1997-1998 SURVEY OF INTERNATIONAL LAW IN THE SECOND CIRCUIT*

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* This survey reviews significant case law from the United States Court of Appeals for the Second Circuit, the Federal District Courts in New York, and the New York Court of Appeals decided from Aug. 1, 1997 through Aug. 1, 1998. Only those cases which overturned old law and/or broke new ground were included in this survey. Consequently, cases that simply reaffirmed previous decisions were not reported.

I. Foreign Sovereign Immunity Act

A. Elliott v. British Tourist Authority, 986 F.Supp. 189 (S.D.N.Y. 1997); Although the Foreign Sovereign Immunity Act ("FSIA") mandates that a wholly-owned, funded and directed tourism promoting agency of a foreign government is to be presumed immune from the jurisdiction of United States, the agency's hiring of American citizens to work in the United States requires it to abide by the Age Discrimination in Employment Act ("ADEA") with regard to such employees and brings it within the FSIA's commercial exception, which may overcome such presumption of immunity.

In *Elliott v. British Tourist Authority*, the District Court for the Southern District of New York held that although the Foreign Sovereign Immunity Act ("FSIA")[1] mandates that a wholly-owned, funded and directed tourism promoting agency of a foreign government is to be presumed immune from the jurisdiction of United States, the agency's hiring of American citizens to work in the United States requires it to abide by the Age Discrimination in Employment Act ("ADEA")[2] with regard to such employees and brings it within the FSIA's commercial exception, which may overcome such presumption of immunity.[3]

The plaintiff, a New York resident formerly employed by the British Tourist Authority ("BTA") in its New York office, claimed that he was wrongfully terminated because of his age in violation of the ADEA.[4] In response, the BTA moved to dismiss, arguing that as an agency of a foreign state, it is entitled to immunity from jurisdiction of United States courts, in accordance with the provisions of the FSIA.[5]

In reaching its decision, the court employed a two step analysis. First, it had to determine if the provisions of the ADEA applied to an agency or instrumentality of a foreign state that employs United States citizens on United States soil.[6] If the ADEA applied, the court then had to ascertain if the BTA was immune from the jurisdiction of American courts under the FSIA.[7]

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1. Foreign Sovereign Immunity Act of 1976, Pub. L. No. 94-583, 90 Stat. 2898 (1976), *codified at* 28 U.S.C. §§ 1330(a), 1441(d), 1602-1611.

2. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967), *codified at* 29 U.S.C. §§ 621-634.

3. Elliott v. British Tourist Auth., 986 F.Supp. 189 (S.D.N.Y. 1997).

4. *Id.* at 191.

5. *Id.* at 190.

6. *Id.* at 191.

7. *Id.*

In determining whether the provisions of the ADEA apply to an agency of a foreign state that employs United States citizens on United States soil, the court first examined ADEA § 623(h)(2), which specifies the ADEA's applicability to such circumstances.[8] It also looked to how courts in other circuits have ruled on issues raised by § 623(h)(2)[9], paying particular attention to the legislative purpose behind the 1984 amendments to the ADEA that added § 623(h)(2).[10] The court chose to interpret the ADEA provision of non-applicability to foreign employers as referring only to their employment of American citizens *overseas*, and surmised that in adopting the ADEA, Congress never intended to subject American citizens working in the United States to foreign employment law.[11] Hence, by hiring United States citizens to work in its New York office, the BTA subjected itself to the provisions of the ADEA, to the extent permitted by the FSIA.[12]

Next, the court considered the merit of the BTA's claim of immunity as an agency of a foreign state. The FSIA provides immunity for "an agency or instrumentality of a foreign state" if three conditions are met: (i) it is a separate legal person, corporate or otherwise, (ii) it is an organ of a foreign state or political subdivision thereof, and (iii) it is not a citizen of a state of the United States.[13] Plaintiff contended that under 28 U.S.C. §1332(c)[14], the BTA failed to meet the third condition mentioned above, and was in fact a citizen of the State of New York subject to the jurisdiction of the federal courts.[15] Examining the facts, the court concluded that "the BTA (i) was established by the British Government Development of Tourism Act of 1969, (ii) is not incorporated in New York and (iii) its principal place of business is London, England. Therefore, under the three-part test of § 1603(b), the BTA is an agency or instrumentality of a foreign state and is thereby presumed immune from

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8. *Id.* The court concluded that the BTA is a "foreign person" under the ADEA. ADEA, 29 U.S.C. § 623(h)(2) (stating "the prohibitions of this section shall not apply when the employer is a foreign person not controlled by an American employer").

9. Elliott, 986 F.Supp. at 191. *See* EEOC v. Kloster Cruise Ltd., 888 F.Supp. 147, 148 (S.D.Fla. 1995) (stating that § 623(h)(2) was intended to apply only to overseas operations of a "foreign person", not to the operations of a "foreign person" within the United States), Helm v. South African Airways, No. 84 Civ. 5404 (MJL), 1987 WL 13195 (June 25, 1987) (concluding that nothing in the ADEA indicates that section was meant to exclude United States citizens working for a "foreign person" within the United States from ADEA coverage).

10. *Id.*

11. *Id.*

12. *Id.* at 192.

13. Foreign Sovereign Immunity Act of 1976, 28 U.S.C. § 1603(a), (b).

14. 28 U.S.C. §1332(c) states in part: "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."

15. Elliott, 986 F.Supp. at 192.

the jurisdiction of United States courts."[16] The court recognized, however, that the FSIA does not offer blanket immunity, and that it provides for a number of exceptions.[17]

Plaintiff argued that the defendant's activities placed it within the FSIA's "commercial exception," which overcomes the BTA's presumption of immunity and conferred upon American courts the necessary jurisdiction to hear the case.[18] The "commercial activity" exception provides that sovereign immunity will not apply where "the action is based upon a commercial activity carried on in the United States by the foreign state. . .."[19] In order to determine if the BTA's activities were commercial in nature, the court "examine[d] the nature, rather than the purpose, of the activity under scrutiny."[20] The court concluded that the FSIA mandates that there be a clear distinction between a state's governmental activities (*acts jure imperii*) and its commercial endeavors (*acts jure gestionis*), with only the latter offered immunity.[21] In order to determine which category the BTA's actions fit, the court delved into the FSIA's legislative history[22], and concluded that the hiring and firing of American citizens (as opposed to diplomatic staff and civil servants) is commercial in nature and not subject to immunity.[23] The court examined prior applications of the rule[24], and concluded that the BTA was not entitled to sovereign immunity. Given that the plaintiff's title was

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16. *Id.*

17. *Id.* at 193.

18. *Id.* Plaintiff argued that four exceptions to the FSIA apply to overcome the BTA's presumed immunity. As the court found that the defendant's activities are subject to the FSIA's commercial exception, it did not address the plaintiff's other arguments.

19. Foreign Sovereign Immunity Act of 1976, 28 U.S.C. § 1605(a)(2).

20. Elliott, 986 F.Supp. at 193 (citing Segni v. Commercial Office of Spain, 835 F.2d 160 (7th Cir. 1987)).

21. *Id.* (citing Broadbent v. Organization of American States, 628 F.2d 27, 31 (D.C. Cir. 1980), *Segni*, 835 F.2d at 162).

22. *Id.* (citing H.R.Rep. No. 94-1487, at 16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604,6615 (stating that "public or governmental, but not commercial in nature would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States. . .. Activities such as a foreign government's employment or engagement of laborers, clerical staff or public relations or marketing agents. . . would be among those included within the definition [of commercial activity].")).

23. *Id.*

24. *Id.* at 193-94. *See* Zveiter v. Brazilian Nat'l Superintendency of Merchant Marine, 833 F.Supp. 1089 (S.D.N.Y. 1993), (foreign state was not immune from a sexual harassment claim brought by a secretary who was a United States citizen employed by the defendant in the United States. Court held that employment of the secretary was not "peculiarly sovereign in nature", and therefore constituted commercial activity.), Segni, 835 F.2d at 165, (hiring of a marketing agent for Spanish wines constitutes commercial activity), Holden v. Canadian Consulate, 92 F.3d 918, 922 (9th Cir.1996), (hiring and firing of "Commercial Officer" primarily engaged in promotion and marketing constitutes commercial activity not subject to immunity.).

"Manager of Industry Relations," and taking into account the nature of the BTA's business, the court found that it fit squarely within the definition of a "marketing agent," which necessarily denotes a commercial activity on the part of the employer.[25]

Finally, the courts emphasized the need for "significant nexus between the commercial activity in this country upon which the exception was based, and a plaintiff's cause of action."[26] In other words, the plaintiff's cause of action must stem from the same activity that gave rise to the "commercial activity" exception from immunity. The court found a clear significant nexus between the commercial activity of employment and the plaintiff's claim of age discrimination.[27]

In determining that the plaintiff's ADEA claim applies to the foreign state, and that the plaintiff's argument of "commercial exception" under the FSIA successfully overcame the defendant's presumption of immunity, the court held that it has the necessary jurisdiction to hear the action. Accordingly, the defendant's motion to dismiss was denied.[28]

B. Rein. v. Socialist People's Libyan Arab Jamahiriya., 995 F.Supp. 325 (E.D.N.Y. 1998); An amendment to the Foreign Sovereign Immunity Act ("FSIA") creating an exception to the sovereign immunity rule for any state designated by the Executive Branch as a sponsor of terrorism was constitutional, rationally related to a legitimate government purpose, did not constitute an impermissible ex post facto law, and did not violate due process.

In *Rein v. Socialist People's Libyan Arab Jamahiriya*, the District Court for the Eastern District of New York held that an amendment to the Foreign Sovereign Immunity Act ("FSIA")[29] creating an exception to the sovereign immunity rule for any state designated by the Executive Branch as a sponsor of terrorism was constitutional, rationally related to a legitimate government purpose, did not constitute an impermissible *ex post facto* law, and did not violate due process.[30]

The plaintiffs, survivors and representatives of victims who died in the December 1988 crash of Pan Am Flight 103 over Lockerbie, Scot-

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25. Elliott, 986 F.Supp. at 194.

26. *Id.* (citing NYSA-ILA Pension Trust Fund v. Garuda Indonesia, 7 F.3d 35, 38 (2nd Cir. 1993)).

27. *Id.*

28. *Id.*

29. Foreign Sovereign Immunity Act of 1976, Pub. L. No. 94538, 90 Stat. 2898 (1976), *codified at* 28 U.S.C. §§ 1330(a), 1441(d), 1602-1611.

30. Rein et al. v. Socialist People's Libyan Arab Jamahirya, 995 F.Supp. 325 (E.D.N.Y. 1998).

land, originally brought an action against Libya on the ground that Libya and its agents were responsible for the plane's destruction and the resulting loss of life.[31] On motion by Libya, the court dismissed the action for lack of subject matter jurisdiction under the FSIA.[32] After Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, which amended the FSIA[33], the plaintiffs commenced the present action.[34]

The defendant challenged the court's subject matter jurisdiction by questioning the constitutionality of the amended FSIA. It argued that since Congress (the Legislative Branch) enacted a law of the United States - i.e. the FSIA - which prescribed that the court's jurisdiction be determined in accordance with designations made by the Secretary of State (the Executive Branch), such law was unconstitutional.[35] In delegating to the Executive Branch the authority to decide which nations may be accorded sovereign immunity by courts, Congress acted in a constitutionally compliant manner.[36] The court pointed out that the FSIA provides for courts to decline to hear cases against nations not designated as terrorist states.[37] In other words, the defense of foreign sovereign immunity can be used as a bar to United States jurisdiction in the great majority of cases, but a United States court is allowed to establish jurisdiction when the nation concerned is designated by the Executive Branch as a sponsor of terrorism.[38] Yet, even in such cases, nothing would prevent the defendant from using the defense of foreign sovereign immunity to attempt to have the court relinquish its jurisdiction acquired by conventional means.[39] In response to Libya's claim that it is entitled

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31. *Id.* at 327-28.

32. *See* Smith v. Socialist People's Libyan Arab Jamahirya, 886 F.Supp. 306 (1995), aff'd, 101 F.3d 239 (2nd Cir. 1996), *cert. denied*, 117 S.Ct. 1569, 137 L.Ed.2d 714 (1997).

33. See 28 U.S.C. § 1605(a).

34. Rein, 995 F.Supp. at 328.

35. *Id.* Libya is referring specifically to the FSIA provision lifting immunity from U.S. jurisdiction to states designated as sponsors of terrorism by the United States State Department (28 U.S.C. § 2371).

36. *Id.* at 329.

37. *Id.* Section 1605(a)(7) of the FSIA mandating that "a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage [or] hostage taking . . . except that the court shall decline to hear a claim under this paragraph (A) if the foreign state was not designated as a state sponsor of terrorism . . .." 28 U.S.C. § 1605(a)(7).

38. *Id.*

39. Rein, 995 F.Supp. at 328-29. *See* Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103, 106 (2nd Cir.), cert. denied, 385 U.S. 931, 87 S.Ct. 291, 17 L.Ed.2d 213 (1966), (stating that "in an action against a sovereign just as in any other suit, jurisdiction must be acquired either by service of process, or by defendant's appearance in court, or in rem by seizure and control of

to certain rights under international law,[40] (presumably among them a right of sovereign immunity) the court relied on *Argentine Republic v. Amerada Hess Shipping Corp.*, where the Supreme Court unequivocally established that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country. . .."[41] The court reiterated that Congress has the authority to remove the defense of foreign sovereign immunity for particular violations of *jus cogens*, as it has done in the 1996 amendment to the FSIA.[42]

The court then examined Libya's claim that the FSIA violates due process because Libya has already been designated as a state sponsoring terrorism, thereby lessening the plaintiff's burden of fully proving every element of the crime.[43] The court noted that the designation serves only to establish an exception to foreign sovereign immunity under the FSIA, and in no way affects the liability of foreign states against whom actions have been taken, nor does it diminish the plaintiffs' burden of proving that Libya was responsible for the acts alleged.[44] Therefore, the FSIA in no way alters judicial due process. This holding is instrumental to the court's rejection of Libya's next argument.

Libya's next position is that since the Executive Branch's designation of Libya as a state sponsor of terrorism violated Libya's fundamental right to a fair trial as guaranteed by the Due Process Clause, such designation should be subjected to strict scrutiny review by the court.[45] Since the court had already established that no "fundamental right is implicated by this classification," it opined that the appropriate test was whether the statute is rationally related to a legitimate governmental purpose.[46] In this case, the court found that the protection of U.S. nationals

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property. Only after such jurisdiction is acquired, does the sovereign immunity defense properly come into consideration. Instead of being a 'jurisdictional' matter in the same sense as acquiring jurisdiction over a person or property, sovereign immunity presents a ground for relinquishing the jurisdiction previously acquired.").

40. *Id.* at 328.

41. *Id.* at 329, (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443, 109 S.Ct. 683, 102 L.Ed.2d 819 (1989)).

42. *Id.* (citing Smith, 101 F.3d at 242).

43. *Id.* at 330.

44. *Id.* (citing First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 620-21, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983).).

45. Rein, 995 F.Supp. at 330.

46. *Id.* at 330-31. *See*, e.g. Heller v. Doe, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

and air carriers qualified as a legitimate government purpose and, as such, no further review is warranted.[47]

The last relevant point addressed by the court was Libya's claim that the 1996 FSIA amendment is an impermissible *ex post facto* law. In rejecting this argument, the court stated that the *ex post facto* doctrine applies when there is a possibility of arbitrary penal sanctions working unfairly to deprive an individual of a liberty interest.[48] It is not applicable to the question of whether or not a state may be completely immune from a civil action, and the decision by the United States not to grant it sovereign immunity does not bring about criminal sanctions.[49] It did not apply to the case at bar, where the only thing established by the 1996 FSIA amendment was "whether a foreign state is amendable to civil suit in the courts of the United States."[50]

Concluding that the FSIA poses no constitutional or jurisdictional hurdles, the court consequently rejected the defendant's motion for dismissal.

II. Forum Non Conveniens

A. *Potomac Capital Investment Corp. v. Koninklijke Luchtvaapt Maatschapplj N.V. D/B/A KLM, No. 97 Civ. 8141(AJP)(RLC), 1998 WL 92416, at *1 (S.D.N.Y. March 4, 1998): under the forum non conveniens doctrine, discretion for a district court to decline jurisdiction is broad and the dismissal should be based on reasonable alternatives that would best serve the ends of justice and be of the most convenience to the parties. The lack of discovery in pretrial procedure, under a country's laws does not make that country an inadequate forum.*

In *Potomac v. KLM,* the United States District Court for the Southern District of New York held that a District Court has much discretion to dismiss a case on forum non conveniens ("FNC") grounds where dismissal would best serve the convenience of the parties and the ends of justice, and the private and public interest factors strongly favor another forum.[51] The plaintiff brought a negligence action against the defendant

47. *Id.* at 331 (court found that the 1996 amendment to the FSIA is a reasonable means of achieving the legitimate government purpose of protecting United States nationals, and it is a rational method of providing a forum for the victims to seek compensation for their injuries.).

48. *Id. See* Doe v. Pataki, 120 F.3d 1263, 1272 (2nd Cir.1997), cert. denied,—U.S. —, 118 S.Ct. 1066, 140 L.Ed.2d 126 (1998).

49. *Id.*

50. *Id.*

51. Potomac Captial Investment Corp. v. Koninklijke Luchtvaapt Maatschapplj N.V. D/b/a KLM, No. 97 Civ. 8141 (AJP)(RLC), 1998 WL 92416, at *1 (S.D.N.Y. March 4, 1998).

for wrongfully repairing an aircraft engine, which failed in a plaintiff owned Boeing 747 in route to Brazil.[52] The defendant moved to dismiss the claim on FNC grounds and the court granted the motion because the defendant satisfied the burden of showing that the private and public interest factors strongly tilt in favor of having the case litigated in an alternative forum.[53]

Koninklijke Luchtvaart Maatschaappij N.V. ("KLM") is a Dutch corporation headquartered in the Netherlands and registered as a foreign corporation in New York.[54] KLM owns an extensive aircraft and engine repair facility in the Netherlands and was contracted to do repairs on aircraft and engines operated by Atlas, a U.S. commercial cargo carrier, which leases aircraft and engines from Potomac Capital Investment Corporation ("Potomac").[55] An Atlas-Potomac Boeing 747, the engine having received repairs from KLM, was in flight from Dakar, Senegal to Veracopas, Brazil when the engine failed.[56] The engine was transported to Amsterdam where KLM examined it and determined that it was the replacement blade, which had caused the failure.[57] Potomac filed the negligence claim in New York but the defendant argued the Netherlands is an adequate alternative forum and the claim should be dismissed under the FNC doctrine.[58]

The FNC standard is a two-step analysis which, if met, gives a district court broad discretion to decline to exercise jurisdiction where "dismissal would best serve the convenience of the parties and the ends of justice."[59] The Second Circuit emphasized the importance and process of the two-step procedure. It explained that the court would first ask if there is an alternative forum with jurisdiction to hear the case; and, secondly, the court would determine which forum would be most convenient and would best serve the ends of justice.[60] The key for the court in determining the second part is to weigh a variety of private and public factors, including: (1) the ease of access to sources of proof; (2) the availability of witness; (3) the cost of obtaining witnesses; (4) the efficiency and expense of a trial; (5) enforceability of judgments; (6) court congestion; (7) imposing jury duty on forum citizens; (8) local interests;

52. *Id.* at *1.
53. *Id.* at *15.
54. *Id.* at *1.
55. Potomac, 1998 WL 92416, at *1.
56. *Id.* at *2.
57. *Id.*
58. *Id.* at *4.
59. Potomac, 1998 WL 92416, at *4, *quoting* Murray v. British Board. Corp., 81 F.3d 287, 290 (2d Cir. 1996).
60. Potomac, 1998 WL 92416, at *4.

and (9) the avoidance of unnecessary problems in the application of foreign law.[61] These are known as the "Gilbert factors."[62]

The court first looked to see if there was an alternative forum. Potomac did not claim that the Netherlands lacks jurisdiction and KLM went uncontested in its declaration that jurisdiction would be proper in the Netherlands' courts.[63] Dutch law also recognizes Potomac's tort claim and the statute of limitations is five years; thus not likely to create a statute of limitations issue.[64] The plaintiff argued that the forum is inadequate due to a lack of U.S.–style discovery.[65] But even if the discovery is more limited, it does not determine whether a forum is adequate or not.[66] The Court explained that litigants in foreign tribunals can seek discovery assistance under 28 U.S.C § 1782, which provides such assistance to foreign tribunals and to litigants before those tribunals.[67]

When weighing the Gilbert Factors, courts generally start with a presumption in favor of the plaintiff as to choice of forum, especially if the defendant resides in the forum.[68] The Private Interest factors favored the alternative forum in this case because Potomac is not a New York resident; therefore, its choice of forum received less deference that it would have if Potomac had been a resident of New York.[69] A foreign plaintiff is to receive less deference if the plaintiff is not a resident of the forum.[70] The Supreme Court has explained that because the main focus of any FNC inquiry is to ensure a convenient trial, deference is usually given to a plaintiff's choice, except where it is foreign to the forum and convenience leans to another forum.[71] The favored forum is the Netherlands because the engine is being stored in the Netherlands, all pertinent documents are available for review there, and 18 witnesses reside in the Netherlands.[72] Potomac could not and did not show any such relationship to New York, except for the possible shipping of the engine (the

61. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-509, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947).

62. Potomac, 1998 WL 92416, at *4.

63. *Id.*

64. *Id.*

65. *Id.* at *5.

66. Potomac, 1998 WL 92416, at *5. Doe v. Hyland Therapeutics Div., 807 F.Supp. 1117, 1124 (S.D.N.Y.1992), "the unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate."

67. Potomac, 1998 WL 92416, at *5.

68. Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 46 (2d Cir.1996).

69. Potomac, 1998 WL 92416, at *7.

70. Murray, 81 F.3d 287, 290 (2d. Cir.1996).

71. Piper Aircraft Co. v. Reyno, 454 U.S. 235, at 255-56; 102 S.Ct. 252, at 265 (1981).

72. Potomac, 1998 WL 92416, at *7.

only form of evidence) to New York.[73] Common sense suggests that in FNC cases the litigation take place in the forum where a larger number of relevant witnesses are located.[74] The plaintiff tried to persuade the Court that KLM's involvement in prior litigation in New York was an effective reason for them to pull the defendant into a New York court. But, the Court reasoned that such a suggestion was as weak as one expressing they should sue in New York because one of the parties might have a main office in New York.[75]

KLM, the defendant, had the burden of showing that the Gilbert Factors "tilt strongly in favor of" the alternative forum.[76] In addition to the private factors favoring the Netherlands as an adequate alternative forum, so do the public interest factors. The court determined the Netherlands to be the most interested in this action because of the suit being against one of its major corporations, while New York had no interest whatsoever.[77] New York lacked interest, and even if there was an interest it would not be sufficient to justify the large commitment of judicial time and resources it would require if litigated in New York.[78] Court congestion and jury duty factors also favor the Netherlands as an alternative forum.[79]

The court declared that the choice of law public interest factor favors the Netherlands.[80] It determined that Potomac misapplied a case to its argument that United States maritime law is the applicable substantive law in the case.[81] The court corrected the plaintiff by stating that just because the engine failed over international waters does not mean that the tort necessarily has a maritime connection.[82] For there to be a "maritime" tort, the wrong must have occurred on navigable waters or

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73. *Id.* at *7-*8.

74. Potomac, 1998 WL 92416, at *7. Nippon Fire & Marine Ins. Co. v. M.V. EgascoStar, 899 F.Supp 164 (S.D.N.Y.1995), (holding that "when the greater number and more relevant witnesses are located in a foreign forum, common sense suggests that the litigation proceed in that forum.").

75. *Id.* at 169.

76. Peregrine, 89 F.3d 41, quoting R. Maganlal & Co. v. M.G. Chem. Co., 942 F.2d 164, 167 (2d. Cir.1991).

77. Potomac, 1998 WL 92416, at *10.

78. Piper, 454 U.S. 235, 261, 102 S.Ct 252, 268, 70 L.Ed2d 419 (1981).

79. Potomac, 1998 WL 92416, at *11.

80. *Id.* at *12.

81. *Id.*

82. *Id.*

must "bear a significant relationship to traditional maritime activity."[83] At this stage, the court decided it need not determine what law applies.[84]

Finally, the Court concluded that in balancing the private and public interest factors, the Netherlands' courts are the favored forum.[85] Despite the fact that this claim was brought in New York, the case has no relationship to New York.[86] Even after all of the non-New York, U.S. based witnesses were considered, the factors still favor the Netherlands forum.[87] KLM also met the burden of showing that the Netherlands is a more appropriate place for the trial.[88] The defendant's motion to dismiss on the basis of forum non conveniens was granted.[89]

B. Capital Currency Exchange, N.V., v. National Westminster Bank PLC, 1998 WL 634783 (2nd Cir. 1998); Antitrust suits brought under the Sherman Act are subject to dismissal under the forum non conveniens doctrine; if the forum is adequate and the Gilbert Factors show more convenience in trying the case in the foreign forum, then dismissal will generally be granted.

In *Capital v. National*, the Second Circuit held that suits brought under the Sherman Act are subject to dismissal under the forum non conveniens ("FNC") doctrine.[90] The Court also found that a district court judge does not abuse his or her discretion by dismissing a complaint on the grounds that there is another, more convenient forum. The Court affirmed the District Court's decision that the complaint be dismissed and that England is a more convenient forum.[91]

National Westminster Bank PLC ("NatWest UK") and Barclays Bank PLC ("Barclays UK") are English corporations that offer currency exchange and money transfer services to their customers.[92] Capital Currency Exchange, N.V. ("CCE") is a financial company organized under the laws of the Netherlands which has affiliates in New York and Britain.[93] CCE was doing business with Barclays UK but was eventually

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83. Executive Jet Aviation v. City of Cleveland, 409 U.S. at 253, 268, 93 S.Ct. at 497, 504 (1972).

84. Potomac, 1998 WL 92416, at *14.

85. Potomac, 1998 WL 92416 (S.D.N.Y.), at *15.

86. *Id.*

87. *Id.*

88. *Id.*

89. Potomac, 1998 WL 92416 (S.D.N.Y.), at *15.

90. Capital Currency Exchange, N.V. v. National Westminster Bank PLC, 1998 WL 634783 (2nd Cir. (N.Y.)).

91. *Id.* at *8.

92. *Id.* at *1.

93. *Id.*

refused business. CCE then sought business with NatWest UK. Eventually, it too refused to extend banking services to CCE.[94]

The plaintiffs brought suit against the two British corporations and individuals involved with them in the United States District Court for the Southern District of New York under Sections 1 and 2 of the Sherman Act.[95] The plaintiffs alleged that it and its affiliates were wrongfully denied banking services.[96] The defendants moved to dismiss the complaint for failure to state a claim under the FNC doctrine.[97]

The plaintiffs argued that FNC cannot apply to antitrust suits.[98] The Court disagreed.[99] At common law, dismissal of suits had long been permitted where, although jurisdiction and venue are proper, there is another forum that is substantially more convenient; however, this was not true of Federal Courts until 1947.[100] Even after there began to be FNC dismissals in federal question cases, there were some not permitted under certain federal statutes, including the Sherman Act, until 1948.[101] The Court referred to the last overruling by the Supreme Court, pursuant to 15 U.S.C. §29, of a FNC case dismissal, brought under the Sherman Act.[102] The Court held that FNC could not be used to transfer an antitrust suit to a more convenient forum within the United States.[103] Shortly after the Supreme Court ruling, Congress passed 28 U.S.C. § 1404(a), which provides that "for the convenience of the parties and

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94. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *1.

95. 15 U.S.C. §§ 1&2.

96. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *1.

97. *Id.* at *1-*2.

98. *Id.* at *2.

99. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *2.

100. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13, 102 S.Ct. 252, 70 L.Ed. 2d 419 (1981); Dismissals on ground of forum non conveniens and transfers between federal courts are not equivalent, since statute allowing transfers was enacted to permit change of venue between federal courts, and although it was drafted in accordance with doctrine of forum non conveniens, it was intended to be a revision rather than codification of common law by giving district court more discretion to transfer than they had to dismiss on grounds of forum non conveniens; and Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947); The doctrine of forum non conveniens presupposes at least two forums in which the defendant is amenable to process and furnishes criteria for a choice between them.

101. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *1-*2.

102. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 372-73, 47 S.Ct. 400, 71 L.Ed. 684 (1927); the court held that an action against foreign corporation for violation of Anti-Trust Act may be brought in district where defendant sold goods in interstate commerce through salesman, by service in another district where it resides, or is found transacting business.

103. *See* United States v. National City Lines Inc., 334 U.S. 573 (1948); The doctrine of forum non conveniens is not a principle of universal applicability and whenever Congress has vested courts with jurisdiction to hear and determine causes and has invested complaining litigants, with a right of choice among them which is inconsistent with exercise by those courts of discretionary power to defeat the choice so made, the doctrine can have no effect.

witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."[104] The Court pointed out that Section 1404(a) has supplanted the common law doctrine of FNC for transfers between U.S. district courts.[105] The Court explained that where the more convenient forum is not a U.S. district court, the common law doctrine of forum non conveniens governs.[106]

The Court moved to apply the two-step analysis of FNC to this case by determining (1) whether there is an adequate forum; and (2) which forum is favored by the public and private interests introduced by Gilbert.[107] The plaintiffs argued that England is not an adequate alternative forum because: (1) claims under the Sherman Act are not recognized; (2) it might not award damages, and/or treble damages, in an antitrust suit; and (3) plaintiff's common law causes of action might not be recognized.[108] The Court believed that under Articles 85 and 86 of the Treaty of Rome, which are similar to Sections 1 and 2 of the Sherman Act and which English courts are bound to enforce, the plaintiffs may litigate the subject matter of their Sherman Act claims in England.[109]

The Court challenged the claims made by the plaintiffs seeking recognition of money damages and common law claims. The Court pointed to an interlocutory appeal where the Law Lords of the House of Lords stated that damages are available for a violation of Article 86.[110] Although a final judgment was never entered in the case, and the decision was therefore considered dicta, the Court considered the case highly persuasive on the question of whether monetary damages would be available to plaintiffs in England.[111] As to the unavailability of treble damages, the Court stated that his does not render a forum inadequate.[112]

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104. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *3.

105. *Id.*

106. *Id.*

107. *Id.* at *5.

108. *Id.* at *8.

109. *Id.*

110. *See* Garden Cottage Foods Ltd. v. Milk Mktg. Bd. [1984] 1 AC 130, where the court recognized the possibility of damages under the Treat of Rome: "The 1958 Treaty of Rome, which established European Atomic Energy Community (Euratom), granted to that organization the powers necessary to conduct and regulate trade in source and special fissionable material (e.g. uranium and plutonium) among the member-states;" State Dept. No. 96-85 1996 WL 361511, *35 (Treaty); for a violation of a Wisconsin statute, "The Wisconsin Environmental Policy Act (WEPA) requires that all state agencies carefully examine the environmental consequences of all actions that constitute 'major actions significantly affecting the quality of the human environment.' Alternatives to environmentally significant actions must also be considered": 1995 WL 406030, *1 (Wis.P.S.C.).

111. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *8.

112. Piper, 454 U.S. 235, at 247.

The Court conceded that the plaintiffs might not be able to recover in England on some of their common law claims, but this does not render the forum inadequate and the essential subject matter of the dispute can still be addressed.[113]

The Court agreed with the District Court in weighing the Gilbert factors, that the public interests favor neither the New York nor England forums but that the private interests strongly favor England.[114] If there is an adequate alternative forum and the Gilbert factors favor that forum, the case should be dismissed under FNC so that convenience may be achieved and the ends of justice may be best served.[115] Therefore, the Court concluded that the District Court did not abuse its discretion by dismissing the complaint on the ground that England is a more convenient forum. The Court further ruled that suits brought under the Sherman Act are subject to dismissal under forum non conveniens doctrine.[116]

In conclusion, the court found that when a district court judge dismisses a claim brought under the Sherman Act, there is no abuse of discretion if it is based on the existence of a more convenient forum.[117] The Gilbert Factors must be the method of measurement, favoring the other forum.[118] In the transfer of civil actions to a more convenient forum, between U.S. district courts, 28 U.S.C. § 1404(a) governs, but where the more convenient forum is not a U.S. district court, the common law doctrine of forum non conveniens governs.[119] England was determined by the court to be the more convenient forum and, under the forum non conveniens doctrine, the claim was dismissed.[120]

113. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *9.
114. *Id.* at *9-*10.
115. *See* Gilbert, 330 U.S. 501, at 508; Peregrine Myanmar, 89 F.3d at 46.
116. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *11.
117. *Id.* at *8.
118. *See* Gilbert, 330 U.S. 501, at 508; Peregrine Myanmar, 89 F.3d at 46.
119. Capital, 1998 WL 634783 (2nd Cir. (N.Y.)), at *3.
120. *Id.* at *8.

III. Immigration and Nationality Act

A. *Karim v. Immigration and Naturalization Service, No. 95 Civ. 510, 1998 WL 60949, at *1 (N.Y.2d Cir. Feb. 13, 1998) (CSH); The Second Circuit has jurisdiction to review an adjustment of status decision when deportation proceedings have not commenced. The District Director of the Immigration and Naturalization Service's exercise of discretion in an adjustment of status case must be based on balanced reasoning and governing law.*

In *Karim v. INS*, the United States District Court for the Southern District of New York decided several issues: the Second Circuit does have jurisdiction to review an adjustment of status decision when deportation proceedings have not commenced; the district director of the Immigration and Naturalization Service's exercise of discretion in an adjustment of status case must be based on balanced reasoning; INA § 1182(a)(7)(A) does not exclude immigrants who qualify under Federal Regulations 8 C.F.R. § 245.4; INA § 1182(a)(7)(B) applies only to "nonimmigrants" as defined by § 1101 (a)(15); INA § 1182(a)(6)(C) excludes only immigrants who intend to mislead U.S. officials.[121]

On October 26, 1990, the Karim family entered the United States of America.[122]

They were refugees from Afghanistan who had been living in Pakistan.[123] The Karims used false Pakistani passports to board a plane destined for JFK Airport in New York.[124] Upon arrival, they immediately informed an Immigration and Naturalization Service ("INS") officer of their true identities as Afghan refugees.[125]

In June of 1991, the Karims filed an application for political asylum which was repeatedly adjourned.[126] In June 1993, when the Foster Nurses Agency filed an application for an immigrant petition on behalf of Mrs. Karim, who had obtained a nurse's license, the Karim family was allowed to apply for adjustment of status.[127] On December 18, 1996, the Karims were finally granted asylum, which allowed them to stay in the United States, but they were denied the status of permanent legal residents that they would achieve through adjustment.[128]

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121. Karim v. Immigration and Naturalization Service, No. 95 Civ. 510, 1998 WL 60949, at *1 (N.Y.2d Cir. Feb. 13, 1998) (CSH).
122. *Id.*
123. *Id.*
124. *Id.*
125. Karim, 1998 WL 60949, at *1.
126. *Id.*
127. *Id.*
128. *Id.* at *2.

The Karims filed their first amended complaint on September 5, 1995.[129] They argued that they could not be excluded for adjustment of status under § 1182(a)(6)(C) because they made no willful misrepresentation to a U.S. official; they could not be excluded under § 1182(a)(7)(B) because they never attempted to enter as nonimmigrants; and finally, they could not be excluded under § 1182(a)(7)(A) because although they did not have the proper papers when they attempted to enter in 1990, this could no longer be held against them in an adjustment of status proceeding.[130] The INS moved to dismiss the complaint setting forth two arguments. First, they argued that no statute specifically authorizes judicial review to adjustment of status decisions.[131] Adjustment of status is similar to a consulate's denial of a visa which has long been immune from judicial review.[132] Second, even if the court did have jurisdiction, the district director did not abuse his discretion and had solid statutory grounds to refuse to adjust the Karims' status.[133]

Since the Second Circuit had never addressed the specific jurisdictional question raised by this case, the court looked to similar issues decided in *Howell v. INS* and *Jaa v. United States INS.*[134] The court in *Howell* held that the district court lacked jurisdiction to review the district director's denial of Howell's application for adjustment of status once deportation proceedings commenced, because she failed to exhaust her administrative remedies.[135] This exhaustion requirement arose as a result of the administrative remedies available to Howell through deportation proceedings.[136] Howell had to pursue these remedies rather than seek review in the district court pursuant to 8 U.S.C. § 1329.[137] These administrative remedies were not available to the Karims, however, because deportation proceedings had not commenced against them.[138] Also, as long as the Karims had asylum, deportation proceedings would not be commenced against them.[139]

Section 1329 was amended recently to grant jurisdiction in the district courts to some matters "arising under" the subchapter, not to all

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129. *Id.*

130. *Id.*

131. Karim, 1998 WL 60949, at *2.

132. *Id.*

133. Karim, 1998 WL 60949, at *2. *See also*, Immigration and Nationality Act §§ 1182(a)(7)(A), 1182(a)(7)(B), and 1182(a)(6)(C) (1998).

134. Karim, 1998 WL 60949, at *2. *See* Howell v. INS, 72 F.3d 288 (2d Cir.1995); Jaa v. United States INS, 779 F.2d 569, 571 (9th Cir.1986).

135. Karim, 1998 WL 60949, at *3, *citing* Howell, 72 F.3d 288.

136. *Id.*

137. *Id.*

138. Karim, 1998 WL 60949, at *3.

139. *Id.*

actions brought by the U.S. that arose under its provisions.[140] Applying § 1329 as it read in 1995, *Howell* suggests that a denial of adjustment of status should be subject to judicial review; the court, primarily concerned with the exhaustion doctrine, left that question open.[141] The INS did not dispute that the Karims took every administrative step available to them.[142] Accordingly, the court was satisfied that it could follow the Ninth Circuit decision in *Jaa v. United States INS.*[143] There, it was held that a district court "has jurisdiction to review a denial of status adjustment" where proper administrative steps had been followed.[144]

The court then analyzed whether the district director abused his discretion in denying the Karims adjustment in status. The Second Circuit set the standard for determining whether there was an abuse of discretion in *Arango-Arandondo v. INS.*[145] The court need only decide whether or not the INS considered the appropriate factors and came to a rational decision.[146] In the Karims' case, the court found all of the evidence was not properly weighed by the district director.[147] The district director made no reference to any positive factors such as Mrs. Karim's nursing job, the family's clean record, or their desperate circumstances.[148] He focused solely on the Karims' means of entry into the United States involving the forged passports.[149] This did not represent the balanced reasoning that must support the exercise of discretion by an officer of the United States.[150] The court held that while not every factor needed to be explicitly mentioned, the failure of the district director

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140. *Id.* at *4.

141. Karim, 1998 WL 60949 at *4 (*citing* Howell, 72 F.3d 288).

142. Karim, 1998 WL 60949 at *4.

143. *Id.* at *3. *See* Jaa v. United States INS, 779 F.2d 569, 571 (9th Cir.1986).

144. Karim, 1998 WL 60949 at *3 (*citing* Jaa, 779 F.2d 569, 571). *See also* Chan v. Reno, 113 R.3d 1068, 1071 (9th Cir.1997) (concluding district court had jurisdiction to review denial of application for adjustment of status); Ijoma v. INS, 854 F.Supp. 612 (D.Neb.1993); Reid v. INS, 1993 WL 267278 (S.D.N.Y. Nov.7, 1993).

145. Karim, 1998 WL 60949 at *4. *See* Arango-Arandondo v. INS, 13 F.3d 610, 613 (2d Cir.1994).

146. Karim, 1998 WL 60949 at *4 (*citing* Arango-Arandondo, 13 F.3d 610, 613) (concluding no abuse of discretion occurred where INS carefully and thoughtfully weighed the evidence in Arango's favor. . .against the detrimental evidence; a court is not empowered to reweigh the evidence where the evidence had been carefully considered).

147. Karim, 1998 WL 60949, at *5.

148. *Id.* at *4.

149. *Id.* at *5.

150. *Id. See also* Zaluski v. INS, 37 F.3d 72 (2d Cir.1994); Arango-Arandondo v. INS, 13 F.3d 610, 613 (2d cir.1994).

to either mention a single positive factor or discuss any process of balancing or weighing indicated that he abused his discretion.[151]

The court then interpreted the statutory arguments made by the parties. The district director first claimed that the Karims were excludable under § 1182(a)(7)(A) because the Karims were not in possession of valid entry documents.[152] Title 8 of the Code of Federal Regulations relieves certain immigrants from the documentary obligation of § 1182(a)(7)(A).[153] The court explained that those applying for an adjustment of status are not seeking admission in the usual sense, but are parolees, asylees, or others who have traveled a different route to residence in the United States so they would not be required to possess the same documents.[154] Also, the court noted that the language of § 1182(a)(7)(A) differs from other provisions of that section in that it speaks in the present tense alone, rather than present and past tenses, referring to an immigrant "who is not in possession" of certain documents.[155] Other exclusion provisions used the present and the past tenses.[156] This change in language provides further evidence that a lack of documents was not intended to permanently exclude an alien.[157] Thus, the court found that the documentation requirements that originally prevented the Karims from being admitted would not preclude adjustment of their status.[158]

Secondly, the district director argued that the Karims were excludable under § 1182(a)(7)(B).[159] The court found this section inapplicable because it only refers to "nonimmigrants."[160] The Karims did not qualify as such since each member of the family qualified as an immigrant as

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151. Karim, 1998 WL 60949, at *5. *See also* Douglas v. INS, 28 F.3d 241, 244 (2d Cir.1994).

152. *Id.* at *6. Immigration and Nationality Act 8 U.S.C. § 1182 (a)(7)(A)(i)(I) (1998) (stating that any immigrant "who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document . . . is excludable.").

153. 8 C.F.R. § 245.4 (1998) (stating, "the documentary requirements for immigrants shall not apply to an applicant under this part").

154. Karim, 1998 WL 60949, at *6.

155. *Id. See* *6 n.8 (1998).

156. *Id.* Immigration and Nationality Act 8 U.S.C. § 1182(a)(6)(E) (1998) (referring to an alien "who at any time" engaged in immigrant smuggling); § 1182 (a)(6)(C) (1998) (referring to an alien who "seeks to procure (or has sought or procured)" documents by fraud); § 1182 (a)(1)(D) (1998) (referring to an alien who "is or has been" a member of a totalitarian party).

157. Karim, 1998 WL 60949, at *6.

158. Karim, 1998 WL 60949, at *6.

159. Immigration and Nationality Act 8 U.S.C. § 1182(a)(7)(B)(i)(II) (1998) (stating that any nonimmigrant who "is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission is excludable.").

160. Karim, 1998 WL 60949, at *6.

defined by 8 U.S.C. § 1101(a)(15) which included every alien except those within certain specific exceptions.[161] The INS abandoned this argument in their briefs before the court.[162]

Finally, the district director denied the Karims' adjustment of status claiming that they were excludable under § 1182 (a)(6)(C).[163] In the words of the director, the Karims "presented fraudulent documents in an attempt to gain entry into the United States."[164] However, the court relied on *Matter of D.L & A.M.* where the Board of Immigration Appeals ("BIA") held that an alien is excludable under § 1182(a)(6)(A) only if there is evidence that the alien intended to present fraudulent documents to an authorized official of the United States Government.[165] Similarly, in *Matter of Y.G.*, the BIA determined that even though the alien had used a false passport to arrive in the United States, because he "gave his real name, stated that the documents he possessed were not his own" and was otherwise forthright with the officials, no misrepresentation had occurred.[166] Likewise, the Karims did not use their fraudulent passports to gain admission to the United States. Rather, they revealed their true identities to the United States Official immediately upon their arrival in New York.[167]

In *Garcia v. INS*, the court held that exclusion under the misrepresentation provision requires "subjective intent" on the part of the alien, involving willful, deliberate behavior."[168] Although the Karims possessed fraudulent passports, the family's immediate renunciation of the passports at JFK airport was evidence of their honest intentions.[169] Thus, the court held that there was no attempt by the Karims to misrepresent themselves to a United States official.[170]

The district director denied the Karim family an adjustment of status. He believed the decision was within his discretion and not within the jurisdiction of the Second Circuit. However, the court held that the case was within their jurisdiction and that the district director did not

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161. *Id.*

162. *Id.*

163. Immigration and Nationality Act 8 U.S.C. § 1182(a)(6(C)(i) (1998) (stating, "Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure a visa, other documentation, or entry into the United States or other benefit provided under this chapter is excludable.").

164. Karim, 1998 WL 60949, at *6.

165. *Id.* at *7. *See* Matter of D.L. & A.M., Int. Dec. # 3162 (BIA Oct. 16, 1991).

166. Karim, 1998 WL 60949, at *7. *See* Matter of Y.G., Int. Dec. # 3219 (BIA May 5, 1994).

167. Karim, 1998 WL 60949, at *7.

168. Karim, 1998 WL 60949, at *7. *See* Garcia v. INS, 31 F.3d 441, 443 (7th Cir.1994) (citing Suite v. INS, 594 F.2d 972, 973 (3d Cir.1979).).

169. Karim, 1998 WL 60949, at *7.

170. *Id.*

base his decision on balanced reasoning and governing law. As a result, the court found that the Karims were entitled to an adjustment of status.

IV. Quasi-In-Rem Jurisdiction and the Question of Due Process For Foreign Entities.

A. *Orient Overseas Container Line v. Kids International Corp., No. 96 Civ. 4699 (DLC), 1998 WL 531840 (S.D.N.Y. Aug 24, 1998); Under the due process standards of International Shoe Co. v. Washington, third-party defendants, China Export and Shanghai North, lacked sufficient minimum contacts with the forum as to permit the exercise of quasi-in-rem jurisdiction and allow a motion for attachment by third-party plaintiff Kids International Corp.*

In *Orient Overseas Container Line v. Kids International Corp.* the United States District Court for the Southern District of New York held that under the Constitutional due process requirements presented in *International Shoe Co. v. Washington,* third-party defendants, Frame International Ltd., China Export Bases Development Shanghai Corp. ("China Export") and Shanghai North Rex-Pu Industries Corp. ("Shanghai North"), lacked sufficient minimum contacts with the forum to permit the exercise of quasi-in-rem jurisdiction which resulted in the denial of a motion for attachment by third-party plaintiff Kids International Corp., ("Kids").[171] In April 1995, China Export and Shanghai North were awarded a judgment against Orient Overseas Container Lines ("Orient") blaming Orient for the improper release of goods without original bills of lading.[172] June 24, 1996, Orient commenced the present action seeking to force Kids to honor the parties' indemnity letters justifying the release of these goods.[173] Kids then sought attachment of the money judgment awarded in 1995 to China Export and Shanghai North.[174] Orient now opposes Kids motion stating that China Export and Shanghai North have insufficient contacts with the New York forum to establish personal jurisdiction and allow for attachment.[175]

In 1994, Kids, a New York clothing corporation, contracted to purchase apparel in the amount of $970 million from third-party defendant, Frame International, who was a joint venturer with third-party de-

171. Orient Overseas Container Line v. Kids International Corp., No. 96 CIV. 4699 (DLC), 1998 WL 531840, at *7 (S.D.N.Y. Aug 24, 1998).

172. *Id.* at *1.

173. *Id.*

174. *Id.* at *1.

175. *Id.*

fendant, Yangzhou Elizabeth Garments Co., Ltd. ("Elizabeth").[176] Elizabeth subcontracted a portion of the manufacturing work to China Export.[177] When Elizabeth and China Export did not acquire necessary export quotas to effect shipment of the goods to Kids, Shanghai North became involved and was named the shipper on the remaining two bills.[178] Plaintiff Orient, a Hong Kong corporation, was selected to transport the clothing from China to the United States.[179]

Orient transported the goods to New York and upon arrival notified Kids that in order to release the goods under the shipment terms Kids needed to present Orient with original bills of lading.[180] Kids, unable to locate the original bills of lading, would only receive the clothing upon agreement to sign letters of indemnity holding Orient harmless to claims brought against Orient as a result of its release of the goods without the original bills of lading.[181] Kids never made payments on the clothing to any third party defendants, claiming the garments were defective.[182]

In April 1995, to secure payment goods, China Export and Shanghai North commenced an action in Shanghai Maritime Court against Orient for the improper release of goods without obtaining the bills of lading.[183] In 1996, Orient initiated the present action seeking an order requiring Kids to honor the parties' indemnity letters by way of intervention and injunction.[184]

Kids filed a Third Party Complaint demanding damages from third-party defendants and a Notice of Motion for an order of Attachment of the 1995 Shanghai Judgement pursuant to Supplemental Rule B(1) Fed. R. Civ. P. or 4(n)(2) Fed. R. Civ. P.[185]

The issue presented to the Southern District of New York was whether Kids may attach the Shanghai Judgement awarded against the Orient and establish quasi-in-rem jurisdiction in this Court over China Export and Shanghai North.[186] The court, in considering an attachment to attain quasi-in-rem jurisdiction, focused on two factors: (1) Whether the movant has satisfied the conditions for an order of attachment under the procedural rules; and, (2) whether the court's exercise of jurisdiction

176. *Id.*
177. Orient, 1998 WL 531840, at *1.
178. *Id.*
179. *Id.* at *2
180. *Id.*
181. *Id.*
182. *Id.*
183. Orient, 1998 WL 531840, at *2.
184. *Id.*
185. *Id.*
186. *Id.*

over the defendants, if attachment occurs, satisfies Constitutional standards of due process. The court found Kid's arguments failed the latter aspect of this test.[187]

Kids first argued that it may obtain a motion for attachment under Supplement Rule B(1) of the Federal Rules of Civil Procedure (Admiralty) which was easily rejected by the court.[188] The court concluded Kids could not apply Rule B(1) because they filed no claim in admiralty against China Export and Shanghai North which is required for an attachment under the rule.[189]

In determining the acceptance of attachment under Rule 4(n)(2) Fed. R. Civ. P., the court reasoned that Kids did satisfy all of the circumstances under Article 62 of the C.P.L.R.[190] Thus, Kids was entitled to an order of attachment against China Export and Shanghai North. The sole question that remained for the court was whether the use of the attachment, a procedure to establish jurisdiction over these entities, was consistent with prevailing Constitutional standards.

The standard needed to exercise quasi-in-rem jurisdiction and fulfill Constitutional due process requirements is established in *International Shoe Co. v. Washington.*[191] The Southern District Court considered whether minimum contacts existed as to be "fair and just" in forcing foreign corporations to defend an action in New York initiated by attachment.[192] It was decided Kids did not satisfy the burden of the minimum contacts test as set forth in *International Shoe.*[193]

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187. Intermeat v. American Poultry, 575 F.2d 1017, 1020 (2d.Cir.1978) (*holding*: Minimum contacts were satisfied when a non-resident defendant had "continuous involvement in the commerce of New York, had repeatedly consented to arbitration in New York, and purchased meat through New York importers.").

188. FED.R.CIV.P.SUPP.RULE B (1), ("The rule envisions that the [attachment]order will issue when the plaintiff makes a prima facie showing that he has a maritime claim against the defendant in the amount used for and the defendant is not present in the district.").

189. Orient, 1998 WL 531840, at *3.

190. *Id.* at *3 - *4, (The relevant provision of New York law to which the Rule points is found in Article 62 of the C.P.L.R., §6201, "[A]n order of attachment may be granted" when the defendant "is a foreign corporation not qualified to do business in the state.").

191. *Id.* at *5. *See* International Shoe v. Washington, 326 U.S. 310, 66 S.Ct. 154 (*holding*: "Due process requires that the defendant have certain minimum contacts with [the forum], such that the maintenance of the suit does not offend traditional notions of fair play and justice.") and Orient Overseas Container Line v. Kids International Corp., No. 96 Civ. 4699 (DLC), 1998 WL 531840 (S.D.N.Y. Aug 24,1998).

192. International Shoe v. Washington, 326 U.S. 310, 66 S.Ct. 154. *See*, APC Commodity Corp. v. Ram Dis Ticaret A.S., 965 F.Supp. 461, 465 (S.D.N.Y.1997) (*holding*: "The test is whether there are sufficient minimum contacts to make it fair and just that the foreign corporation be required to come to New York to defend the action that was begun by attachment.").

193. *Id.*

General jurisdiction could not be established due to lack of systematic contacts. It was stipulated that China Export and Shanghai North had no offices, employees, or bank accounts in New York nor did they solicit, transact, or have a license for business in New York.[194] Thus, the court reasoned that there was no systematic contacts and no jurisdictional presence in the district.[195] China Exports and Shanghai North had no direct contacts with New York to show continuous involvement in the commerce of New York.[196]

The court further considered that the only way China Export and Shanghai North could have minimum contacts with New York was by the contract they both had with Elizabeth and Frame.[197] Minimum contacts with the forum did not exist by virtue of their contacts with these entities that had minimum contacts.[198] Kids argued that minimum contacts was satisfied because China Export and Shanghai North knew the garments were destined for New York and intended to gain financially from the transaction in the forum.[199] This argument was rejected by the court.

Ultimately, the court held that Kids failed to fulfill the due process requirement to enable quasi-in-rem jurisdiction over the third-party defendants due to a lack of evidence of purposeful acts which would establish minimum contacts in New York.[200] The result eliminated a possibility of the appearance of China Export and Shanghai North before the New York forum.[201]

V. Warsaw Convention

A. *Shah v. Pan American World Services, Inc., 148 F.3d 84 (2nd Cir.(NY) June 15, 1998); A claim for fraudulent misrepresentation may be considered willful misconduct under the Warsaw Convention; the liability causation standard established by the Warsaw Convention is whether the damages would have occurred had the carrier performed as promised.*

In *Shah v. Pan American World Services, Inc.* the Second Circuit held that a claim for fraudulent misrepresentation may be considered

194. Orient, 1998 WL 531840, at *7.
195. *Id.*
196. Intermeat, 575 F.2d at 1018.
197. *Id.* at*6.
198. Orient, 1998 WL 531840, at *7.
199. *Id.*
200. *Id.*
201. *Id.*

willful misconduct under the Warsaw Convention ("Convention")[202], removing carrier liability limitations if found.[203] The Second Circuit also held that the causation standard established by the Convention is whether the damages would have occurred had the carrier performed as promised.[204]

Injured passengers and relatives of those killed during the hijacking of Pan Am Flight 73 in Karachi, Pakistan on September 5, 1986 filed suit in several United States district courts against Pan Am for damages.[205] In 1987 and 1988 the lawsuits were transferred to the Southern District of New York by the multi-district litigation panel for consolidated pre-trial proceedings under 28 U.S.C. § 1407. The court referred the consolidated case to itself in December, 1993.[206]

At trial the plaintiffs argued that Pan Am had engaged in willful misconduct by advertising it had contracted a security system for its international flights with Alert Management Systems, Inc.("Alert").[207] In April, 1994, the jury returned a special verdict determining that Pan Am did engage in willful misconduct in connection with Alert but the misconduct was not the proximate cause of the hijacking.[208] The district court entered a final judgement for damages within the limitations of the Convention.[209] On appeal, the Second Circuit determined that fraudulent misrepresentation can be considered willful misconduct in actions brought pursuant to the Convention.[210]

Article 17 of the Convention establishes liability for the death or wounding of passengers on board aircraft, subject to limitations established in Article 22.[211] However, Article 25 removes limitations for damages caused by willful misconduct,[212] which the court defined as actions taken with the knowledge injury or death would probably result

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202. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention") *concluded* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C.A. § 40105 (1997).

203. Shah. v Pan Am. World Serv., Inc., 148 F.3d 84, 92 (2nd Cir.(NY) June 15, 1998).

204. *Id.* at 95.

205. *Id.* at 88.

206. *Id.*

207. *Id.* (Only one set of the plaintiffs, the Singhs, allegedly relied on these representations in choosing Pan Am. Sadanand Singh brought suit individually and as executor of the estates of Kala, Samir, and Kalpana Singh. There were several additional plaintiffs to the appeal).

208. Shah, 148 F.3d at 88-89.

209. *Id.* at 89, 93.

210. *Id.* at 93.

211. Shah, 148 F.3d. at 92 *citing* Warsaw Convention *supra* note 1, at arts. 17, 22. (Liability limitations under Article 22 of the Warsaw Convention were modified by the Montreal Agreement, approved by the U.S. *See* Exec Order No. 23,680, 31 Fed.Reg. 7,302 (1966)).

212. Shah, 148 F.3d at 93 *citing* Warsaw Convention *supra* note 1, at art. 25(1).

or a "conscious or reckless disregard of . . . the consequence of its actions."[213] The court found the Convention did not require equal treatment for all passengers when only some were injured by a carrier's misconduct.[214]

The court then looked to the Convention to establish the proper causation standard for willful misconduct claims. Article 24 restricts damage actions under Article 17 to the conditions and limits of the convention itself.[215] Because there are no provisions suggesting causation to be determined otherwise, and as the Convention was intended to create a uniform standard,[216] the court held it is the law of the Convention itself which applies to the causation question and no other jurisdictional standard.[217]

The court examined three possible interpretations of the Convention language before establishing the proper standard. First, it rejected but-for causation as overly broad and insufficient.[218] This approach would allow a passenger lured on board by a misrepresentation of comfort and luxury then injured in a hijacking to file a claim because the false advertising caused them to board and suffer injury.[219]

The Singh plaintiffs urged a second interpretation, linking both reliance on misrepresentation and the relationship between injuries and the misrepresentation.[220] The court found that if the representations made had been carried out and injuries still would have occurred, the misrepresentations could not be said to have caused the injures.[221] Holding carriers liable for actions that would have occurred regardless of whether the representations were performed as advertised would be counter to one of the primary purposes of the Convention, limiting carrier liability.[222]

It was the third interpretation which the court adopted. To establish causation for willful misconduct under Article 25, plaintiffs must demonstrate a reasonable reliance on fraudulent misrepresentation as an

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213. Shah, 148 F.3d at 93 *citing* Pagnucco v. Pan American World Airways, Inc. (*In re* Air Disaster at Lockerbie, Scotland on Dec. 21, 1988), 37 F.3d 804, 812 (2nd Cir.(NY), September 12, 1994)("Lockerbie II").

214. *Id.*

215. Shah, 148 F.3d at 93 *citing* Warsaw Convention *supra* note 1, at art. 24.

216. Shah, 148 F.3d at 94 *citing* Rein v. Pan American World Airways Inc. (In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988), 928 F.2d 1267, 1270, 1280 (2nd Cir.(NY), March 22, 1991)("Lockerbie I").

217. Shah, 148 F.3*d* at 95.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

inducement to use the carrier and then show "the damages would not have occurred if the carrier had performed as promised."[223] Under this definition, the Article 22 liability cap is not removed in the instant case assuming that even if the Alert program delivered as promised, it would not have prevented the hijacking.[224]

Having determined the proper standard to apply, the Second Circuit then looked to see if this was the same one used in the jury instructions and special verdict.[225] The court found that while the form of the special verdict question on misconduct as a proximate cause of the hijacking could have been better worded, the district court's instructions clarified the question of causation with language consistent with the Convention definition and, therefore, the special verdict was not subject to reversal.[226] Given the definition established by the Convention and the lack of reversible error in the special verdict handed down at trial, the court concluded there were no grounds for a misrepresentation claim.[227]

The Singh plaintiffs also challenged the English translation of the Convention. They argued it establishes a different misconduct-causation relationship than the original French text does.[228] They believed a closer translation to the original text requires the damage need only 'arise out of,' not be 'caused by,' the incident. They further argued that under this seemingly lower threshold, the special verdict is not a bar to a fraudulent misrepresentation claim.[229] The court found that under actions arising from willful misconduct, the arising out of approach might be permissible."[230] But the court found it inappropriate to rule on this issue because the plaintiffs did not object to the jury instructions or the special verdict questions before the verdict was reached.[231]

In accordance with established law, the court found that all of the state law claims the Singh plaintiffs sought were within the scope of the Warsaw Convention and state law claims which fall within the scope of the Convention are preempted.[232]

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223. Shah, 148 F.3d at 95.

224. *Id.*

225. *Id.* at 96.

226. *Id.*

227. *Id.* at 96

228. *Id.* at 96-97.

229. Shah, 148 F.3d at 97.

230. *Id.*

231. *Id.*

232. Shah, 148 F.3d at 97, 98 *citing* Fishman v. Delta Airlines, Inc., 132 F.3d 138, 141 (2nd Cir.(NY), Jan. 05, 1998)(citing Lockerbie I, 928 F.2nd at 1273).

The court also rejected appeals related to the case's referral under 28 U.S.C. § 1407.[233]

233. *Id.* at 90 (The Supreme Court had recently ruled against self-referral of §1407 cases. *see* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,—*U.S.* —-, *118 S.Ct. 956, 140 L.Ed.2d 62 (1998).* The court held that this ruling did not apply retroactively).