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She's Got a Ticket to Ride: The Ninth Circuit's Determination in *Sachs v. Republic of Austria* That a Ticket Sale by a Common Law Agent Abrogates a Foreign State-Owned Common Carrier's Sovereign Immunity

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SHE’S GOT A TICKET TO RIDE: THE NINTH CIRCUIT’S DETERMINATION IN *SACHS v. REPUBLIC OF AUSTRIA* THAT A TICKET SALE BY A COMMON LAW AGENT ABROGATES A FOREIGN STATE-OWNED COMMON CARRIER’S SOVEREIGN IMMUNITY

Abstract: On December 6, 2013, in *Sachs v. Republic of Austria*, the U.S. Court of Appeals for the Ninth Circuit, sitting en banc, held that a foreign state-owned common carrier carries on commercial activity in the United States when it sells rail passes through a United States ticket agent. In so holding, the court expanded the scope of jurisdiction over foreign state-owned entities to include claims arising from transactions with common law agents of foreign states. This Comment argues that the Ninth Circuit correctly applied principles of agency law to foreign state-owned common carriers acting through domestic ticket agents, and that, on review, the U.S. Supreme Court should hold the same. Further, this Comment urges Congress to articulate a uniform standard to avoid inconsistencies between the common law in various states.

INTRODUCTION

The Foreign Sovereign Immunities Act (“FSIA”) prescribes the sole means by which a United States court may exercise jurisdiction over a foreign state.¹ A foreign state enjoys jurisdictional immunity from suit in the United States unless the complained-of conduct meets one of the statute’s exceptions

¹ See 28 U.S.C. § 1604 (2012) (“[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided [by the exceptions] in this chapter.”); see also H.R. REP. NO. 94-1487, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610 (explaining that the FSIA establishes the “sole and exclusive standards” for determining whether a foreign state is entitled to sovereign immunity). Historically, the common law extended complete immunity to foreign sovereigns, but as interactions between nations changed over time, a more qualified approach to foreign sovereign immunity became appropriate. See *Doe v. Holy See*, 557 F.3d 1066, 1071–72 (9th Cir. 2009) (citing *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812)). Initially, exceptions to immunity were decided through an ad hoc system of U.S. Department of State recommendations. See *id.* (recounting this state of affairs). In 1976, Congress enacted the FSIA to provide a comprehensive set of rules governing sovereign immunity and exceptions thereto. Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1602–1611); see *Holy See*, 557 F.3d at 1071–72 (explaining the history of United States sovereign immunity policy).

to immunity.² One such exception is for claims arising from a foreign state's commercial acts.³ Under the FSIA, sovereign immunity is abrogated when a plaintiff brings a claim based upon a foreign state's commercial act carried on in the United States.⁴

In April 2007, an American tourist sustained severe injuries while attempting to board a train in Innsbruck, Austria, resulting in the amputation of both legs above the knee.⁵ The tourist brought a tort action in the U.S. District Court for the Northern District of California seeking compensation from the rail system for her injuries.⁶ The rail system, however, is owned and operated by the Republic of Austria and thus enjoys a presumption of sovereign immunity under the FSIA.⁷ In 2013, in *Sachs v. Republic of Austria* (“*Sachs III*”), the U.S. Court of Appeals for the Ninth Circuit, on rehearing en banc, concluded that a foreign state-owned common carrier carries on commercial activity in the United States when it sells rail passes through a domestic ticket agent.⁸ Consequently, the Ninth Circuit held that a United States court has jurisdiction over claims arising from the ticket sale.⁹

² See 28 U.S.C. §§ 1604–1605. The most common exceptions include (1) the commercial activity exception, (2) the tortious activity exception, and (3) the terrorism exception. See *id.* §§ 1605(a)(2), 1605(a)(5), 1605A.

³ *Id.* § 1605(a)(2); accord H.R. REP. NO. 94-1487, at 7, reprinted in 1976 U.S.C.C.A.N. at 6605 (explaining that sovereign immunity under the FSIA is restricted to suits arising from a foreign state's public acts (“*jure imperii*”) and does not extend to suits involving a foreign state's commercial acts (“*jure gestionis*”).

⁴ See 28 U.S.C. § 1605(a)(2).

⁵ See *Sachs v. Republic of Austria* (*Sachs I*), No. C 08-1840 VRW, 2011 WL 816854, at *1 (N.D. Cal. Jan. 28, 2011), *aff'd*, 695 F.3d 1021 (9th Cir. 2012), *rev'd en banc*, 737 F.3d 584 (9th Cir. 2013), *cert. granted sub nom.*, OBB Personenverkehr AG v. Sachs, 135 S.Ct. 1172 (2015).

⁶ See *id.*

⁷ See 28 U.S.C. § 1605(a)(2); *Sachs I*, 2011 WL 816854, at *4 (ruling that a foreign-state owned rail provider enjoys sovereign immunity); see also *Sachs v. Republic of Austria* (*Sachs II*), 695 F.3d 1021, 1029 (9th Cir. 2012) (upholding this ruling), *rev'd en banc*, 737 F.3d 584 (9th Cir. 2013), *cert. granted sub nom.*, OBB Personenverkehr AG v. Sachs, 135 S.Ct. 1172 (2015).

⁸ See 737 F.3d 584, 587–88 (9th Cir. 2013) (en banc) (overturning the panel court decision which held that no agency relationship existed between the ticket agent and the rail system), *cert. granted sub nom.*, OBB Personenverkehr AG v. Sachs, 135 S.Ct. 1172 (2015); see also James E. Berger & Charlene C. Sun, 9th Cir. Clarifies ‘Commercial Activity’ Under FSIA, LAW360, (Jan. 6, 2014, 12:01 PM), http://www.kslaw.com/imageserver/KSPublic/library/publication/2014articles/1-6-14_Law360.pdf, archived at, <http://perma.cc/6AMN-M5E5>. The en banc majority and dissent disagreed over the legal standard to apply to determine whether the domestic ticket agent was in fact an agent of the foreign state-owned rail system for purposes of whether the latter carried on commercial activity in the United States. Compare *Sachs III*, 737 F.3d at 593–94 (majority opinion) (holding that common law principles of agency should govern), with *id.* at 605–07 (O’Scannlain, J., dissenting) (urging application of the FSIA’s definition of agency, or in the alternative, the standard announced by the U.S. Supreme Court in *First National City Bank v. Banco El Comercio Exterior de Cuba* (“*Bancec*”), 462 U.S. 611, 629 (1983)).

⁹ *Sachs III*, 737 F.3d at 587. Under the FSIA, where the commercial activity exception is met, a United States court has subject matter jurisdiction over a party’s claims. See 28 U.S.C. § 1330 (2012). Whether the FSIA also confers personal jurisdiction over a claim remains contested. See

This Comment suggests that common law agency offers the best approach for determining whether acts of a purported agent can be imputed to a foreign state-owned common carrier.¹⁰ Part I of this Comment provides an overview of the FSIA commercial activity exception and discusses the factual and procedural history of the *Sachs III* decision.¹¹ Part II of this Comment examines three proposed standards for evaluating when a foreign state carries on commercial activity through an agent.¹² Finally, Part III of this Comment concludes that common law agency principles best align with legislative intent and important policy goals, but acknowledges that Congress should clarify the issue to attain uniformity in application.¹³

I. THE FSIA AND PLAINTIFF'S INJURY ABROAD

The FSIA outlines various exceptions to sovereign immunity.¹⁴ An exception is provided for claims based upon a foreign state's commercial activity.¹⁵ Section A of this Part first explains the history behind, and elements of, the FSIA commercial activity exception.¹⁶ Section B then describes the events leading to Plaintiff's injury in the *Sachs* case.¹⁷ Finally, Section C explores the case's journey through the courts.¹⁸

H.R. REP. NO. 94-1487, at 13–14, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6612 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)) (stating that the FSIA acts, in effect, as “a Federal long-arm statute over foreign states,” and noting that, “[t]he requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision,” and that, “[t]hese immunity provisions . . . prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction”). *But compare* *Frontera Res. Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 396–98 (2d Cir. 2009) (no minimum contacts analysis required), and *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95–100 (D.C. Cir. 2002) (same), with *Theo H. Davis & Co. v. Republic of the Marshall Islands*, 174 F.3d 969, 974 (9th Cir. 1999) (requiring satisfaction of traditional minimum contacts analysis before personal jurisdiction is proper), and *Gregorian v. Izvestia*, 871 F.2d 1515, 1529 (9th Cir. 1989) (same). *See generally* Joseph W. Glannon & Jeffrey Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675 (1999) (questioning whether federal courts would have personal jurisdiction over a foreign state defendant sued under the terrorism exception to the FSIA).

¹⁰ *See infra* notes 89–107 and accompanying text.

¹¹ *See infra* notes 14–54 and accompanying text.

¹² *See infra* notes 55–88 and accompanying text.

¹³ *See infra* notes 89–107 and accompanying text.

¹⁴ *See* 28 U.S.C. § 1605 (2012).

¹⁵ *Id.* § 1605(a)(2).

¹⁶ *See infra* notes 19–29 and accompanying text.

¹⁷ *See infra* notes 30–42 and accompanying text.

¹⁸ *See infra* notes 43–54 and accompanying text.

A. The FSIA Commercial Activity Exception

The FSIA prescribes the means by which a United States plaintiff may bring suit against a foreign state, including an agency or instrumentality thereof (collectively, “foreign state”), in a domestic forum.¹⁹ The FSIA provides the sole basis for obtaining subject matter jurisdiction over a foreign state.²⁰ Until 1952, United States’ policy was one of total sovereign immunity, premised on the reciprocal notion that foreign sovereigns were coequals.²¹ In 1952, however, the United States adopted a policy of restrictive sovereign immunity that limited grants of immunity to suits involving the public acts of a foreign state.²² In 1976, the policy of restrictive sovereign immunity was codified in the FSIA.²³

Under the FSIA, sovereign immunity is presumed.²⁴ The FSIA, however, outlines several statutory exceptions that, if met, abrogate immunity and afford a United States court subject matter jurisdiction over claims against a foreign state-defendant.²⁵ One exception is for claims based upon a foreign state’s commercial activity.²⁶ A United States federal court will have subject matter jurisdiction over a foreign state where, (1) the foreign state engaged in

¹⁹ See 28 U.S.C. §§ 1603–1605.

²⁰ *Id.* §§ 1330, 1604; *Arg. Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (explaining that Congress intended the FSIA to serve as the “sole basis for obtaining jurisdiction over a foreign state in United States’ courts”).

²¹ See *The Schooner Exch.*, 11 U.S. (7 Cranch) at 137 (“This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as objects.”). See generally Katherine J. Florey, *Indian Country’s Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 616–17 (2010) (explaining the origins of sovereign immunity).

²² See *Holy See*, 557 F.3d at 1071 (explaining the origins of the FSIA).

²³ Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1602–1611); see H.R. REP. NO. 94-1487, at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6605 (explaining the policy of restrictive sovereign immunity).

²⁴ See 28 U.S.C. § 1604.

²⁵ *Id.* §§ 1330, 1605; see *supra* note 2 (introducing the most commonly used FSIA exceptions).

²⁶ 28 U.S.C. § 1605(a)(2). There are in fact three discrete ways to meet the FSIA commercial activity exception. *Id.* This Comment will only address the commercial activity exception defined in the first clause of 28 U.S.C. § 1605(a)(2) that provides: “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 the action is based upon a commercial activity carried on in the United States by the foreign state.” See *id.* The other two ways to meet the commercial activity exception include where an act is performed in the United States in connection with commercial activity conducted abroad, and where an act is performed outside the United States in connection with commercial activity conducted abroad that has a direct effect in the United States. See *id.*; see also 14A CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., *FEDERAL PRACTICE & PROCEDURE* § 3662.3 (4th ed. 2014).

commercial activity,²⁷ (2) the commercial activity was *carried on* in the United States,²⁸ and (3) the claims are *based upon* that commercial activity.²⁹

B. Purchase of Eurail Pass and Subsequent Injuries

In March 2007, Plaintiff Carol P. Sachs (“Sachs”) purchased a Eurail pass from The Rail Pass Experts (“RPE”) for use on her then-upcoming trip to Eastern Europe.³⁰ Although RPE is an American company with offices in Massachusetts, Sachs purchased her Eurail pass via RPE’s website.³¹ Sachs is a resident of California.³²

The passenger rail system in Austria is operated by OBB Personenverkehr AG (“OBB”), a state-owned entity.³³ OBB, like many European transportation providers, is a member of the Eurail Group, an association responsible for marketing and selling Eurail passes to United States residents.³⁴ Although OBB disputes that RPE was an authorized agent of the Eurail Group or an authorized subagent of OBB,³⁵ OBB admits that the Eurail pass sold by RPE allowed Sachs transport on trains in Austria.³⁶ The pass, however, bore the instruction: “The issuing office is merely the intermediary of the carriers in Europe and assumes no liability from the transport”³⁷

In April 2007, Sachs was severely injured while attempting to board a train in Innsbruck, Austria.³⁸ Sachs fell onto the tracks where a moving train

²⁷ See 28 U.S.C. § 1603(d) (defining commercial activity as either a regular course of commercial conduct or a regular commercial transaction or act); accord 14A WRIGHT & MILLER ET AL., *supra* note 26, § 3662.3 (“If the activity is one that normally could be engaged in by a private party . . . a foreign sovereign is not absolutely immune from liability therefor [I]t is the nature rather than the purpose of the foreign state’s activity that is determinative”).

²⁸ See 28 U.S.C. § 1603(e) (defining “a commercial activity carried on in the United States” as one having substantial contact with the United States).

²⁹ See *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000) (explaining that based upon has been interpreted by the Ninth Circuit to mean having a nexus between the commercial activity and the legal claims).

³⁰ Opening Brief for Appellant at 4, *Sachs II*, 695 F.3d 1021 (No. 11-15458).

³¹ See *id.* at 5.

³² *Id.* at 1.

³³ See Brief for Defendant-Appellee OBB Personenverkehr AG at 3, 5, *Sachs II*, 695 F.3d 1021 (No. 11-15458) (explaining that the Republic of Austria, through the Austrian Federal Ministry of Transport, Innovation and Technology, wholly owns a joint-stock company, OBB Holding Group, which itself wholly owns OBB).

³⁴ Opening Brief for Appellant, *supra* note 30, at 5–6.

³⁵ Compare *id.* at 4 (“[Sachs] alleged that she purchased the railway ticket through defendants’ agent, Eurail, and the American based company, The Rail Pass Experts”), with Brief for Defendant-Appellee, *supra* note 33, at 7 (“[T]he Rail Pass Experts is a company based in Massachusetts, and may or may not have been a general sales agent accredited by the Eurail Group and thus able to sell Eurail passes.”).

³⁶ Opening Brief for Appellant, *supra* note 30, at 5.

³⁷ *Id.*

³⁸ *Sachs III*, 737 F.3d at 588.

crushed her legs.³⁹ She required amputation of both legs above the knee.⁴⁰ Two days prior to the accident, Sachs visited the Innsbruck train station, presented the reservation sold to her by RPE, which bore a RPE stamp, and purchased a couchette reservation seat upgrade directly from OBB.⁴¹ The couchette reservation was not processed as a new transaction, but rather as an upgrade to Sachs's existing pass.⁴²

C. Journey Through the Courts

As a result of her injuries, Sachs sued OBB in the U.S. District Court for the Northern District of California.⁴³ OBB moved to dismiss the claims on sovereign immunity grounds.⁴⁴ The district court granted OBB's motion, concluding that OBB had not carried on commercial activity in the United States.⁴⁵ The district court reasoned that a principal-agent relationship did not exist between RPE and OBB and, therefore, RPE's commercial activity in the United States—the sale of the Eurail pass—could not be imputed to OBB.⁴⁶

On appeal to the U.S. Court of Appeals for the Ninth Circuit, a split three-judge panel affirmed.⁴⁷ The dissenting judge, however, argued that RPE acted as a subagent of OBB and accordingly, its sale of the Eurail pass could be imputed to OBB such that OBB carried on commercial activity in the United States.⁴⁸ Additionally, the dissenting judge concluded that Sachs's claims were based upon the sale of the Eurail pass.⁴⁹

The Ninth Circuit ordered rehearing en banc to clarify (1) whether a principal-agent relationship existed between RPE and OBB such that RPE's sale of the Eurail pass could be imputed to OBB, and (2) whether Sachs's

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* Although Sachs's Eurail pass from RPE would have enabled her to board the train and sit in an unassigned seat, Sachs opted to reserve a couchette bed by paying an upgrade fee directly to OBB. *See id.*

⁴² *See id.* at 588, 601.

⁴³ *See Sachs I*, 2011 WL 816854, at *1. Sachs's claims against OBB included negligence, strict liability for design defect, failure to warn about a design defect, breach of implied warranty of merchantability, and breach of implied warranty of fitness. *See id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at *4; *see also* 28 U.S.C. § 1603(e) (2012) (stating that "a commercial activity carried on in the United States" is one having substantial contact with the United States).

⁴⁶ *Sachs I*, 2011 WL 816854, at *3–4. The parties agreed that the sale of the Eurail pass constituted commercial activity under the FSIA. *See id.* at *2.

⁴⁷ *Sachs II*, 695 F.3d at 1029. One affirming judge accepted the district court's reasoning, but the other affirming judge, writing separately in a concurring opinion, contended that Sachs's claims were not based upon the sale of the Eurail pass. *Compare id.* at 1025–26 (opinion of the court), *with id.* at 1030 (Bea, J., concurring).

⁴⁸ *Id.* at 1032–34 (Gould, J., dissenting).

⁴⁹ *Id.*

claims were based upon the sale of the Eurail pass.⁵⁰ On rehearing, the Ninth Circuit reversed, adopting the reasoning propounded by the dissenting panel judge.⁵¹ Thus, the en banc majority concluded that the commercial activity exception was met and subject matter jurisdiction was proper over OBB.⁵² OBB subsequently petitioned the U.S. Supreme Court for certiorari.⁵³ The Court granted the petition on January 23, 2015.⁵⁴

II. ARE YOU MY AGENT? THREE PROPOSED STANDARDS FOR EVALUATING WHEN A FOREIGN STATE “CARRIES ON” COMMERCIAL ACTIVITY THROUGH AN AGENT

The U.S. Court of Appeals for the Ninth Circuit’s 2013 en banc decision in *Sachs v. Republic of Austria* (“*Sachs III*”) highlights the confusion surrounding the appropriate legal standard for determining who is an agent or subagent of a foreign state when evaluating whether a commercial act was carried on in the United States.⁵⁵ It is essential to know when an entity acts as an agent of a foreign state because an agent’s actions can abrogate the sovereign immunity typically afforded to the foreign state.⁵⁶ Just as an employer can be held vicariously liable for the actions of its employee, so too can the action of a foreign state’s agent be imputed to the foreign state.⁵⁷ In *Sachs III*, the court considered three standards, including: (1) common law agency, (2) the FSIA definition of agency, and (3) the *Bancec* standard.⁵⁸

A. The Common Law

In *Sachs III*, the en banc majority favored adoption of common law agency principles.⁵⁹ Under common law agency, a subagent is a third party appointed by an agent to perform functions that the agent has agreed to perform on behalf of a principal.⁶⁰ An agent has actual authority to appoint a

⁵⁰ *Sachs III*, 737 F.3d at 590–91.

⁵¹ *Id.* at 593–94, 598–600; see also *Sachs II*, 695 F.3d at 1032–34 (Gould, J., dissenting).

⁵² *Id.* at 603.

⁵³ Petition for a Writ of Certiorari, *OBB Personenverkehr AG v. Sachs*, 135 S.Ct. 1172 (2015) (No. 13-1067).

⁵⁴ *OBB Personenverkehr AG v. Sachs*, 135 S.Ct. 1172 (2015).

⁵⁵ See 737 F.3d 584, 590–91 (9th Cir. 2013), cert. granted sub nom, *OBB Personenverkehr AG v. Sachs*, 135 S.Ct. 1172 (2015).

⁵⁶ See *id.* at 603.

⁵⁷ See *id.* at 593; RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt b (2006) (explaining how an employer can be held vicariously liable for the tort of an employee).

⁵⁸ See *Sachs III*, 737 F.3d at 593–95.

⁵⁹ *Id.* at 593.

⁶⁰ RESTATEMENT (THIRD) OF AGENCY § 3.15 (2006); see, e.g., *U.S. ex rel. Miller v. Bill Harbert Int’l Constr., Inc.*, 505 F. Supp. 2d. 20, 32 (D.D.C. 2007) (explaining subagency princi-

subagent when the agent reasonably believes that the principal consents to the appointment of a subagent based on a manifestation from the principal.⁶¹ A principal may expressly or impliedly authorize a subagency.⁶² A principal impliedly authorizes a subagency when the principal knows, or has reason to know, that the agent employs a subagent and takes no action to terminate the subagent's employment.⁶³ Importantly, when a subagent acts, the action carries the same legal consequences for the principal as if it were the agent acting.⁶⁴ Thus, where a subagent acts within the scope of a subagency relationship, the acts are attributable to the principal.⁶⁵

In *Sachs III*, OBB employed Eurail Group to market and sell its rail passes.⁶⁶ Eurail, in turn, enlisted third parties such as RPE to market and sell OBB's rail passes to United States customers.⁶⁷ The en banc majority held that even if OBB did not expressly authorize Eurail Group to employ RPE as a subagent-ticket distributor, OBB impliedly authorized the subagency when it honored the RPE-stamped reservation that Sachs presented to purchase her couchette upgrade.⁶⁸ At that point, OBB knew of the subagency and took no action to terminate it.⁶⁹ Thus, the en banc majority concluded that a subagent relationship existed between RPE and OBB and RPE's acts as a subagent could be imputed to OBB, its principal.⁷⁰

The en banc majority noted that the U.S. Court of Appeals for the Second Circuit and the U.S. Court of Appeals for the D.C. Circuit have used common law agency to answer other inquiries related to the FSIA commercial activity exception.⁷¹ In 1987, in *Barkanic v. General Administration of Civil Aviation of the People's Republic of China*, the Second Circuit held that a

ples); *In re Nat'l Audit Def. Network*, 332 B.R. 896, 920 (Bankr. D. Nev. 2005) (same); *Estate of Smith v. Underwood*, 487 S.E.2d 807, 816 (N.C. Ct. App. 1997) (same).

⁶¹ RESTATEMENT (THIRD) OF AGENCY § 3.15 cmt. C (2006).

⁶² *Id.*; 19 RICHARD A. LORD, WILLISTON ON CONTRACTS § 54:15 (4th ed. 2002).

⁶³ 19 LORD, *supra* note 62, § 54:15.

⁶⁴ RESTATEMENT (THIRD) OF AGENCY § 3.15 cmt d (2006).

⁶⁵ *See id.* § 7.04.

⁶⁶ *Sachs III*, 737 F.3d at 587.

⁶⁷ *Id.* at 593.

⁶⁸ *Id.*

⁶⁹ *See id.* ("If RPE had impermissibly sold the Eurail pass to Sachs, OBB would have had no duty to honor the pass. But it did. It cannot now sensibly argue that the sale of that pass by RPE in the United States was unauthorized.")

⁷⁰ *See id.* at 594. The en banc majority also acknowledged *arguendo* that, if RPE's sale of the Eurail pass was entirely unauthorized, OBB's decision to honor Sachs's Eurail pass amounted to ratification of the sale. *See id.* at 593 n.6. A principal ratifies an unauthorized act by expressly manifesting assent or by conduct that justifies a reasonable assumption that the principal so consents. *See* RESTATEMENT (THIRD) OF AGENCY § 4.01 (2006). When a principal ratifies an unauthorized act, the act is treated as if performed with actual authority, that is, attributable to the principal. *See id.* § 4.01 cmt. b.

⁷¹ *See Sachs III*, 737 F.3d at 593–94.

commercial act was carried on in the United States—thus triggering the commercial activity exception—where the only domestic act was a ticket sale by a Washington, D.C. travel agent.⁷² Relatedly, in 2005, in *Kirkham v. Société Air France*, the D.C. Circuit also held that a ticket sale by a Washington, D.C. travel agent satisfied the commercial activity exception.⁷³ In both cases, the existence of a subagency or agency relationship was material to the commercial activity exception.⁷⁴

Notably, the Ninth Circuit itself has stated that a common law agency relationship can support a commercial activity exception.⁷⁵ In 1997, in *Phaneuf v. Republic of Indonesia*, the Ninth Circuit held that when a common law agent, acting with actual authority, engages in a commercial act, that act can be imputed to a foreign state-principal such that the foreign state carried on commercial activity.⁷⁶ In *Phaneuf*, however, the Ninth Circuit stressed that an act may only be attributed to a foreign state-principal where the agent acts with actual, and not apparent, authority.⁷⁷ Thus, the Ninth Circuit had already held that acts of a common law agent could be imputed to a foreign state-principal to demonstrate the foreign state carried on commercial activity, even before so holding in *Sachs III*.⁷⁸

⁷² See 822 F.2d 11, 14 (2d Cir. 1987). In *Barkanic*, a Chinese state-owned airline expressly authorized Pan American Worldwide Airways to act as its general sales agent in the United States with authority to select and appoint United States ticket agents. See *id.* at 12. Pan American, in turn, expressly authorized a Washington, D.C. travel agent to sell the airline's tickets to United States customers. See *id.*

⁷³ See 429 F.3d 288, 293 (D.C. Cir. 2005). In *Kirkham*, the French state-owned airline, Air France, conceded that the ticket sale by the Washington D.C. travel agent—the only commercial act at issue—constituted commercial activity by Air France in the United States. See *id.* Logically, this concession is predicated on Air France's acknowledgement that the travel agent functioned as Air France's common law agent, acting with the airline's actual authority. See *id.*

⁷⁴ See *Kirkham*, 429 F.3d at 293; *Barkanic*, 822 F.2d at 12–13; see also *Sachs III*, 737 F.3d at 592 n.5 (explaining that although the parties conceded agency relationships existed in both cases, the circuit courts each had an independent duty to assess jurisdiction and implicitly accepted the agency relationships as valid by not holding otherwise).

⁷⁵ See *Phaneuf v. Rep. Indon.*, 106 F.3d 302, 307–08 (9th Cir. 1997). In *Phaneuf*, a holder of promissory notes issued by the National Defense Security Council of the Republic of Indonesia sued to enforce payment after the Indonesian government declared the notes invalid. See *id.* at 304.

⁷⁶ See *id.*

⁷⁷ See *id.* at 308 (“If the foreign state has not empowered its agent to act, the agent's unauthorized act cannot be attributed to the foreign state; there is no ‘activity of the foreign state.’”). Conversely, apparent authority exists when a third party reasonably believes the agent has authority to act and that belief is traceable to the manifestations of the principal. RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006).

⁷⁸ See *Sachs III*, 737 F.3d at 593; *Phaneuf*, 106 F.3d at 307–08.

B. The FSIA Definition

In *Sachs III*, the en banc court divided over how to interpret statutory terms.⁷⁹ The en banc dissent argued that the Ninth Circuit should have looked exclusively to the definition of agency within the FSIA to determine whether RPE was an agent of OBB.⁸⁰ Within the meaning of the FSIA, a “foreign state” includes a political subdivision or an “agency or instrumentality of a foreign state.”⁸¹ The en banc majority, however, held that the statutory language was relevant insofar as determining which entities may claim *sovereign immunity*, not whether acts of an agent can be *imputed to a principal*—a concept historically addressed by the common law.⁸²

C. The *Bancec* Standard

As an alternative to the FSIA definition of agency, the dissent in *Sachs III* argued that the standard set forth in *First National City Bank v. Banco El Comercio Exterior de Cuba* (“*Bancec*”) should control.⁸³ In 1983, in *Bancec*, the U.S. Supreme Court held that instrumentalities created by a foreign state could be liable for acts of the foreign state (1) where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, or (2) when recognizing the separateness would work fraud or injustice.⁸⁴ Although *Bancec* addressed liability, the Ninth Circuit embraced the

⁷⁹ Compare 737 F.3d at 595 (majority opinion) (holding statutory definition inapposite), with *id.* at 605–07 (O’Scannlain, J., dissenting) (favoring extension of statutory definition).

⁸⁰ See *id.* at 605 (O’Scannlain, J., dissenting). Section 1603 of the FSIA defines the term “agency or instrumentality of a foreign state.” 28 U.S.C. § 1603(b) (2012). The en banc dissent contended that the presumption of consistent usage canon of statutory interpretation requires the definition provided in section 1603 apply equally to questions of immunity discussed in section 1604 and the exceptions addressed in section 1605, though the former specifically employs the term “agency or instrumentality of a foreign state,” while the latter does not. *Sachs III*, 737 F.3d at 606 (O’Scannlain, J., dissenting).

⁸¹ 28 U.S.C. § 1603(a)–(b). The statute defines “agency or instrumentality of a foreign state” as “[A]ny entity—(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined [herein], nor created under the laws of any third country.” *Id.*

⁸² See *Sachs III*, 737 F.3d at 595 (majority opinion). The en banc majority points to other canons of statutory interpretation, namely the surplusage canon, the harmonious reading canon, the associated words canon, and the prior construction canon, which all support application of common law agency principles for purposes of the commercial activity exception. See *id.* at 598 n.13. Importantly, the prior construction canon instructs that where a statute uses a term that has already been interpreted by a court of last resort, the term is to be understood in light of such construction. See *id.*

⁸³ *Id.* at 607 (O’Scannlain, J., dissenting).

⁸⁴ See 462 U.S. 611, 629 (1983). *Bancec* considered whether the official bank of Cuba could be liable for acts taken by Cuba, a slightly different inquiry from *Sachs III*, which asks whether

two-tier *Bancec* standard in 2009, in *Doe v. Holy See*, to determine when acts of a third party could be attributed to a foreign state for the purpose of establishing subject matter jurisdiction under the FSIA.⁸⁵ Because *Bancec* was decided on equitable grounds under the test's second prong, *Holy See* clarified that the first prong of the *Bancec* standard is met where the foreign state engages in day-to-day or routine involvement in the affairs of the other entity.⁸⁶ In *Sachs III*, the en banc dissent argued that application of the *Bancec* standard would align with the Ninth Circuit's decision in *Holy See*.⁸⁷ The en banc majority, however, reasoned that the *Bancec* standard was inapposite because both *Bancec* and *Holy See* involved *corporate* affiliates that were tied via a *corporate* relationship, quite unlike the situation in *Sachs* where OBB and RPE shared no corporate ties.⁸⁸

III. RECOMMENDED APPROACH: THE COMMON LAW

The U.S. Supreme Court, on review, should follow the majority opinion from the U.S. Court of Appeals for the Ninth Circuit's 2013 en banc decision in *Sachs v. Republic of Austria* ("*Sachs III*") and hold that common law agency principles inform whether a foreign state carries on commercial activity in the United States.⁸⁹ The Court should acknowledge that the question of whether a foreign state carries on commercial activity through an agent is different from one that asks whether an agent of a foreign state is entitled to sovereign immunity.⁹⁰ The Court should look to the plain language of the FSIA, its legislative history, and case law from two U.S. Courts of Appeals to conclude that Congress intended the statute to incorporate broad common law

the foreign state, Austria, retains liability for transactions entered into by a state-owned common carrier. *See id.* at 613, 629; *Sachs III*, 737 F.3d at 590–91.

⁸⁵ *See Doe v. Holy See*, 557 F.3d 1066, 1078 (9th Cir. 2009); *see also Sachs III*, 737 F.3d at 607 (O'Scannlain, J., dissenting). In *Holy See*, a parishioner alleged sexual abuse against Holy See, its instrumentalities, and its agents. *See* 557 F.3d at 1070. Holy See, as the ecclesiastical, governmental, and administrative arm of the Roman Catholic Church, is treated as a foreign state. *See id.*

⁸⁶ *Holy See*, 557 F.3d at 1079.

⁸⁷ *See Sachs III*, 737 F.3d at 607 (O'Scannlain, J., dissenting).

⁸⁸ *See id.* at 594 (majority opinion); BLACK'S LAW DICTIONARY 67 (9th ed. 2009) (defining corporate affiliates as a subsidiary, parent, or sibling corporation); *see also Walkovsky v. Carlton*, 223 N.E.2d 6, 7–8 (N.Y. Ct. App. 1966) (explaining the legal principle of piercing the corporate veil, under which a *parent corporation* may be held liable for the intentional or negligent wrongdoing of its *subsidiary*).

⁸⁹ *See 737 F.3d 584*, 596 (9th Cir. 2013), *cert. granted sub nom*, OBB Personenverkehr AG v. Sachs, 135 S.Ct. 1172 (2015).

⁹⁰ *See id.* at 595; H.R. REP. NO. 94-1487, at 15 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 1614 ("An entity which does not fall within the definitions of [agency or instrumentality of a foreign state] *would not be entitled to sovereign immunity* in any case before a Federal or State court.") (emphasis added).

agency principles into the carried on analysis.⁹¹ Thus, the Court should find that the FSIA does not displace common law agency principles and, further, should hold that actions of a common law agent—or relatedly, a common law subagent—may be imputed to a foreign state-principal.⁹²

The Court should also recognize that common sense dictates adoption of the common law approach as opposed to the approaches favored by the *Sachs III* dissent.⁹³ If courts applied the FSIA definition, a foreign state-owned common carrier would be afforded immunity, and thus would be consistently exempt from liability, in any circumstance where the passenger's ticket was purchased from a travel agent that is not majority-owned by the foreign state.⁹⁴ Similarly, if courts adopted the *Bancec* standard—also advocated for by the *Sachs III* dissent—a foreign state-owned common carrier would be exempted from liability in any circumstance where the passenger's ticket was purchased by a travel agent whose day-to-day operations did not include involvement from the foreign state.⁹⁵ In either case, a foreign state's sophisticated lawyers could intentionally craft ownership structures to preserve immunity.⁹⁶ Further, under either the FSIA definition or the *Bancec* standard, immunity would not be limited to tort actions, but would extend to contract actions as well.⁹⁷ As the *Sachs III* majority noted, this could mean that an American who purchases a ticket for international travel through an American travel agent may find the reservation cancelled but payment retained by the foreign state-owned common carrier with no recourse in domestic courts.⁹⁸

⁹¹ See 28 U.S.C. § 1603(e) (2012) (defining “commercial activity carried on in the United States by a foreign state” to include commercial acts that have *substantial contact* with the United States) (emphasis added); *Sachs III*, 737 F.3d at 591 (explaining that the “carried on by” requirement should be interpreted in light of broad agency principles); *Mar. Int'l Nominees Establishment v. Rep. Guinea*, 693 F.2d 1094, 1105 (D.C. Cir. 1982) (“[A] foreign state, in Congress’s view, can surrender immunity by virtue of activities committed by an agent, and that, consequently, the ‘carried on by’ requirement can be interpreted in light of broad agency principles.”); H.R. REP. NO. 94-1487, at 17, *reprinted in* 1976 U.S.C.C.A.N. at 6615–16 (“This definition includes cases based on commercial transactions performed in whole or in part in the United States It will be for the courts to determine whether a particular commercial activity has been performed in whole or in part in the United States.”).

⁹² See *Sachs III*, 737 F.3d at 595 (“To abrogate common-law principles of agency the FSIA ‘must speak directly to the question addressed by the common law.’” (quoting *United States v. Bestfoods*, 524 U.S. 51, 63 (1998))).

⁹³ See *id.* at 596–97; *cf.* *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (holding that statutory interpretation must “be guided to a degree by common sense”).

⁹⁴ See *supra* note 81 (defining “agency or instrumentality of a foreign state”); *cf.* *Sachs III*, 737 F.3d at 596–97.

⁹⁵ See *Sachs III*, 737 F.3d at 596–97; *supra* note 84 and accompanying text (defining the *Bancec* standard).

⁹⁶ *Cf.* *Sachs III*, 737 F.3d at 596–97.

⁹⁷ See *id.* (advancing a similar line of reasoning).

⁹⁸ See *id.*

Moreover, the Court should find it fairer to place the burden on foreign state-owned common carriers to monitor entities that sell their tickets than to require unsophisticated ticket-purchasers to investigate the ownership structure or day-to-day operations of any ticket agent or travel agent with whom the purchaser transacts.⁹⁹ Because the foreign state-owned common carrier profits from the increased sales reach afforded by a United States ticket agent or travel agent, a reciprocal duty to monitor those selling such tickets is not particularly onerous.¹⁰⁰ Further, it is the carrier, not the ticket purchaser, who routinely engages in these transactions and is thus better situated to absorb any monitoring costs.¹⁰¹

The Court's decision, however, cannot end the inquiry.¹⁰² One chief drawback of the common law approach is its lack of uniformity.¹⁰³ Often, the common law varies from state to state.¹⁰⁴ Because the FSIA provides the sole basis for obtaining subject matter jurisdiction over a foreign state, uniformity is essential.¹⁰⁵ In an era during which foreign states routinely conduct business through domestic common law agents and subagents, Congress should clarify a uniform legal standard.¹⁰⁶ Broad common law agency principles, however, should provide the guiding framework.¹⁰⁷

⁹⁹ See *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring) (suggesting a seller is better equipped than a buyer to absorb and spread costs associated with an injury from a defective product); RESTATEMENT (SECOND) OF TORTS § 496D (1965) (stating a plaintiff does not assume the risk of harm unless aware of the risk and appreciates its character); Paula J. Dalley, *All in a Day's Work: Employers' Vicarious Liability for Sexual Harassment*, 104 W. VA. L. REV. 517, 529 (2002) (explaining advantages of loss spreading); David J. Molnar, *Should Loss-Spreading Be the Paramount Public Policy Rationale for the Imposition of Strict Products Liability? A Study of the Intersection of Strict Products Liability and Landlord-Tenant Law*, 22 J. CORP. LAW. 93, 102 (1996) (same).

¹⁰⁰ See Molnar, *supra* note 99, at 102.

¹⁰¹ See *Escola*, 150 P.2d at 440–41 (Traynor, J., concurring) (noting that, whereas “[t]he cost of an injury . . . may be an overwhelming misfortune to the person injured,” providers of services and products are better situated to absorb such costs because “the risk of injury can be insured . . . and distributed among the public as a cost of doing business”).

¹⁰² See Reply Brief of Petitioner at 3, *OBB Personenverkehr AG v. Sachs*, 135 S.Ct. 1172 (2015) (No. 13-1067) (arguing that varying state interpretations of common law agency may present challenges in application of federal immunity law).

¹⁰³ See *id.*; *cf.* *Guar. Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945) (holding that a federal court sitting in diversity should not reach a particular outcome solely because of the state in which it sits).

¹⁰⁴ *Cf.* 14A WRIGHT & MILLER ET AL., *supra* note 26, § 4514 (noting the absence of a federal common law).

¹⁰⁵ See Reply Brief of Petitioner, *supra* note 102, at 3.

¹⁰⁶ See *id.*

¹⁰⁷ See *Sachs III*, 737 F.3d at 591 (urging application of broad common law agency principles in carried on analysis).

CONCLUSION

The U.S. Court of Appeals for the Ninth Circuit's decision in *Sachs v. Republic of Austria* ("*Sachs III*") illustrates the confusion surrounding the appropriate legal standard for determining who is an agent or subagent of a foreign state when evaluating whether a commercial act was carried on in the United States under the FSIA commercial activity exception. In *Sachs III*, the en banc majority embraced common law agency principles and rejected both the FSIA definition of agency and the *Bancec* standard. On review, the U.S. Supreme Court should find that common law agency principles best align with congressional intent and important policy goals. The common law, however, is problematic because it varies from state to state. Because the FSIA requires uniformity among all domestic federal jurisdictions, Congress should ultimately clarify a uniform standard that incorporates broad common law agency principles in line with the decision in *Sachs III*.

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