

## 2004-2005 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 July 1, 2003 through June 30, 2004. 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.

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I. WARSAW CONVENTION<sup>1</sup>

*A. Girard v. American Airlines, Inc. et al.*<sup>2</sup>

The Court found that it was undisputed that plaintiff's injury occurred in the course of embarkment, but held that it was an issue of fact as to whether plaintiff's fall and subsequent injury constituted an "accident" within the meaning of the *Warsaw Convention*. Plaintiff sustained injuries when she fell as she was exiting a bus with an allegedly defective step. The bus was shuttling her and other passengers from the arrival terminal at the San Juan Airport to the American Airlines terminal from which plaintiff's connecting flight would depart. The Court stated that "the Warsaw Convention contemplates a form of strict liability for injuries sustained during international air travel and makes no provision for actual or constructive notice as a prerequisite for liability."<sup>3</sup> Specifically, Article 17 of the Warsaw Convention applies "if the accident which caused the damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking."<sup>4</sup>

The Court discussed the Supreme Court's decision in *Air France v. Saks*,<sup>5</sup> in which the Supreme Court examined the meaning of "accident" for purposes of the *Warsaw Convention*. The *Saks* Court determined that "liability under Article 17 of the *Warsaw Convention* arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger."<sup>6</sup> Following the Supreme Court's direction, the Second Circuit finds "any unusual or unexpected event [to be] covered [by Chapter 17 of the *Warsaw Convention*] as long as it is external to the plaintiff."<sup>7</sup> The Court found that plaintiff had satisfied causation as to defendant airlines because her injuries were traceable causally to the operations of the defendant airlines, finding that they had constructive control over the shuttle bus transporting their passengers from terminal to terminal. According to the Court, Plaintiff also had satisfied causation with respect to the defendant who actually

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1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 127 L.N.T.S. 11 (1934), reprinted in note following 49 U.S.C. §40105.

2. 2003 U.S. Dist. LEXIS 14506 (E.D.N.Y. 2003).

3. *Id.* at 6.

4. *Id.* at 7 (quoting 49 U.S.C. §40105).

5. 470 U.S. 392, 84 L. Ed. 2d 289, 105 S. Ct. 1338 (1985).

6. *Id.* at 9 (quoting *Saks*, 470 U.S. at 405) (internal quotation marks omitted).

7. *Id.* at 10.

owned or operated the shuttle bus in question, although the Court noted that a factual dispute still existed as to the actual ownership and control of the shuttle bus. The Court then found that the incident in question was an unusual or unexpected external event because “it is not usual or expected that the stairs of a terminal bus would abruptly give way, nor would an injury incurred by such a defect be within the normal operation of an aircraft or airline.”<sup>8</sup> As such, plaintiff’s injury was covered by the *Warsaw Convention*. Nevertheless, the Court found that whether plaintiff’s injury was caused by an “accident” was an issue for a jury to decide.<sup>9</sup> A finding of fact by a jury that the step was defective would impose liability under the *Warsaw Convention*, according to the Court.<sup>10</sup>

*B. Royal & Sun Alliance Insurance v. American Airlines, Inc. et al.*<sup>11</sup>

The Court held that the United States adheres to the Hague Protocol<sup>12</sup> rather than the original *Warsaw Convention*. This litigation involves the non-delivery of cargo that was scheduled to be shipped from Brussels, Belgium to Tulsa, Oklahoma.<sup>13</sup> Plaintiffs, in a motion for partial summary judgment, argued that the original *Warsaw Convention* applied to the shipment at issue and requested that the Court dismiss defendants’ “eighth partial affirmative defense that its liability is limited by the terms of the air waybill and the Hague Protocol.”<sup>14</sup> Defendants opposed the motion to dismiss their eighth partial affirmative defense and claimed that the original *Warsaw Convention* does not apply because the United States adheres to the Hague Protocol. Article 22 of the original *Warsaw Convention* would limit defendants’ liability to \$20 per kilogram of goods unless defendants failed to set forth the “agreed stopping places” (among other things) for the shipment in the air waybill as required by Article 8 of the original *Warsaw Convention*. The Hague Protocol removed the “agreed stopping places” requirement, among other changes to the original terms.

The Court agreed with defendants that “when the United States

8. 2003 U.S. Dist. LEXIS 14506, at 29-30.

9. *Id.* at 31.

10. *Id.*

11. 277 F. Supp. 2d 265 (S.D.N.Y. 2003).

12. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on Oct. 12, 1929, Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter *The Hague Protocol*].

13. *Id.* at 265.

14. *Id.* at 266.

ratified the Montreal Protocol No. 4,<sup>15</sup> which amended the *Warsaw Convention* as amended by the Hague Protocol, the United States acceded to the Hague Protocol” (italics added).<sup>16</sup> The Court noted that the United States expressly consented to adhere to the Hague Protocol when it ratified Montreal Protocol No. 4 because Article XVII (2) of the Montreal Protocol No. 4 states that: “Ratification of this Protocol by any State which is not a party to the *Warsaw Convention* as amended by the Hague, 1955, shall have the effect of accession to the Warsaw Convention as amended by the Hague, 1955, and by the Protocol No. 4 of Montreal, 1975” (italics added).<sup>17</sup> It also stated that President Clinton’s Letter of Submittal to the Senate of the *Montreal Convention* on June 23, 2000 made it clear that with the Montreal Protocol No. 4 “the United States also became bound by the provisions of the Hague Protocol. . . .”<sup>18</sup> In addressing plaintiffs’ claims that the United States is not bound by the Hague Protocol, the Court stated that “while ratification of the Hague Protocol would resolve any remaining doubt that the United States intends to be bound by the treaty, actual ratification of the Hague Protocol is not necessary for the United States to be bound by its terms. . . it is sufficient that the United States ratified Montreal Protocol No. 4.”<sup>19</sup>

## II. ALIEN TORT CLAIMS ACT

### *A. Flores, et al. v. Southern Peru Copper Corp.*<sup>20</sup>

In *Flores, et al. v. Southern Peru Copper Corp.*, the Second Circuit affirmed the judgment of the District Court dismissing plaintiffs’ complaint for lack of jurisdiction and failure to state a claim under the Alien Tort Claims Act.<sup>21</sup> Flores and other plaintiffs, all residents of Ilo, Peru, brought personal injury claims against defendant Southern Peru Copper Corporation (SPCC), a United States company, under the Alien

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15. Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on Oct. 12, 1929, amended by Protocol Done at Hague on Sept. 28, 1955, Sept. 25, 1975, ICAO Doc. 9148, reprinted in Lawrence B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* 401 (2000) [hereinafter *Montreal Protocol No. 4*].

16. 2003 U.S. Dist. LEXIS 14506, at 6-7.

17. U.S. Dist. LEXIS 14506, at 7-8 (internal quotation marks omitted).

18. *Id.* at 8.

19. *Id.* at 10-11.

20. *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003).

21. *Id.* at 172; *see* 28 U.S.C. § 1350.

Tort Claims Act (ATCA).<sup>22</sup> The ATCA provides that “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>23</sup> Plaintiffs claimed that they (or their decedents) were suffering (or had suffered) from severe lung disease caused by pollution from SPCC’s operations in Ilo, Peru.<sup>24</sup> Plaintiffs argued that SPCC violated the law of nations (synonymous with customary international law in the context of the ATCA) by infringing upon their “right to life,” “right to health,” and right to “sustainable development.”<sup>25</sup> The district court concluded that “plaintiffs had failed to state a claim under the ATCA because they had not pleaded a violation of any cognizable principle of customary international law.”<sup>26</sup>

In upholding the district court’s dismissal of the Plaintiffs’ complaint, the Second Circuit discussed the decision in *Filartiga v. Pena-Irala*,<sup>27</sup> as the first case in which a federal appellate court recognized the ATCA as a viable basis for relief.<sup>28</sup> The *Filartiga* Court determined that it had jurisdiction under the ATCA to adjudicate the claim of two Paraguayan citizens alleging that a former Paraguayan police inspector-general had violated the customary international law prohibition against official torture when he tortured and killed a member of their family in Paraguay.<sup>29</sup> Thus, “the *Filartiga* Court not only held that the ATCA provides a jurisdictional basis for suit, but also recognized the existence of a private right of action for aliens only seeking to remedy violations of customary international law or of a treaty of the United States.”<sup>30</sup> The *Filartiga* Court then determined that the ATCA permitted private causes of action for recently-identified violations of customary international law, as opposed to only providing causes of action for violations of customary international law as customary international law was defined in 1789 when the ATCA became law.<sup>31</sup> The Second Circuit also pointed to *Kadić v. Karadžić*<sup>32</sup> which made it clear that the ATCA allowed claims to be brought against

22. *Flores*, 343 F.3d, at 143.

23. *Id.* at 143 (quoting 28 U.S.C. § 1350) (internal quotation marks omitted).

24. *Flores*, 343 F.3d, at 143.

25. *Id.*

26. *Id.* at 145.

27. *Filartiga*, 630 F.2d 876 (2d Cir. 1980).

28. *Flores*, 343 F.3d, at 149.

29. *Id.* at 149.

30. *Id.* at 149-50.

31. *Id.* at 151.

32. *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

private actors (as compared to the State official at issue in *Filartiga*).<sup>33</sup> The *Kadić* Court stated “that certain activities are of ‘universal concern’ and therefore constitute violations of customary international law not only when they are committed by state actors, but also when they are committed by private individuals.”<sup>34</sup> The Second Circuit then noted that there was a split among circuits as to whether the decision in *Filartiga*, allowing private causes of action for recently-identified customary international law, was correct. The Second Circuit concluded that

neither Congress nor the Supreme Court has definitively resolved the complex and controversial questions regarding the meaning and scope of the ATCA. Whatever the differing perspectives among judges and scholars—differences that ultimately can only be resolved by Congress or the Supreme Court—*Filartiga* remains the law of this Circuit, and we analyze the [P]laintiffs’ claims under the framework set forth in that case and its progeny.<sup>35</sup>

The Second Circuit stated that “customary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern.”<sup>36</sup> In order to determine whether something is customary international law, “courts must look at concrete evidence of customs and practices of states.”<sup>37</sup> The Second Circuit stated that

Article 38 [of the Statute of the International Court of Justice] embodies the understanding of States as to what sources offer competent proof of the content of customary international law. It establishes that the proper *primary* evidence consists only of those ‘conventions’ (that is, treaties) that set forth ‘rules expressly recognized by the contesting states,’ ‘international custom’ insofar as it provides ‘evidence of a general practice *accepted as law*,’ and ‘the general principles of *law* recognized by civilized nations,’ . . . It also establishes that acceptable *secondary* (or

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33. *Flores*, 343 F.3d, at 150.

34. *Id.*

35. *Id.* at 153.

36. *Flores*, 343 F.3d, at 154.

37. *Id.* at 156.

‘subsidiary’) sources summarizing customary international law include ‘judicial decisions,’ and the works of ‘the most highly qualified publicists,’ as that term would have been understood at the time of the Statute’s drafting.<sup>38</sup>

The Second Circuit noted that “where the customs and practices of States demonstrate that they do not universally follow a particular practice out of a sense of legal obligation and mutual concern, that practice cannot give rise to a rule of customary international law.”<sup>39</sup>

As an initial matter, the Second Circuit rejected Plaintiffs’ proposal that a cognizable claim under the ATCA existed if the action at issue was “shockingly egregious” under *Zapata v. Quinn*.<sup>40</sup> In *Zapata*, the court rejected the claim under the ATCA by an alien winner of the New York State Lottery that she was deprived of property without due process of law when her lottery proceedings were awarded to her in an annuity rather than in a lump sum.<sup>41</sup> The *Zapata* Court stated, “jurisdiction is lacking under 28 U.S.C. § 1350 (the ‘alien tort’ statute), which applies only to shockingly egregious violations of universally recognized principles of international law. . . .”<sup>42</sup> The Second Circuit clarified that *Zapata* stood for the proposition that “[t]he phrase ‘shockingly egregious’ is used descriptively, not prescriptively, merely to indicate that ‘because universal acceptance is a prerequisite to a rule becoming binding as customary international law, only rules prohibiting acts that are ‘shockingly egregious’ are likely to attain that status.”<sup>43</sup> The Second Circuit concluded that “[n]o matter how shocking or egregious an action, it does not provide the basis for a claim under the ATCA unless it violates customary international law.”<sup>44</sup>

The Second Circuit then determined that plaintiffs did not allege a violation of customary international law.<sup>45</sup> It concluded that the assertions of “right to life” and “right to health” are not “clear and unambiguous” rules of customary international law.<sup>46</sup> With respect to the claim that customary international law prohibits intra-national

38. *Flores*, 343 F.3d, at 157 (internal citations omitted) (emphasis in original).

39. *Id.* at 158.

40. *Zapata v. Quinn*, 707 F.2d 691 (2d Cir. 1983).

41. *Flores*, 343 F.3d, at 159.

42. *Id.*

43. *Id.* (internal quotation marks omitted).

44. *Id.*

45. *Id.* at 160.

46. *Flores*, 343 F.3d, at 160.

pollution, the Second Circuit held that Plaintiffs failed to demonstrate that there was such a customary international law norm. The Second Circuit reviewed the following evidence submitted by plaintiffs and found them all insufficient to support a finding of customary international law on this issue: (1) treaties, conventions and covenants; (2) non-binding declarations of the United Nations General Assembly; (3) non-binding multinational declarations of principle; (4) multinational tribunals' decisions; and (5) affidavits of international scholars.

### III. FOREIGN SOVEREIGN IMMUNITIES ACT

#### *A. Leslye Knox et al. v. The Palestinian Liberation Organization et al.*<sup>47</sup>

The Court denied defendants' claim that Palestine, the Palestinian Liberation Organization, or the Palestinian Authority were entitled to immunity from suit in the United States. In *Knox*, plaintiffs, representative heirs and survivors of the decedent, brought a claim under the Antiterrorism Act of 1990 (ATA), 18 U.S.C.S. § 2331 et seq., against a shooter, the Palestinian Liberation Organization (PLO), Palestinian Authority (PA), the chairman of the PLO and leader of the PA and other defendants. Plaintiffs claimed that defendants were responsible for decedent's death when decedent died as a result of a shooting at a bat mitzvah in Israel. Defendants claimed immunity under the provision of the ATA that bars an action against "a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority," 18 U.S.C. § 2337, and under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C.S. § 1602 et seq. The Court considered both claims to be identical because the term "foreign state" has the same meaning under the ATA and the FSIA.<sup>48</sup> The Court then rejected those claims, finding that Palestine was not recognized politically in the United States such that it should be accorded the privileges and immunities of sovereign States in the United States. In its decision, the Court determined that Palestine was not a state under international law as State is defined by the Restatement (Third)'s definition. The Restatement (Third), which has been adopted by the Second Circuit, defines a State as "an entity that has [1] a defined territory and [2] a permanent population, [3] under the control of its

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47. *Knox v. Palestinian Liberation Organization*, 306 F. Supp. 2d 424 (S.D.N.Y. 2004).

48. *Id.* at 430.

own government, and that [4] engages in, or has the capacity to engage in, formal relations with other such entities.”<sup>49</sup> With respect to whether the PA has control over its territory and population within the meaning the Restatement, the Court found that it did not because of the limited governmental power of the PA. This limited governmental power detracted from the claim that the Palestinian territory was an independent State. The Court found that the PA explicitly did not have the authority to conduct foreign relations under Article IX of the Interim Agreement on the West Bank and the Gaza Strip.<sup>50</sup>

The Court then found that even if there did exist a sovereign Palestinian State under international law, such status would not automatically make defendants immune from the Court’s subject matter jurisdiction.<sup>51</sup> Specifically, the Court noted that the United States has not recognized or otherwise treated Palestine as a sovereign State. The Court determined that although both the ATA and the FSIA excluded foreign States from the application of those statutes, nothing in either statute supported the position that traditional rules of comity would not apply. The Court added that it is the executive branch that recognizes a State as sovereign, not Congress or the Court. Since the executive branch is putatively aware of the claim of sovereign immunity in this case as well as several other cases, and has not expressed any position that Palestine is a State for purposes of foreign sovereign immunity, the Court declined “to find sovereign immunity where none may exist.”<sup>52</sup> The Court expressed its concern that if it were to find Palestine entitled to foreign sovereign immunity, even though the United States had not recognized Palestine as a State, that “may be deemed tantamount to an incongruous act of ‘judicial recognition’ of a government not recognized by the United States.”<sup>53</sup> Therefore, the Court declined to take such action.

Finally, the Court rejected Defendants’ arguments that the Court was being asked to decide non-justiciable claims. The Court noted that the intent of the ATA was to allow United States nationals justice for the atrocities that they may have suffered through acts of terrorism.<sup>54</sup>

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49. *Knox*, 306 F. Supp. 2d, at 434 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1987)).

50. *Id.* at 438.

51. *Id.* at 438-39.

52. *Id.* at 446.

53. *Id.* at 448.

54. *Knox*, 306 F. Supp. 2d, at 448.

*B. Reers et al. v. Deutsche Bahn AG et al.*<sup>55</sup>

The Court granted Defendant Deutsche Bahn AG and its subsidiaries' motion to dismiss for lack of jurisdiction under the Foreign Sovereign Immunities Act, and Defendants Accor SA and Companie Inter-Nationale des Wagons-Lits' motion to dismiss for forum non conveniens. Plaintiffs sued the nationally owned rail operator of Germany, Deutsche Bahn AG, its subsidiaries Deutsche Bahn AutoZug AG ("AutoZug") and Deutsche Bahn Reise & Touristik AG ("R&T"), the Republic of France Corporations Accor SA, Companie Inter-Nationale des Wagons-Lits and others, in a wrongful death and survival action stemming from the deaths of five of their family members due to a fire aboard the train in which they were riding in France. The train was en route to Germany. The railcar to which the decedents were assigned was owned by AutoZug, a subsidiary of Deutsche Bahn.

The Court agreed with Deutsche Bahn that it had no subject matter jurisdiction over the claims against Deutsche Bahn under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1603-10.<sup>56</sup> The Court found that Deutsche Bahn, an instrumentality of the Republic of Germany within the meaning of the FSIA, was not subject to the two statutory exceptions to immunity claimed by plaintiffs. Plaintiffs had claimed that Deutsche Bahn had waived its immunity pursuant to §1605(a)(1) or in the alternative, was not immune from the Court's jurisdiction because the action was based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act cause[d] a direct effect in the United States. . . ."<sup>57</sup> In support of their claim that Deutsche Bahn had waived its immunity, plaintiffs pointed to the *Convention Concerning International Carriage by Rail* (COTIF) to which Germany was a signatory, and which Deutsche Bahn conceded provided that each signatory "has waived its sovereign immunity with respect to damage claims arising from its railway transportation activities in other signatory countries. . . ."<sup>58</sup> The Court noted that under the treaty the signatories agreed "that personal injury actions arising from railway accidents can be filed only in the country in which the injury occurred."<sup>59</sup> The United States is not a signatory to the COTIF. The

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55. *Reers v. Deutsche Bahn AG*, 320 F. Supp. 2d 140, 149 (S.D.N.Y. 2004).

56. *Id.* at 150.

57. *Id.* at 147.

58. *Id.* (citing *Convention Concerning International Carriage by Rail* (May 9, 1980), app. A, art. 52, § 1).

59. *Id.*

Court rejected Plaintiffs' claim that the waiver contained in the treaty was "an implied waiver of immunity from suit in the United States within the meaning of the FSIA" as an overly broad reading of the treaty.<sup>60</sup> The Court noted that "the FSIA's implied waiver provision should be construed narrowly" and stated that "[P]laintiffs provide no justification for finding that through such a limited waiver [as that contained in the COTIF], Germany and its instrumentalities have impliedly waived sovereign immunity for lawsuits arising in non-signatory jurisdictions and in countries other than the country in which the injury giving rise to the suits occurred."<sup>61</sup>

The Court also rejected plaintiffs' claim that the deaths resulted from Deutsche Bahn's commercial activity outside of the United States which caused a direct effect in the United States within the meaning of the FSIA. All parties agreed that the provision of rail transportation in Europe constituted a commercial activity.<sup>62</sup> However, the Court determined that the fire causing the deaths at issue was a direct effect to those who died in France, and did not constitute an exception to sovereign immunity based on case law precedent discussed by the Court in its opinion.<sup>63</sup>

The Court then considered whether it had personal jurisdiction over AutoZug and R&T. Plaintiffs were unable to allege direct contacts between AutoZug and New York and only one contact between R&T and New York, which the Court rejected as insufficient because the contact did not show R&T "conducted a continuous course of business in New York or executed . . . contracts [with U.S. airlines which have operations in New York to develop 'rail and fly' packages for U.S. customers] in New York."<sup>64</sup> The Court then considered Plaintiffs' argument that AutoZug and R&T were "mere departments" of Deutsche Bahn, such that Deutsche Bahn's direct contacts with New York would be sufficient to result in personal jurisdiction. The Court pointed to the flaw in plaintiffs' logic in that if AutoZug and R&T were mere departments of Deutsche Bahn, they would then be entitled to Deutsche Bahn's sovereign immunity because as mere departments of Deutsche Bahn, they "are not separate corporate entities at all, but rather alter egos of an immune entity."<sup>65</sup> The Court then rejected plaintiffs' claim

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60. *Reers*, 320 F. Supp. 2d, at 147-48.

61. *Id.* at 148.

62. *Id.*

63. *Id.* at 149.

64. *Id.*

65. *Reers*, 320 F. Supp. 2d, at 149.

that it had jurisdiction over these two entities because they were doing business through an agent in New York, and concluded that plaintiffs had not made a *prima facie* showing of the Court's personal jurisdiction over AutoZug and R&T.

The Court then considered, but did not fully decide, whether it had jurisdiction over the Republic of France Corporations of Accor SA and Companie Intern-Nationale des Wagons-Lits because it granted their motion to dismiss based on the doctrine *forum non conveniens*. The Court determined that France was an adequate alternative forum because defendants were amenable to process there (under the COTIF) and French law permits litigation of the subject matter of the suit.<sup>66</sup> The Court then considered the public and private interest factors set forth in *Gulf Oil Corp. v. Gilbert*.<sup>67</sup> According to the Court, the public interest factors include "(1) the administrative difficulties arising from congested courts; (2) the imposition of jury duty on members of a community unconnected to the litigation; (3) a forum's interest in adjudicating local controversies; and (4) the potential difficulties arising from the application of foreign law."<sup>68</sup> While the Court found that the first and fourth factors added little weight to its analysis because the recent filling of judicial vacancies in New York meant less congestion in the courts and no parties had indicated any issues with applying French law, it determined that the second and third factors weighed heavily in favor of litigation in France as the most appropriate forum. This was due to France's strong interest in the lawsuit in terms of its interest in having safe trains and partners that properly maintain the trains and educate their employees, as well as the significant burden that would be imposed on New York jurors.<sup>69</sup> In considering the *Gilbert* private interest factors including "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive,"<sup>70</sup> and the financial hardship faced by each party in litigating in a distant forum, the Court found that the action should be dismissed in favor of litigation in France.

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66. *Reers*, 320 F. Supp. 2d, at 158.

67. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 91 L. Ed. 1055, 67 S. Ct. 839 (1947)

68. *Id.* at 159 (citing *Gilbert*, 330 U.S. at 508-509).

69. *Reers*, 320 F. Supp. 2d, at 160.

70. *Id.* (quoting *Gilbert*, 330 U.S. at 508) (internal quotation marks omitted).

*C. Human Rights in China v. Bank of China*<sup>71</sup>

The Court granted Defendant Bank of China's motion to dismiss Plaintiff Human Rights in China's claim that the Bank of China allegedly colluded with Chinese authorities to allow the Chinese authorities to confiscate certain funds because the Court did not have jurisdiction over the claim under the Foreign Sovereign Immunities Act. Human Rights in China (HRIC) alleged that the Bank of China (BOC) (1) refused to cancel HRIC's wire transfer of \$20,000 and return the funds; (2) made fraudulent statements to HRIC's bank regarding the status of the transferred funds; and (3) colluded with the Beijing Police which resulted in the Police confiscating the transferred funds.<sup>72</sup> On June 14, 1999, HRIC requested that \$20,000 from its New York account be transferred to the BOC's Beijing branch's bank account of "Jane Lee" (this was a fictitious name used by the Court to conceal the identity of the person at issue), a Chinese citizen.<sup>73</sup>

The purpose of the funds was apparently to provide cash to families of Chinese citizens killed in Tiananmen Square on June 4, 1989.<sup>74</sup> The HRIC usually concealed its identity out of concern that the Chinese government's reaction would be hostile by identifying itself as HRIC instead of "Human Rights in China."<sup>75</sup> The bank transfer at issue, however, was requested by a recently hired employee who identified the sender as Human Rights in China instead of HRIC.<sup>76</sup> Upon learning of the error, HRIC became concerned about Jane Lee's safety and sought to cancel the transaction.<sup>77</sup> A series of communications between HRIC's New York bank and the BOC occurred between June 15, 1999 and February 3, 2000 (in part through Society for Worldwide Inter-bank Telecommunications' (SWIFT) messages), but ultimately the funds were not returned to HRIC's New York bank.<sup>78</sup>

The BOC claimed that it had already credited the funds to Jane Lee's account prior to receiving the communication from HRIC's New

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71. *Human Rights in China v. Bank of China*, 2003 U.S. Dist. LEXIS 16436, at 1 (S.D.N.Y. Sept. 18, 2003).

72. *Human Rights in China*, 2003 U.S. Dist. LEXIS 16436, at 2.

73. *Id.* at 5-6.

74. *Id.* at 5.

75. *Id.* at 6.

76. *Id.* at 7-11.

77. *Human Rights in China*, 2003 U.S. Dist. LEXIS 16436, at 7.

78. *Id.* at 8.

York bank to cancel the transfer.<sup>79</sup> On approximately June 27, 1999, Jane Lee was detained by the Beijing Police and questioned about the funds that she claimed she had received no notice from the bank of their being deposited.<sup>80</sup> The Beijing Police then allegedly required her to withdraw the funds and immediately confiscated the funds from her.<sup>81</sup>

The parties did not dispute that under the Foreign Sovereign Immunities Act (FSIA) the BOC was an “instrumentality” of the Chinese government and therefore a “foreign State” under the FSIA.<sup>82</sup> In order for the Court to have jurisdiction over the BOC, one of the exceptions to the immunities foreign States and instrumentalities normally enjoy from suit in the United States must apply.<sup>83</sup> The Court determined that only the “commercial activity” exception of the FSIA could possibly apply.<sup>84</sup> That exception states that immunity is not available in any case

in which the action is based upon a commercial activity carried on in the United States by the foreign State; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.<sup>85</sup>

In order for the first or second commercial activity exception to apply, the “claims being litigated must be ‘based upon’ the activities within the United States—i.e., the United States commercial activities must comprise ‘those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case.’”<sup>86</sup> The Court added that “the Second Circuit imposes a requirement in lawsuits brought under the first clause of the commercial activity exception that there be a significant nexus between the United States commercial activities and the plaintiff’s cause of action.”<sup>87</sup> Although the BOC engages in a

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79. *Human Rights in China*, 2003 U.S. Dist. LEXIS 16436, at 8.

80. *Id.* at 9.

81. *Id.*

82. *Id.* at 12-13.

83. *Id.* at 13.

84. *Human Rights in China*, 2003 U.S. Dist. LEXIS 16436, at 13.

85. *Id.* at 13-14 (quoting 28 U.S.C. §1605(a)(2)).

86. *Id.* at 15 (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993)(internal quotation marks omitted).

87. *Id.* at 15.

significant amount of commercial activity in the United States, the Court found that those generalized banking activities are insufficient to satisfy either the first or second clauses of the commercial activity exception because the SWIFT messages sent from the BOC to HRIC's New York bank "were not acts carried on or performed 'in the United States'...[t]hey were acts performed in China, and that cannot be altered by the fact that they were sent to a party within the United States."<sup>88</sup>

The Court then examined whether the third clause of the commercial activity exception applied. It determined that it had insufficient information regarding whether there had been a "direct effect in the United States" within the meaning of the FSIA.<sup>89</sup> The Court discussed *Republic of Argentina v. Weltover*,<sup>90</sup> which it characterized as "[t]he leading case on the direct effect requirement."<sup>91</sup> According to *Weltover*, "an effect is 'direct' under Section 1605(a)(2) 'if it follows as an immediate consequence of the defendant's activity.'"<sup>92</sup>

The Court addressed HRIC's claim that the BOC failed to rescind the wire transfer and return the funds separately from the allegation that the BOC colluded with Beijing Police to confiscate the money. With respect to the failure to rescind the wire transfer, the Court stated that "if HRIC could establish that, at the time the [BOC] learned of [HRIC's bank's] request to reverse the wire transfer, it had not deposited the money in Jane Lee's account and could have reversed the transaction, then it would follow that the Bank's decision not to do so had a direct effect on HRIC."<sup>93</sup> Although the BOC had provided some evidence that the funds had already been deposited into Jane Lee's account before HRIC sought to cancel the transaction and claimed that banking regulations would not require the rescission of a wire transfer once funds were deposited, the Court found that additional factual information was required on this issue. Therefore, the Court denied BOC's motion to dismiss these claims against it, but noted that BOC could renew this argument after discovery was conducted on this issue.<sup>94</sup>

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88. *Human Rights in China*, 2003 U.S. Dist. LEXIS 16436, at 16.

89. *See id.* at 21.

90. *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992).

91. *Human Rights in China*, 2003 U.S. Dist. LEXIS 16436, at 18.

92. *Id.* (quoting *Weltover*, 504 U.S. at 618).

93. *Id.* at 19.

94. *Id.* at 20.

With respect to the claim that BOC colluded with Beijing Police so that Police could confiscate the funds, the Court held that the FSIA prevented it from exercising jurisdiction over that claim because the alleged acts did not occur in the United States, but rather occurred in China, and did not have a direct effect in the United States.<sup>95</sup> With regard to this issue, the Court also noted that the actions of the Beijing Police were intervening events and that if the BOC communicated with the Beijing Police on this issue, its actions were political rather than commercial.<sup>96</sup>

#### IV. LACK OF JURISDICTION OVER FOREIGN DEFENDANTS

##### *A. In re Ski Train Fire in Kaprun, Austria*<sup>97</sup>

Court granted motion to dismiss for lack of personal jurisdiction of Defendant Gletscherbahnen Kaprun AG (GBK). Plaintiffs, the parents, spouses and grandparents of eight Americans who died in a November 2000 ski train fire in Kaprun, Austria, claimed that the Court had personal jurisdiction over GBK based on GBK's website advertising, promotional activities and spoliation of evidence.<sup>98</sup> The Court noted that in order to exercise personal jurisdiction over a defendant, the plaintiff must show that the defendant is subject to personal jurisdiction under the forum State's laws and that the exercise of such jurisdiction comports with due process.<sup>99</sup> The Court determined New York was the forum State and therefore examined whether it had jurisdiction under Sections 301 and 302(a) of New York Civil Procedure. It found that it did not have general jurisdiction under Section 301 because GBK's alleged marketing activities were not sufficient to constitute "doing business" in New York.<sup>100</sup>

The Court stated that GBK's alleged advertising abroad, even if it constituted contacts with the United States, was insufficient to allow the exercise of jurisdiction by New York courts over GBK. The Court also found that allegations that GBK offered discount promotions to military bases and businesses in New York was not sufficient to constitute "doing business" in New York. Finally, the Court held that "a

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95. *Human Rights in China*, 2003 U.S. Dist. LEXIS 16436, at 21-22.

96. *Id.* at 22-23.

97. *In re Ski Train Fire in Kaprun, Aus.*, 2003 U.S. Dist. LEXIS 22139, at 4 (S.D.N.Y. Dec. 9, 2003).

98. *Id.* at 11.

99. *Id.*

100. *Id.* at 15.

defendant's website alone cannot form the basis for general jurisdiction in New York because 'the fact that a foreign corporation has a website accessible in New York is insufficient to confer jurisdiction under CPLR § 301.'<sup>101</sup>

The Court then examined whether jurisdiction was proper under Section 302(a)(1), New York's long-arm statute which allows a court to exercise jurisdiction over a nondomiciliary if "the nondomiciliary transacts business within the state, [and] the claim against the nondomiciliary arises out of that business activity."<sup>102</sup> The Court then examined whether GBK's website activity and other marketing activities allowed the exercise of jurisdiction under the long-arm statute. It concluded that they did not. The Court stated that while "interactive" websites generally support a finding of personal jurisdiction, Plaintiffs had failed to allege a substantial relationship between the website and their claims. That is, there was no allegation that the website was visited by the victims of the ski train fire or that they had used the website to make their November 2000 reservations.

With respect to GBK's other marketing activities, such as marketing to English-speaking people and discounts for U.S. military personnel, the Court found that they were also insufficient to confer long-arm jurisdiction under 302(a)(1) because Plaintiffs did not allege that these activities "rose to the level of GBK's 'transacting business' in New York either in terms of frequency or revenue and a connection between the victims of the ski train fire and the discounts."<sup>103</sup> Finally, the Court rejected Plaintiffs' argument that GBK's European marketing activities were sufficient for the basis of personal jurisdiction because contacts with U.S. military bases abroad, even assuming *arguendo* that they constituted contacts with U.S. territory were nevertheless not contacts with New York.

The Court then examined whether personal jurisdiction existed under Section 302(a)(3) which allows personal jurisdiction to

be asserted over a non-domiciliary if the non-domiciliary 'commits a tortuous act without the state' injuring a person within New York, and either (i) 'regularly does or solicits business, or engages in any other persistent course of conduct,' or (ii) derives substantial revenue from interstate

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101. *In re Ski Train Fire*, 2003 U.S. Dist. LEXIS 22139, at 15.

102. *Id.* at 16.

103. *Id.* at 21-22.

commerce and expects or reasonably should expect the tortuous act to have consequences in the state.<sup>104</sup>

The Court stated that exercise of jurisdiction under this provision required the court to apply a "situs-of-injury test" to determine whether the original event which caused the injury was in New York. According to the Court, the original event from which the case arises was GBK's tortuous acts relating to the ski train fire in Kaprun, Austria, not injury to a person within New York.<sup>105</sup> Finally, the Court rejected Plaintiffs' argument that because the Court ordered GBK to preserve evidence and allegedly destroyed that evidence (that is, GBK's alleged spoliation of evidence), the Court now had jurisdiction over GBK. The Court noted that its "orders to preserve evidence explicitly preserved GBK's right to challenge the underlying action on the basis of personal jurisdiction."<sup>106</sup>

## V. EXTRADITION

### A. *In re Extradition of Muhamed Sacirbegović*<sup>107</sup>

In the matter of the *Extradition of Muhamed Sacirbegović*, the Court denied the application of Muhamed Sacirbegovic, a/k/a/ "Muhamed Sacirbey" (Sacirbey), a naturalized U.S. citizen, to be released on bail pending a hearing on the Federation of Bosnia and Herzegovina's (BiH) formal request for his extradition. BiH requested Sacirbey's extradition pursuant to its Mutual Extradition Treaty with the United States ("Treaty") because "Sacirbey has been charged in BiH with the crime of abuse of position or powers in violation of Article 358, Paragraph 3, of the BiH Criminal Code."<sup>108</sup> These charges stemmed from allegations that Sacirbey had withdrawn funds from the BiH's Permanent Mission to the United Nations and General Consulate and from an account belonging to the Republic of Bosnia and Herzegovina Investment Fund Ministry and transferred them into his private bank accounts.<sup>109</sup> Subsequently, Sacirbey was arrested pursuant to a Complaint for Arrest with a View Toward Extradition, and detained.

Sacirbey applied for bail pending his extradition hearing. As an

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104. *In re Ski Train Fire*, 2003 U.S. Dist. LEXIS 22139, at 26.

105. *Id.* at 27.

106. *Id.* at 29.

107. *In re Extradition of Muhamed Sacirbegović*, 280 F. Supp. 2d 81 (S.D.N.Y. 2003).

108. *Id.* at 82.

109. *Id.*

initial matter, the Court noted that “bail applications in extradition cases are typically denied in the absence of ‘special circumstances’ [because] if the accused were to be released on bond and thereafter absconded, the mere surrender of a quantity of cash or other property ‘would hardly meet the international demand’ and could cause the United States government ‘serious embarrassment.’”<sup>110</sup> The Court then considered Sacirbey’s argument that his request for bail should be granted because he does not need to show “special circumstances” for three reasons: (1) the BiH has not formally charged him with any crime; (2) he is a U.S. citizen; and (3) the criminal acts alleged by BiH occurred in the United States.<sup>111</sup> The Court rejected all three claims.

With respect to the claim that he has not been formally charged in BiH, the Court cited to *Borodin v. Ashcroft*,<sup>112</sup> in which the court stated that “the ‘charge’ requirement is satisfied by a requesting nation’s intent to prosecute as evidenced by he record.”<sup>113</sup> The Court then found that there was sufficient information in the BiH’s request for extradition to suggest an intent to prosecute Sacirbey, thereby satisfying the charge requirement. The Court also rejected Sacirbey’s position that because he was a U.S. citizen and the Treaty did not compel the extradition of American citizens, there was no “overriding national interest” regarding his extradition and his constitutional individual liberty interests should therefore prevail in this matter.<sup>114</sup> The Court noted that the Secretary of State has the discretion to extradite a U.S. citizen. As such, “[t]he fact that the United States is not compelled to extradite Sacirbey therefore does not constitute a basis for ignoring the presumption that an accused whose extradition is sought will not be granted bail in the absence of ‘special circumstances.’”<sup>115</sup> Indeed, the Court stated that “there consequently is a presumption against bail for someone whose extradition has been formally sought.”<sup>116</sup>

The Court then rejected Sacirbey’s claims that the Court lacked jurisdiction to order his extradition because the alleged crimes were committed in the United States rather than in BiH and he was not a “fugitive” within the meaning of the Treaty. The Treaty provides for the extradition of persons “who, having been charged with or convicted

110. *In re Extradition of Muhamed Sacirbegović*, 280 F.Supp.2d, at 83.

111. *Id.*

112. *Borodin v. Ashcroft*, 136 F. Supp. 2d 125, 129 (E.D.N.Y. 2001).

113. *In re Extradition of Muhamed Sacirbegović*, 280 F.Supp.2d, at 84 (internal quotation marks omitted).

114. *Id.*

115. *Id.* at 85.

116. *Id.* at 83.

of any of the crimes and offenses specified in the following article, committed within the jurisdiction of one of the high contracting parties, shall seek asylum or be found within the territories of the other. . . .”<sup>117</sup> The Court stated that the use of the phrase “committed within the jurisdiction” must be construed in a manner to support BiH’s request, and therefore meant subject to the legal authority of BiH to hear and decide a case as proposed by the U.S. government rather than Sacirbey’s claim that it meant the crime was committed in BiH.<sup>118</sup> Finally, with respect to Sacirbey’s “fugitive” claim, the Court noted that the Treaty applied to the “fugitive or person so charged” and therefore jurisdiction was not dependent on Sacirbey being a “fugitive.”<sup>119</sup> The Court then noted that, in any event, “fugitive” in American extradition treaties is “usually construed to regard fugitive as one who is charged with having committed a crime punishable under the laws of the demanding State, but who is not to be found in that territory after allegedly committing the crime.”<sup>120</sup>

Having thus disposed of Sacirbey’s arguments that its request for bail should be granted because he was not required to show “special circumstances,” the Court then considered and rejected Sacirbey’s arguments that under the “special circumstances” standard the Court should grant bail. The Court found that Sacirbey’s alleged “special circumstances” of (1) eligibility for bail in BiH; (2) BiH’s political situation; (3) likelihood of prevailing at the extradition hearing; and (4) alleged lack of flight risk, did not constitute “special circumstances” such that he should be released from custody pending the extradition hearing. With respect to being eligible for bail in BiH, the Court stated that “there is no basis for Sacirbey’s suggestion that the mere possibility of bail in the requesting nation constitutes a special circumstance.”<sup>121</sup> The Court then rejected Sacirbey’s claim that the political situation in BiH was fractious and he would be recognized, and stated, “There does not appear to be any Second Circuit case law suggesting that persons charged with alleged political offenses are entitled to special consideration by being granted bail pending an extradition hearing,” and that in any event, there was no information on the record that Sacirbey

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117. *In re Extradition of Muhamed Sacirbegović*, 280 F.Supp.2d, at 85 (quoted in Treaty, Art. 1) (internal quotation marks omitted).

118. *Id.*

119. *Id.*

120. *Id.* at 86 (quoting *United States v. Marasco*, 275 F. Supp. 492, 496 (S.D.N.Y. 1967) (internal quotation marks omitted).

121. *Id.* at 87.

was not an “ordinary potential extraditee.”<sup>122</sup>

With respect to Sacirbey’s likelihood of success on the merits argument, the Court rejected, as meritless, Sacirbey’s argument that the extradition request would fail because the Treaty covered persons who committed crimes in BiH (and he did not). The Court also found that Sacirbey’s second likelihood of success on the merits claim, that the evidence submitted in support of the extradition request was insufficient on its face, would be unsupported and in any event would be addressed at the extradition hearing.<sup>123</sup> The Court then found that even if Sacirbey was not a flight risk, this was not a “special circumstance.” Finally, the Court considered whether the factors combined rose to the level of a “special circumstance,” and determined that Sacirbey’s “special circumstances” showing was insufficient to justify bail.<sup>124</sup>

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122. *In re Extradition of Muhamed Sacirbegović*, 280 F.Supp.2d, at 88.

123. *Id.*

124. *Id.*