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**OWOLABI V. AIR FRANCE AND MOSES V. AIR AFRIQUE—
DISTRICT COURTS DENY RELIEF TO PLAINTIFFS
INJURED BY TORTS COMMITTED BY
STATE-OWNED AIRLINES**

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INTRODUCTION

THE FOREIGN SOVEREIGN IMMUNITIES ACT (“FSIA”) provides the exclusive basis for obtaining subject matter jurisdiction over claims against foreign states brought in United States courts.¹ Under the FSIA, foreign states are immune from the jurisdiction of United States courts unless the claims against them fall under one of the Act’s enumerated exceptions.² The Act also provides immunity to “agenc[ies] or instrumentalit[ies] of a foreign state.”³ Corporations are protected if a foreign state’s government or a political subdivision of the government owns a majority of the company’s shares. Key to our discussion here, this definition includes airlines if a majority of the stock is held by the government, allowing some airlines to be judgment-proof in situations where they exhibit egregious tortious conduct.⁴

The exception to the FSIA that is most frequently invoked by plaintiffs is the “commercial activity” exception.⁵ It was intended to provide a framework for the courts in differentiating between public acts and private ones. The former would have immunity while the latter would fall under this exception.⁶ The commercial activity exception allows for a suit when the action is based either: 1) upon a commercial activity carried on in the

¹ See *Republic of Argentina v. Weltover*, 504 U.S. 607, 610-11 (1992).

² 28 U.S.C. § 1604 (1994).

³ *Id.* at § 1603(a).

⁴ See H.R. REP. NO. 94-1487 (1976).

⁵ See Sunil R. Harjani, *Litigating Claims over Foreign Government-Owned Corporations under the Commercial Activities Exception to the Foreign Sovereign Immunities Act*, 20 NW. J. INT’L L. & BUS. 181, 182 (1999).

⁶ See H.R. REP. NO. 94-1487 (1976).

United States by a foreign state; 2) upon an act performed in the United States in connection with a commercial activity elsewhere; or 3) upon an act outside the United States in connection with a commercial activity of the foreign state elsewhere and that activity has a direct effect in the United States.⁷ The first clause of the commercial activity exception is the most frequently litigated clause in the context of commercial aviation.

Nelson v. Saudi Arabia—Misunderstood Precedent

The Supreme Court laid out a three-part test to determine if an activity falls within the first clause of the commercial activity exception in *Saudi Arabia v. Nelson*.⁸ The Court stated, “[f]or there to be jurisdiction in this case. . . [the] action must be ‘based upon’ some ‘commercial activity’ by petitioners that had ‘substantial contact’ with the United States within the meaning of the Act.”⁹ The Court also interpreted the meaning of “based upon” as it is used in the FSIA in *Nelson*.¹⁰ The Court held that the commercial activities must involve “elements of a claim that, if proven, would entitle the plaintiff to relief under his theory of the case.”¹¹ The application of this definition by lower courts to cases involving government-owned corporations has produced results that are not in keeping with the stated purpose of the commercial activity exception.

In *Nelson*, agents of Saudi Arabia hired the plaintiff in the United States to monitor the safety of a hospital in Saudi Arabia.¹² After complaining about several safety violations the plaintiff had witnessed, he was arrested, imprisoned for 39 days, and tortured.¹³ He brought suit for failure to warn of the hazards of reporting what he had seen, as well as the intentional torts involved in his wrongful arrest, detention, and torture.¹⁴ The Court characterized the basis of the claim as the police brutality he suffered after his arrest rather than his contractual relationship with the hospital. Although the Saudi Arabian

⁷ 28 U.S.C. § 1605(a)(2) (2000).

⁸ 507 U.S. 349 (1993); see also Alexander J. Mueller, *Nelson v. Saudi Arabia and the Need for a Human Rights Exception to the Foreign Sovereign Immunities Act*, 13 N.Y. INT'L L. REV. 87, 95 (2000).

⁹ *Nelson*, 507 U.S. at 356.

¹⁰ *Id.*

¹¹ *Id.* at 357.

¹² *Id.* at 352.

¹³ *Id.* at 352-53.

¹⁴ *Id.* at 353-54.

government's behavior was unconscionable, the Court characterized police action as an act that is uniquely sovereign in nature.¹⁵ Because the act underlying the suit in *Nelson* was sovereign in nature rather than commercial, the claims could not be brought under the commercial activity exception. The Court further discussed the meaning of "based upon," and concluded that for purposes of the FSIA, it required "more than a mere connection with, or relation to, a commercial activity."¹⁶

The Court also discussed what differentiates a sovereign activity from a commercial one. A foreign state engages in commercial activity, as opposed to sovereign activity, when it acts in the manner of a private player in the market.¹⁷ Furthermore, the question of whether a state acts as a private player in the market is determined by the behavior of the actor, not the motivation behind it. For example, when a foreign state contracts to purchase munitions for its army, the activity is commercial in nature rather than sovereign because the action of contracting is commercial, and the motivations for the contract are deemed irrelevant for this analysis.¹⁸ In *Republic of Argentina v. Weltover*, the Supreme Court made it clear that whether a state acts "in the manner of a private party is a question of behavior, not motivation."¹⁹ Furthermore,

[B]ecause the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'²⁰

Nelson is generally assumed to have narrowed the application of the first clause of the commercial activity exception.²¹ But *Nelson* is clearly differentiable from cases involving state-owned corporations. The Court made it clear that the holding in *Nelson* was limited to situations in which the activity upon which the

¹⁵ *Nelson*, 507 U.S. at 361.

¹⁶ *Id.* at 358.

¹⁷ *Id.* at 360.

¹⁸ See H.R. REP. NO. 94-1487 (1976).

¹⁹ 504 U.S. 607, 614 (1992).

²⁰ *Nelson*, 507 U.S. at 360-61 (*quoting* *Republic of Argentina v. Weltover*, 504 U.S. 607, 610-11 (1992)).

²¹ Harjani, *supra* note 5, at 191.

claim was based was purely sovereign in nature.²² After applying the private act/public act analysis to cases involving government-owned airlines, it becomes clear that virtually every action undertaken by them should fall under the aegis of the commercial activity exception. No action undertaken by an airline is uniquely sovereign in nature. The more narrow construction that has followed *Nelson* results in inequity in the legal system by denying compensation to those who have been harmed by these foreign entities.

*Owolabi v. Air France and Moses v. Air Afrique—
Misinterpretation at Its Worst*

Mary Owolabi purchased tickets to travel to Lagos, Nigeria at Air France's office in New York City.²³ At the time she purchased her tickets, Ms. Owolabi informed an Air France employee that she was blind and would need a wheelchair and assistance at the airport. She was informed that Air France would provide the assistance she required.²⁴ Upon arrival in Lagos, she was helped to an Air France office while her grandson went to meet relatives at the baggage claim area, where she was to join him.²⁵ Ms. Owolabi was stranded in the office for more than an hour while the employee who was to take her to baggage claim remained absent. When he returned, her requests to be taken to the baggage claim area were still denied because the elevator was broken. When she asked for help to walk to baggage claim, that request was also denied.²⁶ The total amount of time she was delayed in the office is not specified in the case.

Ms. Owolabi's return trip to New York was no less eventful. When her plane arrived at Charles de Gaulle airport in Paris, an Air France attendant once again assisted Ms. Owolabi through the airport.²⁷ She asserted that the assistant was "very rough in handling the wheelchair," and ignored her requests to slow down.²⁸ She was left alone by the attendant for an hour after her meal and was then assisted to a "noisy thoroughfare" where she was left alone for seven hours.²⁹ Ms. Owolabi made several

²² *Nelson*, 507 U.S. at 358 n.4.

²³ 2000 U.S. Dist. LEXIS 3208, at *3 (S.D.N.Y. Mar. 15, 2000).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at *5.

²⁷ *Id.* at *6.

²⁸ *Owolabi*, 2000 U.S. Dist. LEXIS 3208, at *6-7.

²⁹ *Id.* at *7.

pleas for help, and ultimately urinated on herself.³⁰ She was eventually moved and someone asked for her traveling papers. No one told her where she was going, although she asked several times. She was ultimately placed on a Delta flight to New York.³¹

In *Moses v. Air Afrique*,³² three Air Afrique ground crew members in Dakar, Senegal accosted Mr. Uwazurike when he failed to comply with their demands for \$58.00 in “excess luggage charge[s].”³³ He was beaten, his luggage was ransacked, and his passport and wallet were stolen.³⁴ He returned to New York shortly thereafter to seek medical treatment for his injuries.³⁵

Both Ms. Owolabi and Mr. Uwazurike brought suit pro se against the airlines upon their return to the United States. Ms. Owolabi brought claims alleging discrimination on the basis of her disability, age discrimination, racial discrimination, intentional and negligent infliction of emotional distress, negligence, and assault and battery.³⁶ Mr. Uwazurike brought claims of assault, battery, false imprisonment, intentional infliction of emotional distress, wrongful conversion, and negligent failure to train and supervise its employees against Air Afrique.³⁷

Both Ms. Owolabi and Mr. Uwazurike argued that the respective airline’s immunity was abrogated by the “commercial activity” exception.³⁸ In both cases, only the first clause of the exception was held to be applicable.³⁹ After analyzing the elements of each claim brought by the plaintiffs using the *Nelson* precedent, the *Owolabi* and *Moses* courts determined which of those claims related to the commercial activity of the defendants in the United States—selling airline tickets and providing air transport.⁴⁰ Because proving the elements of intentional tort

³⁰ *Id.*

³¹ *Id.*

³² 2000 WL 306853 (E.D.N.Y. Mar. 21, 2000).

³³ *Id.* at *1.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Owolabi*, 2000 U.S. Dist. LEXIS 3208, at *8-9. Ms. Owolabi also brought suit for damages from the delayed arrival of a freezer she shipped from the United States, a claim that is irrelevant to this discussion. *Id.* at *6.

³⁷ *Moses*, 2000 WL 396853, at *1.

³⁸ *Id.* at *2; *Owolabi*, 2000 U.S. Dist. LEXIS 3208, at *26.

³⁹ *Moses*, 2000 WL 306853, at *3; *Owolabi*, 2000 U.S. Dist. LEXIS 3208, at *26-27.

⁴⁰ *Moses*, 2000 WL 306583, at *3; *Owolabi*, 2000 U.S. Dist. LEXIS 3208, at *26-27.

claims would not involve proof of the underlying commercial activity, the intentional tort claims of both plaintiffs were dismissed.⁴¹

The negligence claims were another matter. In *Moses*, the court held Uwazurike's claim of negligent supervision and training to be merely a restatement of the intentional tort claims against Air Afrique, and dismissed the claim as a "semantic ploy."⁴² The court stated "Uwazurike. . . may not circumvent Air Afrique's immunity by re-characterizing his intentional tort claims as negligent failure to supervise and train employees."⁴³ The court based its decision upon a similar situation faced by the Supreme Court in *Nelson*. In *Nelson*, the Court explained "a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it."⁴⁴ But in *Nelson*, the Court held that there was no "commercial activity" for a negligent act to be based upon, making all of the claims in that case uniquely sovereign in nature and differentiating the Supreme Court's holding from the *Moses* result.⁴⁵

The court in *Owolabi* treated the negligence claims differently, holding that a claim for negligence requires that the plaintiff show that the defendant owed a cognizable duty of care, which would require proof of the commercial activity in the United States.⁴⁶ Therefore, Air France was not found to be immune to the negligence claim.⁴⁷ To prove the elements of that claim, Ms. Owolabi would have to show that a contract was entered into in the United States. That contract would provide a link to the commercial activity of Air France in the United States.⁴⁸

The courts in *Owolabi* and *Moses* both wrongly rely on *Nelson* as the basis for their holdings. While it is logical to extend the definition of "based upon" from *Nelson* to other cases, it is not logical to apply that definition in a way that undermines the very

⁴¹ *Moses*, 2000 WL 306583, at *3; *Owolabi*, 2000 U.S. Dist. LEXIS 3208, at *28-30.

⁴² *Moses*, 2000 WL 306853, at *4.

⁴³ *Id.*

⁴⁴ *Id.* (citing *Nelson*, 507 U.S. at 363).

⁴⁵ See *Nelson*, 507 U.S. at 358 (stating that for purposes of the FSIA, the meaning of "based upon" requires "more than a mere connection with, or relation to, a commercial activity").

⁴⁶ *Owolabi*, 2000 U.S. Dist. LEXIS 3208, at *28.

⁴⁷ *Id.* at *31.

⁴⁸ *Id.*

purpose of the commercial activity exception. Applying the definition to cases involving government-owned corporations that act as private players in the market inevitably leads to such an unreasonable result.

CONCLUSION

The FSIA was written to provide for sovereign immunity in cases involving a foreign state's public acts but not in cases based on commercial or private acts.⁴⁹ The commercial activity exception was intended to "prevent sovereign states from taking refuge behind their sovereignty when they act as market participants."⁵⁰ When a foreign sovereign owns a commercial venture, its immunity extends to cover the commercial venture in cases in which the venture would not otherwise have been protected. While the commercial activity exception does allow some claims to be brought against these "foreign instrumentalities," cases like *Owolabi* and *Moses* go too far by construing the exception narrowly based upon a misinterpretation of the Supreme Court's decision in *Nelson*. A more appropriate interpretation, given the purpose of the legislation and the role of our tort system, would deny jurisdiction only for those actions that are uniquely sovereign in nature. To do otherwise is to deny justice to United States citizens injured by these foreign corporations' unconscionable behavior.

⁴⁹ See H.R. REP. NO. 94-1487 (1976).

⁵⁰ *Nelson*, 507 U.S. at 368 (White, J., concurring).

