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## Casenotes and Statute Notes

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**FOREIGN SOVEREIGN IMMUNITIES ACT — SUBJECT MATTER JURISDICTION** — Federal courts have subject matter jurisdiction over a foreign sovereign's airline if an American passenger bought and paid for a ticket in the United States from an agent of the foreign airline, and used the ticket for passage although the passenger was not guaranteed passage. *Barkanic v. General Administration of Civil Aviation of the People's Republic of China*, 822 F.2d 11 (2d Cir.), *cert. denied*, 108 S. Ct. 453 (1987).

In January, 1985, two American businessmen, Peter Barkanic and Donald Fox, purchased tickets for transportation on a Civil Aviation Agency of China (CAAC) intra-China flight.<sup>1</sup> CAAC is the Chinese government agency responsible for domestic and international air transportation.<sup>2</sup> Barkanic and Fox purchased their tickets in the United States from an agent acting on behalf of CAAC; the agent issued them tickets for flight 1508 between

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<sup>1</sup> *Barkanic v. General Admin. of Civil Aviation of the People's Republic of China*, 822 F.2d 11, 12 (2d Cir.), *cert. denied*, 108 S. Ct. 453 (1987). Mr. Barkanic had obtained the tickets in Washington, D.C. on January 9, 1985. *Id.* at 12.

<sup>2</sup> *Id.* CAAC has been authorized to conduct international airline operations to and from the United States since 1980 pursuant to a foreign air carrier permit issued by the Civil Aeronautics Board (CAB). Appellee's Brief at 3, *Barkanic v. General Admin. of Civil Aviation of the People's Republic of China*, 822 F.2d 11 (2d Cir.) (No. 86-7985), *cert. denied*, 108 S. Ct. 453 (1987). The permit sets out rules relating to international transportation in the United States and includes a waiver of any defense of sovereign immunity for any claim arising out of flights to or from the United States. *Barkanic*, 822 F.2d at 12. The CAB permit covered only CAAC's international flights. *Id.* It is not relevant to this case. A CAB permit modified by Department of Transportation Order No. 87-8-8 (July 31, 1987), however, would have been relevant to this case. The Order states that in order to obtain a permit, a foreign air carrier must waive sovereign immunity for flights to and from the United States as well as flights for which the ticket was purchased in the United States. D.O.T. Order 87-8-8 (July 31, 1987). Since Barkanic and Fox purchased their tickets in the United States, the Order would have been relevant. See *infra* note 136 and accompanying text for a discussion of the relevance of D.O.T. Order 87-8-8 to this case.

Nanjing and Beijing.<sup>3</sup> Because the tickets were for travel on a CAAC flight exclusively in China, the agent in the United States did not have the authority to issue a confirmation.<sup>4</sup> The CAAC office in China confirmed all final arrangements for CAAC flights exclusively in China.<sup>5</sup>

Once in China, Barkanic and Fox contacted CAAC to confirm their flight.<sup>6</sup> They learned that CAAC changed their reservations from flight 1508, as originally designated on the tickets issued in the United States, to flight 5109, a later departure.<sup>7</sup> On January 18, 1985, both men died on flight 5109 when it crashed due to poor weather.<sup>8</sup>

Representatives of the decedents' estates filed a wrongful death action against CAAC in the United States District Court for the Eastern District of New York.<sup>9</sup> CAAC moved to dismiss for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA).<sup>10</sup> The district court granted the motion. The lower court held that issuance of unconfirmed tickets for a flight exclusively in China was insufficient commercial activity in the United States to warrant subject matter jurisdiction over a foreign sovereign under the FSIA.<sup>11</sup>

<sup>3</sup> *Barkanic*, 822 F.2d at 12. Barkanic purchased the tickets from his private travel agent, an agent for Pan American World Airways. *Id.* CAAC and Pan American World Airways had entered into an agreement whereby Pan American was to act as the sales agent for CAAC in the United States. *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* The court stated, "It is undisputed that tickets issued for domestic flights in China in this manner [by Pan American] must be confirmed by CAAC in China . . . ." *Id.* The agreement between CAAC and Pan American did not provide that any private travel agent would be permitted to issue confirmed tickets. Appellee's Brief, *supra* note 2, at 4.

<sup>6</sup> Appellee's Brief, *supra* note 2, at 4.

<sup>7</sup> *Barkanic*, 822 F.2d at 12. The CAAC issuing office in Nanjing, China made the changes. *Id.*

<sup>8</sup> *Id.* The flight which killed Barkanic, Fox and others crashed while attempting to land at Jinan, China. *Id.*

<sup>9</sup> *Barkanic v. General Admin. of Civil Aviation*, 3 Av. L. Rep. (CCH) (20 Av. Cas.) 17,402 (E.D.N.Y. Oct. 23, 1986), *rev'd*, 822 F.2d 11 (2d Cir.), *cert. denied*, 108 S. Ct. 453 (1987).

<sup>10</sup> *Id.*; see *infra* notes 23-26 and accompanying text for an introduction to the Foreign Sovereign Immunities Act.

<sup>11</sup> *Barkanic*, 3 Av. L. Rep. (CCH) at 17,402; see *infra* notes 28-32 and accompanying text for an introduction to the commercial activities exception to the FSIA.

Plaintiffs appealed to the United States Court of Appeals for the Second Circuit.<sup>12</sup> *Held, reversed*: Federal courts have subject matter jurisdiction over a foreign sovereign's airline if an American passenger bought and paid for a ticket in the United States from an agent of the foreign sovereign airline, and used the ticket for passage although the passenger was not guaranteed passage. *Barkanic v. General Administration of Civil Aviation of the People's Republic of China*, 822 F.2d 11 (2d Cir.), *cert. denied*, 108 S. Ct. 453 (1987).

## I. LEGAL BACKGROUND

### A. Common Law Sovereign Immunity

Sovereign immunity is a principle of international law that grants a nation immunity from the jurisdiction of the courts of other nations.<sup>13</sup> The doctrine of sovereign immunity is based on the maxim: *par in parem imperium non habet* — “an equal has no dominion over an equal.”<sup>14</sup> Chief Justice John Marshall first articulated an absolute theory of sovereign immunity in 1812 in *Schooner Exchange v. McFadden*.<sup>15</sup> The absolute sovereign immunity theory exempts both the public and private acts of a nation from

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<sup>12</sup> *Barkanic*, 822 F.2d at 11.

<sup>13</sup> See generally Comment, *Jurisdiction Over Foreign Governments: A Comprehensive Review of the Foreign Sovereign Immunities Act*, 19 VAND. J. TRANSNAT'L L. 119, 119-24 (1986) (introduction to sovereign immunity in the United States) [hereinafter *Comprehensive Review*]; Comment, “Commercial Activity” Under the Foreign Sovereign Immunities Act of 1976: Toward a More Practical Definition, 34 BAYLOR L. REV. 295, 295-98 (1982) (discussion of the development of sovereign immunity in the United States) [hereinafter *A More Practical Definition*].

<sup>14</sup> BLACK'S LAW DICTIONARY 1004 (5th Ed. 1979); see *A More Practical Definition*, *supra* note 13, at 295.

<sup>15</sup> 11 U.S. (7 Cranch) 116, 135-47 (1812). In *Schooner Exchange v. McFadden*, two Americans filed suit claiming that the Emperor Napoleon forcibly took their ship in violation of their rights. *Id.* at 117. The Supreme Court held that a country at peace with the United States was exempt from United States jurisdiction. *Id.* at 147. Chief Justice Marshall stated that all sovereigns possess equal rights and equal independence under international law; therefore, one sovereign enters another's territory confident that his independent sovereign immunities “are reserved by implication, and will be extended to him.” *Id.* at 137; see also *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 486 (1983) (foreign sovereign immunity granted as a matter of grace and comity on the part of the United States).

the jurisdiction of another nation's courts.<sup>16</sup> From 1812 until 1952 the official United States policy towards suits against foreign sovereigns was absolute sovereign immunity.<sup>17</sup>

The United States, however, has slowly eroded the principle of absolute sovereign immunity. With the increase in international trade and commercial contacts between the United States and other nations, courts took exception to absolute sovereign immunity.<sup>18</sup> A new theory emerged from the United States State Department, pursuant to the Tate Letter,<sup>19</sup> recognizing immunity for the public acts of a foreign nation but not for its private acts.<sup>20</sup> Under the rubric of restrictive sovereign immunity, American courts began to permit suits against foreign nations involved in commercial or business ventures. Pursuant to the Tate Letter, however, courts had to keep the diplomatic considerations of the State Department in mind when determining whether to grant jurisdiction.<sup>21</sup> Before the FSIA the courts could not apply restrictive sov-

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<sup>16</sup> Badr, *Recent Developments in the Dynamics of Sovereign Immunity*, 30 AM. J. COMP. L. 678, 679 (1982). Public acts, or acts *jure imperii*, are "acts . . . carried out by the foreign state under its public law as a sovereign authority . . . ." *Id.* Private acts, or acts *jure gestionis*, are "acts that a private person can carry out under private law . . . ." *Id.* Sometimes it is difficult to distinguish between the public and private acts of a sovereign state. See *Comprehensive Review*, *supra* note 13, at 122 n.13.

<sup>17</sup> See *Comprehensive Review*, *supra* note 13, at 119.

<sup>18</sup> See von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 36-37 (1978) (discusses the erosion of absolute sovereign immunity in the United States).

<sup>19</sup> See Letter from Jack B. Tate, Acting Legal Advisor of the Department of State, to Philip B. Perlman, Acting Attorney General of the United States (May 19, 1952), reprinted in 26 DEP'T ST. BULL. 984 (1952).

<sup>20</sup> *Id.* The restrictive theory of immunity officially replaced the theory of absolute immunity in the United States in 1952 when the State Department issued the famous Tate Letter. Jack Tate, acting legal advisor of the State Department, announced that the Department would no longer assert immunity on behalf of friendly foreign sovereigns in actions arising from private or commercial activities. *Id.*

<sup>21</sup> The Tate Letter set forth the following standard for the courts: A plaintiff wishing to sue a foreign state had to establish first that the "exercise of jurisdiction was prudent in light of diplomatic considerations." Note, *Effects Jurisdiction Under the Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U.L. REV. 474, 478 (1980) [hereinafter *Sovereign Immunities Act and Due Process*]; see also *Rich v. Naviera Vacuba, S.A.*, 197 F. Supp. 710, 724-25 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th

foreign immunity consistently because the State Department had the authority to determine whether jurisdiction would impair diplomatic relations.<sup>22</sup>

## B. *The Foreign Sovereign Immunities Act*

### 1. *The Commercial Activities Exception*

To develop a more consistent approach to sovereign immunity, Congress, in 1976, codified the theory of restrictive immunity in the FSIA.<sup>23</sup> The FSIA sets forth the exclusive standard federal or state courts should use in resolving questions of sovereign immunity raised by foreign states.<sup>24</sup> The FSIA provides for a general grant of

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Cir. 1961); Young, *Defending Litigation Against a Foreign Airline under the Foreign Sovereign Immunities Act*, 51 J. AIR L. & COM. 461, 464-74 (1986).

Typically, a plaintiff brought a suit and the foreign state claimed sovereign immunity. The State Department usually then determined whether the claim was based on commercial acts and whether diplomacy would permit the plaintiff to pursue the case. See *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 358-59 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). In essence, the State Department was applying a legal standard to the case but without any legal procedures, such as hearing evidence, examining witnesses and permitting appeal. *Sovereign Immunities Act and Due Process*, *supra*, at 478; see also H.R. REP. NO. 1487, 94th Cong., 2d Sess. 6-7, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6607 [hereinafter HOUSE REPORT].

<sup>22</sup> See Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORDHAM L. REV. 543, 548-50 (1977) (discusses the political pressures exerted on account of the restrictive theory of sovereign immunity).

<sup>23</sup> 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-11 (1982) [hereinafter FSIA]. The FSIA defines the terms and conditions under which the United States has jurisdiction over a foreign state and sets forth when a foreign state may invoke sovereign immunity. HOUSE REPORT, *supra* note 21, at 6. The FSIA also removes decisions on sovereign immunity from the executive branch [State Department] and gives them to the judicial branch, thereby reducing the foreign policy implications in immunity determinations. *Id.* at 7. The other general purposes of the FSIA are to provide a method of service of process for foreign state defendants and to establish a method of satisfying judgments against foreign states. *Id.* at 7-8.

<sup>24</sup> 28 U.S.C. § 1330(a) (1982). "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." *Id.* The FSIA combines into one inquiry three different issues: federal subject matter jurisdiction, personal jurisdiction and sovereign immunity. Comment, *Subject Matter Jurisdiction and the Foreign Sovereign Immunities Act of 1976*, 68 VA. L. REV. 893, 896-97 (1982). Section 1330 instructs a court to determine first whether the defendant is entitled to the defense of sovereign immunity. *Id.* at 897. Both subject matter jurisdiction and

sovereign immunity;<sup>25</sup> however, it limits the extent to which foreign states may rely on this immunity as a defense. A nation cannot assert immunity when engaging in non-governmental activities.<sup>26</sup>

A basic theme of the FSIA is that a foreign nation impliedly waives the defense of sovereign immunity for its commercial activities.<sup>27</sup> Section 1605(a)(2),<sup>28</sup> the "commercial activities exception,"<sup>29</sup> denies immunity to a foreign sovereign from any claim based upon (1) commercial activity carried on in the United States,<sup>30</sup> (2) acts within the United States in connection with commercial activity elsewhere,<sup>31</sup> or (3) acts outside the United States in con-

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personal jurisdiction follow from the court's determination of immunity. *Id.* at 897-98.

<sup>25</sup> 28 U.S.C. § 1604 (1982). According to legislative history, the FSIA starts from a basic premise of immunity for the foreign state. HOUSE REPORT, *supra* note 21, at 6.

<sup>26</sup> 28 U.S.C. § 1605(a) (1982). Section 1605(a) provides the following general exceptions to the jurisdictional immunity of a foreign state: express waiver of immunity, implied waiver of immunity (such as conducting commercial activity in the United States), taking property in violation of international law, and committing noncommercial torts. *Id.*; see also Young, *supra* note 21, at 464-74.

<sup>27</sup> 28 U.S.C. § 1605(a)(2) (1982). See *infra* notes 28-32 and accompanying text for an introduction of commercial activities under the FSIA; see also von Mehren, *supra* note 18, at 34.

<sup>28</sup> 28 U.S.C. § 1605(a)(2) (1982). Section 1605(a)(2) provides:

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

<sup>29</sup> HOUSE REPORT, *supra* note 21, at 18-19.

<sup>30</sup> See *infra* notes 33-39 and accompanying text for a discussion of the first clause of section 1605(a)(2).

<sup>31</sup> Under the second clause of section 1605(a)(2), a court may exercise jurisdiction only under the following conditions: an act must be performed in the United States, the plaintiff's claim must be based on this act, and the act must have been performed in connection with a commercial activity performed elsewhere. 28 U.S.C. § 1605(a)(2); see also Lacroix, *The Theory and Practice of the Foreign Sovereign Immunities Act: Untying the Gordian Knot*, 5 INT'L TAX & BUS. L. 146, 173 (1987) [hereinafter *Untying the Gordian Knot*]. The second clause does not apply in the

nection with commercial activity elsewhere which cause a "direct effect" in the United States.<sup>32</sup>

2. *Judicial Interpretations of the First Clause of Section 1605(a)(2)*

The first clause of section 1605(a)(2) covers business deals transacted in the United States.<sup>33</sup> To determine whether the first clause of section 1605(a)(2) applies, a court must resolve the following threshold issues: whether the activity was "commercial";<sup>34</sup> whether the activity was carried out in the United States;<sup>35</sup> and the issue

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instant case because the airplane crash giving rise to the decedent's claims did not occur in the United States, but rather in China.

<sup>32</sup> The third clause of section 1605(a)(2) provides that a foreign sovereign shall not be immune in any case in which the action is based 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." 28 U.S.C. § 1605(a)(2). See *Untying the Gordian Knot*, *supra* note 31, at 176 for a discussion of this clause. In the instant case the only effect of the aircrash in the United States was grief and loss experienced by family, friends and colleagues of the decedents; however, courts have unanimously held that causing such injury abroad to American citizens does not constitute a direct effect in the United States. See *Upton v. Empire of Iran*, 459 F. Supp. 264 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979). *Upton* involved claims arising from the collapse of a roof at the main terminal building of the Tehran international airport. *Id.* at 265. Two United States citizens were killed. *Id.* The district court, however, dismissed the actions for the pain and suffering experienced by the decedents' families in the United States. *Id.* at 266. The court ruled that a common sense interpretation of a direct effect would preclude damages for pain and suffering occurring in the United States. *Id.* A direct effect, the court wrote, "[i]s one that has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Id.*

<sup>33</sup> *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056, 1061 (E.D.N.Y. 1979).

<sup>34</sup> 28 U.S.C. § 1603(d) (1982). The FSIA defines commercial activity as "either a regular course of commercial conduct or a particular transaction or act." *Id.* Whether an act is commercial is determined by the "nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* Courts look at the legislative history to determine whether an activity is commercial. *Texas Trading & Milling Corp. v. Federal Republic of Nig.*, 647 F.2d 300, 309-10 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). In the instant case, whether the activity was commercial was not in dispute because the transaction between the decedents and CAAC (through the American agent) was clearly commercial in nature.

<sup>35</sup> 28 U.S.C. § 1603(e) (1982). The FSIA defines an activity carried out in the United States as one with "substantial contact" with the United States. *Id.* It is up to the courts to determine whether a particular commercial activity involves a substantial contact with the United States under this provision. HOUSE REPORT, *supra*



in the instant case, whether the plaintiff's claim is based on commercial activity occurring in the United States.<sup>36</sup> The language of the first clause of section 1605(a)(2) does not provide guidelines for determining whether a plaintiff's claim is based upon the commercial activity carried on by a foreign state in the United States.<sup>37</sup> Congress intended the courts to have great latitude in determining what claims would fall under the first clause of section 1605(a)(2).<sup>38</sup> Congressional latitude, however, has produced widely varying interpretations of the clause's jurisdictional scope.<sup>39</sup>

The various interpretations courts have given the "based upon" language of the first clause of section

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note 21, at 17. Whether the activity was carried out in the United States was not an issue in the instant case because the transaction between the decedents and CAAC (through the American agent) occurred in the United States.

<sup>36</sup> 28 U.S.C. § 1605(a)(2) (1982). The court must determine whether the defendant state's commercial activity in the United States has the necessary relationship to plaintiff's cause of action described by the first clause of section 1605(a)(2). *Id.*

<sup>37</sup> Many courts have encountered difficulty interpreting the FSIA. Judge Ward remarked:

The Foreign Sovereign Immunities Act of 1976 . . . is a statutory labyrinth that, owing to the numerous interpretative questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar but a constant bane of the federal judiciary.

Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1105 (S.D.N.Y. 1982).

<sup>38</sup> Feldman, *Foreign Sovereign Immunity in the United States Courts 1976-1986*, 19 VAND. J. TRANSN'L L. 19, 23 (1986). The draftsmen of the FSIA knew from experience that courts must have flexibility in developing the law of immunity to account for ever changing international relations. *Id.* Congress made the section 1605 exceptions "purposely ambiguous, . . . decid(ing) to put [their] faith in the U.S. Courts," and provided little guidance to the judiciary. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 53 (1976) (testimony of Monroe Leigh, Legal Advisor, Department of State); see also *Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 205 (5th Cir. 1984) (Higginbotham, J., concurring in part, and dissenting in part).

<sup>39</sup> *Vencedora*, 730 F.2d at 199-200. "Despite strong congressional intent to promote uniformity in decision making through judicial application of the first clause of section 1605(a)(2), judicial readings of this clause have not been consistent." *Id.*; see also *Barnett v. Iberia Air Lines of Spain*, 660 F. Supp. 1148, 1150 (N.D. Ill. 1987).

1605(a)(2) can be divided into four categories.<sup>40</sup> Cases falling in the first category take a literal approach, requiring that plaintiff's cause of action be directly based upon the defendant foreign state's commercial activity in the United States.<sup>41</sup> Other courts have adopted a bifurcated literal/nexus approach, requiring the plaintiff to show either that a direct causal connection exists between the foreign entity's commercial activity in the United States and the acts giving rise to the cause of action, or that the commercial activity is an element of the cause of action.<sup>42</sup> A third approach is the "doing business" standard, which requires the plaintiff to show that some part of the foreign state's regular course of commercial conduct has substantial contact with the United States, regardless of the relationship between the lawsuit and the United States.<sup>43</sup>

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<sup>40</sup> *Vencedora*, 730 F.2d at 200.

<sup>41</sup> *Id.* The circuit courts have rejected application of the literal test. *Gemini Shipping v. Foreign Trade Org.*, 647 F.2d 317, 319 (2d Cir. 1981) (the drafters of the FSIA did not intend such a "niggardly" construction); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 273 (3d Cir. 1980) (if the drafters had intended to limit the first clause to acts in the United States they would have expressly stated the limitation similar to the express limitation in the second clause); see also *Gibbons*, 549 F. Supp. at 1108 n.5.

<sup>42</sup> *Vencedora*, 730 F.2d at 200. This approach was first adopted in *Gilson v. Republic of Ir.*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982) (plaintiff accused Ireland of inducing him into a commercial venture and then stealing from him certain proprietary information). The *Gilson* court adopted the bifurcated literal/nexus test in the context of interpreting the second clause of section 1605(a)(2). In *Gibbons*, 549 F. Supp. at 1109, however, the court applied the *Gilson* approach to all three clauses of section 1605(a)(2). See also *Vencedora*, 730 F.2d at 200 (commenting on the *Gibbons* court's reading of *Gilson*).

<sup>43</sup> *Vencedora*, 730 F.2d at 201. The "doing business" approach was first adopted in *In re Rio Grande Transp., Inc.*, 516 F. Supp. 1155, 1162 (S.D.N.Y. 1981). Plaintiff's claim arose from a collision in the Mediterranean with an Algerian ship bound from Algeria to West Germany. Since there was no particular nexus between plaintiff's claim and the United States, the first clause of section 1605(a)(2) applied only because the court based jurisdiction on Algeria's worldwide shipping activities which did have substantial contact with the United States. The court stated that a broad interpretation of the first clause was "consistent with Congress' goal of providing access to the courts to those aggrieved by the commercial acts of a foreign sovereign." *Id.* at 1162 (quoting *Texas Trading & Milling Corp. v. Federal Republic of Nig.*, 647 F.2d 300, 313 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982)).

### 3. The "Nexus" Interpretation

The final formulation is the nexus approach, which is neither as restrictive as the literal or bifurcated approaches, nor as broad as the "doing business" approach.<sup>44</sup> Under the nexus approach, the plaintiff's cause of action may be based upon the commercial activity of a foreign sovereign performed outside the United States if a nexus has been established between the commercial activity in the United States and the facts giving rise to the cause of action.<sup>45</sup> The Second, Third, and Fifth Circuits have adopted the nexus approach to the first clause of section 1605(a)(2).<sup>46</sup>

#### C. Sufficiency of Nexus Under the First Clause of Section 1605(a)(2)

Cases addressing the sufficiency of the nexus required under the first clause of section 1605(a)(2) typically involve an American injured abroad by an agency or instrumentality of a foreign state, and the foreign state claims sovereign immunity under the FSIA. Plaintiff then seeks to establish that jurisdiction is appropriate under the first clause of section 1605(a)(2). After it has first determined that the foreign nation transacted commercial activity in the United States, the court must resolve whether the activity was sufficiently connected to plaintiff's cause of action.<sup>47</sup>

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<sup>44</sup> *Vencedora*, 730 F.2d at 200, 202. This approach was first adopted in *Sugarman*, 626 F.2d at 272 (passenger sued Mexican national airline for his physical pain, mental anguish, and loss of time and wages as a result of waiting 15 hours in a Mexican airport for a delayed flight to New York City). See *infra* notes 56-58 and accompanying text for a discussion of the *Sugarman* case.

<sup>45</sup> *Sugarman*, 626 F.2d at 272-73.

<sup>46</sup> See *Barkanic*, 822 F.2d at 13 (requirement of a nexus between the commercial activity in the United States and the cause of action); *Vencedora*, 730 F.2d at 202 ("the Third Circuit's nexus interpretation of the first clause of section 1605(a)(2) is sound and therefore [the Fifth Circuit] adopt[s] it as . . . [its] own."); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 820 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982) (there must be a nexus between the plaintiff's grievance and the sovereign's commercial activity).

<sup>47</sup> 28 U.S.C. § 1605(a)(2); see *supra* notes 34-36 and accompanying text for a discussion of the appropriate time to invoke the first clause of section 1605(a)(2).

On similar facts, courts following the nexus approach have arrived at contradictory outcomes over whether a sufficient nexus exists between a plaintiff's cause of action and a foreign state's commercial activity in the United States.<sup>48</sup> The cases are best illustrated by two polar extremes.<sup>49</sup> At one extreme are cases which establish a clearly sufficient connection;<sup>50</sup> at the other extreme are cases which establish no connection at all.<sup>51</sup>

### 1. *Cases Establishing a Sufficient Nexus*

In *Ministry of Supply, Cairo v. Universe Tankships, Inc.*<sup>52</sup> the Egyptian Ministry originally brought suit against Universe Tankships for damages when Universe allegedly ruined grain while unloading it from a ship in Port Said.<sup>53</sup> Babanaft International intervened and cross claimed. Babanaft alleged that Egypt wrongfully disputed with Universe over unloading the grain in Port Said, thereby wrongfully denying Babanaft the rightful use of the ship.<sup>54</sup> Although Babanaft's injuries resulted from a dispute outside of the United States, the court ruled that Babanaft's claim was based upon Egypt's contacts in the United States, including Egypt's negotiations with Uni-

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<sup>48</sup> See Barnett, 660 F. Supp. at 1151. "[T]he formulation of the degree of connection required between the commercial activity in the United States and the acts giving rise to the cause of action has not been uniform." *Id.*; see *infra* notes 52-71 and accompanying text for a discussion of the inconsistent ways courts have defined a "sufficient nexus."

<sup>49</sup> The polar extremes illustration encompasses the contradictory interpretations of the language of the first clause of section 1605(a)(2). Compare *Tigchon v. Island of Jamaica*, 591 F. Supp. 765, 768 (W.D. Mich. 1984) (there must be a "direct" connection between the commercial activity and the acts complained of) with *Verlinden B.V. v. Central Bank of Nig.*, 488 F. Supp. 1284, 1295-96 (S.D.N.Y. 1980) (there must be a "close-connection"), *rev'd on other grounds*, 461 U.S. 480 (1983).

<sup>50</sup> See *infra* notes 52-58 and accompanying text for a discussion of cases holding a sufficient nexus established under section 1605(a)(2).

<sup>51</sup> See *infra* notes 59-67 and accompanying text for a discussion of cases holding an insufficient nexus established under section 1605(a)(2).

<sup>52</sup> 708 F.2d 80 (2d Cir. 1983).

<sup>53</sup> *Id.* at 81-82.

<sup>54</sup> *Id.* at 83.

verse for the grain purchase and transportation.<sup>55</sup> In other words, the court ruled that Babanaft's claim, though directly connected to the dispute over unloading the grain at Port Said, was also closely connected with Egypt's entire course of activity in the United States.

*Sugarman v. Aeromexico, Inc.*,<sup>56</sup> is an example of a negligence case where the court has found a sufficient nexus. Plaintiff complained that Aeromexico negligently caused him to wait for 15 hours under "extremely brutal conditions" in the Acapulco Airport.<sup>57</sup> The court held that plaintiff's claim was based upon Aeromexico's commercial activity in the United States. The delayed flight was bound for New York, plaintiff bought his tickets for the delayed flight from a travel agent in New Jersey and the delayed flight was the "return trip" of a flight plaintiff had taken from New York.<sup>58</sup>

The court in *Universe Tankships* granted jurisdiction under the first clause of section 1605(a)(2) because the plaintiff's claim, for wrongfully halting a grain discharge, was based upon the Egyptian Ministry's entire course of commercial activities in the United States. In *Sugarman*, the court granted jurisdiction because the plaintiff's claim was also based upon Aeromexico's commercial activities in the United States, such as conducting a flight to the United States and marketing tickets in the United States. Upon similar facts, however, other courts have reached the opposite conclusion. The connection between the defendant's commercial activity in the United States and plaintiff's cause of action was too attenuated to invoke jurisdiction under the first clause of section 1605(a)(2).

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<sup>55</sup> *Id.* at 84. "Babanaft's claim is 'based upon' [the Ministry's] *entire course of activity* in arranging in the United States for the purchase of the wheat and its transportation to Egypt, not simply on the acts done (or not done) by [the Ministry] in the course of unloading at Port Said." *Id.* (emphasis added).

<sup>56</sup> 626 F.2d 270 (3d Cir. 1980).

<sup>57</sup> *Id.* at 271. Plaintiff claimed that without adequate food and water he suffered from cardiac insufficiency, angina and arrhythmia causing him physical pain, mental anguish, injury to health, and loss of time and wages. *Id.*

<sup>58</sup> *Id.*

## 2. Cases Holding an Insufficient Nexus

In *Tigchon v. Island of Jamaica*,<sup>59</sup> plaintiff sought damages after her husband died in a water skiing accident at a resort hotel owned and operated by the defendant, Jamaica.<sup>60</sup> She claimed there was a sufficient connection between the negligent operation of the hotel resulting in the alleged injury, and Jamaica's commercial activity in the United States, specifically, Jamaican promotional travel literature and advertising.<sup>61</sup> The court held that the connection between the promotions in the United States and a vacationer's death while water skiing was too attenuated.<sup>62</sup> The court required a *direct* nexus between a plaintiff's injury and the commercial contacts with the United States.<sup>63</sup>

In *Harris v. VAO Intourist, Moscow*,<sup>64</sup> an American citizen died in a hotel fire in Moscow.<sup>65</sup> Harris, the representative of the decedent's estate, brought suit against two state-owned Russian tourist services: Intourist, Moscow (Intourist Moscow) and Intourist, New York (Intourist New York). Intourist Moscow owned and operated the hotel in Moscow, and Intourist New York maintained an office in New York promoting Russian tours and the use of Intourist Moscow's hotel facilities.<sup>66</sup> The court ruled that the activity out of which the plaintiff's claim arose was the negligent operation of the Moscow hotel and that any connected commercial activity in the United States through Intourist New York or American travel agents was too remote to apply the first clause.<sup>67</sup>

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<sup>59</sup> 591 F. Supp. 765 (W.D. Mich. 1984).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 768.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* "The [FSIA] clearly contemplates a *direct connection* between the injury suffered and the contacts with the United States." *Id.* (emphasis added). The court cited *Sugarman* as an example of a sufficient connection. *Id.*; see *supra* notes 56-58 and accompanying text for a discussion of *Sugarman*.

<sup>64</sup> 481 F. Supp. 1056 (E.D.N.Y. 1979).

<sup>65</sup> *Id.* at 1057.

<sup>66</sup> *Id.* at 1057-58.

<sup>67</sup> *Id.* at 1061. The court stated:

### 3. Conclusion — Conflicting Determinations of Sufficiency

As demonstrated by the above examples, the nexus sufficiency is to a great extent fact-dependent; nevertheless, courts have used inconsistent logic to determine on which extreme, sufficient or insufficient, plaintiff's claim falls. For example, in *Universe Tankships*, the court invoked jurisdiction by permitting the plaintiff to base its claim on the Egyptian Ministry's entire course of commercial activity, including the arrangements made in United States for the sale of grain, rather than solely on the dispute in Egypt over unloading the grain.<sup>68</sup> In *Harris*, however, the court did *not* permit the plaintiff to base his claim on defendant's entire course of commercial activity.<sup>69</sup> The *Harris* court took two opportunities to deprive plaintiff of a sufficient connection between his claim and Intourist Moscow's entire course of activity in the United States. First, the court stated that Intourist New York's connection with Intourist Moscow was of no significance.<sup>70</sup> Second, the court never discussed the hotel's practice of taking confirmations from travel agents in the United States.<sup>71</sup> Case

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The commercial activity out of which plaintiff's claim arises is the operation of the Hotel in Moscow; despite the apparent integration of the Soviet tourist industry, the relationship between the negligent operation of the National Hotel and any activity in the United States is so attenuated that this clause is not applicable. Even though [the Hotel] 'may be doing business here in the *traditional* sense' there is no 'doing business' provision in the [FSIA]."

*Id.* (citations omitted).

<sup>68</sup> *Universe Tankships*, 708 F.2d at 84; see *supra* notes 52-55 and accompanying text for a discussion of the court's reasoning in *Universe Tankships*.

<sup>69</sup> *Harris*, 481 F. Supp. at 1056; see *supra* notes 64-67 and accompanying text for a discussion of the court's reasoning in *Harris*.

<sup>70</sup> *Harris*, 481 F. Supp. at 1058. "Whether [Intourist New York] is a separate entity for purposes of the Immunities Act, as plaintiff alleges, or a part of Intourist, Moscow, incapable of being sued as an independent organization, as defendants assert, is . . . of no significance under the facts of this case." *Id.*

<sup>71</sup> The court mentions in the facts of the case:

[W]hen visitors from the United States seek accommodations in Russia, they do so through private United States travel agencies which place orders with Intourist, Moscow. Intourist, Moscow confirms the arrangements with the American private agencies. In the case at bar, a private travel agent in New York City arranged with Intourist, Moscow for decedent's accommodations at the Moscow Hotel.

precedents regarding the required nexus between a plaintiff's claim and a state's commercial activity in the United States under the first clause of section 1605(a)(2) are inconsistent.

#### D. *International Civil Aviation*

The courts have also arrived at conflicting conclusions over the sufficiency of the nexus under the first clause of section 1605(a)(2) in cases concerning international civil aviation. Under the FSIA, the definition of a foreign state includes all agencies and instrumentalities of government within a foreign state; therefore, an airline owned by a foreign government or operated as a department or division of the foreign government qualifies as a foreign state.<sup>72</sup>

All national air carriers operating flights to or from the United States must first obtain a foreign air carrier permit or exemption from the United States.<sup>73</sup> In order to obtain this permit, the national air carrier must expressly waive the defense of sovereign immunity.<sup>74</sup> A flight which does

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*Id.* Without any discussion of the extent of the contacts between the Hotel and American travel agents the court determined that the relationship between the Hotel's negligence and contacts with American travel agents was "attenuated". *Id.* at 1061.

<sup>72</sup> 28 U.S.C. § 1603(b) (1982); see HOUSE REPORT, *supra* note 21, at 6, 16. Entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including . . . [an] airline." *Id.* at 16.

<sup>73</sup> The Department of Transportation issues foreign air carrier permits or exemptions pursuant to the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 2857. See Young, *supra* note 21, at 465.

<sup>74</sup> The Civil Aeronautics Board first imposed waiver of sovereign immunity in 1951, stating that, "[a]s a matter of policy . . . proper protection of shippers and the traveling public requires that insofar as practicable a foreign air carrier shall not enjoy immunity from suit any more than a domestic air carrier." *El Al Israel Air.*, Amendment of Permit, 14 C.A.B. 962 (1951). 14 C.A.B. 962 states that as a condition of operation in the United States, a foreign air carrier is required to waive sovereign immunity under the following standard:

The Holder [of the foreign air carrier permit or exemption] shall waive any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against it in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations under this [permit or exemption].

*Id.* The FSIA provides an exception to sovereign immunity when the nation has



not fly to or from the United States does not need such a permit; consequently, the national air carrier has not expressly waived sovereign immunity for flights outside of the United States.<sup>75</sup>

A national air carrier may have implicitly waived sovereign immunity, however, based on its commercial activities in the United States with respect to its flights outside of the United States.<sup>76</sup> Such commercial activity would typically be the marketing and purchasing of tickets in the United States. In recent aviation cases involving claims arising from flights of a foreign sovereign air carrier outside the United States, the courts have struggled to determine whether there was a sufficient nexus between the plaintiff's claim and the foreign sovereign air carrier's commercial activity in the United States to justify invoking the implied waiver provision under the first clause of section 1605(a)(2).<sup>77</sup>

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expressly waived such immunity such as in the CAB permit. 28 U.S.C. § 1605(a)(1). See *supra* note 26 and accompanying text for a discussion of express waiver under section 1605(a)(2).

<sup>75</sup> The Department of Transportation recently issued a proposed order which would have required foreign air carriers with flights to or from the United States to waive sovereign immunity for *all* their flights, regardless of whether such flights were to or from the United States. D.O.T. Order No. 86-1-38 (January 1, 1986). If adopted, Order No. 86-1-38 would have applied a "doing business" test to impose jurisdiction over a national air carrier regardless of whether there was a sufficient nexus between the plaintiff's claim and the national airline's commercial activities in the United States. At least one commentator remarked that the proposed order exceeded the Department of Transportation's scope of authority, was contrary to the policy as expressed in the FSIA, and could be unconstitutional. Rafols, *DOT's Show Cause Order 86-1-38: A Case Study of an Overzealous Government Effort to Expand United States Jurisdiction Over Foreign Air Carriers*, 52 J. AIR L. & COM. 353 (1986).

The Department of Transportation narrowed its scope, however, and instead issued an order requiring a foreign air carrier to waive sovereign immunity for flights to and from the United States *as well as flights for which a contract of carriage was purchased in the United States*. D.O.T. Order 87-8-8 (July 31, 1987) (emphasis added).

<sup>76</sup> 28 U.S.C. § 1605(a)(2) (1982); see *supra* notes 28-32 and accompanying text for a discussion of the first clause of section 1605(a)(2), which denies sovereign immunity to a nation for any claim based upon commercial activity carried on in the United States.

<sup>77</sup> See *infra* notes 78-97 and accompanying text for a discussion of the inconsistencies courts have arrived at in applying the nexus test to international aviation cases.

If the national air carrier has not engaged in any commercial activity in the United States in connection with its flight outside of the United States upon which plaintiff bases his claim, the courts will not imply a waiver of immunity. For example, in *In re Disaster at Riyadh Airport*,<sup>78</sup> American passengers died when a Saudi Arabian Airlines aircraft caught fire on a domestic flight from Riyadh to Jeddah.<sup>79</sup> The representative of the decedents' estates brought a tort action against Saudi Arabian Airlines.<sup>80</sup> Although Saudi Arabian Airlines had four business offices in the United States,<sup>81</sup> the court held that the plaintiff's claim was based upon the airplane fire on the flight in Saudi Arabia and not upon any commercial activity carried on in the United States.<sup>82</sup> The court indicated that there must be a greater connection to commercial activities in the United States upon which to predicate jurisdiction.<sup>83</sup>

In *Aboujdid v. Singapore Airlines, Ltd.*,<sup>84</sup> certain passengers, traveling on a Singapore Airlines flight, later hijacked a connecting Air France flight. Plaintiffs, passengers on the Air France flight, claimed that because Singapore Airlines negligently failed to inspect the hijackers' luggage before permitting them to board the Singapore Airlines aircraft in Athens, the hijackers were later able to hijack the Air France flight.<sup>85</sup> The court ruled that although Singapore Airlines engaged in commercial activities in the United States, plaintiffs' claims were not based on any of those commercial activities but rather arose solely from the defendant's alleged negligence in

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<sup>78</sup> 16 Av. Cas. (CCH) 17,880 (D.D.C. 1981).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 17,881, 17,882 n.1.

<sup>82</sup> *Id.* at 17,881.

<sup>83</sup> *Id.* "The legislative history [of the FSIA] indicates that there must be a greater connection between the cause of action and the United States than exists in this case for the [first clause of § 1605(a)(2)] to apply." *Id.*

<sup>84</sup> 108 A.D.2d 330, 489 N.Y.S.2d 171 (N.Y. App. Div. 1985).

<sup>85</sup> *Id.* 489 N.Y.S.2d at 173.

Athens.<sup>86</sup>

If there is a sufficient nexus between the commercial activity in the United States in connection with a flight outside of the United States and plaintiff's claim, the courts should imply a waiver of immunity. The trouble is, however, in determining whether there is a sufficient nexus. In *Arango v. Guzman Travel Advisors Corp.*,<sup>87</sup> the Arango family brought suit against the national airline of the Dominican Republic (Dominicana).<sup>88</sup> The Arangos based their claims on breach of a vacation tour contract and injuries suffered in an "involuntary re-routing" from the Dominican Republic. Dominicana argued that the Arangos' claims arose from noncommercial activities.<sup>89</sup> The court of appeals agreed that Dominicana's action in connection with the involuntary re-routing was a governmental function, but ruled that the vacation contract was a commercial function not entitled to foreign sovereign immunity.<sup>90</sup> Immunity did not bar the Arangos' breach of contract claim because it "arose directly from or in connection with" Dominicana's making vacation tour contracts in the normal course of its commercial activity in the United States.<sup>91</sup>

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<sup>86</sup> *Id.* at 174. The court stated that, "a close nexus between the incident and the forum state is required; '[o]blique contacts with the United States wholly unrelated to the instant suit may not be considered'." *Id.* (citing *Chicago Bridge & Iron Co. v. Islamic Republic of Iran*, 506 F. Supp. 981, 988 (N.D. Ill. 1980)).

<sup>87</sup> 621 F.2d 1371 (5th Cir. 1980).

<sup>88</sup> *Id.* at 1373.

<sup>89</sup> *Id.* The "involuntary re-routing" occurred when Dominican immigration officials denied the Arangos entry in the country upon their arrival. The Arangos had apparently been included on a government list of "undesirable aliens". The officials forced the Arangos to reboard their Dominicana plane for the return flight to the United States. *Id.* Because it was following the orders of Dominican immigration officials when it rerouted the Arangos, thereby acting in a non-commercial capacity, Dominicana argued that the first clause of section 1605(a)(2) was inapplicable. *Id.* at 1378-79.

<sup>90</sup> *Id.* at 1379-80.

<sup>91</sup> *Id.* "Each of [the Arangos'] claims, and the duties alleged therein to have been breached, arose *directly from or in connection with* the marketing and execution of contracts — i.e., the sale of the airline tickets and 'tourist cards' necessary to enter Dominican Republic — by Dominicana . . . in the normal course of its airline business in the United States. . . . [t]hey plainly stem from Dominicana's 'commer-

On similar facts, another federal court has arrived at the opposite conclusion. In *Barnett v. Iberia Air Lines of Spain*,<sup>92</sup> plaintiffs brought suit against Iberia Airways, the airline agency of Spain, after Iberia refused them passage on an intra-Spain flight from Madrid to Arrecife.<sup>93</sup> Plaintiffs had bought the plane tickets from TWA, an agent for Iberia, in Chicago.<sup>94</sup> Plaintiffs argued that the sale of tickets in Chicago constituted a sufficient nexus to their cause of action.<sup>95</sup> Because the parties had formed a contract in the United States, plaintiffs argued, there was sufficient connection between Iberia's commercial transaction with plaintiffs in the United States and the acts of Iberia in Madrid.<sup>96</sup>

The district court rejected the plaintiff's argument, ruling that the connection between the commercial activities of Iberia in the United States and the acts of Iberia in Madrid was insufficient under the nexus interpretation of the first clause of § 1605(a)(2).<sup>97</sup> Confronted with similar facts the *Arango* and *Barnett* courts arrived at different conclusions.

## II. *BARKANIC V. CAAC*

Approximately three months after the *Barnett* decision, the Court of Appeals for the Second Circuit decided *Barkanic v. General Administration of Civil Aviation of the Peo-*

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cial activity' in the United States and are, therefore, not barred by foreign sovereign immunity." *Id.* (emphasis added).

<sup>92</sup> 660 F. Supp. 1148 (N.D. Ill. 1987).

<sup>93</sup> *Id.* at 1149.

<sup>94</sup> *Id.* at 1151.

<sup>95</sup> *Id.* at 1151-52.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1152. Although it did not expressly state it was applying the nexus test followed by the Second, Third, and Fifth Circuits to the first clause of section 1605(a)(2), the *Barnett* court did imply that it was applying the nexus test. The court wrote, "The court thinks that the necessary nexus between the acts of Iberia in Madrid and the commercial activities of Iberia in the United States is missing . . . [t]he court believes that the acts of an agent are insufficient under the nexus approach." *Id.* (emphasis added). The court rejected the "doing business" test. *Id.*; see *supra* note 46 for Second, Third, and Fifth Circuit cases applying the nexus test.

ple's Republic of China.<sup>98</sup> The *Barkanic* opinion began with a discussion of the varying interpretations of the "based upon" language of section 1605(a)(2).<sup>99</sup> The opinion dismissed both the literal and the "doing business" approaches, concluding that the correct interpretation to follow was the nexus approach.<sup>100</sup>

The court explained the factors which influenced it to hold that the commercial activity CAAC carried out in the United States was sufficiently connected to the cause of action arising from the airplane crash.<sup>101</sup> The sales agency agreement between Pan American and CAAC gave Pan American authority to issue CAAC tickets on intra-China flights for a specific date and time and to accept payment for the tickets.<sup>102</sup> Despite the fact that according to the terms of the agreement any tickets issued by Pan American were invalid until confirmed by CAAC in China, the court concluded that the unconfirmed status of the tickets was irrelevant.<sup>103</sup>

The opinion did not focus on the reservation status of the tickets or on the fact that Barkanic and Fox ("decedents") had not traveled on the flight as designated on the tickets issued in the United States. Instead, it focused on the transaction between the parties.<sup>104</sup> Decedents had

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<sup>98</sup> 822 F.2d 11 (2d Cir.), *cert. denied*, 108 S. Ct. 453 (1987). The District Court issued *Barnett* on March 31, 1987. *Barnett*, 660 F. Supp. at 1148. The Second Circuit decided *Barkanic* on June 29, 1987. *Barkanic*, 822 F.2d at 11.

<sup>99</sup> *Barkanic*, 822 F.2d at 13.

<sup>100</sup> *Id.* The Second Circuit had earlier disapproved of the "literal" and "doing business" approach in *Universe Tankships*, 708 F.2d at 84. The *Barkanic* court agreed with the Fifth Circuit that *Universe Tankships* should not be given a "doing business" reading of the first clause of section 1605(a)(2) because such a reading of *Universe Tankships* was too broad. *Id.* Citing *Vencedora*, 730 F.2d at 201 n.12, the court wrote, "[w]e agree . . . as did the district court, that a nexus is required between the commercial activity in the United States and the cause of action." *Id.*

<sup>101</sup> *Id.*; see also *supra* note 36 and accompanying text for a discussion of commercial activity sufficient under the first clause of 28 U.S.C. § 1605(a)(2).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* The paragraph which resolves the central issue in the case, whether there is a sufficient nexus between the crash and CAAC's commercial activity in the United States, is the same paragraph in which the court discusses CAAC's contractual obligation to decedents. *Id.*

bought and paid for tickets through CAAC's agent in the United States; therefore, the court concluded that a "contract of carriage" had been formed.<sup>105</sup> Furthermore, decedents had paid money as consideration for CAAC's promise to provide commercial service in China.<sup>106</sup> The court reasoned that if CAAC had refused to accept or confirm decedent's tickets in China, in effect refusing to honor its promise, the decedents would have had a cause of action for breach of contract.<sup>107</sup> Because decedent's purchase of the tickets represented a formal and final contract transaction, the court held that the commercial activity conducted by the parties in the United States provided a sufficient basis for plaintiff's claim arising from the fatal plane crash.<sup>108</sup>

The opinion mentioned three other cases which had not established a sufficient nexus under the first clause of section 1605(a)(2).<sup>109</sup> The opinion noted that in *Tigchon* and *Harris* the defendants, state-operated hotels, denied engaging in any commercial activity in the United States.<sup>110</sup> In *In re Disaster at Riyadh Airport*, plaintiffs never established any connection between the air disaster in Saudi Arabia and any Saudi Arabian Airlines commercial

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<sup>105</sup> *Id.* The court wrote, "[i]n our view, by accepting . . . payment for transportation . . . and by issuing tickets . . . CAAC entered into a contract of carriage with the decedents." *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* The court's reasoning was as follows: the decedents paid money in the United States and received tickets; CAAC accepted the decedent's tickets in China without requiring decedents to purchase new tickets or pay an additional fee; therefore, the parties had entered into a contract. *Id.* at 12, 13. "It follows that there is a sufficient nexus between the airplane crash and the commercial activity carried on by CAAC in [the United States]." *Id.* at 13.

<sup>109</sup> *Id.* at 13, 14. The court mentioned *Disaster at Riyadh*, 16 Av. Cas. (CCH) 17,880, and *Harris*, 481 F. Supp. 1056, because the lower court relied on those two cases. *Id.* The court also mentioned *Tigchon*, 591 F. Supp. 765, even though the lower court did not rely on it. *Id.* at 13. Appellee's Brief cited *Tigchon* as authority. Appellee's Brief, *supra* note 2, at 20. The court stated that the three cases of *Disaster at Riyadh*, *Harris* and *Tigchon* were all readily distinguishable. *Barkanic*, 822 F.2d at 13. The court only discussed the facts of these cases, however, and did not contrast them with *Barkanic*.

<sup>110</sup> *Barkanic*, 822 F.2d at 14.

activity in the United States.<sup>111</sup>

The court concluded instead that *Barkanic* was more like the cases in which courts have found a sufficient nexus, such as *Universe Tankships* and *Arango*.<sup>112</sup> In *Universe Tankships*, the defendant conducted extensive business dealings with the United States; in *Arango*, the defendant directly sold tickets for a vacation package in the United States.<sup>113</sup> In both cases, and by implication in *Barkanic*, plaintiffs' claims were sufficiently connected to defendants' commercial activity in the United States.<sup>114</sup>

### III. LEGAL AND PRACTICAL IMPLICATIONS

#### A. *Inconsistencies Among the Cases Remain Unresolved*

As a practical matter, *Barkanic* does not help to settle the inconsistencies among the courts over the nexus test because the court did not adequately support its assertions and conclusions. For example, the crux of *Barkanic* is that the tickets the decedents purchased in the United States from CAAC's agent amounted to a contract formed in the United States and was sufficient to invoke jurisdiction.<sup>115</sup> The court did not address, however, the district court's concern that the parties formed the contract in China rather than in the United States.<sup>116</sup> The *Barkanic* court acknowledged that Pan American designated the decedents' tickets "RQY" in the ticket's "Status" box, which in airline ticketing practice means that the reservation has been requested but not finalized or confirmed.<sup>117</sup> After this acknowledgment, however, the court stated that if

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<sup>111</sup> *Id.* at 13-14.

<sup>112</sup> *Id.* at 14.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* The court only mentioned that *Barkanic* is similar to *Universe Tankships* and *Arango* but did not actually compare the cases.

<sup>115</sup> *Barkanic*, 822 F.2d at 13; see *supra* note 108 and accompanying text for a discussion of the court's reasoning in granting jurisdiction to plaintiffs.

<sup>116</sup> *Barkanic*, 3 Av. L. Rep. (CCH) at 17,405. The district court stated, "[t]he unconditioned evidence is that plaintiffs' tickets, though issued in the United States, were not valid unless confirmed by the defendant in China." *Id.*

<sup>117</sup> *Barkanic*, 822 F.2d at 13; see also Appellee's Brief, *supra* note 2, at 4.

CAAC refused to honor the ticket, the decedents would "certainly have had an action for breach of contract."<sup>118</sup> The court did not explain how the decedents could have had an action for breach of contract when the ticket itself designated that the transaction was incomplete.<sup>119</sup>

The court did correct the district court by distinguishing *Barkanic* from *Riyadh*. The district court in *Barkanic* wrote, "[T]he decedents no more engaged in a commercial transaction in the United States than did the plaintiffs in *Riyadh* engage in a commercial transaction with the foreign sovereign in that case."<sup>120</sup> The lower court failed to recognize that in *Riyadh* no connection existed between the air crash and the airline's commercial activity in the United States, whereas in *Barkanic* clearly there was some connection.<sup>121</sup> The issue in *Barkanic* was whether the connection was sufficient.

The court, however, did not adequately distinguish *Barkanic* from *Harris*. The court merely recited the *Harris* holding<sup>122</sup> and did not address the following two concerns: First, *Harris* held that the plaintiff's claim was not sufficiently connected to the commercial activities of In-tourist New York.<sup>123</sup> In *Harris*, the plaintiff could not rely on the hotel's "doing business" in the United States as a

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<sup>118</sup> *Barkanic*, 822 F.2d at 13.

<sup>119</sup> The court might have supported its assertion in one of the following three ways: 1) Discussing the ticketing policies and practices of CAAC to determine whether the purchase of an unconfirmed ticket did generally obligate the airline to provide a flight, not necessarily the designated flight, but any flight. If the purchase did obligate CAAC to provide *some* flight, the court would have had a better argument that a contract had been formed in the United States; (2) Relying on industry-wide ticketing policies and practices to determine if a ticket holder has a cause of action for breach of contract before his ticket has been actually confirmed; or 3) Relying on basic contract law. A confirmation is interpreted better as a duty rather than as a condition precedent to avoid the possibility of forfeiture on the part of the ticket holder. See E. FARNSWORTH, *CONTRACTS* § 8.4, at 550 (1982).

<sup>120</sup> *Barkanic*, 3 Av. L. Rep. (CCH) at 17,405.

<sup>121</sup> *Barkanic*, 822 F.2d at 12. Decedents purchased the tickets in the United States. *Id.* In contrast, plaintiffs in *Disaster at Riyadh* did not assert that decedents purchased or reserved their tickets in the United States.

<sup>122</sup> *Id.* at 14; see also *Harris*, 481 F. Supp. at 1061 and *supra* notes 64-67 and accompanying text for a discussion of *Harris*.

<sup>123</sup> *Harris*, 481 F. Supp. at 1061.



sufficient connection. Because plaintiff's claim arose from the negligent operation of a hotel, the hotel's commercial activity in the United States — taking reservations from travel agents — was too attenuated.<sup>124</sup> Applying the *Harris* logic to *Barkanic*, CAAC should have successfully argued that because the commercial activity out of which plaintiffs' claim arose was the negligent operation of the airplane, the airline's commercial activity in the United States — taking reservations from an agent — was also too attenuated.

Second, if the formation of a contract in the United States provides a sufficient connection to a plane crash, as indicated in *Barkanic*, then *Harris* should have resulted in a different outcome. The decedent in *Harris* booked a reservation for a Moscow hotel through an American travel agent and the Moscow hotel confirmed the American travel agent's booking in the United States.<sup>125</sup> The hotel in *Harris* conducted more commercial activity connected to the plaintiff's claim in the United States than CAAC conducted in *Barkanic*. In *Harris* the hotel made and confirmed reservations in the United States;<sup>126</sup> in *Barkanic*, CAAC only made the reservations in the United States but confirmed them in China.<sup>127</sup> The *Barkanic* court cited *Harris* but did not explain why the contract formed in *Barkanic* was sufficient commercial activity while the contract formed in *Harris* was not sufficient.

The *Barkanic* court recited the holdings of both *Universe Tankships* and *Arango* for support<sup>128</sup> but failed to explain their similarity to *Barkanic*. In *Universe Tankships* the plaintiff's claim was connected to arrangements made in the United States.<sup>129</sup> Similarly, in *Barkanic*, decedents made

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1058.

<sup>126</sup> *Id.*

<sup>127</sup> *Barkanic*, 822 F.2d at 12-13.

<sup>128</sup> *Id.* at 14.

<sup>129</sup> *Universe Tankships*, 708 F.2d at 84; see *supra* notes 52-55 and accompanying text for a discussion of *Universe Tankships*.

travel arrangements in the United States.<sup>130</sup> The arrangements in the United States, however, was only one of four reasons cited in *Universe Tankships* to explain why jurisdiction was appropriate under section 1605(a)(2).<sup>131</sup> *Barkanic* failed to address the district court's concern that a much more significant link existed between plaintiff's claim and commercial activity in the United States in *Universe Tankships* than existed in *Barkanic*.<sup>132</sup> The *Barkanic* court also did not explain why it believed *Arango* was similar to *Barkanic*, and, even if it had, the obvious differences between the two cases make *Arango* weak authority. In *Arango* the flight originated in the United States and the Dominican airlines sold confirmed tickets in the United States.<sup>133</sup> In *Barkanic*, however, the flight was exclusively within China, and an agent sold unconfirmed tickets in the United States.<sup>134</sup>

The issue of whether a sufficient nexus exists between a foreign sovereign carrier's commercial activities in the United States and the plaintiff's claim has a new significance as a result of a recent Department of Transportation order. All international air carriers traveling to and from the United States are required to obtain permits from the Department of Transportation, and in the past

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<sup>130</sup> *Barkanic*, 822 F.2d at 12; see *supra* note 3 and accompanying text for a discussion of decedents' travel arrangements in *Barkanic*.

<sup>131</sup> *Universe Tankships*, 708 F.2d at 84-85. Other factors which influenced the court to hold that a sufficient nexus existed include: 1) FSIA legislative history listed import-export transactions as conduct within the first clause of section 1605(a)(2); 2) Egypt purchased the wheat under a United States statute; and 3) a United States port or vessel carried the wheat under bills of lading pursuant to the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 (1936). *Universe Tankships*, 708 F.2d at 84-85.

<sup>132</sup> *Barkanic*, 3 Av. L. Rep. (CCH) at 17,406. The district court wrote: "[*Universe Tankships*], requir[ing] a significant link or aggregation of links to be present in order to support the exercise of jurisdiction over a foreign sovereign, stand[s] in contrast to [*Barkanic*] where the only connection between plaintiff's claims and defendant's commercial activities in the United States . . . is that a private travel agent in the United States issued two unconfirmed tickets . . . ."

*Id.*

<sup>133</sup> *Arango*, 621 F.2d at 1373, 1380-81; see *supra* notes 87-91 and accompanying text for a discussion of *Arango*.

<sup>134</sup> *Barkanic*, 822 F.2d at 12.

these permits required national air carriers to waive the defense of sovereign immunity for their flights to or from the United States.<sup>135</sup>

Department of Transportation Order 87-8-8 has broadened the express waiver to include both an international air carrier's flights to or from the United States as well as flights for which the contract for carriage was purchased in the United States.<sup>136</sup> According to the Order, when courts confront a case such as *Barkanic* or *Barnett*, they may avoid an analysis of implied waiver of immunity under section 1605(a)(2) by instead finding an express waiver of immunity if the contract for carriage was purchased in the United States. Courts will be reluctant, however, to rule that a foreign sovereign expressly waived sovereign immunity by selling a ticket in the United States, pursuant to the Order, when the same action might not imply a waiver of sovereign immunity under section 1605(a)(2). For example, in *Barnett* there was not enough of a contract for carriage to warrant basing an implied waiver of immunity under section 1605(a)(2), even though the tickets were confirmed and plaintiff's claim for breach of contract was directly related to the sale of tickets. Under the more liberal *Barkanic* nexus test, however, a contract did exist to base implied waiver of immunity even though the tickets were unconfirmed and plaintiff's

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<sup>135</sup> See *supra* note 74 and accompanying text for a discussion of the Federal Aviation Act of 1958 and 14 C.A.B. 926 (1951).

<sup>136</sup> D.O.T. Order No. 87-8-8 (July 31, 1987). The Order amended the waiver of sovereign immunity condition contained in all permits and exemptions issued to foreign air carriers to read:

The holder agrees that operations under this [permit or exemption] constitute a waiver of sovereign immunity for the purposes of 28 U.S.C. § 1605(a) but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are: (a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States . . . .

*Id.* (emphasis added); see *supra* note 75 and accompanying text for a discussion of the history of D.O.T. Order No. 87-8-8 (July 31, 1987).

claim for wrongful death was more attenuated to the sale of tickets than the *Barnett* breach of contract claim.

#### IV. CONCLUSION

The *Barkanic* court granted jurisdiction over CAAC, the Chinese air carrier, holding that plaintiff's wrongful death action had sufficient ties to the United States even though the American passengers died on a Chinese domestic flight and had purchased unconfirmed tickets in the United States. Foreign sovereign air carriers, most of them state-owned like CAAC, welcome American tourists and their travel money on their domestic flights, and probably make arrangements through agents permitting Americans to reserve and to purchase tickets in the United States for such flights.

On the issue of whether foreign sovereign air carriers could invoke sovereign immunity under the FSIA for their domestic flights, courts will find it difficult to reconcile the conservative view of the *Barnett* decision with the more liberal view of *Barkanic* concerning the sufficiency of the nexus required. As a result of *Barkanic*, cases finding an insufficient nexus, such as *Harris* and *Barnett*, will be reviewed with less precedential value.<sup>137</sup> Foreign state owned airlines permitting American passengers on domestic flights must take notice. If a foreign sovereign air carrier transacts any commercial activity in the United States involving its domestic flights, then its status as an immune sovereign under the first clause of section 1605(a)(2) of the FSIA remains ambiguous.

The *Barkanic* view should prevail when courts are confronted with the issue of whether a contract for carriage has been purchased in the United States in order to find an express waiver of sovereign immunity for the purposes

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<sup>137</sup> See *Harris*, 481 F. Supp. 1056, and *supra* notes 64-67 and accompanying text for a discussion of the court's holding in *Harris*; see *Barnett*, 660 F. Supp. 1148, and *supra* notes 92-97 and accompanying text for a discussion of the court's holding in *Barnett*.

of the section 1605(a)(2) equivalent of Order 87-8-8.<sup>138</sup> In its simplest form a contract relationship requires only a mutuality of obligation, to wit: the carrier consents to transport the passenger from one designated spot to another, and that the passenger in turn consents to the transport.<sup>139</sup> An exchange of money evidences this mutuality of obligation. In *Barkanic*, defendant argued that a contract subject to modification was deemed incomplete; however, modification should not change the basic nature of a contractual relationship. An airline ticket is evidence of "a highly modifiable contract;" airline and passenger attitudes and business procedures expect and accommodate modifications.<sup>140</sup> When a passenger enters into a contract with an air carrier but takes a flight not stipulated on the passenger ticket the passenger and the airline usually modify the original contract rather than enter into a new one.<sup>141</sup>

With facts similar to *Barkanic* and *Barnett*, courts should follow *Barkanic* because it leads to more consistent results. A court could rule that when a passenger purchased a contract for carriage in the United States, according to Order 87-8-8, the foreign sovereign air carrier expressly waived sovereign immunity for the purposes of section 1605(a)(2). Under *Barkanic* the same action would also impose an implied waiver of immunity for the purposes of section 1605(a)(2). Under *Barnett*, however, the same action does not impose an implied waiver of immunity for the purposes of section 1605(a)(2). Following *Barnett*, a court would find it difficult to reconcile imposing an express waiver of immunity for the purposes of section 1605(a)(2) under Order 87-8-8 when the same action

<sup>138</sup> See *supra* note 26 and accompanying text for a discussion of waiver under section 1605(a), and *supra* note 136 and accompanying text for a discussion of waiver pursuant to D.O.T. Order No. 87-8-8 (July 31, 1987).

<sup>139</sup> *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330-31 (5th Cir. 1967).

<sup>140</sup> *Briscoe v. Compagnie Nationale Air France*, 290 F. Supp. 863, 866 (S.D.N.Y. 1968); see also *Vergara v. Aeroflot "Soviet Airlines,"* 390 F. Supp. 1266, 1269 (D. Neb. 1975); *Boyar v. Korean Air Lines*, 664 F. Supp. 1481, 1485 (D.D.C. 1987).

<sup>141</sup> *Boyar*, 664 F. Supp. at 1485.

would not constitute an implied waiver of immunity for the purposes of section 1605(a)(2).

*Michael L. Hood*



**DEPOSITIONS AND DISCOVERY — HAGUE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS** — The Convention does not deprive a district court of its jurisdiction to order a foreign national party to produce evidence located within a signatory nation pursuant to the Federal Rules of Civil Procedure; but does provide an optional means of discovery which the district court, in its discretion, may employ in the interest of international comity. *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 107 S. Ct. 2542 (1987).

Societe Nationale Industrielle Aerospatiale and Societe de Construction d'Avions de Tourism are two French corporations<sup>1</sup> which designed, manufactured, and marketed an aircraft, the "Rallye."<sup>2</sup> The Rallye crashed in Iowa on August 19, 1980, injuring the pilot and a passenger.<sup>3</sup> Three individuals filed separate actions against the two French corporations alleging negligence and breach of warranty.<sup>4</sup> The French corporations answered the complaint and the parties consented to consolidation of the cases in the United States District Court for the Southern District of Iowa.<sup>5</sup> Both sides conducted and complied with initial discovery without objection insofar as producing information and material located within the United

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<sup>1</sup> *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the S. Dist. Iowa*, 107 S. Ct. 2546 n.2 (1987). *Societe Nationale Industrielle Aerospatiale* is owned by the French government. *Societe de Construction d'Avions de Tourism* is a wholly owned subsidiary of *Societe Nationale Industrielle Aerospatiale*. *Id.*

<sup>2</sup> *Id.* at 2546. The "Rallye" aircraft was allegedly advertised in American aviation publications as "the World's safest and most economical STOL plane." *Id.* The term "STOL" is an acronym for "short takeoff and landing." *Id.* at 2546 n.3.

<sup>3</sup> *Id.* at 2546.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*



States.<sup>6</sup> The plaintiffs then served a second set of interrogatories,<sup>7</sup> a second request for production of documents,<sup>8</sup> and requests for admission.<sup>9</sup> The defendants sought a protective order, alleging that the information

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<sup>6</sup> *Id.* at 2546 n.4.

<sup>7</sup> FED. R. CIV. P. 33 provides in part:

Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party . . . Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objection shall be stated in lieu of an answer . . . The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time.

*Id.*

<sup>8</sup> FED. R. CIV. P. 34 provides in part:

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26 (b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon, within the scope of Rule 26 (b).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them

sought could only be found in France and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters<sup>10</sup> (the Convention) exclusively dictated the procedures for such discovery.<sup>11</sup> Furthermore, the French corporations argued that, under a French "blocking statute,"<sup>12</sup> they would be subject to criminal penalties for responding to the discovery orders.<sup>13</sup> The French statute prohibits any disclosure of material in conjunction with a foreign judicial proceeding which is not

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as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

*Id.*

<sup>9</sup> FED. R. CIV. P. 36 provides in part:

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact including the genuineness of any documents described in the request. Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint of that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon that defendant . . . .

*Id.*

<sup>10</sup> *Opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231.

<sup>11</sup> 107 S. Ct. at 2546.

<sup>12</sup> C. PEN. 80-538. Article 1A of the "blocking statute" provides that "Subject to treaties or international agreements . . . it is prohibited for any party to request, seek or disclose . . . documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith." *Id.*

<sup>13</sup> See Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, *Societe Nationale Industrielle Aerospatiale v. United States District Court for the S. Dist. Iowa*, 107 S. Ct. 2542 (No. 85-1695); see also Brief of Amicus Curiae the Republic of France in Support of Petitioners. *Id.*

properly requested under Convention rules.<sup>14</sup>

The district court denied the defendants' motion, rejecting the assertion that the Convention rules superseded the Federal Rules of Civil Procedure where foreign discovery is requested.<sup>15</sup> With regard to the French blocking statute, the district court concluded that the United States' interest in protecting its citizens from harmful foreign products outweighed France's interests in protecting its citizens from foreign discovery rules.<sup>16</sup> The

<sup>14</sup> See *supra* note 12 and accompanying text.

<sup>15</sup> *Societe Nationale*, 107 S. Ct. 2547. The magistrate stated that requiring resort to the Hague Convention rules would "frustrate the courts' interest . . . in protecting United States citizens . . . and in compensating them for injuries . . ." *Id.*

<sup>16</sup> *Id.* The district court relied on the following passage from RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES in applying the "balancing test" to the competing states' interests:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as (a) vital national interests of each of the states; (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person; (c) the extent to which the required conduct is to take place in the territory of the other state; (d) the nationality of the person; and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965). It is worth noting that the new RESTATEMENT adopts different criteria for evaluating a district courts' power to order foreign discovery over the objections of foreign sovereigns. The new criteria to be evaluated include:

- (1) the importance to the [forum] litigation of the documents or other information requested;
- (2) the degree of specificity of the request;
- (3) whether the information originated in the United States;
- (4) the availability of alternative means of securing the information; and
- (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with requests would undermine important interests of the state where the information is located.

RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 437(1)(c) (Tent. Draft No. 7, 1986) (approved May 14, 1986). The revised RESTATEMENT provisions seem to more clearly address the courts' need to respect the more limited role "pre-trial" procedures play in most foreign nations. Provision (2) requiring an evaluation of the specificity of the request seems particularly calculated to address the accusation that many American litigants simply

defendants then sought a writ of mandamus from the Court of Appeals for the Eighth Circuit.<sup>17</sup> The Eighth Circuit considered the petition due to the novelty and importance of the issue presented and the likelihood of its recurrence.<sup>18</sup>

The Eighth Circuit denied the petition on the ground that the Convention is not applicable to the production of evidence in a party's possession when the district court has jurisdiction over the party.<sup>19</sup> The court held that the Federal Rules apply exclusively in such cases, regardless of whether the evidence is located within the territory of a signatory to the Convention.<sup>20</sup> The Eighth Circuit rejected the petitioners' assertion that such an interpretation would completely emasculate the Convention, noting that the Convention procedures would still be available for the purpose of obtaining evidence from nonparties.<sup>21</sup>

The Eighth Circuit further rejected the petitioners' "first resort" argument<sup>22</sup> that would require resorting first to the Convention procedures and employing the federal discovery procedures only if the Convention procedures prove ineffective.<sup>23</sup>

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embark on "fishing expeditions" via the liberal discovery procedures applied in the United States.

<sup>17</sup> *Societe Nationale*, 107 S. Ct. at 2547; see *Kerr v. United States*, 426 U.S. 394, 402 (1976) (party seeking writ of mandamus must show that extraordinary circumstances exist and there are no other means to secure the desired relief); *Central Microfilm Serv. Corp. v. Basic/Four Corp.*, 688 F.2d 1206, 1212 (8th Cir.) (interlocutory order only immediately appealable where such order is entered into without authority; arguable error within the trial court's discretion is not a proper basis for mandamus), *cert. denied*, 459 U.S. 1204 (1982).

<sup>18</sup> *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, 123 (8th Cir. 1986); see also *Schlagenhauf v. Holder*, 379 U.S. 104, 111-12 (1964) (mandamus proper to review order of district court which appears to be outside of the court's jurisdiction). See generally Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973).

<sup>19</sup> *In re Societe Nationale*, 782 F.2d at 124 (8th Cir. 1986).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 125. "[T]he Hague Convention will continue to provide useful, if not mandatory, procedures for discovery abroad from foreign nonparties who are not subject to an American court's jurisdiction and compulsory powers." *Id.*

<sup>22</sup> See *infra* notes 75-81 and accompanying text for a discussion of the first resort rule.

<sup>23</sup> *Id.* The Eighth Circuit relied heavily upon the Fifth Circuit decision in *In re*

On certiorari, the United States Supreme Court vacated the judgment of Eighth Circuit. *Held, vacated*: the Convention does not deprive a district court of its jurisdiction to order a foreign national party to produce evidence located within a signatory nation; but does provide an optional means of discovery which the district court, in its discretion, may employ in the interest of international comity.

## I. LEGAL BACKGROUND

### A. *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*

The Hague Convention on Private International Law has conducted periodic sessions since 1893.<sup>24</sup> The United States became a participating member in 1964 and later proposed the adoption of an international evidence convention. This Convention was unanimously approved on October 26, 1968.<sup>25</sup> The United States signed the Convention in 1970 intending to improve procedures for ob-

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*Ansuetz & Co. GmbH*, 754 F.2d 602 (5th Cir. 1985) (determining that the "first resort" argument should be rejected), *vacated*, *Ansuetz & Co. v. Mississippi River Bridge Auth.*, 107 S. Ct. 3223 (1987). See *infra* notes 47-59 and accompanying text for a discussion of *Ansuetz*. The court also dispensed with the petitioner's argument that the discovery order sought required the French corporations to either (1) comply with the request and face possible criminal penalties under the French "blocking statute" or (2) refuse to comply with the request and face possible sanctions in the district court. First, the court held that the potential for criminal penalties under the French statute did not automatically bar a district court from compelling production. See generally *Gebr. Eickhoff Maschinenfabrik und Eisengieberei GmbH v. Starcher*, 328 S.E.2d 492, 497 n.7 (W. Va. 1985) (state having jurisdiction to enforce a law is not precluded from doing so solely because it would subject a person to liability under the law of another state) (citing both state and federal authority). But see *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). The fear of criminal prosecution constitutes a weighty excuse for noncompliance with discovery orders. *Id.* at 211 (citing *United States v. Murdock*, 284 U.S. 141 (1931)); see also *Minpeco, S.A. v. Conticommodity Serv., Inc.*, 116 F.R.D. 517 (S.D.N.Y. 1987). The court then concurred in the district court's analysis of the competing state's interests and upheld the discovery order. 782 F.2d at 126-27.

<sup>24</sup> Amran, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651, 652 (1969).

<sup>25</sup> *Id.*

taining evidence abroad in private legal disputes.<sup>26</sup>

Much of the resistance of foreign parties and tribunals to American discovery procedures may stem from a misunderstanding of the term "pre-trial." Because many pre-trial procedures routinely employed in the United States would more appropriately be termed "trial" procedures if carried on in a civil law nation,<sup>27</sup> the civil law signatories to the Convention have been reluctant to open the door to the wide open pre-trial discovery as known in the United States.

One of the primary objectives of the Convention was to bridge the gap between common law and civil law nations with respect to obtaining evidence.<sup>28</sup> In civil law countries, a magistrate normally conducts discovery and then provides a summarized resume of the evidence to the party seeking the evidence.<sup>29</sup> In contrast, private parties typically conduct discovery in common law countries. This usually results in a verbatim transcript of witness' testimony and certified copies of requested documents.<sup>30</sup>

In 1963, the United States amended the Federal Rules of Civil Procedure. These amendments allow foreign litigants wide access to evidence located in the United States. No reciprocity requirement exists.<sup>31</sup> The amendment also provides that evidence taken abroad is admissible even though it is not taken under oath or is not a verbatim transcript as is generally required in domestic litigation under

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<sup>26</sup> *Id.*

<sup>27</sup> *Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33 (N.D.N.Y. 1987); *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D. Pa. 1983). In civil law countries, deposition and interrogation are functions of the judiciary. Counsel only suggest questions; no direct or cross examination is entertained. *Id.* For a discussion of the misunderstanding of the term "pre-trial", see *Societe Nationale*, 107 S. Ct. at 2565 n.21 (Blackmun, J., concurring in part and dissenting in part).

<sup>28</sup> Preamble to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231.

<sup>29</sup> *Amran*, *supra* note 24, at 652.

<sup>30</sup> *Id.*

<sup>31</sup> FED. R. CIV. P. 28(b).

the Federal Rules.<sup>32</sup>

One of the primary goals of the Convention was to further liberalize discovery procedures in international litigation in the United States as well as in the other signatory nations to the Convention.<sup>33</sup> The Convention also expressly provided that all procedures of signatory nations for obtaining evidence in a manner consistent with the Convention but on a less restrictive basis, would not be abridged.<sup>34</sup>

The primary means of discovery under the Convention are the letters of request defined by Articles 1 and 23.<sup>35</sup> A judicial authority of one of the signatory nations issues these letters to a designated central authority of another signatory, which in turn transfers the letter to a local judicial authority for execution.<sup>36</sup> Article 23, however, permits a state to declare that it will not comply with Convention procedures for pre-trial discovery in common law countries.<sup>37</sup> This effectively allows member nations to

<sup>32</sup> *Id.*

<sup>33</sup> *Societe Nationale*, 107 S. Ct. at 2548-49; see also Amram, *supra* note 24, at 651 (emphasizing the need to set up a "model system" to bridge the gap between common law and civil law systems).

<sup>34</sup> Convention, *supra* note 10, art. 27(b).

<sup>35</sup> Article 1 of the Convention states:

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that state, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

23 U.S.T. at 2557. Article 23 of the Convention provides that:

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purposes of obtaining pre-trial discovery of documents as known in Common Law countries.

23 U.S.T. at 2568.

<sup>36</sup> Article 2 of the Convention provides:

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority or another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

23 U.S.T. at 2558.

<sup>37</sup> For the text of Article 23 see *supra* note 35 and accompanying text.

disregard the Convention as it would apply to common law litigants.

## B. *Judicial Interpretation*

### 1. *Federal Courts*

In *Societe Nationale Industrielle Aerospatiale v. United States District Court for the District of Alaska* (9th Circuit),<sup>38</sup> the plaintiff, in a wrongful death action arising from the crash of a helicopter manufactured by Societe National Industrielle Aerospatiale, sought discovery from the French corporation which was subject to the jurisdiction of the district court.<sup>39</sup> The Ninth Circuit denied the defendant's petition for a writ of mandamus ordering production of documents in accordance with the Convention.<sup>40</sup> The Ninth Circuit reasoned that because the Convention was intended not only to protect foreign litigants from American discovery procedures, but also to make evidence located within a foreign signatory's territory more accessible to common law litigants, the Convention did not shield foreign litigants from the ordinary burdens of litigation in American courts.<sup>41</sup> The Ninth Circuit also refused to adopt the "first resort"<sup>42</sup> rule, but acknowledged that resort to the Convention procedures should be "considered" in each case.<sup>43</sup> Finally, the court found that, because no discovery proceedings would take place in France, the intrusion on French sovereignty as a result of

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<sup>38</sup> 788 F.2d 1408 (9th Cir. 1986). The defendant in this case was the same corporation as the defendant of the subject case of this article, though the cause of action was unrelated.

<sup>39</sup> *Id.* at 1410-11. A pilot's estate sought production of documents located in France pursuant to the Federal Rules. *Id.*

<sup>40</sup> *Id.* at 1410. The court held that mandamus is available only in "extraordinary circumstances." *Id.*

<sup>41</sup> *Id.* The court stated that if the Convention supplanted the Federal Rules, foreign litigants would have an "extraordinary advantage" in American courts. *Id.* at 1411.

<sup>42</sup> *Id.*; see *infra* notes 73-82 and accompanying text for a discussion of the "first resort" rule.

<sup>43</sup> *Societe Nationale Alaksa*, 788 F.2d at 1441 (citing *In re Messerschmitt Bolkow Blohm, GmbH*, 757 F.2d 729 (9th Cir. 1985), *vacated*, 476 U.S. 1168 (1986)); see *supra* note 60 and accompanying text for a discussion of this case.



the discovery order would be minimal.<sup>44</sup> The Ninth Circuit relied heavily upon the Fifth Circuit decision in *In re Anschuetz & Co., GmbH*<sup>45</sup> for its conclusion that the Convention procedures were not intended to be mandatory.<sup>46</sup>

In *Anschuetz*, the Court of Appeals for the Fifth Circuit denied a writ of mandamus sought by a German corporation ordering a district judge to vacate or stay discovery orders.<sup>47</sup> The district court had directed the German corporation to produce its employees for depositions in Germany, to produce documents located in Germany, and to pay attorney's travel expenses to Germany for the taking of depositions.<sup>48</sup> The Fifth Circuit first concluded that the German corporation was subject to the jurisdiction of the district court under a Louisiana long-arm statute.<sup>49</sup> The court then held that where a party from whom discovery is sought is subject to the personal jurisdiction of a United States District Court, the Convention "has no application at all" to the production of evidence in the United States by that party.<sup>50</sup>

The *Anschuetz* court also held that "matters preparatory" to compliance with United States federal discovery orders do not constitute foreign discovery within the meaning of the Convention.<sup>51</sup> The court stated that merely because the information sought is located in a foreign country does not mean that discovery necessarily

<sup>44</sup> *Societe Nationale Alaska*, 788 F.2d at 1410.

<sup>45</sup> 754 F.2d 602 (5th Cir. 1985), *vacated*, *Anschuetz & Co. v. Mississippi River Bridge Auth.*, 107 S. Ct. 3223 (1987).

<sup>46</sup> *Societe Nationale Alaska*, 788 F.2d at 1411. The court also relied on the Eighth Circuit opinion in *In Re Societe Nationale*, (8th Cir. 1986) which was vacated and remanded in the subject case of this article.

<sup>47</sup> 754 F.2d at 615-16.

<sup>48</sup> *Id.* at 604. The German corporation had been ordered to produce at least ten of its employees for depositions in Kiel, Germany as well as to produce documents located there for inspection in New Orleans, Louisiana. *Id.*

<sup>49</sup> *Id.* at 604 n.3; see LA. REV. STAT. ANN. § 13.3201 (West 1968) (providing personal jurisdiction over foreign corporations transacting business in Louisiana).

<sup>50</sup> *Anschuetz*, 754 F.2d at 615. The court held that the supplying of information for indentifying and qualifying witnesses did not amount to "obtaining evidence" in Germany. *Id.*

<sup>51</sup> *Id.* at 611. The court stated that even the occurrence of preparatory acts abroad does not amount to foreign discovery. *Id.*

takes place there. Rather, it is the location of the service of the interrogatories and where the evidence is to be produced which defines where discovery is taking place.<sup>52</sup>

The court then concluded that discovery sought for identifying and quantifying witnesses did not amount to obtaining evidence in Germany.<sup>53</sup> The Fifth Circuit also rejected the "first resort" principle<sup>54</sup> reasoning that this rule raised the potential for even greater insult to a foreign signatory than simply barring application of the Convention where the district court has jurisdiction over the parties.<sup>55</sup> Such a rule, stated the court, would suggest that the decisions of the foreign tribunals in executing letters of request pursuant to the Convention are subject to being overridden by the American courts.<sup>56</sup>

The court in *Anschnetz* clearly recognized the jurisdiction of the district court to compel compliance with its discovery orders under the threat of sanctions. However, it questioned whether this power should be exercised in all cases.<sup>57</sup> The court suggested that the exercise of this judicial power "should be tempered by a healthy respect for the principles of comity,"<sup>58</sup> and directed the district court to reconsider its discovery orders in line with its

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<sup>52</sup> *Id.* at 615. The Fifth Circuit in *Anschnetz* in turn relied upon *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984), which it quoted in part as follows:

Discovery does not 'take place within [a state's] borders' merely because documents to be produced somewhere else are located there. Similarly, discovery should be considered as taking place here, not in another country, when interrogatories are served here, even if the necessary information is located in the other country.

*Graco*, 101 F.R.D. at 521.

<sup>53</sup> See *supra* notes 48-51 and accompanying text.

<sup>54</sup> *Anschnetz*, 754 F.2d at 611; see *infra* notes 73-82 and accompanying text for a discussion of the "first resort" rule.

<sup>55</sup> *Anschnetz*, 754 F.2d at 613.

<sup>56</sup> *Id.* (suggesting that this might involve even more offensive second guessing of the foreign courts' execution of a letter of request made pursuant to the Convention).

<sup>57</sup> *Id.* at 614-16 (the court held that the "full range of sanctions" available under the Federal Rules may be employed by the district court against foreign parties to assure compliance with discovery orders).

<sup>58</sup> *Id.* at 614; see *infra* note 98 and accompanying text for a discussion of the principle of comity.

opinion.<sup>59</sup>

Again, in *In re Messerschmitt Bolkow Blohm, GmbH*,<sup>60</sup> the Fifth Circuit concluded that the Convention procedures were not applicable to discovery sought through a proceeding in a United States court. The court held that the Federal Rules applied exclusively to those cases where the court has jurisdiction over the parties, and which ultimately concern "only matters that are to occur in the court's jurisdiction, not abroad."<sup>61</sup> In *Messerschmitt*, the district court ordered a German corporation which had manufactured a helicopter which crashed in Texas to produce documents physically located in Germany and to produce for depositions expert witnesses residing in Germany.<sup>62</sup> The Fifth Circuit held that because none of the discovery requests sought involved "alien procedures on German soil," they did not implicate the comity considerations addressed in *Anschuetz*.<sup>63</sup> The court added that the district court could employ the full range of sanctions available under the Federal Rules to compel the production of both documents and witnesses.<sup>64</sup>

Primarily because West Germany had exercised its right not to execute letters of request for the purpose of further pre-trial discovery in common law countries,<sup>65</sup> the court in *Murphy v. Reifenhauer KG Maschinenfabrik*<sup>66</sup> held that a plaintiff did not have to first attempt compliance with the Convention before resorting to the Federal Rules.<sup>67</sup> The

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<sup>59</sup> *Anschuetz*, 754 F.2d at 615-16. In light of its opinion the court did not feel it needed to issue mandamus or to determine whether or not the district court abused its discretion. *Id.*

<sup>60</sup> 757 F.2d 729 (5th Cir. 1985), *vacated*, 476 U.S. 1168 (1986).

<sup>61</sup> *Id.* at 731.

<sup>62</sup> *Id.* at 730.

<sup>63</sup> *Id.* at 733 (the court indicated no examples of what would be considered "alien procedures").

<sup>64</sup> *Id.*

<sup>65</sup> See *supra* note 35 and accompanying text.

<sup>66</sup> 101 F.R.D. 360 (D. Vt. 1984). The father of a decedent sought to compel answers to interrogatories and production of documents after defendant had already answered two sets of interrogatories. *Id.*

<sup>67</sup> *Id.* at 363. The court employed the comity analysis announced in *Hilton v. Guyot*, 159 U.S. 113 (1895), discussed *infra* at note 96.

court was particularly motivated by the fact that the defendant did not raise the Convention procedures until a relatively late stage of discovery.<sup>68</sup> The defendant had already complied with initial discovery requests and the court concluded that resort to the Convention procedures would amount to "further unnecessary delay" of discovery.<sup>69</sup>

In a novel approach to the issues raised in these cases, the court in *Laker Airways Ltd. v. Pan American World Airways*<sup>70</sup> deferred entry of an order to compel discovery for thirty days in order to give German authorities an opportunity to comply with the American court's discovery orders by approving the defendant's compliance.<sup>71</sup> The defendant operated under a licensing agreement with the West German government which precluded the defendant from producing the information sought without the approval of the government.<sup>72</sup>

Though these three cases held the Convention inapplicable where the court has personal jurisdiction over the litigants, several other courts reached contradictory conclusions. Many determined that, even where the court has personal jurisdiction over a foreign litigant, the plaintiff must first resort to the Convention procedures in attempting to obtain evidence located abroad and that resort to the Federal Rules could only be had where such attempts prove ineffective.

In 1983, the United States District Court for the Eastern District of Pennsylvania, in *Philadelphia Gear Corporation*

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<sup>68</sup> *Murphy*, 101 F.R.D. at 361 (defendant had answered two sets of interrogatories without raising the Convention issue).

<sup>69</sup> *Id.* at 363.

<sup>70</sup> 103 F.R.D. 42 (D.D.C. 1984) (plaintiff in antitrust case sought to compel a German airline to produce its vice chairman and former chairman for depositions).

<sup>71</sup> *Id.* at 51.

<sup>72</sup> *Id.* Although the defendant corporation was owned by the German government and had not even sought approval to comply with the discovery requests, the court left open the possibility that an accommodation could be achieved between the court and the German government. *Id.*

*v. American Pfauter Corp.*,<sup>73</sup> rejected a plaintiff's contention that the Convention was merely a supplement to the Federal Rules. The court denied the plaintiff's motion to compel because the plaintiff had made no effort to comply with the Convention discovery procedures prior to resorting to the Federal Rules.<sup>74</sup> There, the court held that "the avenue of first resort" for discovery of evidence located abroad was the Convention and that this decision was required by the "proper exercise of judicial restraint."<sup>75</sup>

## 2. State Courts

In 1985, the Supreme Court of Appeals of West Virginia also adopted the "first resort" principle. In *Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH v. Starcher*<sup>76</sup> the court held that the district court had personal jurisdiction over a German corporation because of sufficient minimum contacts with the state. However, the *Gebr* court concluded that international comity dictated first resort to the Convention procedures.<sup>77</sup> Other discovery procedures could be employed only when the Convention procedures had been proven ineffective.<sup>78</sup>

New Jersey has also recognized the "first resort" principle. In 1984, *Vincent v. Ateliers de la Motobecane, S.A.*<sup>79</sup> held that because compliance with the discovery orders may have subjected the defendant to criminal penalties in France, international comity required first resort to the Convention procedures.<sup>80</sup>

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<sup>73</sup> 100 F.R.D. 58, 61 (E.D. Pa. 1983).

<sup>74</sup> *Id.* at 61.

<sup>75</sup> *Id.* (suggesting that it would disserve the interests of international relations and comity to allow one country to impose its legal procedures upon another).

<sup>76</sup> 328 S.E.2d 492, 504-06 (W. Va. 1985).

<sup>77</sup> *Id.* at 505-06 (the court also suggested that time limitations may be imposed by the district court to expedite proceedings under the Convention and to ensure that it not be interposed merely as a delay tactic).

<sup>78</sup> *Id.* (holding that comity requires that foreign litigants from member states to the Convention be given the opportunity to demonstrate the effectiveness of the Convention procedures).

<sup>79</sup> 193 N.J. Super. 716, 723, 475 A.2d 686, 690 (App. Div. 1984).

<sup>80</sup> *Id.*, 475 A.2d at 689-90 (the court referred to this requirement as a "diplo-

Under the theory that state law must yield to international agreements whenever it is inconsistent with or impairs the policy or provisions of such treaties or agreements, the Texas Court of Appeals also adopted the "first resort" rule. The decision in *Th. Goldschmidt A.G. v. Smith*<sup>81</sup> was partially motivated by a letter sent to the Texas court from the West German Embassy stating that the West German Government would consider enforcement of the discovery order a violation of its national sovereignty and that the only vehicle for such discovery was the Convention procedures.<sup>82</sup>

II. *SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE V.  
UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF IOWA*

The question faced by the United States Supreme Court in *Societe Nationale* was whether the Hague Convention procedures (1) provide the exclusive means of transnational discovery, (2) must be resorted to first but not exclusively, (3) provide merely supplemental discovery procedures, or (4) must be resorted to when dictated by the interests of international comity.<sup>83</sup>

The Court initially noted that the Convention was "in the nature of a contract between nations [to which] gen-

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matic procedure" which is required by comity); see *infra* note 96 for a discussion of comity.

<sup>81</sup> 676 S.W.2d 443, 445 (Tex. Ct. App. 1984) (citing *United States v. Pink*, 315 U.S. 203 (1942)).

<sup>82</sup> *Id.* at 445. In *Societe Nationale* the governments of France, Switzerland, and Germany all submitted amicus curiae briefs in support of the petitioners suggesting that the Convention procedures were the exclusive means by which private litigants were to obtain evidence located within another signatory nation's territory. See also *Pierbourg BMBH & Co. K.G. v. Superior Court*, 137 Cal. App. 3d 238, 247, 186 Cal. Rptr. 876, 882-83 (1982) (plaintiffs seeking foreign discovery must attempt to comply with Hague Convention procedures); *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 123 Cal. App. 3d 840, 857-59, 176 Cal. Rptr. 874, 885-86 (1981) (Convention procedures provide a "minimum measure of international cooperation" and require first resort in the interests in international comity).

<sup>83</sup> 107 S. Ct. 2542, 2550 (1987).

eral rules of construction apply.”<sup>84</sup> In interpreting its content, the Court considered (1) the text of the treaty, (2) the history and negotiations of the Convention, and (3) the practical construction adopted by the parties.<sup>85</sup> Focusing primarily upon the “permissive language” included in the Convention itself,<sup>86</sup> the Court concluded that the Convention was not exclusive, but rather an optional means of discovery of evidence located in a foreign territory.<sup>87</sup> Because, the Court reasoned, the Convention contains no “statement of pre-emptive intent,” the Convention does not deprive the district court of its jurisdiction over a foreign litigant.<sup>88</sup>

The Court noted that Article 23 of the Convention allows civil law nations to disregard the Convention procedures at will.<sup>89</sup> The Court found it inconceivable that the common law signatories to the Convention intended to foreclose any use of their pre-existing discovery procedures for foreign discovery while allowing the civil law signatories to adhere to the Convention procedures only as an option.<sup>90</sup> The inclusion of Article 23, the Court reasoned, was incompatible with the interpretation that the Convention procedures are mandatory and exclusive for common law litigants seeking evidence abroad.<sup>91</sup>

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<sup>84</sup> *Id.* (quoting *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984)(Civil Aeronautics Board’s continued use of the last official price under the Gold Standard was proper under the Warsaw Convention)).

<sup>85</sup> *Id.* (citing *Air France v. Saks*, 470 U.S. 392 (1985) (aircraft passenger who became permanently deaf as a result of an unusual reaction to normal pressurization aboard the plane had not suffered an “accident” under the Warsaw Convention)).

<sup>86</sup> *Societe Nationale*, 107 S. Ct. at 2551.

<sup>87</sup> *Id.* at 2553.

<sup>88</sup> *Id.* The court explained, among several other factors, that the rule of exclusivity would require American citizens to compete on an unfair basis with the citizens of other signatory nations because, were they both to be sued in the United States, the foreign citizen would be subject to less extensive discovery procedures. Justice Blackmun, in dissent, suggested that this argument was illusory, however, because such outcomes are the “unavoidable inequality inherent in the benefits conferred by any treaty that is less than universally ratified.” *Id.* at 2567.

<sup>89</sup> *Id.* at 2552; see *supra* note 35 for text of Article 23.

<sup>90</sup> *Societe Nationale*, 107 S. Ct. at 2552.

<sup>91</sup> *Id.*

The Court, however, did state that the Eighth Circuit went too far in holding that the Convention procedures did not apply at all where the district court had jurisdiction over the parties.<sup>92</sup> Rather, the Convention procedures are available whenever they will aid discovery and are "one method of seeking evidence that a court may elect to imply."<sup>93</sup>

The Court declined to apply the "first resort" principle because it would, in many situations, require "unduly time consuming and expensive" measures required by the Convention.<sup>94</sup> Such procedures, the Court held, conflict with the "overriding interest in the 'just, speedy, and inexpensive determination' of litigation in our courts."<sup>95</sup> The Court also concluded that foreign "sovereign interests" were already better protected by the concept of international comity<sup>96</sup> than by the first resort rule.<sup>97</sup> Further, the Court stated that the possibility of a foreign litigant's being subject to criminal penalties in his home state for compliance with the United States courts' discovery orders did not necessarily require the American courts to refrain from issuing them.<sup>98</sup> The Court held that the decision relevant to the comity analysis and the applica-

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<sup>92</sup> *Id.* at 2554.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 2555. Justice Stevens disputed the majority's conclusion that the Hague procedures are often unduly time consuming and expensive and cited the Brief of the Securities Exchange Commission as *amicus curiae* which suggested that, according to the State Department, private plaintiffs "[h]ave found resort to the Convention [procedures] more successful [than those of the Federal Rules.]" *Id.* at 2565 n.20.

<sup>95</sup> *Id.* at 2555 (quoting FED. R. CIV. P. 1).

<sup>96</sup> *Id.* at 2548. "Comity" refers to the practice among sovereign states of cooperation in the resolution of disputes affecting the laws and interests of other sovereign states. *Id.* at 2555 n.27 (quoting *Hilton v. Guyot*, 159 U.S. 113 (1895)): "'Comity' . . . is neither a matter of absolute obligation . . . nor of mere courtesy and good will . . . [b]ut is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation . . . ." *Id.* Comity has been defined as arising from "a sort of moral necessity to do justice, in order that justice may be done to us in return." J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 38 (Bigelow ed. 1883); see *Societe Nationale*, 107 S. Ct. at 2561 n.10.

<sup>97</sup> 107 S. Ct. at 2555. But see sources cited *supra* note 82 and accompanying text.

<sup>98</sup> *Id.*; see *supra* note 23 for a discussion of the Eighth Circuit treatment of this



tion of the Convention procedures should be made by the trial court on a case by case basis. Though the Court suggested that the "reasonableness" and "intrusiveness" of a particular discovery procedure requested should be considered, it declined to provide any specific guidelines for this determination.<sup>99</sup>

### III. PRACTICAL IMPLICATIONS

Prior to the decision of the Supreme Court in *Societe Nationale*, there existed a split among both the federal and state courts as to how Convention rules were to be applied, if at all, by domestic tribunals with jurisdiction over foreign litigants. The Supreme Court correctly concluded that the Eighth and Fifth Circuits erred in holding that the Convention procedures had absolutely no application whenever the district court has jurisdiction over the foreign party. The Court properly refrained from adopting the technical fiction announced in *In re Anschuetz* that dis-

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issue. Included in neither the Eighth Circuit's or the Supreme Court's opinion is Article 1 of the French "blocking statute" which states:

Subject to treaties or international agreements, it is prohibited for any natural person of French nationality or habitually residing in French territory and for any executive, representative, employees or entity having its registered office or establishment therein to disclose in writing, orally or otherwise, in any place, to foreign public authorities, economic, commercial, industrial, financial or technical documents or data disclosure of which is liable to infringe the sovereignty, security, essential economic interests of France or public policy, specified by the administrative authorities if need be.

C. PEN. 80-538 (emphasis added). Additionally, Article 3 of the "blocking statute" provides:

without prejudice to heavier penalties prescribed by law, [that] any breach of Articles 1 and 1A of the Act shall be punished by imprisonment for two to six months and a fine of 10,000 to 120,000 F or either.

C. PEN. 80-538 (this amounted to approximately 7,500 to 95,000 U.S. dollars as of November 1987). The French government clearly considered the discovery order issued by the district court in *Societe Nationale* an infringement upon its sovereignty. Brief of Amicus Curiae the Republic of France in Support of Petitioners, *Societe Nationale*, 107 S. Ct. 2542; see also *Societe Nationale*, 107 S. Ct. 2548 n.11.

<sup>99</sup> *Societe Nationale*, 107 S. Ct. at 2557. In addition the Court determined that the district court may order the party urging resort to the Convention to produce "translations and detailed descriptions of relevant documents" needed to assure complete production pursuant to the Convention. *Id.* at 2557 n.30.

covery does not necessarily take place abroad merely because evidence or witnesses are located on foreign territory.<sup>100</sup> The Convention itself draws no distinction between foreign and domestic discovery based upon the location of the evidence or where it will be produced.<sup>101</sup> Therefore, the court rightly concluded that the Convention procedures are optional means by which parties may seek foreign discovery.

However, by simply holding that whether the Convention rules apply hinges on a general comity analysis to be conducted on a case by case basis rather than employing the first resort principle, the Court missed the opportunity to lay down a definitive rule. Such a rule would not only inject more predictability into the litigation process in American courts, but would also better serve the United States' interests in improved relations with our civil law neighbors in the international community.<sup>102</sup>

First, it is unlikely that the Convention procedures will often prove ineffective if pursued with any degree of skill and familiarity.<sup>103</sup> Second, any insult to foreign sovereignty would be substantially *diminished* by demonstrating our willingness to at least attempt compliance with the Convention and cooperation with foreign tribunals as a first resort. Furthermore, district courts are "ill equipped to assume the role of balancing the interests of foreign nations with that of our own."<sup>104</sup> By allowing district courts to determine that the interests of international comity do not require resort to the Convention procedures with the remote possibility that such a decision will

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<sup>100</sup> *Id.* at 2554.

<sup>101</sup> 23 U.S.T. 2555.

<sup>102</sup> See *supra* note 82 and accompanying text for a discussion of the amicus curiae briefs filed by foreign governments on this issue.

<sup>103</sup> See *supra* note 55 and accompanying text for a discussion of the Fifth Circuit's treatment of this issue.

<sup>104</sup> *Societe Nationale*, 107 S. Ct. at 2560 (Blackmun, J., concurring in part and dissenting in part). See generally Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. MIAMI L. REV. 733, 739-44 (1983).

be reviewable on interlocutory appeal,<sup>105</sup> the Court leaves open the possibility that in many cases the Convention rules will be neglected or overridden simply because they are unusual or unfamiliar.<sup>106</sup>

By suggesting that the district court may require translations and descriptions of relevant documents that are needed to assure prompt and complete production pursuant to the terms of the Convention, the Court seems to have empowered federal district courts with expansive "Hague Convention authority" without requiring them to apply its procedures.<sup>107</sup>

Additionally, by refusing to lay down any specific guidelines for determining when comity requires resort to the Convention, the Court has created a void in terms of guidance to lower courts, both state and federal. This was resoundingly demonstrated by the recent decision in *Hudson v. Hermann Pfauter GmbH & Co.*<sup>108</sup> There the court seemed to disregard the majority's explicit rejection of the first resort principle in *Societe Nationale*.<sup>109</sup> Rather, the court in *Hudson* noted the lack of guidance from the Court in *Societe Nationale*<sup>110</sup> and employed the first resort principle under the guise of "defer[ence]. . . at least in the first instance" to the Convention procedures.<sup>111</sup> Thus, it seems that while the "first resort" rule as a universal requirement when foreign discovery is sought has been re-

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<sup>105</sup> See *supra* notes 17-18 and accompanying text for a discussion of the possibility of appellate review of such orders.

<sup>106</sup> See *Societe Nationale*, 107 S. Ct. 2560-61 (Blackmun, J., concurring in part and dissenting in part).

<sup>107</sup> See *supra* note 99 and accompanying text.

<sup>108</sup> 117 F.R.D. 33 (N.D.N.Y. 1987).

<sup>109</sup> *Id.* at 36.

<sup>110</sup> *Id.* at 36-37 (the court noted "guidance from other sources," including the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, and Justice Blackmun's opinion, concurring in part and dissenting in part, in *Societe Nationale*, in determining that the Convention procedures required deference in the interests of international comity).

<sup>111</sup> *Id.* at 36. The court relied heavily on the governmental interest analysis employed by Justice Blackmun in his partial concurrence in *Societe Nationale*. *Id.* at 37-38.

jected, the lower courts may still apply the rule if the interest of international comity so requires.

Furthermore, on remand in *In re Anschuetz*,<sup>112</sup> the Fifth Circuit, while describing the "specifically defined test" to be employed by district courts in determining whether to apply the Convention procedures, acknowledged the district courts' "wide discretion" in resolving conflicts between the Convention and the Federal Rules.<sup>113</sup>

Finally, the Texas Court of Appeals recently held that because federal supremacy in treaty-making binds state courts to the Supreme Court's interpretation of the Hague Convention in *Societe Nationale*, it could no longer follow the first resort rule.<sup>114</sup> The upshot of this decision, if followed in other jurisdictions, is that both federal and state trial courts will be required to conduct an evaluation of the international comity interests in each case involving foreign discovery between parties located in member states to the Convention. As pointed out by Justice Blackmun, such a determination may be inappropriate at the trial court level.<sup>115</sup>

Additionally, with the unlikelihood that such decisions will be reviewable on interlocutory appeal, there will probably be a scarcity of intermediate and primary level opinions dealing with this subject. This will render the trial courts' evaluations unduly burdensome and time consuming.

#### IV. CONCLUSION

The "first resort" rule would not only encourage the use and understanding of the Convention rules but would also ameliorate some of the foreign criticism of the far reaching jurisdiction of American courts. Therefore, the interests of international comity would be best served by

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<sup>112</sup> 838 F.2d 1362 (5th Cir. 1988).

<sup>113</sup> *Id.* at 1364.

<sup>114</sup> *Sandsend Fin. Consultants v. Wood*, 743 S.W.2d 364, 366 (Tex. Ct. App. 1988).

<sup>115</sup> See *supra* note 104 and accompanying text.

requiring first resort to the Convention procedures when foreign discovery is sought, with the application of the Federal Rules preserved for those cases where the Convention procedures are ineffective.

The inherent shortcomings of the Convention will not be solved by unilateral judicial interpretations and should be dealt with diplomatically. In the meantime, courts should make every effort to respect the intent of the drafters of the Convention to improve international judicial relations. The first resort rule would best serve this goal.

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