SPECIAL ISSUE

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The World in US Courts

# New Decision of the US Supreme Court Limits Suits Against Non-US Governmental Entities

By Robert P. Reznick and Alison M. Kilmartin

The US Foreign Sovereign Immunities Act ("FSIA") codifies the doctrine of sovereign immunity and generally prohibits lawsuits in US courts against non-US sovereigns. But the FSIA has an exception where, among other things, a claim is "based upon" the commercial activity of a sovereign in the US.[1] In its December 1, 2015 decision in *OBB Personenverkehr AG v. Sachs*,[2] the US Supreme Court unanimously rejected a broad interpretation of this exception, holding that a claim is only "based upon" a sovereign's commercial activity where that activity forms the "gravamen" or "core" of the plaintiff's claim.[3] The effect of the Court's decision is to require that litigation premised on the so-called "commercial exception" of the FSIA be directly traceable to conduct in and affecting the US. Especially in cases where an injury is suffered outside the US—including many likely to present the most politically-charged issues—the ruling should very substantially limit suits against non-US sovereigns, and is solidly within the present Court's inclination not to provide access to the federal courts for disputes whose origins and effects relate principally to places outside this country. Additionally, there is some reason to think that the opinion's somewhat holistic interpretation of the phrase "based upon" may be applied to limit the exercise of special personal jurisdiction over claims said to "arise from" a defendant's contacts with the US.

## Summary of Decision

Carol Sachs lives in Berkley, California. In 2007, she bought a Eurail pass over the Internet from a travel agent based in Massachusetts. The next month, while attempting to board a train in Austria, Ms. Sachs fell from the platform onto the tracks and suffered serious injuries when a train crushed her legs. That train was indirectly owned and operated by the Austrian state.[4]

Ms. Sachs sued the Austrian-owned railway, OBB Personenverkehr AG ("OBB"), in US District Court in California asserting claims of negligence, strict products liability, and breach of implied warranties.[5] OBB sought dismissal for lack of subject matter jurisdiction, arguing that Ms. Sachs' suit was barred by the FSIA. At issue was the "commercial activity" exception—a provision of the FSIA that removes a non-US sovereign's immunity where, as relevant here, "the action is based upon a commercial activity carried on in the United States by the foreign state."[6] Ms. Sachs argued that the commercial activity exception applied because her action was "based upon" the railway's sale of the Eurail pass to her in the US. OBB argued that the exception was inapplicable because the sale of the ticket did not itself give rise to Ms. Sachs's injuries. The district court agreed with OBB and dismissed her suit.[7] A divided panel of the US Court of Appeals for the Ninth Circuit affirmed the dismissal, but on further review the Ninth Circuit sitting *en banc* reinstated the case. The full court of appeals concluded that the Internet sale of the pass in the US could be attributed to OBB through common law agency principles, and that each claim brought by Ms. Sachs was "based upon" the Eurail pass sale because the sale satisfied at least one element of the claim.[8]

In a unanimous decision issued on December 1, 2015, the Supreme Court held that the claim should have been dismissed because the commercial activity exception did not apply. Writing for the Court, Chief Justice Roberts did not reach the question whether the travel agent's sale in the US could be attributed to OBB through common law principles of agency (itself an important question in many FSIA cases). Rather, the Court elected to decide the case on the ground that Ms. Sachs's suit was not "based upon" the sale of the Eurail pass, as would be required for the commercial exception of the FSIA to apply.[9] After acknowledging that the FSIA does not define the phrase "based upon," the Court concluded that its 1993 decision in *Saudi Arabia v. Nelson*[10] provided "sufficient guidance" to resolve the question—specifically, to require that a claim be "based upon" conduct that forms the "gravamen" or "core" of the suit, and that caused the injuries alleged.[11] The Court's unusual description of *Saudi Arabia v. Nelson* as providing "some guidance" perhaps reflected the fact that the *en banc* court of appeals *also* thought that it was applying *Saudi Arabia v. Nelson* in reaching the opposite result. "Be that as it may," Justice Roberts observed, it was clear that the Court's prior decision did not undertake a "claim-by-claim, element-by-element" analysis of the complaint in that case but instead looked to the "'particular conduct' that constitutes the 'gravamen' of the suit"[12] Because the conduct constituting the "gravamen" of Ms. Sachs's suit—allegedly dangerous conditions and wrongful conduct in Austria—"plainly occurred abroad," Ms. Sachs's suit fell outside the commercial activity exception and was barred by principles of sovereign immunity.[13] The Court also rejected Ms. Sachs's argument that her "failure to warn" claim related exclusively to a failure that occurred in the US, at the time the Eurail pass was sold, concluding that the "gravamen" of the claim remained rooted in actions taken in Austria. "Any other approach would allow plaintiffs to evade the [FSIA]'s restrictions through artful pleading."[14]

The Court noted that its prior decision in *Saudi Arabia v. Nelson* was "limited," and it made the same comment about its present analysis: "Domestic conduct with respect to different types of commercial activity may play a more significant role in other suits under the [FSIA's commercial activity exception]. In addition, we consider here only a case in which the gravamen of each claim is found in the same place."[15]

## Discussion

What is to be made of a unanimous, seemingly easy decision in which the Court expressly appears to limit its ruling to the facts and declines to address one of the two issues presented? More, perhaps, than meets the eye. In the "but-for" world in which the Ninth Circuit's *en banc* decision had been allowed to stand, international litigation with political overtones and tenuous links to the US would be expected to proliferate. This Supreme Court has proved itself no fan of such claims,[16] and the *OBB* decision seems to cut the growth of such litigation off at the roots. Moreover, the fact pattern of injuries suffered outside the US based on conduct occurring outside the US may well not be so unusual as to leave the decision in any sense anomalous.

The Court's opinion may also have some applicability to the scope of specific personal jurisdiction—jurisdiction based not on the presence of a party in the forum but rather on contacts that it had with the forum. In such cases, and among other requirements, personal jurisdiction exists where the plaintiff's claim "aris[es] out of or relate[s] to the defendant's contacts with the forum."[17] The potential parallels between a claim that is "based upon" conduct and one that "arises out of" conduct are apparent, and it is not at all clear that the alternative "related to" language in the context of personal jurisdiction complicates the issue.[18] The *OBB* opinion's "gravamen" analysis thus may find its way into the jurisprudence of specific personal jurisdiction.

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[1] 28 U.S.C. § 1605(a)(2).
[2] No. 13-1067 (December 1, 2015).
[3] *OBB*, Slip Op. at 7.
[4] *Id.* at 2.
[5] *Id.* at 3.
[6] 28 U.S.C. § 1605(a)(2).
[7] *OBB*, Slip Op. at 4.

[8] *Id.* at 4-5.

[9] *Id.* at 5.

[10] 507 U.S. 349 (1993).

[11] *OBB*, Slip Op. at 6-8.

[12] *Id.* at 7.

[13] *Id.* at 8.

[14] *Id.*

[15] *Id.* at 9 n.2.

[16] *See, e.g.*, *Daimler AG v. Baumann*, 134 S. Ct. 736 (2014) (limiting scope of general personal jurisdiction), and *Kiobel v. Royal Dutch Petroleum Co*., 133 S. Ct. 1659 (2013) (limiting extraterritorial reach of Alien Tort Statute).

[17] *Bauman*, 134 S. Ct. at 754, *quoting Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984) (brackets in original).

[18] *Helicopteros*, 466 U.S. at 414-15 & n.10 ("Absent any briefing on the issue, we decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists"). The Court has not subsequently resolved the question whether personal jurisdiction exists for claims that "relate to," but do not "arise from," a defendant's contacts with the forum. *See* Bernadette Bollas Genetin*, "The Supreme Court's New Approach to Personal Jurisdiction"* 107, 116, Akron Law Publications, Paper 233 (2015).