# INTERNATIONAL LAW—WAIVER OF SOVEREIGN IMMUNITY USING APPARENT AUTHORITY OF THE AGENT AND RATIFICATION BY PRINCIPAL—*CAPITALKEYS, LLC V. DEM. REP. OF CONGO*, NO. 21-7070, 2022 U.S. APP. LEXIS 20367 (D.C. CIR. JULY 22, 2022).

It is customary and codified international law that sovereign countries, as independent legal entities, are immune from answering lawsuits brought by private parties.[1] In the United States, this principle is governed by the Foreign Sovereign Immunities Act of 1976 (FSIA), which gives federal district courts jurisdiction to hear civil suits brought against foreign states.[2] In *CapitalKeys, LLC v. Dem. Rep. of Congo*,[3] the United States Court of Appeals for the

1. *See* Rob Regan, *Sovereign Immunity and The Lost Ships of Canada's Historic Merchant Fleet*, 64 U.T. FAC. L. REV. 1, 54 (2006) (describing custom of sovereign immunity in international law). Notably, "[t]he principle of sovereign immunity is a creature of customary international law." *Id. See also* KRISTA NADAKAVUKAREN SCHEFER, INTERNATIONAL INVESTMENT LAW: TEXT, CASES AND MATERIALS, 37-39 (3d ed. 2020) (ebook) (describing enforcement in international investment law). Before the inception of international investment agreements, and bilateral investment treaties, private companies were not able to bring claims against countries in the International Court of Justice (IJC). *Id.* at 40. Most current international investment agreements contain provisions authorizing private companies to sue governments for breach of the agreement. *Id.* at 41-42. *See also* Rebecca Heintz, *Federal Sovereign Immunity and Clean Water: A Supreme Misstep*, 24 ENVTL. L. 263, 266 (1994) (discussing history of foreign sovereign immunity). The doctrine of foreign sovereign immunity is traced to English common law. *Id.* The maxim on which the doctrine is based is "the king can do no wrong." *Id.* Each English lord, and for that matter, the King, had their own court, for which they were the judge. *Id.* A lord could be sued by his subjects in any court higher than his own, whereas the King could not be sued without consent since his was the highest court. *Id.*

2. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C.S. § 1602 (codifying foreign sovereign immunity doctrine). The Foreign Sovereign Immunities Act (the FSIA) states "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter . . . ." *Id. See also* Maryam Jamshidi, *The Political Economy of Foreign Sovereign Immunity*, 73 Hastings L.J. 585, 587 (2021) (analyzing suits under Foreign Sovereign Immunities Act). The Foreign Sovereign Immunities Act concerns civil litigation in both U.S. federal and state courts, brought against foreign governments, their agencies, and their instrumentalities. *Id.* Foreign states are awarded immunity from lawsuits under the Foreign Sovereign Immunities Act unless an enumerated exception in the statute applies. *Id.*

3. No. 21-7070, 2022 U.S. App. LEXIS 20367, *1 (D.C. Cir. July 22, 2022).

District of Columbia Circuit considered whether the Governor of the Central Bank of the Democratic Republic of Congo (Central Bank), Jean-Claude Masangu Mulongo (Governor Masangu), implicitly waived the Central Bank's sovereign immunity when contracting with the Appellant for government relations and strategic communications services.[4] The D.C. Circuit held that Governor Masangu lacked both actual and apparent authority to waive the sovereign immunity of the Central Bank and affirmed the district court's ruling that dismissed the complaint for lack of subject matter jurisdiction.[5]

CapitalKeys, a D.C.-based lobbying firm, entered into an agreement with the Democratic Republic of Congo (DRC) and Central Bank which stated the Central Bank would pay CapitalKeys $16.6 million for CapitalKeys to provide government relations and strategic communication services.[6] The agreement

4. *See id.* at *4 (giving general description of case). The President of CapitalKeys and Governor Masangu negotiated the contract at issue. *Id.* Under the Democratic Republic of Congo (DRC) law, the approval of such a contract was under the power of the board of the Central Bank of the Democratic Republic of Congo (Central Bank), not Governor Jean-Claude Masangu Mulongo (Governor Masangu) himself. *Id.* at *5. *See also* CapitalKeys, LLC v. Dem. Rep. of Congo, No. 15-cv-2079 (KBJ), 2021 U.S. Dist. LEXIS 103996, at *1 (D.D.C. June 3, 2021) (describing facts of case). The District Court considered a magnitude of issues relating to the agreement between CapitalKeys and the Central Bank. *Id.* The main issue on appeal was the Central Bank's motion to dismiss, concerning primarily that the U.S. District Court lacked subject matter jurisdiction over the present case. *Id.* at *14. The Central Bank argued that no exception under the FSIA applied to CapitalKeys's claim because Governor Masangu acted without authority, and there is no evidence the Central Bank was carrying out a commercial activity within the meaning of the statute. *Id.*

5. *See CapitalKeys, LLC*, 2022 U.S. App. LEXIS 20367, at *2-3 (ruling in favor of Central Bank). The DRC failed to appear at any stage of litigation, but the district court still had the ability to determine immunity for the foreign state. *Id.* at *3. *See also CapitalKeys, LLC*, 2021 U.S. Dist. LEXIS 103996, at *3 (holding for Central Bank). The Central Bank prevailed at the district court level as well. *Id.*

6. *See CapitalKeys, LLC*, 2022 U.S. App. LEXIS 20367, at *2 (describing agreement between parties). The agreement was to last for a period of five years. *Id. See also CapitalKeys, LLC*, 2021 U.S. Dist. LEXIS 103996, at *4 (describing negotiations between parties). The negotiations took place over a six-month period in 2013. *Id.* CapitalKeys alleged that the DRC paid them $600,000 as consideration for the agreement. *Id.* The $600,000 is described as a good-faith payment which was joined with an alleged oral promise by Governor Masangu that the remaining payment was coming shortly. *Id.* at *7-*8. The motivation behind the agreement was to "improv[e] the [DCR's] image abroad" and to help strengthen its economy over the period of the contract. *Id.* at *4. It was later determined that the correct measure of CapitalKeys's damages was just over $12.5 million. *Id.* at *12. CapitalKeys alleges that a month after the agreement the International Monetary Fund cancelled "all cash disbursements to [the] Congo . . . ." *Id.* at *9. CapitalKeys claims they were able to counsel the DRC when negotiation with the International Monetary Fund, securing a $225 million release of funds to the DRC. *Id.*

was signed by CapitalKeys' President, Adam Falkoff, and Governor Masangu, whose term as Governor of the Central Bank was expiring.[7] The agreement also provided that a potential suit arising out of the contract would be governed by the laws of the District of Columbia.[8] Two years from the execution of the contract between the parties, CapitalKeys initiated this breach of contract suit for the DRC and Central Bank's failure to pay for the services provided.[9]

To succeed in their lawsuit, CapitalKeys needed to demonstrate that the DRC and Central Bank had waived their sovereign

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The more general assertions CapitalKeys brings is that they elevated the DRC's global image, assisted in modernizing the DRC's infrastructure, and connected the country with leaders of foreign governments. *Id.* at *9-10.

7. *See CapitalKeys, LLC*, 2022 U.S. App. LEXIS 20367, at *1-2 (detailing parties' signing agreement). Adam Falkoff acted as representative of CapitalKeys. *Id. See also CapitalKeys, LLC*, 2021 U.S. Dist. LEXIS 103996, at *7 (describing nature of signature). The district court found it vital under the circumstances that the contract was only signed by these two parties. *Id.* CapitalKeys agreed to provide a number of services to the Central Bank. *Id.* at *5. The services included agreements to: 1) strategize with the Central Bank in order to reduce the DRC's inflation and strengthen the currency; 2) advise the Central Bank in creating a new stock market; 3) help modernize the DRC's infrastructure; 4) improve the Central Bank's reputation with a number of financial decision makers; 5) redefine the image of the central bank around the world; 6) help raise important issues with the World Bank and International Monetary Fund; and 7) introduce Central Bank leadership to high ranking individuals in foreign governments. *Id.* at *5. CapitalKeys maintained that Governor Masangu not only had actual and apparent authority to enter into the agreement with them, but also the choice of law provision contained in the contract constituted an implicit waiver of sovereign immunity. *Id.* at *14.

8. *See CapitalKeys, LLC*, 2022 U.S. App. LEXIS 20367, at *2 (describing choice of law provision). The District of Columbia was to be the exclusive location for any dispute or proceeding arising from the agreement between CapitalKeys and the Central Bank. *Id. See also CapitalKeys, LLC*, 2021 U.S. Dist. LEXIS 103996, at *6 (examining case of breach). In the event of a breach, the agreement provided that suspension of work by CapitalKeys may take place. *Id.* The choice of law provision stated, "[t]his Agreement will be governed by the laws of the District of Columbia without regard to principles of conflicts of law and a court in said place shall be the exclusive location for any suit relating to this Agreement." *Id.* at *7.

9. *See CapitalKeys, LLC*, 2022 U.S. App. LEXIS 20367, at *2 (characterizing cause of suit). CapitalKeys brought this suit in order "to retrieve what it believed was owed via the district court." *Id. See also CapitalKeys, LLC*, 2021 U.S. Dist. LEXIS 103996, at *8 (detailing time after alleged breach). It is important to note between the time of breach and CapitalKeys filing suit, they rendered services to the Central Bank. *Id.* CapitalKeys justified their actions by stating they relied on oral promises made by high-ranking officials promising payment for the services rendered. *Id.* CapitalKeys alleges but fails to identify, the representatives of the DRC who made promises to pay their fee. *Id.* at *8. Despite their failure to pay, CapitalKeys alleges they continued providing services to the Central Bank, pertaining to the agreement, relying on these promises for DRC representatives. *Id.*

immunity.[10] They argued that the DRC, which did not appear in any stage of litigation, and the Central Bank implicitly waived their immunity by including a choice-of-law provision in the contract.[11] To show this, the Circuit Court determined Governor Masangu needed to have the requisite authority to waive the immunity of the Central Bank.[12] The D.C. Circuit Court of Appeals affirmed the district court's decision that CapitalKeys failed to prove that this breach of contract claim fell within an

10. *See CapitalKeys, LLC*, 2022 U.S. App. LEXIS 20367, at *2 (describing presumptive immunity). The Circuit Court noted that the Central Bank and DRC are presumptively immune from answering a lawsuit in the United States. *Id. See also CapitalKeys, LLC*, 2021 U.S. Dist. LEXIS 103996, at *26 (discussing CapitalKeys's arguments). In response to the Central Bank raising a sovereign immunity argument, CapitalKeys alleged that implied waiver occurred when representatives for the Congo travelled with Governor Masangu when he signed the contract, and that since the contract was executed and performed in the United States, the commercial activity exception applied. *Id.* at *15.

11. *See CapitalKeys, LLC*, 2022 U.S. App. LEXIS 20367, at *2-3 (considering choice of law precedent). The circuit court does recognize that some courts of the United States, including the D.C. Circuit, have determined choice of law provisions are assents to be bound by the jurisdiction of American courts. *Id. See also CapitalKeys, LLC*, 2021 U.S. Dist. LEXIS 103996, at *14-15 (detailing Central Bank's response). In defense of the claims against it, the Central Bank alleged the agreement was invalid because Governor Masangu acted in contravention of Congolese law when signing the contract. *Id.* at *14. In response to CapitalKeys's commercial activity exception argument, the Central Bank maintained that no facts had been alleged which would show that a commercial activity had been carried out by the Central Bank in the United States. *Id.* at *14-15. At multiple stages of the litigation, Capitalkeys properly served process on the Central Bank and the DRC. *Id.* at *10-13. Ten months after being served with a default judgment, the Central Bank entered an appearance and "filed a motion to set aside the default judgment . . . ." *Id.* at *13. The Central Bank's motion to set aside the default judgment was allowed. *Id.* Additionally, CaptialKeys alleges that while Governor Masangu acting on behalf of the Central Bank signed the agreement, there was an understanding between the parties that this action would bind the DRC. *Id.* at *7. This argument is grounded in the claim "'that the Central Bank was acting as the agent and alter ego of Congo and that Congo would be bound by the agreement.'" *Id.*

12. *See CapitalKeys, LLC*, 2022 U.S. App. LEXIS 20367, at *4-5 (assessing Governor Masangu's authority). The circuit court agreed with the district court's assertion that for the choice of law provision to apply, the agent signing the contract on behalf of the principal needed to have the authority to do so. *Id.* at *5. *See also CapitalKeys, LLC*, 2021 U.S. Dist. LEXIS 103996, at *7, *27 (alleging Governor Masangu's authority to contract). CapitalKeys alleged that "all parties understood that the Central Bank was acting as the agent and alter ego of Congo and that Congo would be bound by the agreement." *Id.* at *7. The Magistrate Judge concluded, in both a 2016 report and recommendation, that the Central Bank and the DRC "were not entitled to sovereign immunity under the FSIA . . . they were liable for breach of contract . . . and that Capital Keys should be awarded" more than $16 million dollars in damages. *Id.* at *11.

exception under the FSIA, and dismissal of the suit of the District Court for lack of subject matter jurisdiction was proper.[13]

Every country in the world recognizes the immunity of a foreign sovereign, a concept which arose from the fear of insulting a foreign dignity and potentially showing hostility to a foreign power.[14] The recognition of foreign sovereign immunity in the

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13. *See CapitalKeys, LLC*, 2022 U.S. App. LEXIS 20367, at *12 (affirming district court ruling). Governor Masangu had neither actual nor apparent authority to bind the Central Bank, and therefore the implied waiver exception did not apply. *Id.* at *5. The Circuit Court quickly denied CapitalKeys' commercial activity exception claim, considering it was not an activity "'carried on by' the DRC or the Central Bank." *Id.* at *12. *See also* Foreign Sovereign Immunities Act of 1976, 28 U.S.C.S § 1602 (discussing U.S. Federal Court's subject matter jurisdiction under FSIA). Foreign states are subject to the jurisdiction of U.S. Federal Courts under specific circumstances, otherwise their immunity remains intact under the FSIA. *Id. See also CapitalKeys, LLC*, 2021 U.S. Dist. LEXIS 103996, at *79 (holding in favor of Central Bank). The district court's decision came after a default judgment was entered on behalf of CapitalKeys based on the uncontested facts at the time. *Id.* at *11. The district court initially agreed that there was subject matter jurisdiction to hear the case. *Id.* at *12. The court then determined that either party before December 17, 2018 could file to modify or set aside the default judgment in favor of CapitalKeys. *Id.* On December 13, 2018, the Central Bank moved to set aside the default judgment. *Id.* at *13. The court granted this motion after the Central Bank successfully argued that the default by the Central Bank was not willful but was caused by "internal confusion regarding how the litigation would be handled and by whom". *Id.* The Central Bank was allowed to file its motion to dismiss, which is the basis for CapitalKeys's appeal, raising the defenses at issue in the Circuit Court. *Id.* at *14.

14. *See The Jurisdictional Immunity of Foreign Sovereigns*, 63 YALE L. J. 1148, 1148 (1954) [hereinafter *Jurisdictional Immunity*] (describing motivation of establishing foreign sovereign's immunity). The fear of offending a foreign sovereign by subjecting them to a state's jurisdiction meant citizens of the state had to sacrifice their legitimate claims, giving way for the national interest of foreign diplomacy. *Id.* In discussing in rem sovereign immunity cases, the authors note that most of the case law in this area involves ships. *Id.* at 1150. The position of the American courts was that a ship was granted immunity as property of the sovereign as long as the sovereign was in possession of the ship. *Id.* The test for possession required "'some act of physical dominion or control . . . or at least some recognition on the part of the ship's officers that they were controlling the vessel and crew on behalf of their government.'" *Id.* at 1152. The authors argue that under this test, placing a junior naval officer on a vessel may meet the standard of possession. *Id.* In discussing the balance between allowing immunity and denying immunity, the authors note that international expediency would call for allowing immunity always, whereas "maximizing individual satisfactions" would call for denying immunity always. *Id.* at 1155. The traditional American approach to sovereign immunity, briefly explained above, did not do well in finding the balance between these two extremes. *Id. See also* Daniel T. Murphy, *The American Doctrine of Sovereign Immunity: An Historical Analysis*, 13 VILL. L. REV. 583, 583 (1968) (discussing history of foreign sovereign immunity doctrine). Unlike other legal doctrines and concepts, foreign sovereign immunity has avoided developing as a freely evolving legal concept. *Id.* The two basic competing notions of sovereign immunity are that it is either absolute or restrictive. *Id.* Through the restrictive approach, the concern is only whether the party being sued is a foreign sovereign. *Id.* If the restrictive approach is applied, and

United States dates back to the early nineteenth century.[15] For approximately one hundred years after first recognizing foreign sovereign immunity, American jurisprudence in this area typically involved admiralty cases.[16] From this time, American courts have recognized presumptive absolute immunity for sovereign defendants, and a further understanding of the doctrine has been established ever since.[17]

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the party being sued is a foreign sovereign, the action will be dismissed. *Id.* at 583-84. Under the restrictive approach, the concern is whether the party being sued is a foreign sovereign and whether they are acting in a public capacity rather than a private one. *Id.* at 584. Murphy also notes that in dealing with cases implicating foreign sovereign immunity it creates an impasse between the judiciary trying to develop the doctrine of sovereign immunity, and the executive branch's control over the country's foreign affairs. *Id.*

15. *See* Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch.) 116, 143-44 (1812) (recognizing foreign sovereign immunity). Chief Justice Marshall established the doctrine of foreign sovereign immunity in American courts by finding the French government was immune from the jurisdiction of the court. *Id. See Jurisdictional Immunity*, *supra* note 14, at 1148 (describing *Schooner Exchange* case). The case arose out of Napoleonic agents converting an American merchant ship into a French warship. *Id.* This case "held that the immunity of the sovereign person extended to the sovereign's public armed vessels." *Id.* at 1149. The authors noted that the *Schooner* case exhibited the Court's sensitivity to the impact of foreign affairs when applying the doctrine, specifically "to avoid international friction." *Id. See also* Murphy, *supra* note 14, at 584 (analyzing historical development of foreign sovereign immunity). The *Schooner Exchange* case is considered the "theoretical base of the doctrine of sovereign immunity" in the United States. *Id.* If the American court had exercised authority to hold the French liable for damages to the parties who claimed to be the owners of the vessel, this would be considered exercising authority over a sovereign nation. *Id.* Murphy explained that this decision involved the convergence of two concepts. *Id.* at 585. One involved the practices of nations and the other mutual courteousness between nations. *Id.* These concepts combined "require recognition and application of the sovereign immunity concept." *Id.*

16. *See* Murphy, *supra* note 14, at 587 (describing initial history of foreign sovereign immunity). Immunity in these admiralty cases, "was generally granted to those ships in the actual possession of a foreign government . . . ." *Id. See* The Carlo Poma, 259 F. 369, 370 (2d. Cir. 1919) (determining immunity of Italian-owned merchant ship). The ship at issue was not used as a warship but instead carried cargo, specifically for 10,712 boxes of lemons. *Id.* at 369-70. *See also* The Attualita, 238 F. 909, 912 (4th Cir. 1916) (discussing liability of Greek-owned ship). The suit arose out of a collision between two ships in the Mediterranean Sea. *Id. See also* The Pampa, 245 F. 137, 139 (E.D.N.Y 1917) (issuing decree "releasing the vessel from arrest"). This suit involved an Argentinian cargo ship moving general cargo, coal, and munitions. *Id.*

17. *See Jurisdictional Immunity*, *supra* note 14, at 1150 (reviewing American courts' recognition of foreign sovereign immunity doctrine). Traditionally, "[a]merican courts have followed the 'absolute theory' of immunity, which grants immunity in all cases where a sovereign is [a] defendant." *Id.* In some cases, immunity has been denied where the foreign government does not actually possess the property and where the agent of the sovereign is actually a corporation. *Id. See also* Murphy, *supra* note 14, at 590 (describing Supreme Court's adoption of absolute immunity). The concept of

Foreign sovereign immunity was codified into American law with the FSIA in 1976.[18] American courts have held that the FSIA created a general right for foreign sovereigns to be exempt from being sued in federal court in the United States.[19] The purpose in passing the FSIA was to give federal district courts jurisdiction to hear civil suits brought against foreign states and their instrumentalities.[20] In further analyzing the purpose of the FSIA, the

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absolute foreign sovereign immunity was effectively adopted by the Supreme Court following World War I. *Id.*

18. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C.S § 1602 (establishing foreign sovereign immunity); *see also* George K. Chamberlin, *Exceptions to Jurisdictional Immunity of Foreign States and Their Property Under the Foreign Sovereign Immunities Act of 1976*, 59 A.L.R. FED. 99, 99 (defining terms of Foreign Sovereign Immunities Act). Not only does a political subsidiary of the foreign state fall under the guise of the Foreign Sovereign Immunities Act, but also an agency or instrumentality of a foreign state is also covered. *Id.* To qualify as an agency or instrumentality of the foreign state, the entity must be a separate legal entity, and be considered an organ of the foreign state or "a majority of [the instrumentality's] shares or other ownership interest is owned by a foreign state or political subdivision" of the foreign state. *Id.*

19. *See* Pullman Constr. Indus. v. United States, 23 F.3d 1166, 1169 (7th Cir. 1994) (quoting *In re* Ayers, 123 U.S. 443, 505 (1887)) (discussing Congressional restrictions for suing federal government). In terms of sovereign immunity for the United States government, "[t]he very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive power of judicial tribunals at the instance of private parties." *Id.* With the same principles in mind, the FSIA "is designed to promote harmonious international relations by respecting governmental immunities recognized in international law while permitting claims arising out of ordinary commercial activities." *Id. See also* Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 846 (5th Cir. 2000) (discussing foreign sovereign immunity through context of statutory interpretation). The *Kelly* case stands for the notion that "[a] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in 28 U.S.C. §§ 1605-1607." *Id.* (quoting 28 U.S.C. § 1604). *See also* Robinson v. Gov't of Malay., 269 F.3d 133, 139-40 (2d Cir. 2001) (describing limited tortious action exception). Two narrowly construed criteria must exist for this exception to apply. *Id.* The exception exists "if (i) the plaintiff claims some injury 'caused by the tortious act or omission' of a foreign state; and (ii) this act or omission was 'nondiscretionary.'" *Id. See also* Gutch v. Fed. Republic of Ger., 255 Fed. Appx. 524, 525 (D.C. Cir. 2007) (quoting World Wide Minerals, Ltd. v. Republic of Kaz., 296 F.3d 1154, 1162 (D.C. Cir. 2002)) (describing narrowly construed waiver of authority). "A foreign sovereign will not be found to have waived its immunity unless it has clearly and unambiguously done so." *Id.*

20. *See* Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 790 (2d Cir. 1980) (describing basic purpose of FSIA). In determining the purpose of the FSIA, the court concludes it "is to give the district courts jurisdiction to hear civil cases involving claims against foreign states, and their instrumentalities . . . ." *Id.* While discussing the purpose of the FSIA, the case was nuanced as it was contemplating the retroactive effect of the FSIA on the district court's subject matter jurisdiction. *Id. See also* Hanil Bank v. PT. Bank Negara Indon., 148 F.3d 127, 130 (2d Cir. 1998) (considering jurisdiction when immunity not present). Prior to the U.S. State Department's "1952 Tate Letter", which include principles codified in the FSIA, the United States granted

statute is codifying the international law principle of respecting governmental immunities with some narrowly interpreted exceptions to the principle.[21]

While the FSIA is the "sole basis for obtaining jurisdiction over a foreign state in the courts" of the United States, federal courts have also recognized some exceptions to the presumptive immunity of the foreign state or instrumentality of the foreign state.[22] One such exception is known as the "waiver exception," which applies when the foreign state has waived its immunity

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complete and absolute immunity to foreign sovereigns. *Id.* Under the FSIA, if the foreign state or entity does not qualify for immunity under the FSIA, the federal district court will have original jurisdiction as long as the foreign state or entity was properly served. *Id. See also* Hashemite Kingdom of Jordan v. Layale Enters. (*In re* B-727 Aircraft), 272 F.3d 264, 270 (5th Cir. 2001) (discussing subject matter jurisdiction of federal courts). The FSIA "does not vest federal courts with subject matter jurisdiction by creating an independent cause of action." *Id.* The FSIA was meant to provide a forum to resolve ordinary legal disputes involving a foreign sovereign. *Id.* The FSIA is "the sole basis for obtaining in personam jurisdiction over a foreign state. *Id.*

21. *See Pullman Constr. Indus.*, 23 F.3d at 1169 (describing commercial activity exception). "[T]he FSIA . . . is designed to . . . respect[] governmental immunities recognized in international law while permitting claims arising out of ordinary commercial activities." *Id. See also Hanil Bank*, 148 F.3d at 129 (applying commercial activities exception). The commercial activities exception applies because the banking transaction involved in this case had a direct effect in the United States. *Id. See also* Persinger v. Islamic Republic of Iran, 729 F.2d 835, 838-39 (D.C. Cir. 1984) (identifying tortious act exception). A foreign state, entity, or person thereof is not immune from the jurisdiction of U.S. courts when their act or omission causes tortious injury in the United States. *Id.*

22. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989) (determining what FSIA provides). Notably, "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court . . . ." *Id.* at 439. *See also* Obhiambo v. Republic of Kenya, 764 F.3d 31, 34 (D.C. Cir. 2014) (describing FSIA exceptions). The federal district court only has subject matter jurisdiction over a suit brought against a foreign state if the claim falls within one of the exceptions in the FSIA. *Id.* The court explains further in that, "the FSIA exceptions are exhaustive; if no exception applies, the district court has no jurisdiction." *Id. See also* Bell Helicopter Textron, Inc. v. Islamic Republic of Iran, 734 F.3d 1175, 1183 (D.C. Cir. 2013) (describing commercial activity direct effect exception). The commercial activity exception states "that a foreign state is not immune when 'the action' in question 'is based . . . upon an act outside the [] United States in connection with a commercial activity of the foreign state elsewhere [which] causes a direct effect in the United States.'" *Id. See also* 28 U.S.C. § 1605 (2023) (detailing exceptions to Foreign Sovereign Immunities Act). A foreign state can waive their sovereign immunity explicitly, with an act, or implicitly. *Id.* at § 1605(a)(1). The commercial activity exception applies when the "activity is carried on in the United States by the foreign state . . . ." *Id.* at § 1605(a)(2). This exception is also in effect when the act is "performed in the United States in connection with a commercial activity of the foreign state elsewhere . . . ." *Id.* Finally, the exception can be administered when the act is outside of the United States and "in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . ." *Id.*

either explicitly or by implication.[23] Whether implied waiver has occurred has been left to common law principles.[24] In some cases, implied waiver has been found when a choice of law clause, to

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23. *See* Creighton Ltd. v. Gov't of State of Qatar, 181 F.3d 118, 122 (D.C. Cir. 1999) (discussing implied waiver exception). The implied waiver exception is minimally described in the statute, simply stating that a foreign state is not immune from the jurisdiction of American courts when the foreign state waives immunity by implication. *Id.* The court notes that in conjunction with an implied waiver, the party must have had the actual intention to waive their sovereign immunity. *Id.* While implied waiver can be found in assenting to be governed by another country's laws, the court declines to find implied waiver of sovereign immunity when a party agrees to be governed by another country's laws other than the United States. *Id.*

24. *See* Shapiro v. Republic of Bol., 930 F.2d 1013, 1017 (2d Cir. 1991) (interpreting implied waiver). The implied waiver clause of the FSIA is construed narrowly, a practice followed by a vast majority of federal courts. *Id.* The issue in front of the court was whether a foreign state filing suit on a related matter was an implied waiver of sovereign immunity. *Id.* Bolivia entered into a contract to purchase NATO held F-104 Starfighter jets. *Id.* at 1015. In conformance with the contract, Bolivia issued promissory notes when executing the contract to the defendant company, and Belgium who officially owned the fighter jets. *Id.* The agreement provided, however, that if the U.S. Government did not approve the sale of the fighter jets, the promissory notes would be returned to Bolivia. *Id.* The U.S. government did not approve the sale, and Bolivia requested the return of their promissory notes. *Id.* This request was fulfilled by all holders of the notes except for the company, and eventually, Bolivia brought an action to recover the promissory notes held by the company. *Id.* The plaintiff in this case was the holder of one of those promissory notes, and alleged since Bolivia brought an action to recover the promissory notes held by the company, the court has subject matter jurisdiction over his action to recover the monetary amount of that promissory note. *Id.* at 1016. The Court declined to extend the concept of implied waiver to the circumstances of this case because this separate action by the note holder concerned different rights and obligations from the claim brought by Bolivia for the return of their promissory notes. *Id.* at 1017-18. *See also* Princz v. Fed. Republic of Ger., 26 F.3d 1166, 1174 (D.C. Cir. 1994) (describing intention of foreign state). One of the requirements for implicit waiver is that the foreign state must have actually intended to waive its sovereign immunity. *Id.* The plaintiff was an American-Jewish person living in Slovakia during the outbreak of the Second World War. *Id.* at 1168. He and his family were arrested, sent to concentration camps, and forced to work in Nazi war factories. *Id.* Tragically, Mr. Princz's parents, sister, and two brothers were murdered by the Nazis. *Id.* After the Germans denied his initial reparations claim, Mr. Princz would have recovered from a revised reparations program in the 1960s, however, he filed his claim after the statute of limitations ran. *Id.* Mr. Princz resorted to filing a claim in the U.S. Federal District Court in the 1990s, and Germany moved to dismiss the claim for lack of subject matter jurisdiction, asserting their sovereign immunity. *Id.* The Court determined that neither the Third Reich nor the present German Government ever at any point intended to "waive [sovereign] immunity for actions arising out of the Nazi atrocities." *Id.* at 1174. Implied waiver of sovereign immunity, specifically the intentionality requirement, arises from a foreign state's agreement to arbitration, a choice of law provision, or from filing a responsive pleading. *Id. See also* Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 444 (D.C. Cir. 1990) (repeating intention requirement). There must be strong evidence that waiving sovereign immunity is what the foreign state actually intended. *Id.*

handle disputes in a U.S. jurisdiction, is incorporated as a contractual provision between a private party and a foreign state or instrumentality of the state.[25] In an ideal scenario, the agent of a foreign state will have actual authority to waive sovereign immunity, but courts are in disagreement as to whether apparent authority is sufficient to waive sovereign immunity.[26]

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25. *See* World Wide Mins., Ltd. v. Republic of Kaz., 296 F.3d 1154, 1161, n. 11 (D.C. Cir. 2002) (addressing implied waiver through choice of law provision). It is virtually unanimous among the circuits that the implied waiver exception is to be construed narrowly. *Id.* Some courts have concluded that a foreign state has waived their sovereign immunity through implication by agreeing to a choice of law or arbitration provision incorporated in a contract. *Id. See also Creighton*, 181 F.3d at 123 (qualifying choice of law provisions). When discussing the intentionality requirement of waiver, the:

> requirement is also reflected in the examples of implied waiver set forth in the legislative history of § 1605(a)(1), all of which arise either from the foreign state's agreement (to arbitration or to a particular choice of law) or from its filing a responsive pleading without raising the defense of sovereign immunity.

*Id. See also* GDG Acquisitions LLC v. Gov't of Belize, 849 F.3d 1299, 1302 (11th Cir. 2017) (holding implied waiver through ratification of contract). The Belize government claimed that they could not have waived their sovereign immunity because the minister who negotiated the contract lacked the authority to do so. *Id.* The court held that despite the lack of authority, the government ratified the contract so the claim that they were not bound did not stand. *Id.*

26. *See* RESTATEMENT (THIRD) OF AGENCY, § 1.03 (AM. L. INST. 2006) (defining authority within public sector). When dealing with an agent in the public sector, the authority that individual holds is defined by legislation or regulation. *Id. See also id.* at § 2.01 (defining actual authority). Actual authority is determined from the manifestations of the principal to the agent. *Id.* This manifestation is that the principal wishes the agent to do some act on behalf of the principal. *Id. See also id.* at § 3.03 (defining apparent authority). Apparent authority is determined as the conduct from the principal to the third party. *Id.* If the third party's belief that the agent had authority can be traced to principal, the agent is considered to have apparent authority. *Id. See also* 2 Barkley Clark & Barbara Clark, *The Law of Bank Deposits, Collections & Credit Cards* § 12.05(c) (rev. ed. 2010) (describing how ratification erases lack of authority). Ratification is defined as "a retroactive adoption of the unauthorized signature by the person whose name is signed and may be found from conduct as well as from express statements. For example, it may be found from the retention of benefits received in the transaction with knowledge of the unauthorized signature." *Id. See also* 2 Walter Wilson, *Government Contracts: Law, Administration & Procedure* § 17.20(b) (2022) (defining benefit from later ratification). Ratification can bind the government to a contract where the agent lacked the authority to sign the contract, especially where a benefit to the government can be shown. *Id. See also id.* at § 17.30(1)(a) (contemplating example of benefits after ratification). When the principal accepts the benefits of a contract which was created with lack of authority, ratification can cure that issue and bind the principal. *Id. See also* 1 Bruce Salvatore, *Doing Business in Canada* § 8A.01(d) (2022) (reiterating lack of authority ratification relationship). Lack of authority is a defense in contract law, considering "a signature made without authority is inoperative." *Id.* Ratification can cure this lack of authority defense. *Id. See also* 4 Kathleen Geiger, *Doing Business in the United States* § 64.02(1)(c) (2000) (stating how principal can ratify contract). In the case where

In *CaptialKeys v. Dem. Rep. of. Congo*, the court concluded that it was implausible for Governor Masangu to have acted with any authority when signing the agreement with CapitalKeys, for purposes of foreign sovereign immunity waiver analysis.[27] The

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the partner lacks the authority to bind the partnership, the partnership can subsequently ratify the partner's act whether or not the ratification is in writing. *Id. See also* SACE S.p.A. v. Republic of Para., 243 F. Supp. 3d 21, 38-39 (D.D.C. 2017) (considering waiver of sovereign immunity with apparent authority). The D.C. District Court determined that apparent authority is insufficient to waive sovereign immunity. *Id.* at 38. In its rationale, the court determined that in accordance with basic international law standards, waiver has to be approved by the foreign state, not a representative of the foreign state. *Id. See also* First Fid. Bank, N.A. v. Gov't of Ant. & Barb.-Permanent Mission, 877 F.2d 189, 194 (2d Cir. 1989) (allowing waiver of sovereign immunity with apparent authority). Under New York law, the defendants had apparent authority, and if they acted with that apparent authority during the transactions with the plaintiff, the foreign state would be liable. *Id.* at 195. *See also* Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1299 (11th Cir. 1999) (determining ambassadors waiver authority). In situations where an ambassador of a foreign state is acting in their official capacity, "under the FSIA, courts should assume that an ambassador possesses the authority to appear before them and waive sovereign immunity absent compelling evidence making it 'obvious' that he or she does not." *Id. See also* Phaneuf v. Republic of Indon., 106 F.3d 302, 308 (9th Cir. 1997) (considering apparent authority with congressional intent). The Ninth Circuit held that if Congress intended for a foreign entity to be bound by an agent acting without actual authority, they would have so indicated when drafting the FSIA. *Id. See also* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990) (discussing basis for *Phaneuf* decision). The court in *Phaneuf* used *Chuidian* as the basis for determining that apparent authority did not apply, because *Chuidian* held that if an agent acts outside of the authority granted to them, they are responsible, not the agent's foreign state. *Id. See also* Silverman v. United States, 679 F.2d 865, 870 (Ct. Cl. 1982) (determining benefits conferred through ratification). The Federal Trade Commission accepted the benefits flowing from the official who lacked authority to bind them, thereby ratifying the agreement and being bound by the promise. *Id. See also* Barnett v. United States, 397 F. Supp. 631, 638 (D.S.C. 1975) (noting benefit of ratification). The contract in question was between the plaintiff and the U.S. Department of Defense for the delivery of peaches to the United States Army stationed in Europe. *Id.* at 632. The U.S. District Court discussed the manifestation of the agreement, determining the U.S. government must have benefited from the agreement entered into by an Army officer. *Id.* at 638. *See also* Musher Corp. v. United States, 118 Ct. Cl. 259, 261 (1951) (discussing intent generally). This Court of Claims case concerned a supposed implied contract between the plaintiff who provided knowledge on a variety of premixed food products they manufactured to the U.S. Government. *Id.* at 260. The crux of the opinion concerned whether the U.S. Government actually had the intention to pay for the information, or whether it was provided voluntarily. *Id.* at 261. *See also* Goodyear Tire & Rubber Co. v. United States, 276 U.S. 287, 293 (1928) (referencing intent generally). The Court considered a tenant-landlord contractual dispute between the appellant and the United States government. *Id.* at 290. The basis of the opinion was concerned with evidence provided as to whether the United States, as the tenant, intended to continue the terms of the contract. *Id.* at 293.

27. *See CapitalKeys, LLC*, 2022 U.S. App. LEXIS 20367, at *9 (discussing Governor Masangu's affirmations of agency relationship). CapitalKeys's argument that they relied on Governor Masangu's representations that he had requisite authority when trying to assert apparent authority were improper, considering apparent authority is

Court began its analysis by turning to basic agency law to determine whether Governor Masangu was acting with either actual or apparent authority.[28] In agreement with the district court, the circuit court noted that apparent authority involves the Central Bank's manifestations to CapitalKeys, not Governor Masangu's representations.[29] As for the DRC, the Court could not point to what role they played in the agreement, let alone waiving their sovereign immunity.[30] Concluding there was no factual basis as to Governor Masangu's apparent authority, the Court declined to make a decision on whether apparent authority can be used to waive sovereign immunity.[31]

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regarding the principal's manifestations, not the agent's manifestations. *Id.* The court concluded that there was no evidence brought forward by CapitalKeys supporting a claim that the Central Bank, acting as principal, made any kind of manifestation to CapitalKeys indicating Governor Masangu had the authority to contractually bind the Central Bank. *Id.* The evidence brought forward by CapitalKeys alleging this was contrary to the institutional structure of the Central Bank. *Id.* at *7.

28. *See id.* at *6-8 (determining Governor Masangu's authority). The circuit court determined in quick decision that Governor Masangu did not have actual authority considering DRC domestic law, which states decisions of this nature are vested solely with the board of the Central Bank. *Id.* at *6. There was no evidence to indicate Governor Masangu could plausibly think he had actual authority. *Id.* The DRC statute establishing the Central Bank Governor's authority clearly stated that the Governor could not act "on any matter not related to operational and administrative oversight of the Central Bank" without approval from the board. *Id.* The Court concluded that the Board, as a whole "must agree to a contract before its Governor can sign it" and therefore, Governor Masangu did not enjoy actual authority. *Id.* at *7.

29. *See id.* at *6 (describing reasoning for affirming). According to the Circuit Court, the facts which CapitalKeys claimed were the manifestations of the principal did not constitute the requisite intention by the principal to waive their sovereign immunity. *Id.* Despite this determination, the court did note that the D.C. Circuit is undecided as to whether apparent authority of the agent sufficiently waives sovereign immunity. *Id.* at *7.

30. *See id.* at *11 (considering DRC's involvement). The only facts that were alleged were that the DRC sent high-ranking officials with Governor Masangu to sign the agreement, but since the role of the DRC is unclear as to their involvement in procuring services, CapitalKeys' allegations that these actions constituted waiver of sovereign immunity are unfounded. *Id.* The factual assertions CapitalKeys makes do not trace back to the Central Bank, as the manifestations made to them, by those other than Governor Masangu, were from representatives of the DRC, a distinct legal entity from the Central Bank. *Id.* The Court was not convinced that the DRC could have directed one of its authorized agents enter into a contract when such action was in direct conflict with the governing statute of the Central Bank. *Id.*

31. *See id.* at *11-12 (declining to analyze apparent authority issue). There was no evidence of apparent authority granted to Governor Masangu, and the facts presented were not sufficient to establish such authority. *Id.* In determining this, the circuit court declined to rule on the circuit split since the issue did not apply in the case at hand. *Id.* The Court reviewed the district court's dismissal of the case for lack of subject matter jurisdiction de novo. *Id.* at *8. The Court therefore reviewed the District Court's findings of fact for clear error. *Id.* at *9.

The circuit court also determined the commercial activities exception to sovereign immunity did not apply to the facts of this case because Governor Masangu acted outside the scope of his authority.[32] Further, the Court reasoned that neither the contract itself nor the default on that contract amounted to a commercial activity under the statute.[33] The circuit court determined the district court was correct in dismissing the case for lack of subject matter jurisdiction, considering the claim by CapitalKeys did not fall within any exceptions under the FSIA.[34]

This case presented two key issues: (1) whether apparent authority can waive sovereign immunity; and (2) whether agreeing to a contract with a choice-of-law provision can constitute a waiver of sovereign immunity.[35] The D.C. Circuit had previously

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32. *See id.* at *12. (describing reason for denying commercial activities exception argument). The court found that the appellants' arguments regarding the commercial activities exception did not stand. *Id.* The circuit court did not determine whether this contract for services was a commercial activity under the statute but ruled on different grounds. *Id. See also* 28 U.S.C. § 1605(a)(2) (2022) (clarifying commercial activity exception). If the commercial activity exception is present, the court will be able to exercise their subject matter jurisdiction on the case. *Id.*

33. *See CapitalKeys, LLC*, 2022 U.S. App. LEXIS 20367, at *12 (supplying reasoning for commercial activities exception). The court reasoned that since Governor Masangu acted outside the scope of his authority, the contract did not constitute a commercial activity. *Id.* Because Governor Masangu lacked the requisite authority, this was not considered an activity carried out by the DRC or the Central Bank. *Id.*

34. *See id.* (determining presence of sovereign immunity exceptions). CapitalKeys failed to prove that any exceptions applied to their claim. *Id.* They failed to meet their burden that the presumptively immune parties should not be afforded such immunity. *Id. See also* 28 U.S.C. § 1605 (discussing commercial activities exception under FSIA). The commercial activities exception applies to action carried out in the United States, an action in the United States benefiting an activity elsewhere, or an act that occurs outside of the United States but has a direct effect on the United States. *Id.*

35. *See* SACE S.p.A. v. Republic of Para., 243 F. Supp. 3d 21, 38 (D.D.C. 2017) (determining apparent authority cannot waive sovereign immunity). The D.C. Circuit district courts have already ruled that apparent authority cannot waive sovereign immunity, but the appeals court has not dealt with the issue. *Id.* Basic international principles establish that foreign state's actions control when waiving sovereign immunity. *Id. See also* First Fid. Bank, N.A. v. Gov't of Ant. & Barb.-Permanent Mission, 877 F.2d 189, 195 (2d Cir. 1989) (holding apparent authority can waive sovereign immunity). The Second Circuit held that based on the facts and circumstances of the case, and applying New York law, apparent authority was enough to waive sovereign immunity. *Id. See also* Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1299 (11th Cir. 1999) (determining ambassadors have inherent apparent authority). The nature of an ambassador of the foreign state means they have inherent apparent authority when acting in their official capacity unless there is specific evidence that they do not have such authority. *Id. See also Phaneuf*, 106 F.3d at 308 (holding apparent authority for waiver of sovereign immunity improper). In analyzing the language of the FSIA, there is no doubt in the mind of the Ninth Circuit that Congress did not intend for apparent

determined that choice of law provisions can waive sovereign immunity and rightfully concluded that the court need not consider the apparent authority issue.[36] The court correctly concluded that there was no evidence Governor Masangu had authority, apparent or actual, to bind the Central Bank when signing the contract.[37]

If the Court had opined on the issue of apparent authority, they should have determined that apparent authority is not enough to waive sovereign immunity, adopting the Ninth Circuit's rationale.[38] If an agent is acting outside of the scope of their actual authority, it should not be enough to waive a foreign state's

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authority to waive sovereign immunity. *Id.* *See also* Creighton Ltd. v. Gov't of State of Qatar, 181 F.3d 118, 123 (D.C. Cir. 1999) (finding implied waiver through choice of law provision). Implied waiver can be found where the party assents to a valid contract which incorporates a choice of law provision. *Id.* *See also* World Wide Mins Ltd. v. Republic of Kaz., 296 F.3d 1154, 1161 n. 11 (D.C. Cir. 2002) (noting FSIA not defining implied waiver). The D.C. Circuit recognized that there are situations where a choice of law provision can be considered an intentional act when assenting to a contract which incorporates such a provision. *Id.*

36. *See* Restat. 3d of Agency, § 3.03 (discussing apparent authority). Apparent authority is what the principal manifests to the third party. *Id.* The third party must have a traceable belief back to the principal that the agent had the authority to take some action. *Id.* *See also World Wide Mins. Ltd.*, 296 F.3d at 1161 n.11 (displaying scenarios where recognized issues do not arise). The D.C. Circuit has repeatedly recognized issues that might arise, but if the facts presented do not involve the issue, they will decline to conduct an analysis on the issue. *Id.*

37. *See* Restat. 3d of Agency, at § 2.01 (qualifying actual authority). Actual authority exists between the principal and their agent. *Id.* The principal authorizes the agent to act in some way on their behalf. *Id.* The third party does not have to know the agent has actual authority at the time of dealing with them but must present evidence when making their claim that the agent had actual authority to deal with them. *Id.* *See also CapitalKeys, LLC*, 2022 U.S. App. LEXIS 20367, at *11 (highlighting lack of supporting facts). The only facts that were presented considered CapitalKeys's belief that Governor Masangu conveyed he had the proper authority to bind the Central Bank. *Id.* As the court properly notes, this is an improper interpretation of apparent authority. *Id.* There was also no evidence that this belief could be traced to any action by the DRC or the Central Bank other than high ranking officials making promises that carried little to no weight. *Id.*

38. *See* Phaneuf v. Republic of Indon., 106 F.3d 302, 307-08 (9th Cir. 1997) (holding apparent authority should not waive sovereign immunity). The Ninth Circuit held that Congress' statement that the action had to be "of the foreign state" meant the foreign state needed to take an affirmative action. *Id.* This viewpoint comes from the idea that "foreign state acts through its agents, an agent's deed which is based on the actual authority of the foreign state constitutes activity 'of the foreign state.'" *Id.* *See also* 28 U.S.C. § 1605 (looking at plain language of statute). The commercial activity exception includes the language that the action is "of the foreign state." *Id.*

immunity.[39] That agent, on the other hand, should not be afforded immunity for acting outside the scope of their authority.[40]

The protection granted to certain foreign entities under the FSIA should be reconsidered when sufficient acts of ratification are shown, thereby establishing greater certainty for companies when dealing with foreign entities protected under the statute.[41]

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39. *See Phaneuf*, 106 F.3d at 308 (discussing agent acting without authority). If the agent is acting beyond the scope of the authority, then they are not taking an action the sovereign has explicitly authorized them to take. *Id.* If it is an unauthorized act, it cannot be attributed to the foreign state, and therefore cannot be considered the activity of the foreign state. *Id.* In assuming the ordinary meaning of the FSIA exceptions, which the Ninth Circuit adopts, they do not think it is their place to imply exceptions. *Id.* The Ninth Circuit believes that if Congress had intended for exceptions to apply to acts of an agent without actual authority, they would have explicitly included it in the language of the statute. *Id.*

40. *See* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990) (addressing agent acting outside of authority). The Ninth Circuit held that when the agent of a foreign state is acting outside of their authority, that agent will not be afforded immunity under the FSIA. *Id.* On the other hand, it is imperative that the foreign state maintains its sovereign immunity even when their agent acts outside the scope of their authority. *Id.* These actions are outside of the limitations placed on the agent and are considered the individual's actions, not the actions of foreign states. *Id.*

41. *See* GDG Acquisitions LLC, v. Gov't of Belize, 849 F.3d 1299, 1310 (11th Cir. 2017) (discussing principle of ratification). The principal does not have to expressly state they are ratifying the transaction for sufficient ratification to be shown. *Id.* Generally, it comes down to whether the principal reaped the benefits from the transaction. *Id. See* Clark & Clark, *supra* note 26, at § 12.05(c) (describing curing effect of ratification). Ratification is defined as "a retroactive adoption of the unauthorized signature by the person whose name is signed and may be found from conduct as well as from express statements. For example, it may be found from the retention of benefits received in the transaction with knowledge of the unauthorized signature." *Id. See also* 2 *Government Contracts: L., Admin. & Proc.* § 17.20(1)(b) (2023) (describing benefits from later ratification). Ratification can bind the government to a contract where the agent lacks the authority to sign the contract, especially where a benefit to the government can be shown. *Id. See also id.* at § 17.30(1)(a). When the principal accepts the benefits of a contract that was created with a lack of authority, ratification can cure the lack of authority and bind the principal. *Id. See also* Salvatore, *supra* note 26, at § 8A.01(5)(d) (discussing ratification when agent lacks authority). Lack of authority is a defense in contract law, considering "a signature made without authority is inoperative." *Id.* Ratification can cure this lack of authority defense. *Id. See also* Geiger, *supra* note 26, at § 64.02(1)(c) (discussing modes of ratification by principal). In the case where the partner lacks the authority to bind the partnership, the partnership can subsequently ratify the partner's act whether or not the ratification is in writing. *Id. See Silverman*, 679 F.2d at 870 (discussing example of ratification benefits). The Federal Trade Commission accepted the benefits flowing from the official who lacked authority to bind them, thereby ratifying the agreement and being bound by the promise. *Id. See also* Shapiro v. Republic of Bol., 930 F.2d 1013, 1017 (2d Cir. 1991) (construing implied waiver). The federal courts follow the practice of construing implied waiver extremely narrow to afford the requisite protection to the foreign entity. *Id. See also* Gutch v. Fed. Republic of Ger., 255 Fed. Appx. 524, 525 (D.C. Cir. 2007) (quoting World Wide Mins.,

The Circuit Court should have considered whether the Central Bank's acceptance of CapitalKeys' services ratified the contract and waived their sovereign immunity.[42] Instead the Circuit Court determined that there was no possibility to bind the Central Bank to the contract, while seemingly looking beyond these facts.[43] By accepting CapitalKeys's services and benefitting from them, the Central Bank ratified the contract under basic contract law principles, constituting an intentional action by the Central Bank.[44]

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Ltd. v. Republic of Kaz., 296 F.3d 1154, 1162 (D.C. Cir. 2002)) (describing standard for waiver). The standard is that the foreign sovereign or entity must clearly do something to waive their immunity. *Id. See also* Creighton Ltd. v. Gov't of State of Qatar, 181 F.3d 118, 122 (D.C. Cir. 1999) (describing statutory language for implied waiver). How a foreign state or entity can waive sovereign immunity by implication is not discussed in the FSIA language. *Id.*

42. *See CapitalKeys, LLC*, 2022 U.S. App. LEXIS 20367, at *2 (describing time discrepancy). One of the appellants' factual assertions is that they provided their services for two years prior to filing this suit. *Id. See also CapitalKeys, LLC*, 2021 U.S. Dist. LEXIS 103996, at *9 (discussing facts alleged by CapitalKeys). The services alleged that CapitalKeys provided the Central Bank during the two-year period include counseling the Central bank and Congolese officials in negotiating with the International Monetary Fund, who froze some of their assets. *Id.* It is also alleged that CapitalKeys helped the Congolese negotiate with the United States Agency for International Development to procure over $100 million in humanitarian aid. *Id.*

43. *See CapitalKeys, LLC*, 2022 U.S. App. LEXIS 20367, at *12 (holding neither Central Bank nor DRC bound by agreement). The Circuit Court discusses the facts alleged by CapitalKeys, but immediately determined that since Governor Masangu had no authority, these facts did not matter even if they were presumed to be true. *Id.* at *10. The Circuit Court combines the facts alleged by CapitalKeys that they provided services to the Central Bank and DRC, with their apparent authority analysis. *Id.* at *11.

44. *See GDG Acquisitions*, 849 F.3d at 1311 (applying American principles of ratification). This Court applied the American principles of ratification and felt it unnecessary to look at a foreign case involving ratification. *Id. See CapitalKeys LLC*, 2022 U.S. App. LEXIS 20367, at *10 (describing CapitalKeys' allegations). CapitalKeys pointed to a letter from the office of the DRC President which thanked them for the services they provided. *Id. See also CapitalKeys LLC*, 2021 U.S. Dist. LEXIS 103996, at *8-9 (describing appellant's complaint). The complaint alleged that CapitalKeys provided the Central Bank with a variety of services for five years until this lawsuit was commenced. *Id.* Despite continued emptied promises by representatives from the DRC and the Central Bank, CapitalKeys continued to provide services to the parties as what they alleged were agreed upon in the contract. *Id.* at *8. The district court presumed that these continued promises of payment by the Central Bank and the DRC were oral. *Id. See also* Geiger, *supra* note 26, at § 64.02(1)(c) (explaining oral ratification). The ratification by the principal does not need to be in writing. *Id. See also* Barnett v. United States, 397 F. Supp. 631, 637, 638 (D.S.C 1975) (describing evidence of benefit). It was determined the peaches to be delivered were at no point received or in the possession of the United States Government. *Id.* at 637. This court, however, did not discuss whether their analysis would be different if the peaches had been received, leaving their opinion simply to the fact that there was no benefit conferred to the U.S. government. *Id.* at 638. *See also* Musher Corp. v. United States, 118 Ct. Cl. 259, 261 (1951) (describing

By taking this intentional action, the Central Bank assented to the choice of law provision in the contract, thereby impliedly waiving their sovereign immunity consistent with D.C. Circuit precedent.[45]

The question presented in this case was whether the Central Bank and the DRC should be immune from the lawsuit brought by CapitalKeys. The Circuit Court affirmed the district court's ruling that Governor Masangu did not have the authority to bind the Central Bank. If the arguments were raised the Circuit Court should have affirmed in part the district court's ruling that Governor Masangu lacked the authority to bind the Central Bank and the DRC, but remanded to determine whether the Central Bank ratified the contract through accepting and benefiting from the services provided by the Central Bank. If the Central Bank ratified the contract, then they should have been bound by the choice of law provision, which the D.C. Circuit deems an implied waiver of sovereign immunity. This decision would provide more certainty in contracts with foreign FSIA-protected entities and enhance protection for foreign entities and American companies.

*James Cronin*

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government intention to pay for services). In discussing whether the United States government intended to pay for the information provided, the court notes that an express intention to pay would have created a legally binding obligation. *Id. See also* Goodyear Tire & Rubber Co. v. United States, 276 U.S. 287, 291 (1928) (discussing government's specific intent). The United States government expressed to the landlord a specific intent to pay rent for as long as their occupancy last. *Id.* While the Government, as the tenants, held over their occupancy from the time the original lease ended, they made their intent to pay for a certain period of time clear, which the landlord agreed to. *Id.*

45. *See Creighton Ltd.*, 181 F.3d at 123 (determining implied waiver through choice of law provision). Choice of law provisions may implicate implied waiver under the foreign sovereign immunities act. *Id.* at 118. The court focused their discussion on the premise that the intentionality requirement of implied waiver under the FSIA arises when the foreign state agrees to arbitrate in the United States or agrees to be governed by the laws of the United States. *Id. See also World Wide Mins., Ltd.*, 296 F.3d at 1161 n.11 (recognizing waiver through choice of law provisions). Assenting to a choice of law provision in a contract may constitute an intentional act, and therefore implied waiver of sovereign immunity. *Id.* While this case concerned explicit waiver of sovereign immunity, the court notes that sovereign immunity can be impliedly waived by an agreement to arbitrate or by acceptance of a choice of law provision in a contract. *Id.*