Arms Sales Commission Agreement*, 1971-75 Fontes Iuris Gentium, Series A, Sectio II, Tomus 7, at 267; 1975 OLGZ at 379; Judgment of Dec. 19, 1974 (Land Purchase Broker's Commission Case), Case No. 1 U 3951/74, OLGZ, Munich.

172. *Arms Sales Commission Agreement*, 1971-75 Fontes Iuris Gentium, Series A, Sectio II, Tomus 7, at 267; 1975 OLGZ at 379.

173. *Id.*

174. *See generally* Judgment of Dec. 19, 1974 (Land Purchase Broker's Commission Case), Case No. 1 U 3951/74, OLGZ, Munich.

175. *See generally* Judgment of June 30, 1977 (Spanish State Tourist Office Case), OLGZ, Frankfurt, 23 RIW/AWD 721 (1977), 65 I.L.R. 140 (1984) (F.R.G.).

176. Paussmeyer, *supra* note 21, at 418-21.

man courts.[177] Notwithstanding this deference, German courts do tend to decline immunity in favor of providing private plaintiffs with a forum.[178]

E. *Execution Proceedings*

Even if a forum is provided, a favorable judgment will have little value if the plaintiff is unable to enforce it.[179] German courts have distinguished between jurisdictional and enforcement proceedings.[180] The basic concepts of immunity remain the same in both types of proceedings. The application of general international law under Article 25 still determines immunity based on a private or public classification. Instead of applying this distinction to the activity of the state, however, it applies to the assets being executed or attached.[181]

Although courts continue to use German domestic law to classify the assets being executed or attached, the assets' purpose as designated by the foreign sovereign becomes much more important.[182] The "nature of the activity" test is not directly converted into the "nature of the asset," but the test is left uncertain by the German courts' interchanging use of the words "nature" and "purpose" in their opinions.[183] German courts make a final distinction regarding the status of the entity controlling the assets in question.[184]

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177. *See* Vienna Convention, *supra* note 58; *see also* cases cited *supra* notes 165, 167.

178. Paussmeyer, *supra* note 21, at 420-21.

179. *See* DAHM, *supra* note 33, at 238. "Doubly restricted" immunity is the term used and cited by the Spanish Consular Bank Account case to designate a state that permits jurisdiction as well as execution on foreign states. *Id.*

180. Bouchez, *supra* note 5, at 12-14. *See generally* Steinberger, *supra* note 2, at 417 (providing an in-depth historical review).

181. *See supra* note 177.

182. *Id.*

183. *See* Judgment of Oct. 21, 1980 (National Iranian Oil Co. Legal Status Case), OLGZ, Frankfurt, 26 RIW 874 (1980), 65 I.L.R. 199 (1984) (F.R.G.); Judgment of Mar. 26, 1981 (Foreign Trade Institute Bank Account Case), LG, Hamburg, 27 RIW 712 (1981), 65 I.L.R. 209 (1984) (F.R.G.); Judgment of May 4, 1982 (National Iranian Oil Co. Pipeline Contracts Case), OLGZ, Frankfurt, 28 RIW 439 (1982), 65 I.L.R. 215 (1984) (F.R.G.); Judgment of Apr. 12, 1983 (National Iranian Oil Co. Revenues from Oil Sales Case), BVerfGE, 64 BVerfGE 1, (1984), 65 I.L.R. 215 (1984) (F.R.G.). The language and dicta in each of these cases use the words "nature" and "purpose" in more than one context. This increases the confusion of an attorney attempting to determine which test will apply.

184. *Compare* Judgment of Dec. 13, 1977 (Philippine Embassy Bank Account Case), BVerfGE, 46 BVerfGE 342 (1977), 65 I.L.R. 146 (1984) (F.R.G.) *with* Judgment of Aug. 25, 1976 (Nada Trust v. Central Bank of Nigeria), LG, Frankfurt, 1975 NJW 1044 (1976), 65 I.L.R.

1. Status — Asset Classification

Contemporary German Court decisions considerably reduce the relevance of status in jurisdictional proceedings.[185] Modern German courts have focused on whether the activity of the foreign state was considered public or private.[186] If domestic law classifies the act as private, then even if the defendant is a foreign sovereign, no immunity is available for jurisdictional purposes.[187] Yet, the foreign entity's status has retained greater importance in execution proceedings.

The *National Iranian Oil Company* (NIOC) cases considered how an entity's status affected execution against a foreign state's asset.[188] The Federal Constitutional Court reasoned that no rule of general international law exists requiring a foreign sovereign to be treated as the holder of funds that are in the name of a separate undertaking.[189] The Court found that an entity separate from the foreign state held the funds even though the accounts were governed according to foreign law, which required these funds be transferred to the foreign central bank for state budgetary items.[190] Yet, the Federal Constitutional Court left unanswered the question of whether an account in the foreign state's name, used by a separate entity for clearly private transactions, is immune from execution as assets of the foreign sovereign.

Notwithstanding *NIOC Revenues from Oil Sales*,[191] the Federal Constitutional Court had previously provided binding precedent for giving considerable deference to a sovereign state's designated bank account.[192] The Federal Constitutional Court held that attachment of a bank account in the name of the "Embassy of the Philippines" was a violation of general international law.[193] As a result of the attachment, the Embassy was unable to meet certain obligations, which included

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131 (1984) (F.R.G.). Each case provides diametrically opposed facts pertaining to the status of the defendant.

185. *See Nada Trust*, 65 I.L.R. at 131; *National Iranian Oil Co. Revenues from Oil Sales*, 64 BVerfGE at 1, 65 I.L.R. at 215.

186. *See* sources cited *supra* note 182.

187. *National Iranian Oil Co. Revenues from Oil Sales*, 65 I.L.R. at 226.

188. *National Iranian Oil Co. Pipeline Contracts*, 28 RIW at 439, 65 I.L.R. at 215; *National Iranian Oil Co. Revenues from Oil Sales*, 65 I.L.R. at 224.

189. *National Iranian Oil Co. Revenues from Oil Sales*, 65 I.L.R. at 224.

190. *Id.*

191. *See id.*

192. Judgment of Dec. 13, 1977 (Philippine Embassy Bank Account Case), BVerfGE, 46 BVerfGE 342 (1977), 65 I.L.R. 146 (1984) (F.R.G.).

193. *Id.*

operating costs, payment of staff salaries, and rent.[194] The Court saw the forum court's potential interference in matters within the foreign state's autonomy as the primary issue.[195] The Court stated that, without consent, the forum state could not require the foreign state to provide details of past, present, or future use of the funds.[196] The Court expressly declined to give an opinion on whether the analysis would change if the account were in a separate state entity's name.[197]

Assets in the name of a separate state entity may indicate to a German court that the account is within the realm of private transactions. In such a case, the court would not have to infringe upon the foreign state's autonomy in order to make such a determination. The Superior Provincial Court of Stuttgart used this reasoning to hold that an account in the name of a particular consular office, rather than in the name of the state itself, was sufficient evidence that the assets should be classified as private.[198] In an earlier NIOC case, the Superior Provincial Court of Frankfurt held that, under the general rules of international law, the commercial undertaking of a foreign state endowed with an independent legal personality could not claim immunity even if it were closely interrelated with that state's government.[199] An entity's status will likely influence how a court classifies assets, because a court will be sensitive to the potential problem of interfering in a foreign state's internal matters by forced executions.

2. Purpose — Asset Classification

A court's execution measures may directly and drastically impact upon a foreign state.[200] This potential impact affects the German courts' analysis under German domestic law.[201] In execution proceedings, German courts have continued to analyze the asset's "purpose."[202] The

194. *Id.*

195. *Philipine Embassy Bank Account*, 65 I.L.R. at 166-71.

196. *Id.* at 169.

197. *Id.* at 170.

198. *See* Spanish Consular Bank Accounts Case, LG, Stuttgart, 65 I.L.R. 114, 114-16 (1984) (F.R.G.); *see also* Judgment of May 4, 1982 (National Iranian Oil Co. Pipeline Contracts Case), OLGZ, Frankfurt, 28 RIW 439 (1982), 65 I.L.R. 215 (1984) (F.R.G.) (finding in dicta that if the NIOC was separate, then it could only claim immunity for public (sovereign) acts).

199. Judgment of Oct. 21, 1980 (National Iranian Oil Co. Legal Status Case), OLGZ, Frankfurt, 26 RIW 874, 876 (1980), 65 I.L.R. 199, 201 (1984) (F.R.G.).

200. *See* sources cited *supra* note 51.

201. *Id.*

202. Judgment of Dec. 13, 1977 (Philippine Embassy Bank Account Case), BVerfGE, 46 BVerfGE 342, 353 (1977), 65 I.L.R. 146, 147 (1984) (F.R.G.).

courts look at the obvious or designated purpose of the assets.[203] While the nature of the foreign state's activities is a liberal test applied in jurisdictional cases, German courts classify the assets of a foreign entity as public or private depending on those assets' obvious or designated purpose. This interpretation of domestic law allows greater deference to a foreign state in execution proceedings.[204]

The *Central Bank of Nigeria* court stated that where jurisdiction was permissible, execution also would be permissible.[205] In qualifying this statement, the court reasoned that "double restriction" would apply unless the assets in question had been devoted to public service of the state.[206] Although the court allowed execution, the *Central Bank of Nigeria* court addressed the Nigerian Government reneging on a transaction considered highly relevant to on-going international commercial trade: a letter of credit.[207] The court did not focus on the assets, but instead on the transaction's clearly private and commercial nature.[208] Because this case implicated an important international commercial interest, *Central Bank of Nigeria* is potentially misleading regarding the legal classification of assets that do not affect the underpinnings of customary commercial law.

The scope of this holding was subsequently limited. While *Central Bank of Nigeria* very liberally discounted immunity from execution, the Federal Constitutional Court has held immunity to be a valid defense if, at the time of the measure of execution, such property served sovereign purposes.[209] In further contrast to *Central Bank of Nigeria*, the *Philippine* court held that specific rules of international law applied and, therefore, domestic law was inapplicable for classification.[210] The court deemed the special rules of the Vienna Convention of Diplomatic Relations partially applicable.[211] This interpretation of

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203. 65 I.L.R. at 151.

204. *See generally id.* (implicitly, if not expressly, providing deference to the Philippine state).

205. *See* Judgment of Aug. 25, 1976 (Nada Trust v. Central Bank of Nigeria), LG, Frankfurt, 1975 NJW 1044 (1976), 65 I.L.R. 131 (1984) (F.R.G.) (referencing the *Empire of Iran* case as the proper basis of law and determination of immunity).

206. *Id.*

207. *Id.*

208. *Nada Trust*, 65 I.L.R. at 137.

209. Judgment of Dec. 13, 1977 (Philippine Embassy Bank Account Case), BVerfGE, 46 BVerfGE 342, 346 (1977), 65 I.L.R. 146, 150 (1984) (F.R.G.).

210. *Id.* at 152.

211. *Id.* The reasoning behind applying domestic law in classifying assets of a foreign sovereign as public or private is based on the lack of specific international law. When specific

international rules requires a foreign state's protected area to be very wide.[212]

Difficulties in determining whether a forum state's actions will endanger the ability of the foreign state's diplomatic mission forces German courts to defer to the foreign state.[213] The Federal Constitutional Courts feared that executing authorities might be called upon to ascertain a foreign state's intended purpose through factual investigation.[214] Exclusive of jurisdiction, such an intrusive determination violates international law.[215] The Federal Constitutional Court held that reference need only be made to the "typical abstract danger" and not to the specific threat posed to the foreign state's exclusivity by execution measures.[216]

Although the *Philippine* court provided a hands-off policy, it vaguely addressed the problem of determining whether a foreign state is merely using such accounts as a shield for financial and commercial transactions unrelated to the diplomatic mission.[217] It was then up to the "competent authorities of Germany" to counter such "non-functional" use of immunity.[218] The Court did not say, however, what state authorities were competent.[219] International law does not prohibit requesting the foreign state to substantiate that the account is used for the continued functioning of its diplomatic mission.[220]

Although the *Philippine* case is highly persuasive authority, the facts of the case brought diplomatic questions into play, as well as specific international law. In a different factual situation, in *NIOC Revenues from Oil Sales*, the Federal Constitutional Court provided

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rules of customary international law can be found they take precedence in application over domestic law. *Id.*

212. *Id.*

213. *Id.* at 147. The Court found it immaterial whether despite attachment the embassy could continue all of its operations. *Id.* at 149. This would unfairly differentiate between the financial positions of foreign states. *Id.* Treatment in this area is inherently considered part of the equality of states. *Id.*

214. *Id.* at 150-52. It would be interference in matters within the exclusivity of the foreign state to require them without consent to provide details of the past, present, or future use of the funds. *Id.*

215. *Id.*

216. *Id.* at 153.

217. *Id.*

218. *Id.* at 154. The Court did not elaborate on what agency or authority to which such action would be referred.

219. *Id.*

220. *Id.*

the most recent insight into German sovereign immunity interpretation.[221]

In *NIOC Revenue from Oil Sales*, the Federal Constitutional Court held that no rule of international law prohibited German courts from executing or attaching a foreign state's assets to protect creditors when the assets do not serve a sovereign purpose of the foreign state.[222] The classification of the funds should be made at the moment the execution or attachment was initiated.[223] The Court stated that neither the relationship created by the transaction nor the classification of the original activity generating the funds was decisive in classifying the account's intended function.[224] In this *NIOC* case, which contrasts with the *Philippine* case, the Court followed previous lower appellate decisions and treated the Iranian-created oil company as private in interpreting the "purpose" of its assets as private.[225] Although the funds were destined for budgetary items by the foreign state's law, the Court held that the funds only obtain their decisive "definition of purpose" once they reach the foreign state's central bank.[226] Consequently, the NIOC was unable to claim immunity.[227]

In sum, German courts will apply "doubly restricted" immunity.[228] It is not fully clear whether immunity from execution will be more readily provided to the foreign state by German courts. The status of the entity holding the assets and the clarity of the purpose of those assets are the most important factors in determining whether immunity from execution will be available to a foreign state.

V. CONCLUSION

At some point, a practicing attorney must decide whether to defend or pursue a claim in Germany. Plaintiff's counsel should be concerned that efforts to proceed with litigation in Germany may only increase a client's losses. On the other hand, defendant's counsel should be concerned that a default judgment may be upheld, and the defendant's assets may be executed upon. Resolving the concerns of both parties

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221. Judgment of Apr. 12, 1983 (National Iranian Oil Co. Revenues from Oil Sales Case), BVerfGE, 64 BVerfGE 1, 65 I.L.R. 215 (1984) (F.R.G.).

222. 65 I.L.R. at 222.

223. *Id.*

224. *Id.* at 219.

225. *Id.* at 218-19.

226. *Id.* at 219-20.

227. *Id.* at 225.

228. *See* DAHM, *supra* note 33.

turns on an accurate prediction as to whether the foreign defendant has the right to claim sovereign immunity.

The fact that Germany has not attempted to codify its sovereign immunity defense makes such a prediction difficult. However, it is not impossible; German courts have consistently interpreted the availability of the sovereign immunity defense to foreign entities. German law, in accord with general international law, determines immunity on the basis of the foreign state's activity or assets and on their classification as public or private. This determination, in most factual situations, will be made according to German domestic law. In applying domestic law, German courts have taken a more liberal stand in extinguishing the right of a foreign sovereign to claim immunity for jurisdictional purposes rather than for execution purposes.

German courts have considered it less intrusive to require a foreign sovereign to defend itself from a claim than from the actual taking of property through execution proceedings. The distinction between jurisdiction and execution proceedings is a practical problem due to the application of two different domestically-defined standards. While German courts do look to the nature of a foreign sovereign's activity in order to determine jurisdiction, they merely look to the obvious or designated purpose of that sovereign's asset in order to determine execution. Unfortunately, the inability to execute on a judgment makes obtaining jurisdiction much less valuable. Further, the predictability of the ultimate outcome becomes more difficult.

The trend in Germany is toward a more liberal denial of immunity to a sovereign state. A sense of fairness has permeated German decisions since the early 1960's, when the Federal Constitutional Courts repudiated the absolute theory of sovereign immunity. Germany is bound by general international law. In actuality, the German courts view general international law as a limit outside of which German courts will not venture. Notwithstanding embassy assets and diplomatic-related activities, German courts are less willing to allow a foreign sovereign or its entity to avoid a private or commercial bargain merely because it is no longer to that party's benefit.

VI. RECOMMENDATIONS

In predicting the outcome of jurisdiction and execution proceedings, the practitioner must anticipate certain actions from the other party and from German courts. Such forward looking skills, however, may be used much more effectively prior to any conflict. Practically, the private party should take anticipatory steps early in the transaction.

The private party may protect itself by obtaining a waiver of immunity from the foreign state or entity. This waiver should include a

choice of forum clause in the documents facilitating the transaction. A choice of forum clause will likely add to the strength and clarity of a foreign state's waiver of immunity. Of course, in practice, the foreign sovereign may not be amenable to waive immunity.

A private party steps into a precarious position when transacting with a foreign state. If a sovereign entity claims immunity, the private plaintiff may find itself without effective recourse. A private party should always consider declining to transact business with a sovereign state absent a waiver.

The risk of dealing with a foreign country is significant for other reasons. The practitioner must enter into transactions with a foreign sovereign with open eyes. For example, the stability of the government, availability of hard currency, convertibility of foreign currency, and the reputation of a foreign state should be considered prior to the transaction agreement.

The analysis provided in this note can be used to evaluate some of the risks related to conducting business with a foreign sovereign. The risks related to potential future conflict with a foreign state may then be compared to the potential return and benefits of such a transaction. Only when a practitioner understands the risk and return of a certain transaction, can the practitioner make an informed decision.

Christopher John Oehrle