

## **US Supreme Court Rules Personal Injury Suffered In Austria Does Not Fall within the “Commercial Activity” Exception to the Foreign Sovereign Immunities Act And Dismisses US Lawsuit**

The Foreign Sovereign Immunities Act (“FSIA”) provides US courts, both state and federal, statutory jurisdiction over foreign states. 28 U.S.C. 1605(a)(6)(B). The FSIA provides foreign states immunity from suit unless one of a number exceptions apply. One such exception is the “commercial activity” exception, which provides that a foreign state shall not be immune from U.S. jurisdiction when the action that forms the basis of the suit is “based upon a commercial activity carried on in the United States by the foreign state or its agent.”

On December 1, 2015, the United States Supreme Court dismissed a personal injury lawsuit filed in California against an Austrian state-owned railway, OBB Personenverkehr AG (“OBB”). The Supreme Court found that the personal injury lawsuit was not based upon any commercial activity in the United States, i.e. the sale of a Eurail pass which occurred in the United States, but rather, was based upon negligence and wrongful conduct that occurred solely in Innsbruck, Austria, where the accident and injury occurred. Because the wrongful conduct at issue was not based upon any commercial activity in the United States by the foreign state, the commercial activity exception to the FSIA did not apply. OBB was therefore entitled to immunity from suit in the US.

The facts are tragic but involve a relatively straight-forward personal injury claim and a typical series of events for such cases. Sachs, a California resident, purchased a Eurail pass from a Massachusetts-based sub-agent of Eurail Group, a European company partly owned by OBB. The Eurail Group markets and sells rail passes worldwide, including in the United States. OBB trains carry Eurail customers in Austria. While in Austria, Sachs attempted to board an OBB train, fell onto the tracks and suffered severe injuries which resulted in the amputation of both legs.

The decision was being watched by the international legal community to see what the Supreme Court might decide on the responsibility of state-owned sovereigns for commercial activity conducted in the United States by agents and intermediaries. However, the Supreme Court did not address whether the sale of the Eurail pass in the United States by an agent/subagent should be attributed to OBB through common law principles of agency. Rather, the Supreme Court decided in a relatively narrow (but unanimous) decision that the personal injury claim filed in California was not “based upon” commercial activity in the United States. Rather, the claim was based upon the events that occurred solely in Austria. Therefore, this decision is perhaps notable more for what it did not decide than for what it did decide.

The decision leaves open the issue of what conduct by agents and related actors and intermediaries in the United States in the course of commercial activity might be attributed to foreign states when analyzing the “commercial activity” exception to the FSIA. While not addressing this agency issue, the decision does suggest a disfavor by the Supreme Court for bringing lawsuits in the United States against foreign states and their state-owned entities that are premised upon conduct and injuries occurring solely outside the United States.

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