

1986

Defending Litigation against a Foreign Airline under the Foreign Sovereign Immunities Act

Carol K. Young

Recommended Citation

Carol K. Young, *Defending Litigation against a Foreign Airline under the Foreign Sovereign Immunities Act*, 51 J. AIR L. & COM. 461 (1986)
<https://scholar.smu.edu/jalc/vol51/iss2/4>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

DEFENDING LITIGATION AGAINST A FOREIGN AIRLINE UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

CAROL K. YOUNG*

I INTRODUCTION

FOREIGN AIR carriers are finding themselves increasingly subject to jurisdiction in United States courts without regard to traditional state requirements for personal jurisdiction such as doing business within a forum or other long-arm statute requirements.¹ The passage of the Foreign Sovereign Immunities Act ("FSIA" or "Act") in 1976² has conferred certain benefits upon airlines that are owned by foreign governments but operated in a commercial capacity. A foreign government owned corporation that operates in a commercial capacity is subject to suit in much the same manner as any other citizen, and, in many respects, may be at a distinct disadvantage when the FSIA is applied. This article will provide an overview of some of the provisions of the FSIA and discuss issues that ought to be considered by counsel defending a foreign government owned airline in an action brought in the United States.

II FSIA IN GENERAL

The underlying theory of the common law doctrine of

* Associate with the New York City law firm of Condon & Forsyth, specializing in aviation litigation; B.A. 1976, J.D. 1979 University of Louisville.

¹ See *infra* notes 70-118 and accompanying text.

² 28 U.S.C. §§ 1330, 1332(a)(2)-1332(a)(4), 1391(f), 1441(d), 1602-1611 (1982).

sovereign immunity is that equals may not exercise control over each other.³ The resulting rule prohibits an American court of law in many circumstances from exercising jurisdiction over and rendering a judgment against a foreign sovereign. Congress enacted the FSIA as a reaction to the perceived need to reaffirm the jurisdiction of United States courts in actions against foreign states, to delineate the circumstances in which foreign states are immune from suit and to define those circumstances in which the property of a foreign government is immune from execution of judgment.⁴ The stated purpose of the FSIA is to define the terms and conditions under which actions can be maintained against a foreign state or its entities in the courts of the United States and to set forth when a foreign state may properly invoke sovereign immunity.⁵

Before adoption of the FSIA, the executive branch of the United States government, acting through the State Department, intervened in disputes between United States citizens and foreign states and determined to a large extent whether United States courts should adjudicate particular claims against foreign states.⁶ At least since 1952, a limited view of sovereign immunity had been adopted by the State Department pursuant to an interdepartmental letter known as the Tate Letter.⁷ That document announced the policy that a foreign sovereign government could be held responsible in a United States court in a dispute arising out of its commercial or private

³ Lowenfeld, *Claims Against Foreign States — A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901, 930 & n.8 (1969). See *The Schooner Exchange v. M'Fadden*, 11 U.S. (7 Cranch) 116, 136 (1812). See also *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (foreign sovereign immunity granted as matter of grace and comity on part of the United States).

⁴ H.R. REP. NO. 1487, 94th Cong., 2d Sess. 1 (1976), reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604.

⁵ *Id.* at 6.

⁶ See Note, *Sovereign Immunity — Limits of Judicial Control — The Foreign Sovereign Immunities Act of 1976*, 18 HARV. INT'L L.J. 429, 431-32, 435 (1977).

⁷ Letter from Jack B. Tate, Acting Legal Adviser of the Department of State, to Philip B. Perlman, Acting Attorney General of the United States (May 19, 1952), reprinted in 26 DEPT. ST. BULL. 984 (1952) [hereinafter cited as "Tate Letter"].

acts, but not out of its public or sovereign acts.⁸ Under the guidelines of the Tate Letter, a plaintiff wishing to sue a foreign sovereign had to establish to the satisfaction of the State Department that the "exercise of jurisdiction was prudent in light of diplomatic considerations."⁹ The FSIA eliminated this role of the State Department and the Act is intended to ensure that the restrictive view of sovereign immunity can be applied consistently without diplomatic pressure.¹⁰

A. Definition of "Foreign State"

In order to determine whether the FSIA applies, counsel for a foreign airline should ascertain whether the client qualifies as a "foreign state." Section 1603(a) of the FSIA defines the term "foreign state" to include all levels, subdivisions, agencies, and instrumentalities of government within a foreign state.¹¹ As defined by the FSIA, an instrumentality of a foreign state includes an airline owned by a foreign government or operated as a department or division thereof.¹² If a foreign state or instrumentality

⁸ *Id.* at 984-85.

⁹ Note, *Effects Jurisdiction Under the Due Process Clause*, 55 N.Y.U. L. REV. 474, 478 (1980). See *Flota Maritima Browning de Cuba, S.A. v. Motor Vessel Ciudad de la Habana*, 335 F.2d 619, 623 (4th Cir. 1964).

¹⁰ "A principal purpose of this bill [FSIA] is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process." H.R. REP. NO. 1487, *supra* note 4, at 17.

¹¹ Section 1603(b) of the FSIA defines an agency or instrumentality of a foreign state as any entity:

(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

¹² See H.R. REP. NO. 1487, *supra* note 4, at 6, 16.

As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a

thereof owns the majority of shares or other ownership interest of an airline, or if an airline is created as an organ of a foreign state or political subdivision, it will qualify as an "agency or instrumentality of a foreign state" for purposes of the FSIA.¹³

B. *Express and Implied Waiver of Sovereign Immunity*

Section 1330(a) of the FSIA provides the sole basis for federal jurisdiction in an action against a foreign sovereign or its instrumentality.¹⁴ Under section 1330, a find-

transport organization such as a shipping line or *airline*, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name."

Id. (emphasis added).

The hearings before the Subcommittee on Claims and Governmental Relations of the House Committee on the Judiciary refer specifically to the applicability of the FSIA to a government-controlled airline:

MR. DANIELSON. Could you give an example of an activity by a foreign government corporation, such as you have just been talking about here, like a government-controlled airline, and under what circumstances could his conduct be regarded as a public function rather than a commercial function, for us to invoke an immunity? Can you give me one of those? The other side of the coin?

MR. BROWER. That is pretty difficult for me to conceive of in the case of an airline, which, fully owned by a foreign government, is fundamentally, if not wholly, in the business of transporting air passengers for commercial affairs. . . .

Immunities of Foreign States: Hearings on H.R. 3493 Before Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 16 (1973) [hereinafter cited as "1973 Hearings"] (testimony of Charles N. Brower, Legal Adviser, Dep't of State).

¹³ See 28 U.S.C. § 1603(b), *supra* note 11. See also *Keller v. Transportes Aereos Militares Ecuatorianos*, 601 F.2d 787,788 (D.D.C. 1985) (where T.A.M.E., created as a department of the Ecuadorian Air Force and therefore a foreign State for FSIA purposes under § 1603(a),(b), owned the majority of shares of T.A.M.E., C.A., T.A.M.E., C.A. was an instrumentality of a foreign state under § 1603(b)(2) and thus a foreign state under § 1603(a)).

¹⁴ See 28 U.S.C. § 1330(a) (1982). In *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 587 (9th Cir. 1983), diversity of citizenship was alleged as the basis of jurisdiction for an action against the defendant government of Iran, but the court rejected diversity in favor of the FSIA as the basis for any jurisdiction *in personam* that might exist: "section 1332 [the statutory grant of diversity jurisdiction] no longer provides for district court jurisdiction over a foreign state defendant, and . . . if appellants are to obtain jurisdiction in this case over Iran, it must be through the FSIA". See also *Arango v. Guzman Travel Advisors* 761 F.2d 1527, 1531-32 (11th Cir. 1985); *Goar v. Compania Peruana de Vapores*, 688 F.2d 417,

ing of subject matter jurisdiction hinges on whether the court finds that the foreign state is not entitled to assert immunity pursuant to sections 1605 through 1607 or any applicable international agreement.¹⁵ Absent an exception to immunity, the FSIA immunizes foreign sovereigns from the jurisdiction of federal and state courts.¹⁶ Personal jurisdiction, in turn, hinges on the existence of subject matter jurisdiction and proper service of process.¹⁷

A foreign sovereign is not entitled to assert immunity if it has expressly waived immunity or has impliedly waived immunity by engaging in functions in a non-governmental capacity.¹⁸ Section 1605(a)(1) provides for an express waiver of immunity. All foreign air carriers operating in the United States must first obtain a foreign air carrier permit or exemption from the Department of Transportation pursuant to the Federal Aviation Act of 1958¹⁹ and

421-22 (5th Cir. 1982); *Houston v. Murmansk Shipping Co.*, 667 F.2d 1151, 1153 (4th Cir. 1982); *Rex v. CIA. Pervana de Vapores, S.A.*, 660 F.2d 61, 63-65 (3d Cir. 1981); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 878-81 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982); *Ruggiero v. Compania Peruana de Vapores, S.A.*, 639 F.2d 872, 875-76 (2d Cir. 1981).

¹⁵ 28 U.S.C. § 1330(a) (1982).

¹⁶ 28 U.S.C. § 1604 (1982). Section 1604 states 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 sections 1605 to 1607 of this chapter." *Id.*

¹⁷ 28 U.S.C. § 1330(b) (1982).

¹⁸ See 28 U.S.C. § 1605(a)(1982). Section 1605(a) sets forth the instances when a foreign state is not entitled to immunity in United States courts by express or implied waiver:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

Id.

¹⁹ Foreign air carrier permits were formerly issued by the Civil Aeronautics Board pursuant to 49 U.S.C. § 1371, but with the Civil Aeronautics Board Sunset

the orders, rules and regulations promulgated thereunder. As a condition to obtaining such a permit,²⁰ the foreign air carrier must waive all rights to assert any defense of sovereign immunity in actions arising from the carrier's operations pursuant to the permit.²¹ If a cause of action arises out of the airline's commercial operations in the United States pursuant to its permit, the express waiver of sovereign immunity in the permit should be controlling.²² Accordingly, no consideration of implied waiver under section 1605(a) should be necessary under those circumstances. As a practical matter, however, the defense of sovereign immunity should be pleaded as an affirmative defense or a foreign state may be precluded from later

Act of 1984, Pub. L. No. 98-443, 1984 U.S. CODE CONG. & AD. NEWS 1703, Congress transferred this function to the Department of Transportation, which now issues foreign air carrier permits through its Office of Aviation Operations, Licensing Division.

²⁰ See, e.g., express waiver language in Aeromexico foreign air carrier permit, *infra* note 21.

²¹ See, e.g., Application of Aeronaves De Mexico, S.A., 76 C.A.B. 1034, 1037 (1978) (Order 78-5-184) which provides as follows:

By accepting this permit, as amended, the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder under this permit, as amended.

On January 21, 1986, the Department of Transportation issued a proposed order that would require all foreign air carriers to waive sovereign immunity in any action arising out of their operations regardless of whether the operations are pursuant to the permit or exemption. See Department of Transportation Order No. 86-1-38. In its current form, the Order purports to be retroactive. If the operating permit or exemption is amended in accordance with this Order, foreign air carriers will be deprived of their sovereign immunity and subject matter jurisdiction defenses in all actions regardless of whether there is any nexus between the gravamen of the complaint and the carriers' operations in the United States. Since subject matter jurisdiction coupled with proper service of process under § 1608 of the FSIA form the basis of personal jurisdiction over a foreign sovereign, this Order effectively deprives a foreign airline of all FSIA jurisdictional defenses unless relief is available pursuant to Article 28 of the Warsaw Convention.

²² See 28 U.S.C. § 1605(a)(1), *supra* note 18. The United States Supreme Court in *Verlinden* declined to decide whether, in an express waiver situation, a foreign sovereign also consents to suit based on activities wholly unrelated to the United States. *Verlinden*, 461 U.S. at 490 n.15. However, due process considerations should require that there be some nexus between the claim and the carrier's operations pursuant to the permit. See *infra* notes 70-118 and accompanying text.

moving to dismiss for lack of subject matter jurisdiction.²³

The FSIA section which has proved most troublesome for the courts is the implied waiver embodied in section 1605(a)(2), which provides that a foreign state has no jurisdictional immunity in an action based upon "a commercial activity carried on in the United States" or upon an act "performed in the United States in connection with a commercial activity of the foreign state elsewhere," or upon a commercial act committed outside of the United States which causes a direct effect in the United States.²⁴ In a situation where the cause of action, either in tort or in contract, arises out of acts or omissions performed by the foreign carrier in the United States in connection with its sale of tickets, or operation of ticket offices, flights, or airport facilities, there is little question that the cause of action is based upon a commercial activity carried on in the United States. Such activity is subject to the express waiver of sovereign immunity from actions related to operations conducted pursuant to a foreign air carrier permit. However, the three exceptions to immunity contained in section 1605(a)(2) must be interpreted in conjunction with section 1603(d) which defines "commercial activity" as either "a regular course of commercial conduct or a particular commercial transaction or act."²⁵ Section 1603(e) defines "commercial activity carried on in the United States by a foreign state" as commercial activ-

²³ Although it is questionable whether lack of subject matter jurisdiction can ever be waived by failure to plead the defense, the legislative history of FSIA indicates that "[a]n implicit waiver would . . . include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity" (H.R. REP. NO. 1487, *supra* note 4, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 6617), and that sovereign immunity is an "affirmative defense which must be specifically pleaded" for a court to consider it. *Id.* at 6616. In *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274 (2d Cir. 1984), the court stated in *dicta* that the FSIA bars a subsequent assertion of the defense of lack of subject matter jurisdiction if it has not been raised in the first responsive pleading. *Id.* at 278. *Accord* *Aboujdid v. Singapore Airlines*, 108 A.D.2d 330, 489 N.Y.S.2d 171, 173-74 (N.Y. App. Div. 1985).

²⁴ 28 U.S.C. § 1605(a)(2), *supra*, note 18.

²⁵ 28 U.S.C. § 1603 (1982).

ity "having substantial contact with the United States."²⁶

The first section 1605(a)(2) exception to immunity — commercial activity carried on in the United States — applies only if there exists a substantial nexus between the United States and the commercial activity out of which the cause of action arises.²⁷ Unfortunately, though, the few decisions that have interpreted the immunity provisions of the FSIA and applied them to foreign airlines have done so in an inconsistent manner. In *Sugarman v. Aeromexico, Inc.*²⁸ the United States Court of Appeals for the Third Circuit held that Aeromexico, an airline wholly owned by the Republic of Mexico, was not immune from suit under the facts of the case because the plaintiff's claim was embraced by the exception to immunity for commercial activity carried on within the United States.²⁹ The plaintiff's claims of inconvenience and injury caused by the delay of a return flight from Acapulco to the United States were held to be based upon commercial activity carried on in the United States.³⁰ Significantly, the delay itself occurred in Acapulco, not in the United States.

The *Sugarman* decision provides questionable help in guiding defense counsel through the maze of FSIA provisions. Arguably, the court did not need to discuss which section 1605(a)(2) exception to sovereign immunity applied. Presumably, the Mexican airline expressly waived sovereign immunity with respect to operations to the United States when it obtained a foreign air carrier per-

²⁶ *Id.*

²⁷ See *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigacion*, 730 F.2d 195, 199-204 (5th Cir. 1984) for an extensive discussion of the requirement of a nexus between tortious claims and the commercial activity carried on in the United States. *Accord In re Disaster of Riyadh Airport*, 16 Av. Cas. (CCH) 17,880 (D.D.C. 1981) (no connection between Saudi Arabian Airlines' business activities in the United States and the crash of a Saudi Arabian Aircraft on a flight between Riyadh and Jeddah).

²⁸ 626 F.2d 270 (3d Cir. 1980).

²⁹ *Id.* at 273.

³⁰ *Id.* at 272-73. In concluding that defendant Aeromexico had carried on commercial activity in the United States, the court considered the destination of the flight (New York City) and the purchase of tickets in New Jersey by the plaintiff. *Id.*

mit.³¹ Because the plaintiff had purchased a round-trip ticket in New Jersey, his contract cause of action probably arose out of the operations of the airline pursuant to its foreign air carrier permit.³² However, the interpretation of section 1605(a)(2) in *Sugarman* is at odds with Chief Judge Weinstein's interpretation of the same clause in *Harris v. VAO Intourist, Moscow*,³³ a case which held that under the commercial activity exception to sovereign immunity, the action must be based upon the specific commercial activity carried on in the United States and not simply any general commercial activity of the foreign state.³⁴

Following *Sugarman*, few decisions involving actions against foreign airlines have discussed the express waiver in the foreign air carrier permit, but have instead looked to the implied waiver provisions that deal with commercial activity. In *Arango v. Guzman Travel Advisors Corp.*³⁵ the plaintiffs filed a suit for false imprisonment and battery against several defendants. The plaintiffs alleged that they had been forcibly placed on board a Dominicana flight from Santo Domingo to San Juan by Dominican immigration officers, with the aid of the airline's employees.³⁶ Dominicana, an airline wholly owned by the Dominican Republic and qualifying as a "foreign state" pursuant to section 1603, claimed immunity from the jurisdiction of the court under the provisions of sections

³¹ See Application of Aeronaves De Mexico, *supra* note 21.

³² Critics of this decision who have omitted in their analysis of *Sugarman* any discussion of the express waiver contained in Aeromexico's foreign air carrier permit have compounded the confusion generated by this decision. See Cook, *Counting the Dragon's Teeth: Foreign Sovereign Immunity and its Impact on International Aviation Litigation*, 46 J. AIR L. & COM. 687, 723-24 (1981) for its criticism of *Sugarman* because of its deviation from interpretation of the same FSIA provision in *Harris* and also advocating that the third exception to immunity ("direct effect" clause) should have been controlling instead.

³³ 481 F. Supp. 1056 (E.D.N.Y. 1979).

³⁴ *Id.* at 1062.

³⁵ 621 F.2d 1371 (5th Cir. 1980).

³⁶ *Id.* at 1373. The plaintiffs' names apparently appeared on an official list of undesirable aliens. *Id.*

1604 through 1607 and moved to dismiss the action.³⁷ Dominicana argued that the alleged injuries were caused by the official acts of Dominican immigration authorities, which acts were insulated from judicial scrutiny in United States courts by the "act of state" doctrine.³⁸

The district court granted Dominicana's motion to dismiss without specifying the grounds for dismissal.³⁹ The United States Court of Appeals for the Fifth Circuit reversed and remanded, however, focusing on the implied waiver of immunity provisions in section 1605(a)(2) of the FSIA. The issue for the court was whether the particular conduct that gave rise to plaintiffs' claims was related to the commercial activity of the airline in the United States.⁴⁰ With respect to the Plaintiffs' claims of involuntary rerouting, the court held that the airline's actions in transporting plaintiffs out of the Dominican Republic were not commercial but were pursuant to the direction of the immigration officials.⁴¹ On the other hand, plaintiffs' claims for breach of warranty and contract based on non-performance of the vacation tour arose out of Dominicana's marketing, sale of airline tickets, and commercial activity in the United States.⁴² Consequently, the court held, without discussing the applicability of the foreign air carrier permit express waiver of immunity, that the plaintiffs did state breach of contract and negligence claims based upon the commercial activity of the airline in the United States and came, therefore, within the exceptions to immunity under FSIA.⁴³ Upon subsequent trial of

³⁷ *Id.* at 1374. Dominicana moved to dismiss under FED. R. CIV. P. 12(b)(1) and (6). *Id.*

³⁸ *Id.* Dominicana urged the operation of the act of state doctrine in support of its 12(b)(6) motion. *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 1378-79.

⁴¹ *Id.* at 1379. Acting merely as an arm or agent of the Dominican government, the airline was entitled to government function immunity, the court held. *Id.*

⁴² *Id.* at 1379-80.

⁴³ *Id.* at 1380-81. The Court would probably have reached the same conclusion had its analysis included consideration of Dominicana's express waiver of immunity in its foreign air carrier permit. The express waiver would only apply to claims arising from Dominicana's operations pursuant to the permit, i.e., commer-

the action without jury, the United States District Court for the Southern District of Florida rendered judgment in favor of Dominicana on the grounds that the airline did not breach its contract of carriage with the Arangos. The United States Court of Appeals for the Eleventh Circuit affirmed that plaintiffs had no cause of action against Dominicana.⁴⁴

An even broader interpretation of the exceptions to immunity can be found in *Aboujdid v. Singapore Airlines*.⁴⁵ In that case, the lower court denied the foreign airlines' motions to dismiss.⁴⁶ The court held that sovereign immunity did not apply to commercial transactions, even though the alleged negligent acts of the defendant airlines occurred outside of the United States without causing any direct effect in the United States other than causing injury to United States citizens travelling abroad.⁴⁷ The plaintiffs were passengers on an Air France flight scheduled to fly from Athens, Greece to Paris, France. The flight originated in Tel Aviv but was hijacked by terrorists who diverted the aircraft to Entebbe, Uganda.⁴⁸ It is significant that there existed no privity⁴⁹ or other connection between the plaintiffs, who were Air France passengers, and the defendant airlines.⁵⁰

Nevertheless, plaintiffs alleged that Gulf Air and Singapore Airlines, which had transported the terrorists to Athens, negligently failed to inspect passenger luggage

cial activity in the United States including marketing and sale of tickets and vacation package tours and operations of flights to and from the United States.

⁴⁴ 191 N.Y.L.J. 112 at 12, col. 1, *modified* 108 A.D.2d 330, 489 N.Y.S. 2d 171 (N.Y. App. Div. 1985).

⁴⁵ 761 F.2d 1527 (11th Cir. 1985).

⁴⁶ *Aboujdid v. Singapore Airlines*, 191 N.Y.L.J. 112 at 12, col. 3.

⁴⁷ *Id.* at 12, col. 2.

⁴⁸ *Id.* at 23, col. 1.

⁴⁹ *Id.* The existence of privity between a claimant and a defendant airline is important because it might give rise to a breach of contract claim. Such a claim would arguably bring the action within the ambit of the express waiver of immunity contained in the airlines' foreign air carrier permit if operations to and from the United States were involved. *See supra* note 21.

⁵⁰ *Aboujdid*, 19 N.Y.L.J. 112 at 12, col. 1.

before permitting the terrorists to board the aircraft.⁵¹ Unlike *Sugarman* and *Arango*, the *Aboujdid* plaintiffs had no cause of action for breach of contract against Gulf Air and Singapore Airlines because there had been no contract of carriage between them.⁵² The lower court acknowledged that both Gulf Air and Singapore Airlines were "foreign states", but held without further explanation that the doctrine of sovereign immunity did not apply to commercial transactions, regardless of whether the alleged negligence had any nexus with commercial activity of the airlines conducted in the United States.⁵³ The airlines' commercial activities in the United States at the time of the lawsuit were deemed sufficient to preclude the invocation of immunity.⁵⁴ Such ruling, however, arguably contravened the FSIA implied waiver provisions. Section 1605(a)(2) makes a condition of subject matter jurisdiction based on commercial activity *within* the United States that the cause of action be based on that activity.⁵⁵ On appeal, the New York Appellate Division modified the decision to dismiss the complaint as to defendant Singapore Airlines, but affirmed with respect to defendant Gulf Air on the grounds that the defense of sovereign immunity, and hence, subject matter jurisdiction, was implicitly waived when Gulf Air did not plead it as an affirmative defense in its answer.⁵⁶ As support, the court cited to dicta in *Canadian*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 12, col. 2. *But see* *Velidor v. L/P/G Benghazi*, 653 F.2d 812 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982). In *Velidor*, the court stated that the "mere pursuit of commercial activity affecting the United States does not fully satisfy § 1605(a)(2). . . . It is essential that there be a nexus between the plaintiff's grievance and the sovereign's commercial activity." *Id.* at 820. *See also* *Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigacion*, 730 F.2d 195, 199 (5th Cir. 1984).

⁵⁴ *Aboujdid*, 191 N.Y.L.J. 112 at 12, col. 3.

⁵⁵ *See* 28 U.S.C. § 1605(a)(2), *supra* note 18. Although the court did not discuss it, the express waiver provision in the foreign air carrier permit was not relevant since the plaintiffs' claims did not arise out of the airlines' operations to and from the United States.

⁵⁶ *Aboujdid*, 489 N.Y.S.2d at 173-74. Since Singapore had preserved its defense of sovereign immunity, the court dismissed it from the action after finding that neither the nexus between the incident and the defendants' commercial activity

*Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*⁵⁷

The appellate court held in *Aboujdid* that there existed no basis for a finding of jurisdiction under the third exception to immunity.⁵⁸ The defendants' acts or omissions with respect to the terrorists did not have a "direct effect" in the United States within the meaning of section 1605(a)(2).⁵⁹

Although the courts in *Sugarman*, *Arango*, and *Aboujdid* each found an exception to immunity, the significant differences among the three cases lie in the fact that the plaintiffs in *Sugarman* and *Arango* were in privity with the airlines and had purchased their airline tickets in the United States. At least with respect to their causes of action sounding in contract, their complaint arguably arose out of the airlines' commercial activity in the United States. The plaintiffs in *Aboujdid*, however, had no connection with the airlines against which they asserted a cause of action based solely on negligence.

In *Close v. American Airlines, Inc.*,⁶⁰ the court correctly held that personal injuries sustained by the plaintiff in Kingston, Jamaica from the jet-wash of a nearby aircraft did not cause a "direct effect" in the United States.⁶¹ The plaintiff was not a passenger of the airline whose plane

within the United States nor the effect in the United States of Singapore's negligent conduct in Bahrain was sufficient to give rise to an FSIA exception to immunity. *Id.* at 174.

⁵⁷ 727 F.2d 274 (2d Cir. 1984).

⁵⁸ *Aboujdid*, 489 N.Y.S.2d at 174.

⁵⁹ *Id.* A jurisdictional direct effect in the United States of foreign sovereign commercial activity conducted abroad (28 U.S.C. § 1605(a)(2), *supra* note 18) requires a greater impact in the United States than an American tourist being injured abroad. *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056, 1064-65 (E.D.N.Y. 1979). *Accord* *Australian Government Aircraft Factories v. Lynne*, 743 F.2d 672, 674-75 (9th Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 1189 (1985); *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, 332 (9th Cir.), *cert. denied*, — U.S. —, 105 S.Ct. 510 (1984); *Tigchon v. Island of Jamaica*, 591 F. Supp. 765, 767 (W.D. Mich. 1984). *See* *Upton v. Empire of Iran*, 459 F. Supp. 264, 266 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979) (injury to American citizen abroad insufficient to support *in personam* jurisdiction under District of Columbia long-arm statute after which FSIA was patterned).

⁶⁰ 587 F. Supp. 1062 (S.D.N.Y. 1984).

⁶¹ *Id.* at 1063-66.

injured her with its jet-wash, and her complaint against that company was based solely on negligence principles.⁶² Causing injury to American citizens abroad, the court decided, does not satisfy the requirements of the "direct effect" exception to sovereign immunity.⁶³

Notwithstanding the inconsistent interpretations and analyses of section 1605 implied waivers of immunity with respect to actions involving foreign air carriers, it is clear that an airline qualifying as a "foreign state" is not entitled to sovereign immunity, but is instead subject to the jurisdiction of American courts when a plaintiff's claims arise out of the carrier's commercial operations in the United States or its operations pursuant to a foreign air carrier permit. Upon determination that no immunity exists, a United States District Court has original jurisdiction over any civil action against the foreign air carrier without regard to the amount in controversy, assuming that service of process⁶⁴ is made in accordance with FSIA.

C. *Sovereign Immunity as an Affirmative Defense*

Before the enactment of FSIA, if a person named a foreign sovereign as a defendant in a lawsuit there existed some authority that required the plaintiff to allege and prove the sovereign's consent to be sued.⁶⁵ Congress intended, and cases pursuant to FSIA have held, that sovereign immunity from suit is in the nature of an affirmative defense.⁶⁶ If the defense is not pleaded in the first re-

⁶² *Id.* at 1063.

⁶³ *Id.* at 1063-66.

⁶⁴ For a discussion of service of process under the FSIA, see *infra* notes 138-141 and accompanying text.

⁶⁵ *Puente v. Spanish Nat. State*, 116 F.2d 43, 45 (2d Cir. 1940), *cert. denied*, 314 U.S. 627 (1941); *Landley v. Republic of Panama*, 31 F. Supp. 230, 232 (S.D.N.Y. 1940).

⁶⁶ H.R. REP. NO. 1487, *supra* note 4, at 17. See *Aboujdid v. Singapore Airlines, Ltd.*, 489 N.Y.S. 2d at 173-74. Because subject matter jurisdiction hinges on the existence of an exception to foreign sovereign immunity under § 1330(a), the United States Supreme Court has stated that even if the foreign state does not enter an appearance to assert an immunity defense, a federal district court must still determine whether immunity is available. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493-94 (1983).

sponsive pleading, the court may deem the defense of lack of subject matter jurisdiction waived,⁶⁷ particularly when an instrumentality or agency of a foreign sovereign is sued rather than the sovereign itself. The defendant bears the ultimate burden of proving its entitlement to immunity as a foreign state or instrumentality.⁶⁸ Once the defendant provides evidence of immunity, however, the plaintiff must rebut by offering evidence that one of the statutory exceptions in section 1605(a) applies and support the relevant exception by affidavit or other proof.⁶⁹

III PROCEDURAL ASPECTS

A. *Jurisdiction*

Many courts have held that the FSIA broadens the application of personal jurisdiction over a foreign sovereign beyond the traditional notions of personal jurisdiction exercised with respect to private individuals and corporations. In effect, some courts have held that if a foreign sovereign is subject to personal jurisdiction in any state, it is subject to jurisdiction in every state. State long-arm statutes may, therefore, no longer be relevant in determining whether a foreign air carrier is subject to *in personam* jurisdiction in a particular state. The practical effect of many court decisions is to turn the FSIA into a federal long-arm statute.

The FSIA provisions that govern exceptions to immunity and service of process are interrelated with concepts of subject matter jurisdiction and personal jurisdiction. If

⁶⁷ See *Canadian Overseas Ores Ltd. v. Compania De Acero Del Pacifico S.A.*, 727 F.2d 274, 278 (2d Cir. 1984). See *Flota Maritima Browning de Cuba, S.A. v. Motor Vessel Ciudad de la Habana*, 335 F.2d 619, 625 (4th Cir. 1964) for a discussion of waiver of sovereign immunity by a general appearance prior to enactment of the FSIA.

⁶⁸ *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 253-54 (7th Cir. 1983); *Jet Line Services, Inc. v. M/V Marsa El Hariga*, 462 F. Supp. 1165, 1171 (D.Md. 1978). See also *Matter of Sedco, Inc.*, 543 F. Supp. 561, 564 (S.D. Tex. 1982); *De Sanchez v. Banco Central de Nicaragua*, 515 F. Supp. 900, 903 (E.D. La. 1981).

⁶⁹ *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d at 256.

it is established in an action governed by the FSIA that a foreign state is not entitled to sovereign immunity, the United States District Court automatically has subject matter jurisdiction over the proceedings.⁷⁰ If subject matter jurisdiction exists and proper service of process upon the foreign state has been made under section 1608(b),⁷¹ the United States District Court may exercise statutory personal jurisdiction over the foreign state,⁷² subject to due process requirements.

Although application of the federal long-arm statute embodied in the FSIA obviates the application of the forum state's jurisdictional statutes, courts have held and Congress has recognized that the constitutional limitations on a court's power to exercise personal jurisdiction over a particular defendant must be observed.⁷³ The United States Court of Appeals for the Second Circuit, in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,⁷⁴ interpreted the FSIA and its legislative history to require a due process analysis of the court's power that examines the contacts of a foreign state with the entire United States rather than the contacts with the forum state.⁷⁵ A review of the facts and analysis of *Texas Trading* will highlight the important distinctions in a due process scrutiny under FSIA as compared with that involving an action against a private citizen or corporation.

Texas Trading arose out of a breach of several contracts by the Federal Republic of Nigeria and its Central Bank.⁷⁶

⁷⁰ See *supra* notes 16-18 and accompanying text.

⁷¹ See *infra* notes 138-141 and accompanying text for a discussion of service of process under the FSIA.

⁷² Section 1330(b) states that "[p]ersonal jurisdiction over foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." 28 U.S.C. § 1330 (b) (1982).

⁷³ See comments concerning section 1330(b) in H.R. REP. NO. 1487, *supra* note 4, at 13.

⁷⁴ 647 F.2d 300 (2d. Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

⁷⁵ *Id.* at 308-10.

⁷⁶ *Texas Trading*, 647 F.2d at 302-06. The decision of the United States Supreme Court on the constitutionality of an action by a foreign plaintiff against a foreign sovereign under the FSIA — *Verlinden B.V. v. Central Bank of Nigeria*,

Nigeria had executed 109 contracts with sixty-eight suppliers to buy sixteen million metric tons of cement at a price of nearly one billion dollars.⁷⁷ A backlog of ships waiting to unload in Nigerian harbors developed, with more cement-loaded vessels arriving at Nigerian ports daily.⁷⁸ Nigeria repudiated the contracts because it was unable to accept delivery.⁷⁹ When four suppliers brought actions in the Southern District of New York against the Republic of Nigeria, the Nigerian government invoked the defense of sovereign immunity under the FSIA.⁸⁰ The district court dismissed some of the actions for lack of jurisdiction,⁸¹ but on appeal the United States Court of Appeals for the Second Circuit held that personal and subject matter jurisdiction existed under the FSIA and that the Republic of Nigeria had sufficient minimum contacts with the United States for constitutional constraints to be satisfied.⁸² The Court of Appeals addressed the availability of sovereign immunity as a defense, the presence of subject matter jurisdiction over the plaintiffs' claims, and the propriety of personal jurisdiction over the defendants. The court first established that Nigeria was acting in a commercial capacity and that sovereign immunity was not a defense.⁸³ Then the court looked to the constitutional constraints⁸⁴ on exercising statutory per-

461 U.S. 480 (1982) — also arose out of the breach of a similar contract between a Dutch corporation and the Republic of Nigeria.

⁷⁷ *Texas Trading*, 647 F.2d at 303.

⁷⁸ *Id.* at 305.

⁷⁹ *Id.* at 305-06.

⁸⁰ *Id.* at 306.

⁸¹ *Id.* at 306. The district court held that where all contract negotiations were conducted outside of the United States, the contracts were governed by Nigerian law, and the only effect in the United States was that letters of credit were payable to New York plaintiffs through a New York bank, insufficient direct effects existed in the United States to support jurisdiction under the FSIA. 500 F. Supp. 320, 325-27.

⁸² 647 F.2d at 314-15.

⁸³ *Id.* at 310.

⁸⁴ Since the passage of the FSIA, courts interpreting the Act have applied a due process minimum contacts analysis. See *Maritime International Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1105 (D.C. Cir. 1982), *cert. denied*, — U.S. —, 104 S.Ct. 71 (1983); *Gemini Shipping, Inc. v. Foreign Trade Organiza-*

sonal jurisdiction over the defendants.⁸⁵ When analyzing the defendants' relevant contacts in order to satisfy due process requirements, the court determined that it must first decide whose contacts were relevant.⁸⁶ The court that found the Central Bank of Nigeria's commercial contacts and activities were chargeable to Nigeria and that the contacts of the New York correspondent bank, Morgan Guaranty Trust, were chargeable to the Republic of Nigeria and the Central Bank of Nigeria.⁸⁷

The second aspect of the constitutional inquiry involves determination of the relevant geographical area for purposes of delineating the minimum contacts necessary for *in personam* jurisdiction. Significantly, the *Texas Trading* court wrote that the area with which the defendants must have had minimum contacts was the entire United States, not merely the State of New York where the action was pending.⁸⁸ Application of *Texas Trading* has an adverse

tion for Chemicals and Foodstuffs, 647 F.2d 317 (2d Cir. 1981); Thomas P. Gonzales Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247 (9th Cir. 1980); Carey v. National Oil Corp., 592 F.2d 673 (2d Cir. 1979); Decor by Nikkei International, Inc. v. Federal Republic of Nigeria, 497 F. Supp. 893 (S.D.N.Y. 1980), *aff'd*, 647 F.2d 300 (2d Cir. 1981); Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981 (N.D. Ill. 1980); Harris v. VAO In-tourist, Moscow, 481 F. Supp. 1056 (E.D.N.Y. 1979).

⁸⁵ *Texas Trading*, 647 F.2d at 313-15.

⁸⁶ *Id.* at 314.

⁸⁷ *Id.* Actions in the forum by an agent on the defendant's behalf can support personal jurisdiction over the defendant. Carey v. National Oil Corp., 592 F.2d 673, 676, n.7 (2d Cir. 1979); Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 120-121 (2d Cir. 1967), *cert. denied*, 390 U.S. 996 (1968); Bankers Trust Co. v. Worldwide Transportation Services, Inc., 537 F. Supp. 1101 (E.D. Ark. 1982); East Europe Domestic International Sales Corp. v. Terra, 467 F. Supp. 383, 390 (S.D.N.Y. 1979), *aff'd mem.*, 610 F.2d 806 (2d Cir. 1979); Frummer v. Hilton Hotels International, Inc., 19 N.Y. 2d 533, 227 N.E. 2d 851, *cert. denied*, 389 U.S. 923 (1967).

⁸⁸ *Texas Trading*, 647 F.2d at 314. In reaching this decision, the court of appeals compared the FSIA service of process provision with service of process provisions for antitrust and securities laws. "Since service was made under § 1608, the relevant area in delineating contacts is the entire United States, not merely New York. Compare 28 U.S.C. § 1608 (service of process provision for FSIA) with 15 U.S.C. §§ 21(f) (service of process provision for antitrust laws), 77 V (same for securities laws)." *Id.* See also Bersch v. Drexel Firestone, Inc. 519 F.2d 974, 998-1000 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974); Leasco Data Processing Corp. v. Maxwell, 468 F.2d 1326, 1340 (2d Cir. 1972).

impact on foreign air carriers that fly into the United States. In any action against a foreign air carrier arising out of a contract of carriage where the United States is a stopping place, point of departure, or point of destination, there will always be some contact with the United States. Whether it would be a "minimum contact" sufficient for due process purposes is another question. According to the *Texas Trading* analysis, if the contact is sufficient, the air carrier may be subject to suit in every state of the union without regard to contacts with the forum state, subject to any venue constraints. In *Texas Trading*, the defendant foreign state and its agents were found to have "repeatedly and purposefully" availed themselves of the privilege of conducting business in the United States and to have invoked the benefits and protections of American laws.⁸⁹ When this occurred, the foreign state had every "reason to expect to be haled before a . . . court" in the United States.⁹⁰

The contacts of both the Nigerian government and the Central Bank with the United States were in New York, the forum state.⁹¹ Accordingly, the *Texas Trading* court did not have to address a situation where, although it conducted some business in the United States, the defendant was sued in a state where it did not conduct any business. Nevertheless, this expansive interpretation of "forum" for the "minimum contacts" test by the court of appeals has subsequently been followed in cases where there were no relevant contacts with the forum state.

In *Harris Corp. v. National Iranian Radio and Television*,⁹² the United States Court of Appeals for the Eleventh Circuit stated in *dicta* that the defendant's contacts with the State of New York, not the forum state of Florida, were determinative in applying the constitutional due process

⁸⁹ *Texas Trading*, 647 F.2d at 314. See also *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

⁹⁰ *Texas Trading*, 647 F.2d at 315 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977)).

⁹¹ *Texas Trading*, 647 F.2d at 314-15.

⁹² 691 F.2d 1344 (11th Cir. 1982).

analysis.⁹³ Citing *World-Wide Volkswagen Corp. v. Woodson*⁹⁴ and *Texas Trading*, the court held that the contacts of the foreign state with New York were sufficient "minimum contacts" with the entire United States to satisfy due process constraints.⁹⁵

A district court in Arkansas has also employed this analysis to evaluate the propriety of exercising jurisdiction over an agency of the Mexican government. In *Bankers Trust Co. v. Worldwide Transportation Services, Inc.*,⁹⁶ due process requirements were satisfied by the foreign agency's extensive economic activity in the United States when it repeatedly and purposefully availed itself of the privilege of conducting business in this country.⁹⁷ Consistent with the interpretation of *Texas Trading*, the court held that national rather than forum state contacts are determinative in any due process minimum contacts analysis under the

⁹³ *Id.* at 1352-53.

⁹⁴ 444 U.S. 286, 297 (1980).

⁹⁵ *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d at 1349-53. *Cf. Helicopteros Nacionales de Colombia, S.A. v. Hall*, — U.S. —, 104 S. Ct. 1868, 1874 (1984) (defendant's purchases in the state of Texas and other isolated contacts unrelated to the cause of action did not satisfy the due process requirements of continuous and systematic contacts necessary to support a finding of general jurisdiction over the defendant).

⁹⁶ 537 F. Supp. 1101 (E.D. Ark. 1982).

⁹⁷ *Id.* at 1110-11. In *Bankers Trust*, a Mexican government agency engaged in purchasing agricultural products from American companies had hired an American agent to coordinate the transportation of the goods from points of origin within the United States to Mexico. *Id.* at 1103-09. The Mexican agency also engaged Bankers Trust Company of New York as a financial agent in paying for the services of the transportation agent. *Id.* The district court ruled that such activity was sufficient commercial activity within the United States to support subject matter jurisdiction under the FSIA. *Id.* at 1107-09. With subject matter jurisdiction established, the court turned to a four part analysis of "traditional due process considerations" necessary for personal jurisdiction. *Id.* at 1110. In the first step of its analysis, the court wrote that the facts of the case clearly established that the Mexican agency "repeatedly and purposefully availed itself of the privilege of conducting activities" in the United States. *Id.* Secondly, the court stated, the extensiveness of commercial activity in the United States satisfied the *Schaffer v. Heitner*, 433 U.S. 186 (1977) requirement that the Mexican agency have reason to expect to be haled before an American court. Thirdly, the court continued, litigation in an American court was not "unduly inconvenient." *Id.* at 1111. In the final component of its due process analysis, the court found in the legislative history of the FSIA and in judicial precedent a manifest interest of the United States in hearing the suit. *Id.*

FSIA.⁹⁸

Not all courts, however, have followed this broad interpretation of "forum" in their due process analyses. In a sharp departure from *Texas Trading*, the United States District Court for the Northern District of California in *Meadows v. Dominican Republic*⁹⁹ declined to exercise jurisdiction over the defendant foreign state because the latter had insufficient contacts with the State of California.¹⁰⁰ Recognizing that the Court of Appeals for the Ninth Circuit had not ruled on the issue at that time, the *Meadows* court reasoned that, although the Second Circuit in *Texas Trading* had applied a minimum contacts analysis based on any contact with the entire United States, the Second Circuit was merely applying the traditional "minimum contacts" analysis with respect to the forum state because the defendant in *Texas Trading* was sued in New York where it did in fact conduct business.¹⁰¹ It may well be, however, that the *Meadows* court's refusal to follow the *Texas Trading* interpretation of traditional due process constraints upon the exercise of jurisdiction was due to a reluctance to follow automatically the Second Circuit before the Ninth Circuit had spoken on the issue.¹⁰² The United States

⁹⁸ *Id.* at 1108-09. The court explained its reasoning as follows in pertinent part:

The court finds that to limit the forum to any particular state would clearly not be in keeping with the intents and purposes of the FSIA. Initially it should be noted that the plain language of the Act itself refers again and again to contact with the *United States*, activity carried on in the *United States*, activity elsewhere which causes a direct effect in the *United States*. There is nothing whatsoever in the wording of the Act to indicate that any one state, as opposed to the whole country, should be utilized as the forum for the purpose of determining jurisdiction. . . .

It is thus the finding of the Court that the relevant forum to be utilized in determining whether jurisdiction exists is the entire United States.

Id.

⁹⁹ 542 F. Supp. 33 (N.D. Cal. 1982), *appeal dismissed and remanded*, 720 F.2d 684 (9th Cir. 1983).

¹⁰⁰ *Id.* at 34.

¹⁰¹ *Id.*

¹⁰² *See Id.* at 34. This reluctance was expressed by the district court as follows: The Ninth Circuit explicitly stated that it has not decided whether

Court of Appeals for the Ninth Circuit dismissed an appeal from this ruling without opinion.¹⁰³

Since the *Meadows* decision, however, the Ninth Circuit has implicitly rejected *Texas Trading* by holding that in order to satisfy due process requirements there must be contacts by the foreign sovereign with the forum state.¹⁰⁴ In *Olsen v. Government of Mexico*, an aircraft owned by the Mexican government had crashed in California.¹⁰⁵ The court held that Mexico "purposefully availed itself of the benefits of operating its aircraft over California" and that the claims of the plaintiffs arose from the flight and crash of the plane in California.¹⁰⁶

The United States Court of Appeals for the Ninth Circuit required contacts with the State of California in its due process scrutiny.¹⁰⁷ Since the *Meadows* and *Olsen* decisions, a Virginia district court has expressly rejected the *Texas Trading* test in the context of determining personal jurisdiction over a foreign airline. In *Unidyne Corporation v. Aerolineas Argentinas*,¹⁰⁸ the court refused to exercise jurisdiction over the airline because mere negotiations with a Virginia plaintiff were insufficient to constitute the purposeful activity required to satisfy the due process analysis. *Meadows*, *Olsen*, and *Unidyne* may signify a trend

aggregation of national contacts is proper where federal jurisdiction is asserted under a statute authorizing nationwide or world wide service of process. *Kramer Motors, Inc., v. British Leyland, Ltd.*, 628 F.2d 1175, 1177, n.4 (9th Cir. 1980). In the absence of clear authority from the Ninth Circuit discarding the traditional minimum contacts analysis where jurisdiction is asserted under the FSIA, we are compelled to apply the traditional analysis to this case, and conclude that there are insufficient contacts between the defendants and California to warrant this Court's exercise of jurisdiction.

Id.

¹⁰³ *Meadows v. Dominican Republic*, 720 F.2d 684 (9th Cir. 1983).

¹⁰⁴ *Olsen v. Gov't of Mexico*, 729 F.2d 641, 648-51 (9th Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 295 (1985).

¹⁰⁵ 729 F.2d at 643-44.

¹⁰⁶ 729 F.2d at 649. *See also* *Wyle v. Bank Melli of Tehran*, 577 F. Supp. 1148, 1159-60 (N.D. Cal. 1983) (foreign bank purposefully availed itself of benefit of California law by relying on credit of a California bank).

¹⁰⁷ *Id.* at 648-49.

¹⁰⁸ No. 84-494-N (E.D. Va. Sept. 20, 1985).

away from automatic application of the "national contacts" due process test set forth in *Texas Trading*.

Under the broad interpretation of the FSIA in the *Texas Trading* decision, a foreign air carrier qualifying as an instrumentality of a foreign state would be subject to suit in every state of the United States even if it operated only one flight a week into one state and did not maintain any sales offices in any other state.¹⁰⁹ A domestic carrier, in contrast, would normally be amenable to suit only in those states where licensed to do business, where doing business in the traditional sense, or where "minimum contacts" sufficient to bring it within a state's long-arm jurisdiction exist. Moreover, because a foreign air carrier will be subject to the substantive laws of the forum state rather than a uniform federal standard of liability, the broad application of personal jurisdiction under the *Texas Trading* decision appears to contravene the basic constitutional mandates of due process. As was stated by the Supreme Court in *Hanson v. Denckla*,¹¹⁰ it is "essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."¹¹¹ Although an air carrier may expect to be haled before a court in a jurisdiction with which it has systematic and continuous contacts,¹¹² the function of the due process clause, as defined by the Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*,¹¹³ is to give "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."¹¹⁴

¹⁰⁹ See *supra* notes 88-98 and accompanying text.

¹¹⁰ 357 U.S. 235 (1958).

¹¹¹ *Id.* at 253.

¹¹² *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977).

¹¹³ 444 U.S. 286 (1980).

¹¹⁴ *Id.* at 297. In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, — U.S. —, 104 S. Ct. 1868 (1984), the Supreme Court reversed a million-dollar jury verdict

The potential injustice imposed by a broad application of personal jurisdiction under the FSIA is even more significant in the case of a foreign air carrier that cannot limit its activities to certain areas of the United States by choice, but is instead, at least with respect to flight operations, restricted by bilateral agreements as to the number of cities in the United States to which it may operate. An airline may, of course, operate sales offices throughout the United States, in which case, some justification for a finding of jurisdiction exists if the foreign carrier is licensed to do business in the forum. However, no such distinction will be relevant if the *Texas Trading* analysis ultimately prevails.

Texas Trading relied upon cases brought under the securities laws for authority to make a due process analysis using national contacts rather than state contacts.¹¹⁵ Unlike actions based on securities laws, however, there exists no uniform federal standard governing the liability of a foreign state in disputes arising out of contract or tort. While the FSIA does set forth procedures for bringing suit against a foreign state, substantive issues of liability must still be determined under state law. If the *Texas Trading* concept of "national contacts" is employed rather than the traditional approach adopted by the Ninth Circuit in *Olsen*¹¹⁶ and the Virginia court in *Unidyne*,¹¹⁷ a foreign air carrier may be subject to the vagaries and inconsistencies of the laws of various states, depending on

on the ground that the Texas court did not have *in personam* jurisdiction over a foreign corporation in a cause of action unrelated to the corporation's activities in Texas. *Id.* at 1869-70, 1874. The wrongful death actions arose out of the crash of defendant's helicopter in Peru. The defendant's only contacts with the State of Texas were contract negotiations in Texas; acceptance into its New York bank account of checks drawn on a Texas bank; purchase of helicopters, equipment and training services from a Texas manufacturer; and sending its personnel to the Texas manufacturer's facilities for training. *Id.* at 1870-71. The Court reaffirmed that "continuous and systematic contacts" between the defendant and the forum state are required in order to assert general jurisdiction over a non-resident defendant. *See id.* at 1872-74.

¹¹⁵ *Texas Trading*, 647 F.2d at 314.

¹¹⁶ 729 F.2d at 648.

¹¹⁷ *Supra* note 108.

where the action is commenced, unless it succeeds in having the action transferred to another district court on *forum non conveniens* grounds.¹¹⁸

B. Removal

Under FSIA, United States district courts do not have exclusive jurisdiction over actions against a foreign sovereign.¹¹⁹ A plaintiff may, therefore, sue a foreign sovereign state in an American state court, subject to the right of the foreign sovereign to remove the case to federal court as a matter of course,¹²⁰ without regard to diversity of citizenship, existence of a federal question, or minimum amount in controversy.¹²¹ The foreign state must seek removal within thirty days of service of process, summons, or initial pleading,¹²² except for cause shown,¹²³ even though section 1608(d) allows foreign sovereigns up to sixty days

¹¹⁸ The United States Supreme Court stated that the FSIA "does not appear to affect the traditional doctrine of *forum non conveniens*." *Verlinden*, 461 U.S. at 490 n.15.

¹¹⁹ See *infra* notes 120 and 131 and accompanying text. The advantage of removal for a foreign airline is to obtain a non-jury trial so as to avoid the uncertainties and local prejudices attendant upon jury trials. See 28 U.S.C. § 1441(d), *infra* note 120, which provides that cases removed to federal court pursuant to the FSIA shall be tried by the court without a jury.

¹²⁰ 28 U.S.C. § 1441(d) (1982) provides for removal by a foreign state as follows:

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

¹²¹ 28 U.S.C. § 1330 (1982) confers original jurisdiction on district courts and states as follows in pertinent part:

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

¹²² 28 U.S.C. § 1446(b) (1982).

¹²³ 28 U.S.C. § 1441(d) (1982). The time limitations of section 1446(b) "may be enlarged at any time for cause shown." *Id.*

to file an answer or responsive pleading.¹²⁴ Once an action against a foreign sovereign is removed from state to federal court, it is tried without a jury.¹²⁵ In cases involving both sovereign and non-sovereign defendants, plaintiffs still enjoy the right to a jury trial of their claims against non-sovereign defendants.¹²⁶

Section 1441(d)¹²⁷ has been construed to permit removal by a third-party defendant as well as by a defendant.¹²⁸ This right of foreign sovereign third-party defendants to remove an action to federal court is limited, however, to removal of the third-party action only, including any cross-claims and counterclaims asserted between a foreign state and a non-sovereign party.¹²⁹ Where the foreign sovereign is a defendant as well as a third-party plaintiff, there is some justification for removing the entire action.¹³⁰ The legislative history of section 1441(d) confirms that the section was intended to permit removal "at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought."¹³¹

¹²⁴ 28 U.S.C. § 1608 (d) (1982).

¹²⁵ 28 U.S.C. § 1441 (d), *supra* note 120.

¹²⁶ *Mori v. Port Authority*, 100 F.R.D. 810, 812 (S.D.N.Y. 1980).

¹²⁷ 28 U.S.C. § 1441(d), *supra* note 120.

¹²⁸ In *Alifieris v. American Airlines*, 523 F. Supp. 1189, 1191-92 (E.D.N.Y. 1982) the court held that Olympic Airways, a third-party defendant in a civil action filed in the New York Supreme Court, Kings County and a foreign state for purposes of the FSIA, had a right to remove the third-party action to federal district court pursuant to § 1441(d). Because of concern over unduly extending federal judicial power at the expense of the state, the court severed the third-party action and remanded the main action to state court. *Id.* at 1192-03. *But see* *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980) where the court held that removal by a foreign state defendant operates to remove the entire action against all defendants. *Arango* did not involve a third-party action, however.

¹²⁹ *Alifieris*, 523 F. Supp. at 1191-92.

¹³⁰ In *Mori v. Port Authority*, 100 F.R.D. 810, 812 n.3 (S.D.N.Y. 1984), the court permitted removal of the entire action and distinguished *Alifieris* on the ground that the foreign sovereign defendant in *Mori* was a defendant and third-party plaintiff, whereas in *Alifieris*, the foreign sovereign party was only a third-party defendant.

¹³¹ H.R. REP. NO. 1487, *supra* note 4, at 32.

One of the objectives of the FSIA was to provide uniform treatment of foreign sovereigns. A foreign air carrier which qualifies as a foreign state under section 1603(b)(2) of the FSIA and which chooses to remove the action may obtain a trial by the court even if the plaintiff initially demands a jury in the state court, since section 1330(a), the FSIA grant of subject matter jurisdiction, is the exclusive basis for federal jurisdiction in actions against corporations owned by foreign states.¹³² The broad grant of jurisdiction made by section 1330 was intended to promote uniformity of decisions where foreign governments were involved.¹³³ Other bases of jurisdiction, such as diversity and federal question, are irrelevant when the defendant qualifies as a foreign state.¹³⁴ Yet if the foreign sovereign does not choose to remove the action to federal court, the case will proceed in state court and will be tried to a jury as in actions involving non-sovereigns.¹³⁵ This discretionary right of removal may,

¹³² *Arango v. Guzman Travel Advisors*, 761 F.2d 1527, 1532 (11th Cir. 1985); *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 421 (5th Cir. 1982); *Houston v. Murmansk Shipping Co.*, 667 F.2d 1151, 1153 (4th Cir. 1982); *Rex v. CIA. Compania Pervana de Vapores*, 660 F.2d 61, 65 (3d Cir. 1981), *cert. denied*, — U.S. —, 102 S.Ct. 1971 (1982); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 881 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982); *Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872, 875-76 (2d Cir. 1981). The circuits which have considered whether 28 U.S.C. § 1330(a) is the sole basis for federal jurisdiction in a suit against a foreign corporation owned by a foreign state have held that the Seventh Amendment does not require a jury trial in such a case. *Goar*, 688 F.2d at 426-27; *Murmansk*, 667 F.2d at 1154; *Rex*, 660 F.2d at 68-69; *Williams*, 653 F.2d at 881; *Ruggiero*, 639 F.2d at 878-81.

¹³³ H.R. REP. No. 1487, *supra* note 4, at 32.

¹³⁴ In *Ruggiero*, the Second Circuit determined that jurisdiction in a suit against a foreign state cannot be predicated on diversity of citizenship nor can the presence of a federal question provide an alternative basis for jurisdiction:

The courts must learn to accept that, in place of the familiar dichotomy of federal question and diversity jurisdiction, the Immunities Act has created a tripartite division — federal question cases, diversity cases and actions against foreign states. If a case falls within the third division, there is to be no jury trial even if it might also come within one of the other two.

Ruggiero, 639 F.2d at 876.

¹³⁵ The FSIA vests jurisdiction in the federal district courts and was intended to provide a certainty that actions against a foreign state can be removed to the United States district court. Section 1330 is silent as to the jurisdiction of state

therefore, result in differing applications and interpretations of substantive law and in contradictory outcomes — a result not intended by the drafters.¹³⁶ Removal pursu-

courts but section 1605 provides that a "foreign state shall not be immune from the jurisdiction of courts of the United States or of the States" in the cases therein described. 28 U.S.C. § 1605(a), *supra* note 18. Subject to the right of the foreign state to remove the action to federal court, state courts have the power to try actions against foreign states to a jury. *Verlinden*, 46 U.S. at 489. In *Martinelli v. Djakarta Lloyd P.N.*, 106 Misc. 2d 429, 431 N.Y.S.2d 748 (Civ. Ct. Kings Cty. 1980), a New York state court chose to exercise its jurisdiction stating as follows:

Congress thus limited its policy to seek uniform, judge-made decisions by leaving to foreign sovereign defendants in state courts the option of removal to Federal Court or, in the alternative, to hazard the relative uncertainties of state court trials, including those by jury. Defendants' failure to exercise that option in no way impairs this court's jurisdiction to enter judgment on the verdict.

106 Misc. 2d at 430-31, 431 N.Y.S.2d at 749-50.

¹³⁶ A reading of the congressional hearings indicates that the drafters of the FSIA most likely intended to vest exclusive jurisdiction in the federal courts, but chose the alternative of removal rather than dismissal:

MR. DANIELSON. There is a procedure provided for removal in the event action is commenced in a State court and there are a number of exceptions, but, anyway, I am trying to envision how could an action be commenced in a State court if the service or process is to be done by a summons issued by the clerk of the Federal court? How could that happen? How could the State court ever have jurisdiction that would require removal?

MR. RISTAU. We do have a somewhat anomalous situation at the present time in this one respect. As you know, sir, foreign diplomatic personnel are suable only in the U.S. Supreme Court. The Supreme Court of the United States has original and exclusive jurisdiction in suits against foreign diplomats. A somewhat lower echelon of foreign governmental functionaries in this country; namely, consular officials of a foreign government can be sued only in the U.S. district courts. Now, there have been repeated attempts to subsume foreign sovereign governments to the jurisdiction of State courts and, on occasion, by means of attachment, litigants have succeeded in bringing suits in State courts. You do have in the reported cases quite a number of decisions from the courts of the State of New York and other jurisdictions, where a foreign government became a defendant in a State court.

MR. DANIELSON. What we are simply doing here would be to try to provide a certainty that these can be removed at the request of the foreign state to the U.S. district court?

MR. RISTAU. Yes, sir, we feel that the question of the suability of a foreign government in the courts of the United States is inextricably intertwined with one aspect of foreign relations. As a result of this, we feel and we are convinced that the Congress has absolute authority to legislate in this area.

ant to section 1441(d) may also affect the substantive law applied in the action.¹³⁷

C. *Service of Process*

Section 1608 of the FSIA contains exclusive procedures for effecting proper service of process upon an agency or instrumentality of a foreign state.¹³⁸ The Act provides

MR. DANIELSON. You have answered my question fully and I thank you.

MR. BROWER. Excuse me, Congressman, but I thought your question had a different thrust, namely, when this statute is in force and an attachment is no longer available for establishing quasi in rem jurisdiction and since this statute addresses itself, as far as service of process is concerned, to the Federal courts but not to State courts, how then, when this is on the books, will the defendant get jurisdiction in the State courts and —

MR. DANIELSON. Oh, I think it would be idle act once this is a law, assuming it becomes law, it would be an idle act to sue them in the State courts, but at least the information that has just come forward makes it clear that any pending actions which are being currently filed, could be removed. But I think once it is law, there is no jurisdiction in the State court.

MR. BROWER. It is like the old question, where the client asked his lawyer, can Smith sue me? Of course, he can sue you but whether he can properly sue you or not is another question. It seems to me it may be properly brought to the State court and I think the removing procedure would apply only to actions which might be pending at the time this act becomes effective. MR. MANN. As Mr. Brower indicated, you could choose the alternative of removal rather than dismissal, in other words?

MR. BROWER. Right.

1973 Hearings, *supra* note 12, at 31 (testimony of Bruno Ristau, Chief, Foreign Litigation Unit, Civil Division, Dept. of Justice).

¹³⁷ See *infra* notes 150-152 and accompanying text.

¹³⁸ 28 U.S.C. § 1608(b) (1982). The language of subsection 1608(b) is mandatory and requires that service "shall be made" in the prescribed manner. An interpretation of this language as providing exclusive means of service is supported by the expressed intent of Congress. "Section 1608 sets forth the *exclusive* procedures with respect to service on. . . a foreign state or its political subdivisions, agencies or instrumentalities." H.R. REP. NO. 1487, *supra* note 4, at 24. (emphasis added). See also *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 253 (7th Cir. 1983); *Gray v. Permanent Mission of People's Republic of Congo to the United Nations*, 443 F. Supp. 816, 819 (S.D.N.Y. 1978), *aff'd mem.*, 580 F.2d 1044 (2d Cir. 1978); *Unidyne Corp. v. Aerolineas Argentinas*, 18 Av. Cas. (CCH) 17,817, 17, 819 (E.D. Va. 1984); *Caribbean Southern Corp. v. Commonwealth of Dominica*, 32 Fed. R. Serv. 2d 1714 (N.D. Tex. 1981); 40 D 6262 *Realty Corp. v. United Arab Emirates Gov't*, 447 F. Supp 710, 711 (S.D.N.Y. 1978).

three methods by which proper service can be made.¹³⁹ Most foreign air carriers maintain an office close to their operations within the United States, and personal service can be effected on a managing agent as long as the requirements of section 1608(b)(2) are met.¹⁴⁰

If service by a plaintiff is improper, he may serve the defendant again so as to comply with the FSIA so long as applicable statutes of limitation have not expired. In practice, however, the defendant would most likely move to dismiss the action on all available grounds, including lack of proper service. Before permitting a plaintiff to serve a defendant again so as to comply with section 1608, the court will generally address all other grounds for dismissal to determine whether plaintiff may properly assert a claim against the defendant.¹⁴¹ At the outset of litiga-

¹³⁹ 28 U.S.C. § 1608(b). The FSIA provides that service upon an agency or instrumentality shall be made as follows:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentalities; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request, or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

Id.

¹⁴⁰ See *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 821 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982). The master of the vessel was deemed the agent of the ship's owner for purposes of receiving process pursuant to section 1608(b)(2) even though the summons and complaint were not sent to the foreign instrumentality itself.

¹⁴¹ See *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 253 (7th Cir. 1983) ("It would be a waste of judicial resources to allow plaintiffs to go through

tion, counsel representing a foreign sovereign defendant should include, if applicable, improper service as grounds for dismissal in any motion to dismiss for lack of subject matter jurisdiction, personal jurisdiction, or improper venue.

D. *Venue*

Despite the potential for inequitable assertion of personal jurisdiction by some courts over foreign sovereign defendants, there appears to be some relief for foreign states provided by the venue provisions of the FSIA. Section 1391(f)¹⁴² of FSIA defines the proper venue of an action against a foreign state. Under section 1391(f), a foreign air carrier qualifying as a foreign state may be sued in any district in which a substantial part of the events or omissions giving rise to the claim occurred,¹⁴³ where the foreign air carrier is licensed to do business or is doing business,¹⁴⁴ or in the United States District Court for the District of Columbia.¹⁴⁵ Venue would be proper in the district where the airline maintains offices, or, in an action based on breach of a contract of carriage, where a claimant purchased his ticket or boarded his flight.

If an action against a foreign state has been removed from state court pursuant to 28 U.S.C. § 1441(d), however, section 1441(d) may determine the venue of the action. There is some authority that removal pursuant to section 1441(d) precludes the defendant from challenging the venue of the district court to which the action is removed.¹⁴⁶ Section 1391(f) applies only to actions origi-

the motions of service if the suit will be later dismissed on some other ground. Resolution of plaintiffs' request, then, must abide our review of defendants' remaining grounds for dismissal.")

¹⁴² 28 U.S.C. § 1391(f) (1982).

¹⁴³ 28 U.S.C. § 1391(f)(1).

¹⁴⁴ 28 U.S.C. § 1391(f)(3).

¹⁴⁵ 28 U.S.C. § 1391(f)(4).

¹⁴⁶ If an action is removed pursuant to § 1441(d), any subsequent transfer must be pursuant to § 1404(a) because § 1391(f) does not render venue improper in the court to which the action is removed. *Translinear, Inc. v. Republic of Haiti*, 538 F. Supp. 141, 144 n.2 (D.D.C. 1982). See *Polizzi v. Cowles Magazines, Inc.*,

nally "brought" in federal court.¹⁴⁷ In practice, this provision means that if a foreign air carrier removes the action as a matter of course without considering whether venue is proper, it may be precluded from asserting at a later date that venue is improper.¹⁴⁸ This would have a significant impact on the procedural vehicle for transferring the action which, in turn, may affect the substantive law to be applied by the transferee court.¹⁴⁹

Although section 1391(f) specifies those factors governing proper venue, courts have utilized either section 1404(a) or section 1406 to effect a transfer to another court.¹⁵⁰ The transferee court's choice of law is governed by which transfer statute the transferor court uses. If the transferor court transfers for improper venue pursuant to section 1406, the transferee court will apply the law of its own forum.¹⁵¹ Conversely, cases transferred under sec-

345 U.S. 663, 665-66 (1953); *Minnesota Mining and Manufacturing Co. v. Kirkevold*, 87 F.R.D. 317, 321-22 (D. Minn. 1980).

¹⁴⁷ *Translinear*, 538 F. Supp. at 144.

¹⁴⁸ *See id.*

¹⁴⁹ A recent decision interpreting section 1606 of the FSIA rejected application of the forum's choice of law rules and instead applied the law of the place where the act or omission occurred. *In re Air Crash Disaster at Warsaw, Poland*, on March 14, 1980, MDL No. 441 (E.D.N.Y. Nov. 6, 1985). Because Article 17 of the Warsaw Convention provides a presumption of carrier liability, the act of negligence was the aircraft crash which occurred in Poland. Since Poland would apply a *lex loci delicti* choice of law rule, the Court held that Polish law would apply to the measure of damages recoverable in the wrongful death actions. If the foregoing analysis is adopted by other courts, defense counsel in FSIA cases may remove or transfer an action without affecting the substantive law to be applied.

¹⁵⁰ *In Patel v. Kuwait Airways*, 18 Av. Cas. (CCH) 17,262, 17,263-64 (D. Conn. 1983), where the defendant lacked any contacts with the forum state, the court transferred the action pursuant to § 1404(a) even though venue was improper under 28 U.S.C. § 1391(f). Because venue had been improperly laid in Connecticut, the transferor court should have transferred the action pursuant to § 1406(a) to cure defective venue, instead of pursuant to § 1404(a) — a vehicle of transfer for the convenience of parties and witnesses. Since the transferor court transferred under § 1404, the transferee court may have to apply the law of Connecticut even though the defendant had no contact with that state. *See infra* notes 151-152 and accompanying text. *But see In re Air Crash Disaster at Warsaw, Poland*, on March 14, 1980, M.D.L. No. 441 (E.D.N.Y. Nov. 6, 1985) (section 1606 of FSIA requires application of choice of law rules of place where incident giving rise to liability took place).

¹⁵¹ *Martin v. Stokes*, 623 F.2d 469, 471-72 (6th Cir. 1980). This choice of law rule operates to discourage forum shopping. *See id.*

tion 1404(a) for the convenience of parties and witnesses must be tried pursuant to the law of the transferor court.¹⁵²

A foreign air carrier in an action brought in state court should, therefore, consider very carefully the ramifications of removing the action to federal court under the FSIA. When a foreign air carrier removes an action pursuant to section 1441(d), it effectively affirms the venue of the district to which the case is removed.¹⁵³ The foreign air carrier may be precluded from asserting that the action should be transferred pursuant to section 1406 for improper venue.¹⁵⁴ A subsequent transfer pursuant to section 1404(a) to a more convenient forum would result in application of the law of the transferor court, a result which may not be advantageous to the foreign air carrier.

IV CONCLUSION

The FSIA seeks to provide a framework for resolving disputes in which a foreign government is a party. In do-

¹⁵² *Van Dusen v. Barrack*, 376 U.S. 612, 636-37 (1964). The *Van Dusen* court noted that a section 1404(a) transfer for convenience would allow a "change of law as a bonus for a change of venue" if the transferee court could apply the law of the state where it sits. *Id.*

¹⁵³ See *supra* notes 146-148 and accompanying text.

¹⁵⁴ In *Translinear*, the plaintiff originally filed the action in a Texas state district court, then removed the case to the United States District Court for the Southern District of Texas. 538 F. Supp. at 143. Pursuant to 28 U.S.C. §§ 1391(f) and 1406(a), the federal court in Texas transferred the case to the United States District Court for the District of Columbia. *Id.* After transfer, defendant moved to dismiss on the ground that the District of Columbia statute of limitations barred the action. *Id.* Denying the defendant's motion, the court concluded that § 1391(f) applied only as a vehicle for transfer to actions originally "brought" in federal court. *Id.* at 144. The court reasoned that after removal of a case to federal court under § 1441, a subsequent transfer should not be premised on improper venue:

It would be a travesty of justice to permit defendant to successfully juggle venue provisions of the United States Code to obtain a transfer to this Court under section 1406(a) and then attempt to plead the bar of the District of Columbia statute of limitations when the case was timely filed in Texas.

Id. at 145. The court granted a motion by the plaintiff to transfer the case to the Northern District of Texas, where many of the events of the case occurred. *Id.* By so doing, Texas law would apply and the defendant would be prevented from juggling venue provisions to obtain the benefit of more favorable laws. *Id.*

mestic suits against foreign states acting in a commercial capacity, careful consideration must be given to all aspects of the FSIA. Because the Act is silent on some basic points and its express provisions are often inconsistently applied by the courts, counsel defending a foreign state must resist the temptation to focus narrowly on isolated provisions without gaining a thorough understanding of the close interrelationship of all the provisions.

Since a court must determine jurisdictional issues at the outset of each case, counsel should be familiar with all leading decisions interpreting the FSIA in order to recognize the fallacies in arguments raised by opposing counsel on motions to dismiss. Both personal jurisdiction and subject matter jurisdiction hinge on a finding that an exception to sovereign immunity exists. With regard to personal jurisdiction, recent decisions herald a general trend against automatic adherence to the due process text based on national contacts stated in dicta by the *Texas Trading* court. Careful analysis of the Act suggests that this trend requiring contacts with the forum state is based on sound reasoning and is an interpretation which best effectuates the overall purposes of the FSIA.

In cases subject to the Warsaw Convention, treaty subject matter jurisdiction in United States court pursuant to Article 28 is a threshold determination unaffected by the FSIA which relates solely to domestic jurisdiction. Satisfaction of due process requirements ensures that foreign states and their instrumentalities are not arbitrarily subjected to the jurisdiction of every state of the union in the absence of minimum contracts with the forum. Failure to separate concepts of treaty jurisdiction under Warsaw, subject matter jurisdiction under the FSIA, and personal jurisdiction as limited by due process results in faulty analysis by counsel, poor reasoning in court decisions and bad law.

Comments

