Defending Foreign Government-owned Companies

The Viability of the FSIA in an Evolving Aviation Industry

By Michael McGrory

Significant developments over the last several years have shrunk the FSIA immunity-entitled universe and limited the circumstances in which U.S. Department of Transportation waivers apply.

For 40 years, airlines and aviation manufacturers owned by foreign governments have relied on the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1602 *et seq*., as a defense to lawsuits brought in the United States. The world of international commerce has changed dramatically over that period, though, with globalization and the proliferation of e-commerce casting the FSIA in a different light. Foreign governments have restructured their ownership of aviation companies, regulatory requirements have changed for foreign airlines, and booking travel through websites has become the norm. Judicial interpretation of the FSIA, too, has changed dramatically over that period, particularly with respect to the Supreme Court's strict view of the types of entities entitled to invoke the FSIA. This article will look at the FSIA, the more common ways in which it applies to the international aviation industry, limitations on the immunity that the FSIA provides, and the FSIA's continued viability for foreign government-owned aviation businesses today.

The History of Foreign Sovereign Immunity

This history of foreign sovereign immunity in the United States can be traced back to an 1812 dispute with Napoleon over ownership of a ship called the Balaou. *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812). The Supreme Court adopted what came to be known as the "classical" or "absolute" theory of foreign sovereign immunity, which provides that a sovereign cannot be sued in the United States without its consent. The Court observed that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute," and "is susceptible of no limitation not imposed by itself." *Id*. at 13. For reasons of "grace and comity on the part of the United States," the Court opted to decline jurisdiction over the foreign-owned ship. *Id*.; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Subsequent courts applied *Schooner Exchange* to all cases against foreign governments, "extending virtually absolute immunity to foreign sovereigns" and leaving the decision

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whether to exercise jurisdiction over foreign sovereigns largely to the executive branch. *Verlinden B.V.* 461 U.S. at 486.

In 1952, U.S. State Department lawyer Jack B. Tate wrote a letter to Acting Attorney General Philip B. Perlman that outlined a new approach. *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 273 (3rd Cir. 1980). Tate noted the growing international acceptance of the "newer or restrictive theory of sovereign immunity," which recognized sovereign immunity for public acts but not for private or commercial acts. *Id.* By then, most countries had accepted the restrictive theory, so the United States was extending immunity to foreign governments sued in its courts, but not enjoying the same immunity when the United States was sued in foreign courts. *Id.* Tate therefore recommended that the United States adopt the restrictive theory of sovereign immunity in its own courts. *Id.* The Tate letter ultimately gave rise to the Foreign Sovereign Immunities Act of 1976, which, among other things, codified the restrictive theory of foreign sovereign immunity. *Sugarman,* 626 F.2d at 275.

The Foreign Sovereign Immunities Act

In enacting the FSIA, Congress generally immunized "foreign states" from the jurisdiction of courts in the United States and found that the courts were in the best position to determine the applicability of sovereign immunity in any particular case. 28 U.S.C. §1604. As one court put it, the FSIA "is the exclusive source of subject matter jurisdiction over all suits involving foreign states or their instrumentalities. We lack both statutory subject matter and personal jurisdiction over any claim against a foreign sovereign unless one of the Act's exceptions applies." *Compania Mexicana de Aviacion, S.A. v. U.S. Dist. Court for the Central Dist. of Cal.*, 859 F.2d 1354, 1358 (9th Cir. 1988).

The definition of "foreign state" includes a foreign state's political subdivisions and agencies or instrumentalities. 28 U.S.C. §1603. An "agency or instrumentality" of a foreign state is defined as (1) a separate legal entity, (2) which is an organ of a foreign state or is majority owned by a foreign state, and (3) which is not a citizen of the United States or created under the laws of a third country. *Id.* Thus, the FSIA immunizes corporations that are majority owned by a foreign government. Given the often complex nature of corporate ownership, application of the majority ownership rule has proved tricky and led to a number of important judicial opinions.

There are several exceptions to the FSIA's general immunity, but two, in particular, frequently arise in traditional aviation lawsuits. First, a foreign state does not enjoy immunity if it explicitly or implicitly waived immunity. 28 U.S.C. 1605(a)(1). Second, a foreign state does not enjoy immunity if the action is "based upon" the foreign state's commercial activity in the United States, an act in the United States in connection with foreign activity elsewhere, or a commercial activity elsewhere that causes a "direct effect" in the United States. 28 U.S.C. §1605(a)(2). "Commercial activity" is defined to mean "a regular course of commercial conduct or a particular commercial transaction or act," and it is "determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. §1603(d). "Commercial activity carried on in the States by a foreign state" is defined as activity "having a substantial contact with the United States." 28 U.S.C. §1603(e).

Even if an exception applies, and a foreign government-owned defendant is subject to jurisdiction in the United States, the defendant is entitled to certain special procedural protections. It can remove a state court lawsuit to federal court, and it is entitled to a bench trial. 28 U.S.C. §1441(d). The FSIA also extends the time within which a foreign government-owned defendant must file responsive pleadings to 60 days. 28 U.S.C. 1608(d). Additionally, the FSIA generally protects foreign states from punitive damages, 28 U.S.C. §1606, and limits a court's power to enforce judgment against foreign-owned property, 28 U.S.C. §1610.

The FSIA's Relevance to Aviation Businesses

Most nations view an aviation industry as an economic necessity, not a luxury. Given the huge expense and risk involved in launching an airline or even a new aircraft, governments often provide economic assistance to a private aviation enterprise. The United States has taken an indirect approach toward assisting its domestic aviation industry by, for example, supporting defense-oriented operations of manufacturers with both military and civil operations. U.S. Congress, Office of Technology Assessment, *Competing Economies: America, Europe, and the Pacific Rim*, OTA-ITE-498 (Washington, DC: U.S. Government Printing Office, October 1991). Another approach was compensating airlines for grounded aircraft after the September 11, 2001, terrorist attacks. 49 U.S.C. §40101 note.

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Many foreign governments, on the other hand, have taken a more active approach to promoting their aviation industries by establishing their own government-owned airline or manufacturer. Airbus may be the most notable example, having been founded by the governments of France, Germany, and Spain. And some industry analysts are predicting big things for the Commercial Aircraft Corporation of China (COMAC), a state-owned passenger jet manufacturer poised to compete with Airbus and Boeing. A number of foreign airlines are also owned in whole or part by their governments. Government-owned or government-built aircraft, though, are no less susceptible to accidents than private aircraft. And when accidents do occur, there is an excellent chance that these government-owned businesses will

be haled into a U.S. courtroom to defend against tort claims. In such cases, the foreign government-owned defendant has traditionally invoked the FSIA's jurisdictional and immunity provisions.

Qualifying as a "Foreign State"

Since the FSIA provides immunity only to "foreign states," the first step in determining whether a defendant is entitled to invoke FSIA immunity is to determine whether that defendant qualifies as a "foreign state." As noted above, the FSIA's definition of "foreign state" includes a separate legal entity that is majority owned by the foreign state. FSIA applicability is easy to determine when, say, a government directly owns 51 percent of the corporate defendant. *See Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777 (9th Cir. 1991). Given the complexity of many corporate structures, though, it is not always simple to identify a majority owner, especially when that corporation has been formed under foreign law.

Corporate structures are often of little interest in tort cases. However, in cases involving a foreign government-owned aviation company, defense counsel must become familiar with the client's ownership structure.

Initially, courts took a broad view in deciding whether a corporation was majority owned by a foreign government. In *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, ATR, the manufacturer, claimed foreign sovereign immunity. 96 F.3d 932 (7th Cir. 1996). Half of ATR's shares were owned by SNIA, which in turn was 91.42 percent owned by the French government, and half of ATR's shares were owned by Alenia, which in turn was 62.14 percent owned by the Italian government. *Id.* at 935. Altogether, through intermediaries, France and Italy owned approximately 75 percent of ATR and exercised substantial management authority over ATR. *Id.* The plaintiffs argued that the FSIA did not contemplate immunizing "pooled" corporations, (those owned by more than one government), or "tiered" corporations (those owned through intermediaries). *Id.* at 936–37. The court rejected the this argument as inconsistent with the language of the FSIA, which acknowledges that corporations could assume a variety of forms, and as absurd, since it would permit a company that is 50.05 percent owned by one foreign state and the remainder owned by private interests to cloak itself in immunity, but it would deny immunity to a corporation that is 100 percent owned by two foreign governments with no private interest. *Id.* at 937–40.

Roselawn held sway for many years, and courts regularly applied the FSIA to foreign government-owned corporations even when ownership was pooled or tiered. The Supreme Court, though, abruptly reversed course with its decision in *Dole Food Co. v. Patrickson*. 123 S. Ct. 1655 (2003). There, Israel invoked the FSIA because it owned a majority of the shares in the defendant Dead Sea Companies through intermediary corporations. *Id.* at 1660. The Court held that Israel's tiered ownership did not qualify the Dead Sea Companies as instrumentalities of the sovereign. Under traditional American corporate law, a corporation and its shareholders are distinct entities, and a parent corporation does not own its subsidiary's assets. *Id.* at 1660. Thus, a foreign government's ownership of a parent corporation does not equate to ownership of a subsidiary corporation, even if the government exercises considerable control over the subsidiary. *Id.* at 1660–61. The FSIA's definition of "agency or instrumentality" was not designed to apply to all the ways in which shares may be held; rather, it was designed to account for the possibility that foreign corporations may differ in structure from those organized under U.S. law. *Id.* at 1661.

It has been fairly common for foreign governments engaged in aviation enterprises to use the same type of corporate organization strategies that private entities use and to tier their ownership through intermediaries and subsidiaries. It has also been common, especially among European nations, to pool their interests in a joint-manufacturing concern. Since *Dole*, though, aviation companies owned in indirect or diluted fashions are unlikely to qualify for the protections of the FSIA. The Supreme Court has not yet addressed pooling, so the FSIA remains theoretically applicable to pooled ownership among two or more foreign governments.

Corporate structures are often of little interest in tort cases. However, in cases involving a foreign government-owned aviation company, defense counsel must become familiar with the client's ownership structure. Sometimes this may be as simple as collecting a few key corporate documents. However, this may also be a more complicated endeavor, requiring a defense attorney to engage a foreign corporate lawyer, translate documents, secure affidavits from across the globe, unravel corporate transactions, or perform other acts of corporate sleuthing.

Waiver of FSIA Protections

FSIA immunity will not apply to any defendant that has explicitly or implicitly waived immunity. Waiver of immunity is simple to recognize when expressly set out in a contract. Any U.S. company entering into a contract with a foreign government-owned aviation manufacturer should discuss just such an arrangement. With respect to airlines, though, a passenger is unlikely to have sufficient bargaining power to secure an express waiver in a foreign government-owned airline's contract for carriage. In these cases, plaintiffs have searched beyond the direct contract to other potential sources of waiver, and largely as a result of evolving U.S. Department of Transportation practices, they have found some success.

Foreign air carriers that wish to operate in the United States must first obtain a foreign air carrier permit from the U.S. Department of Transportation. 49 U.S.C. §41301. To obtain a permit, the department requires applicants to waive certain rights, such as the limits of liability imposed by the Warsaw Convention. 14 C.F.R. §203.1 *et seq.* The department also typically conditions

a foreign air carrier permit on the applicant's agreement to waive immunity under the FSIA with respect to lawsuits based on travel that involves a stop in the United States, based on a contract for carriage purchased in the United States, or based upon a claim under an international agreement or treaty recognized by U.S. courts. Unsurprisingly, plaintiffs have argued that foreign government-owned air carriers with a foreign air carrier permit are subject to suit in the United States as a result of these regulatory requirements.

The effect of the foreign air carrier permit waiver on the FSIA was first considered, albeit briefly, in *Barkanic v. General Admin. of Civil Aviation of People's Republic of China*. 822 F.2d 11 (2nd Cir. 1987). *Barkanic* arose out of the crash of a China Airlines flight from Nanjing to Beijing. China Airlines' authorization permitted it to fly to Honolulu, Los Angeles, San Francisco, New York, and Anchorage. The permit also included a waiver of foreign sovereign immunity in a lawsuit "based upon any claim arising out of operations by the holder under this permit." *Id*. at 12. Since the permit "did not cover" a flight occurring entirely within China, the court did not apply the waiver, looking instead to the FSIA's commercial activity exception. *Id*.

A year after *Barkanic*, the Ninth Circuit addressed similar circumstances in a case involving a Mexicana Airlines flight that took off from a point in Mexico and crashed en route to another point in Mexico, killing all aboard. *Compania Mexicana de Aviacion, S.Z. v. U.S. Dist. Court for the Central Dist. of Cal*., 859 F.2d 1354 (9th Cir. 1988). The plaintiffs argued that Mexicana waived FSIA immunity by virtue of its foreign air carrier permit. Similar to the permit in *Barkanic*, Mexicana's permit included a waiver of "any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States… based upon any claim arising out of operations by the holder under this permit." *Id*. at 1359. The Ninth Circuit concluded that the plaintiffs "ask too much of this waiver." *Id*. The obvious intent of the wavier was to confer jurisdiction over suits that have "substantial contact" with the United States, and a case involving tickets purchased in Mexico for between two points in Mexico did not suffice to bring Mexicana's operations "under the permit." *Id*.

Sixteen years later, in *Coyle v. P.T. Garuda Indonesia*, the Ninth Circuit again confronted the foreign sovereign immunity waiver in the department's foreign air carrier permits. 363 F.3d 979 (9th Cir. 2004). The Garuda Indonesia Airlines flight at issue, similar to those in *Barkanic* and *Mexicana*, occurred completely within a foreign country, so Garuda argued that its waiver did not apply. *Id*. at 985. The court disagreed, concluding that Garuda's waiver was broader than earlier waivers and could apply to flights that were purely domestic to a foreign country. *Id*. at 985. The earlier waivers were limited to claims "arising out of operations… under this permit[ ]"; Garuda's, on the other hand, applied to claims "based on… operations in international air transportation" and based on "any international agreement or treaty," even if they do not arise from operations under the permit. *Id*. at 985. The plaintiffs asserted claims under the Warsaw Convention, an international treaty governing the liability of airlines for claims arising out of international air travel; thus, under those circumstances, Garuda's FSIA waiver could apply even if the flight was never intended to include any stops in the United States.

The FSIA waiver in the department's foreign air carrier permit does not necessarily apply only to the permitted airline. An airline's insurer, that stands in the shoes of its insured, may also be subject to suit in the United States. In *In re Air Crash Near Nantucket Island, Massachusetts, on October 31, 1999*, Boeing sought a declaratory judgment prohibiting EgyptAir's insurer, which was a foreign government instrumentality, from suing Boeing for damages. 392 F.Supp.2d 461, 467 (E.D.N.Y. 2005). MISR had named Boeing as an additional insured in the policy that it issued to EgyptAir, and its claim against Boeing was in subrogation, standing in the shoes of EgyptAir. The court concluded that MISR, standing in the shoes of EgyptAir, was bound by EgyptAir's waiver of FSIA immunity under its foreign air carrier permit. *Id*. at 469.

The aviation defense attorney should be careful, though, about pursuing an FSIA defense when the waiver in the client's foreign air carrier permit clearly applies. Thai Airways successfully raised an FSIA argument in a suit brought by a passenger in California state court, and it was dismissed. *Gupta v. Thai Airways, Int'l, Ltd*., 487 F.3d 759 (9th Cir. 2007). Although Thai Airways prevailed in the lawsuit, the U.S. Department of Transportation determined that the airline, by ignoring the waiver contained in its foreign air carrier permit, violated the permit and engaged in an unfair and deceptive practice, and therefore imposed a fine of $15,000. *Thai Airways Int'l Public Co.*, Consent Order 2008-09-15.

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Like the language of the FSIA, the language in the U.S Department of Treasury foreign air carrier permits is subject to interpretation and may apply differently to different facts. And, certainly, *Coyle* and *Air Crash Near Nantucket* do not preclude FSIA immunity in every case involving a permitted airline. The defense practitioner should obtain copies of any potentially applicable waivers from a client, and examine the waiver language in the context of the case's particular facts before pursuing an FSIA defense full-bore.

Implied Waiver of FSIA Protections

Although the FSIA contemplates implied waivers, the issue has not arisen frequently in aviation cases. The plaintiffs in the Lockerbie Pan Am bombing case argued that Libya implicitly waived FSIA protection by violating fundamental norms of international law. This violation, though, even coupled with Libya's general guaranty of any judgment entered against individual defendants, was deemed insufficient to establish waiver. *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 245–46 (2nd Cir. 1997).

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"Based Upon" Commercial Activity

The other FSIA exception that arises repeatedly in aviation cases is the commercial activity exception. The commercial activity exception applies only when the cause of action is "based upon" (1) the foreign state's commercial activity in the United States; (2) an act in the United States in connection with a foreign state's commercial activity elsewhere; or (3) an act elsewhere in connection with a foreign state's commercial activity elsewhere, but the act causes a direct effect in the United States. 28 U.S.C. §1605(a)(2).

Traditionally, courts have interpreted the "based upon" requirement as referring to the facts necessary to establish a claim. *Kirkham v. Societe Air France*, 429 F.3d 288, 292 (D.C. Cir. 2005). In *Kirkham,* a plaintiff purchased an Air France ticket in the United States, and then suffered an injury at the Paris airport. The court reasoned that since the plaintiff had to prove the fact of the ticket purchase to establish Air France's duty of care, the claim was "based upon" Air France's sale of the ticket in the United States, and Air France had no immunity. *Id.* at 293. The *Sugarman* and *Barkanic* courts reached similar conclusions.

A more recent Supreme Court decision casts doubt on the presumption that an airline's sale of a ticket to someone in the United States voids immunity. *Obb Personeneverkehr AG v. Sachs*, 136 S.Ct. 390 (2015). There, a California woman was injured at a train station in Europe while boarding an Austrian state-owned railway. She had purchased her Eurail pass through a U.S. travel website, and she argued that the commercial activities exception barred immunity. The Court clarified that the commercial activities exception does not apply every time that a commercial act in the United States is relevant to an element of the claim; rather, an action is "based upon" a defendant's conduct only if the conduct constitutes the "gravamen" of the action. *Id.* at 395–96. Under this standard, and since all of the plaintiff's claims revolved around an accident that occurred in solely in Austria, the Court held that the gravamen of the plaintiff's lawsuit did not occur in the United States *Id.* at 396. Therefore, the railway was entitled to immunity despite the fact that the plaintiff purchased her ticket in the United States.

Foreign government-owned aviation companies should welcome *Obb*. Given the proliferation of one-stop-shop travel websites and the ease with which one can purchase airline tickets from the comfort of one's own home in the United States, there was some risk that the commercial activities exception would swallow the general rule of immunity. *Obb*, though, stands for the proposition that a simple ticket sale through a third-party website will not, by itself, preclude immunity. Nevertheless, plaintiffs will continue to try to connect accidents that occurred abroad to the ticket sale in the United States. Thus, attorneys called upon to defend foreign government-owned aviation companies should come armed with *Obb* and prepared to demonstrate the baselessness of a claimant's attempt to link an accident with activity in the United States.

Conclusion

The last several years have seen significant developments in the FSIA and its applicability to aviation lawsuits. By holding that tiered corporations were not entitled to FSIA protection, the Supreme Court has shrunk the universe of entities that may be immune. Likewise, courts have limited the circumstances in which the FSIA applies by giving a broad reading to U.S. Department of Transportation waivers. At the same time, courts have refused to jettison FSIA immunity simply because of the ubiquity of online purchases. A number of issues remain unresolved at the Supreme Court level, including the applicability of the FSIA to pooled ownership structures. Moreover, the exceptions to FSIA immunity remain heavily dependent on the underlying facts of a particular case, which discourages broad pronouncements of law, and paves the way for seemingly incongruous decisions. The FSIA, similar to the aviation industry, has experienced some significant changes in recent years. Nevertheless, FSIA immunity remains a viable defense in many cases brought against foreign government-owned aviation companies. FD