FOREIGN SOVEREIGN IMMUNITY—REX V. CIA. PERVANA DE VAPORES, S.A.

Plaintiff, a longshoreman who was injured while working aboard defendant's vessel, brought suit in United States District Court for damages under section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act.[1] The plaintiff demanded a jury trial and alleged diversity jurisdiction under 28 U.S.C. § 1332.[2] The defendant vessel owner is a corporation owned entirely by a foreign sovereign, the State of Peru. Defendant moved to strike plaintiff's demand for a jury trial, alleging that jurisdiction against a foreign sovereign can be exercised only pursuant to 28 U.S.C. § 1330(a), which provides for nonjury trials.[3] The district court, finding both diversity and federal question jurisdiction, denied defendant's motion to strike but certified the question for interlocutory appeal.[4] The Court of Appeals for the Third Circuit held that: 1) the Foreign Sovereign Immunities Act (F.S.I.A.) precludes the right to jury

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[1] Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act provides in relevant part:

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party . . . .

33 U.S.C. § 905(b) (1976).

[2] Prior to the Foreign Sovereign Immunities Act, § 1332 read in relevant part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—(2) citizens of a State, and foreign states or citizens or subjects thereof, ...

The F.S.I.A. changed subsection (a)(2) as follows:

> (2) citizens of a State and citizens or subjects of a foreign state . . . .

28 U.S.C. § 1332 (1976).

[3] 28 U.S.C. § 1330(a) (1976) provides:

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Id.

28 U.S.C. § 1603 (1976) provides in relevant part:

> For purposes of this chapter—
> (a) A 'foreign state', . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
> (b) An 'agency or instrumentality of a foreign state' means an entity—
> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state . . . a majority of whose shares or other ownership interest is owned by a foreign state . . . .

Id.

[4] Rex v. CIA. Pervana de Vapores, S.A., 493 F. Supp. 459 (E.D. Pa. 1980).

trial in an action against a corporation of which the majority stockholder is a foreign sovereign; and 2) because the action is not a suit at common law, this preclusion does not offend the seventh amendment.[5]

In reaching its decision, the Court of Appeals first faced the determination of whether section 1330(a) of the F.S.I.A. affords the exclusive jurisdictional mechanism for actions in United States courts by United States citizens against foreign sovereigns.[6] Finding section 1330(a) to be the sole basis for jurisdiction, the court then was compelled to determine whether the F.S.I.A. requirement that these cases be heard without a jury violates the right to jury trial in "suits at common law" guaranteed by the seventh amendment.[7]

The F.S.I.A. was enacted in 1976. Prior to that time, the State Department policy followed a restrictive principle of foreign sovereign immunity.[8] Restrictive immunity recognizes the immunity of a foreign sovereign to suits resulting from the public acts of the State (*jure imperii*) but not to suits resulting from the private or commercial acts of the State (*jure gestionis*).[9] There were problems with the restrictive interpretation, however, primarily in that the State Department often was forced to apply the principle in cases already before the courts.[10] Moreover, the Department encountered diplomatic pressures from governments that were subject to suit, and as a consequence the immunity question was not always answered on a strictly legal basis.[11]

The F.S.I.A. was intended to determine "when and how . . . a lawsuit against a foreign state or its entities" could be brought in United States courts and the conditions under which the State

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[5] Rex v. CIA. Pervana de Vapores, S.A., 660 F.2d 61 (3d Cir. 1981) [hereinafter cited as *Rex*].

[6] Id. at 61, 62. Under the "saving to suitors" clause of The Judiciary Act of 1789, the citizen could bring his suit in a state court. However, 28 U.S.C. § 1441 allows a suit brought against a foreign state to be removed to a federal court where the case will be heard without a jury.

[7] *Id.* at 62.

[8] The "Tate Letter" advised Attorney General Philip B. Perlman that the State Department was abandoning the "absolute theory of sovereign immunity" in favor of the newer restrictive theory. Letter from Jack B. Tate to Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T STATE BULL. 984 (1952).

[9] H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604, 6605 [hereinafter cited as H.R. Rep. No. 1487].

[10] *Id.* at 6607. In practice, after an action was filed in district court, the foreign state would request immunity from the State Department, which would then advise the Attorney General's Office and the court of the Department's decision. *See also* 26 DEP'T STATE BULL. 984 (1952).

[11] H.R. Rep. No. 1487, *supra* note 9, at 6606.

would be immune.[12] It codified the restrictive principle of foreign sovereign immunity[13] and gave a statutory basis for jurisdiction over a foreign sovereign.

Several district courts have found diversity jurisdiction sufficient to bring a foreign sovereign into United States courts, and have granted plaintiffs' demands for jury trial.[14] Only two circuit courts have considered the jurisdictional question presented in the principal case. Both the Second and Fourth Circuits found sections 1330(a) and 1441(d)[15] to be the exclusive bases of jurisdiction in actions against foreign sovereigns.[16] To date, no plaintiff has sought *certiorari* on this aspect of the F.S.I.A.; thus the Supreme Court has not yet heard the issues involved in this case.[17]

The Second Circuit's extensive treatment of the jurisdictional provisions of the F.S.I.A. in *Ruggiero v. Companhia Pervana de Vapores "Inca Capac Yupanqui"*[18] has become the model for interpretation of this issue and was followed carefully by both the Fourth Circuit in *Williams v. Shipping Corporation of India*,[19] and the Third Circuit in the principal case. Writing for the *Ruggiero* court, Judge Friendly first compared the language of the federal courts' jurisdictional grants prior to 1976 with the language of the F.S.I.A., which removed from section 1332(a) the reference to suits by a citizen against a foreign state.[20] The court rejected the plaintiff's argument that while the defendant is concededly a "foreign state" it is also a "citizen or subject of a foreign state" and therefore subject to diversity jurisdiction, finding it anomalous that the same entity could be both sovereign and subject.[21] Judge Friendly found no reason for Congress to prefer jury trials for federal statutory

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[12] *Id.* at 6604.

[13] *Id.*

[14] *See* Houston v. Murmansk Shipping Co., 87 F.R.D. 71 (D. Md. 1980) (denying the motion to strike the jury trial demand because although a foreign sovereign, the defendant corporation is also a "citizen or subject of a foreign state."); Lonon v. Companhia de Navagacao Lloyd Basiliero, 85 F.R.D. 71 (E.D. Pa. 1979) (any other interpretation would violate the seventh amendment); Icenogle v. Olympia Airways, S.A., 82 F.R.D. 36 (D.D.C. 1979) (the F.S.I.A. does not eliminate jurisdiction facially under § 1332(a)).

[15] *Rex, supra* note 5, at 61, 62.

[16] The legislative history of the F.S.I.A. supports this view. *See* H.R. Rep. No. 1487, *supra* note 9, at 6611, 6612.

[17] In fact, search has failed to disclose any F.S.I.A. case that has reached the Supreme Court.

[18] 639 F.2d 872 (2d Cir. 1981).

[19] 653 F.2d 875 (4th Cir. 1981).

[20] 639 F.2d at 873-75.

[21] *Id.* at 875. However, this argument has been persuasive in the trial courts. *See supra* note 14.

or constitutional questions but not for nonstatutory claims. Therefore, he rejected the plaintiff's final argument that jurisdiction and a jury trial can be reached under section 1331 federal question jurisdiction.[22] Finally, the court focused on the legislative history of the F.S.I.A. in support of its conclusions that sections 1330(a) and 1441(d) are the only bases of jurisdiction and that they bar the right to jury trials.[23]

The *Williams* and *Rex* courts followed the analysis of *Ruggiero* on the jurisdictional question,[24] from which the *Rex* court concluded that "Congress intended all actions against foreign states to be tried without a jury and to be brought under 28 U.S.C. § 1330(a).[25] On the constitutional question, however, the *Rex* court departed from the common reasoning.

The *Ruggiero* and *Williams*[26] opinions began their treatment of the constitutional issue with the argument that the seventh amendment guarantee of a jury trial "[i]n Suits at common law," does not apply to suits against foreign states, because such a suit could not have been brought in 1791 when the amendment was adopted.[27] This argument is difficult to reconcile with the United States Supreme Court ruling in *Curtis v. Loether*,[28] in which Justice Marshall refused to limit the seventh amendment to common law rights that existed in 1791. Reitterating Justice Story's definition of "common law," which equated common law rights with "legal rights" as distinguished from equitable or admiralty rights,[29] the *Curtis*

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[22] *Id.* at 876. Congress did not alter 28 U.S.C. § 1331 as it had § 1332. *See supra* note 2. Therefore, actions against foreign states were not deleted from this statute. However, the legislative history shows that jurisdiction under § 1332 is superfluous because § 1330 is regarded as a comprehensive basis of jurisdiction over foreign sovereigns. H.R. Rep. No. 1487, *supra* note 9, at 6613.

[23] 639 F.2d at 877-78.

[24] 653 F.2d at 880-81, 660 F.2d at 62-63.

[25] 660 F.2d at 65.

[26] On the constitutional issue, the *Williams* opinion closely parallels *Ruggiero* in both structure and language. Compare, for example, the first paragraph, second column of 653 F.2d at 881 with the first paragraph, second column of 639 F.2d at 879.

[27] 639 F.2d at 879 and 881, 653 F.2d at 881 and 883.

[28] 415 U.S. 189 (1974).

[29] *Id.* at 193 (quoting Persons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830)). *See also* Pernell v. Southall Realty, 416 U.S. 363 (1974). It should be noted that the questions involved in the principal case become moot if § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act is construed as invoking admiralty as opposed to common law jurisdiction. No jury trial rights attach to actions in admiralty. The *Rex* court did not discuss whether this might be an admiralty claim. *Ruggiero* explicitly refused to decide whether § 5(b) invokes admiralty or law jurisdiction. 639 F.2d at 876. However, the Fifth Circuit, in Russell v. Atlantic and Gulf Stevedores, 625 F.2d 71 (5th Cir. 1980) decided that admiralty jurisdiction is invoked by § 5(b).

Court held that for purposes of the seventh amendment, the presence of "legal rights" determines the applicability of the right to jury trial.[30] Justice Marshall stated that where an action for damages sounding in tort is created by statute, "a jury trial must be available."[31] The *Ruggiero* and *Williams* courts, however, distinguished *Curtis* by limiting its applicability to expansions in domestic law where the proceedings are analogous to common law actions in 1791.[32] Those courts found that as foreign sovereigns were not subject to suit when the seventh amendment was adopted, there is now no common law right to jury trial in a suit against a foreign sovereign.[33]

The second constitutional argument of the *Ruggiero* and *Williams* courts proceeded by analogy to domestic sovereign immunity. The Supreme Court frequently has held that when the United States consents to be sued in its own courts, thereby waiving its immunity, no right to jury trial attaches because no right to sue the sovereign existed at common law.[34] *Ruggiero* and *Williams* extended this analysis, maintaining that no right to jury trial exists when a foreign sovereign is sued in United States courts as suits against these sovereigns also were unknown at common law.[35]

Writing for the *Rex* court, Judge Aldisert agreed that the F.S.I.A. denial of jury trials is constitutionally permissible. He disagreed, however, with the reasoning of the *Ruggiero* and *Williams* courts.[36] The *Rex* court analysis began with a recognition of the presumption of constitutionality of acts of Congress, a presumption that is reinforced in this case in light of the importance of the F.S.I.A. to foreign policy.[37] Although all three courts agreed that the constitutionality of section 1330(a) is determined by the interpretation of "suit at common law," the *Rex* court refused to "view common law as frozen in 1791."[38]

The court nevertheless rejected plaintiff's argument, based on

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[30] 415 U.S. at 193.

[31] *Id.* at 195.

[32] 639 F.2d at 881, 653 F.2d at 883.

[33] *Id.*

[34] *C.f.*, Lehman v. Nakshian, 453 U.S. 156, 101 S. Ct. 2698 (1981); Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Galloway v. United States, 319 U.S. 372 (1943); McElrath v. United States, 102 U.S. 426 (1880). However, in these cases "common law" seems to refer to the common law as it existed in 1791 as opposed to Justice Story's definition noted in the text accompanying note 28, *supra*. *Cf.* 319 U.S. at 388.

[35] 639 F.2d at 879-80, 653 F.2d at 882.

[36] 660 F.2d at 63.

[37] *Id.* at 65.

[38] *Id.* at 66.

Curtis, that the seventh amendment requires provision of a jury trial in all damages actions. The proper inquiry, according to this court, was "whether the action is in the nature of a legal remedy similar to a suit at common law."[39] The court responded to this question first by reference to the long lines of cases[40] in which the Supreme Court consistently has denied jury trials to plaintiffs in actions against the United States unless the jury trial right was clearly a part of "the legislation creating the cause of action."[41] The Court's reasoning stemmed from notions of sovereign immunity: as the United States basically is immune from suit, when it does consent to be sued in its own courts no common law right to a jury trial accompanies the action even where money damages are at issue.[42]

The *Rex* court then examined the history of foreign sovereign immunity. The first case cited by the court was *The Schooner Exchange v. McFadden*,[43] in which the Supreme Court held that foreign war ships entering the ports of a friendly nation are presumed exempt from the jurisdiction of the courts of the host country unless the sovereign of that nation unambiguously rejects the presumption.[44] It was noted that this immunity was extended in *Berizzi Brothers Co. v. S.S. Pesaro*[45] to include commercial ships owned by foreign sovereigns. Judge Aldisert next referred to the Supreme Court decision of *Republic of Mexico v. Hoffman*,[46] in which it was held that the judiciary should defer to the State Department on questions of sovereign immunity. In that case, as the State Department had not recognized the request by Mexico for immunity, the Court denied it.[47] The *Rex* court thus concluded that because actions against foreign states existed only with the consent of the State Department, these actions never existed at common law but were instead a "unique species of public law, drawing deeply on its origins in admiralty and international law. . . ."[48]

Finally, the court recognized that Congress actually transferred an important aspect of foreign policy to the judiciary by enact-

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[39] *Id.* at 67.
[40] See cases at note 34, *supra*.
[41] 660 F.2d at 67 (quoting *Lehman*, 453 U.S. 156, 162 n.9, 101 S. Ct. at 2702.
[42] 660 F.2d at 67.
[43] 11 U.S. (7 Cranch) 116 (1812).
[44] *Id.* at 145-46.
[45] 271 U.S. 562 (1926).
[46] 324 U.S. 30 (1945).
[47] *Id.* at 38.
[48] 660 F.2d at 68.

ing the F.S.I.A.[49] The opinion suggests that Congress excluded the possibility of jury trial in these actions due to the fact that foreign States unfamiliar with the jury system would be distrustful of United States courts in which they would be faced with the uncertainty of a jury trial.[50] Ultimately, however, the court found that because Congress could have withheld all authority for federal courts to hear these cases, it should be able to determine the conditions under which the cases are heard, especially where those conditions effectuate legitimate foreign policy concerns.[51]

In dissent, Judge Sloviter agreed that the F.S.I.A. is the exclusive jurisdictional mechanism for actions against foreign state-owned corporations, but asserted that those portions of the F.S.I.A. that deprive plaintiffs of a jury trial in damages actions against state-owned foreign corporations are unconstitutional.[52] His opinion attacked the majority holding that the identity of the defendant rather than the nature of the action should determine whether common law rights are involved.[53] In his opinion, the applicable question is whether a damages action sounding in tort falls into the category of "'rights and remedies' . . . enforced at common law."[54]

The analogy drawn by the majority between domestic sovereign immunity and foreign sovereign immunity was particularly unpersuasive to Judge Sloviter. He found authority for the former in "constitutional, historical, and metaphysical principles," but as the basis for foreign sovereign immunity, only notions of courtesy between nations. From this it followed that foreign immunity is revocable at the will of the host country.[55] He argued that foreign state-owned corporations historically were not accorded presumptive immunity, but rather courts generally refused to consider ownership as relevant.[56] Moreover, he pointed to a line of cases which hold that even domestic corporations are not automatically

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[49] *Id.* at 68-69.

[50] *Id.* at 69.

[51] *Id.* The right of Congress to grant or withdraw jurisdiction from the courts is beyond dispute. U.S. CONST. art. III, § 2, cl. 2. *But see* the discussion of the dissent's position in the text accompanying notes 57 and 58, *infra*.

[52] *Id.* at 76.

[53] *Id.* at 70.

[54] *Id.* (quoting Pernell v. Southall Realty, 416 U.S. 362, 375 (1974)).

[55] 660 F.2d at 71.

[56] *Id.* at 72. *Cf.* United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929); Coale v. Societe Co-operative Suisse des Charbons, 21 F.2d 180 (S.D.N.Y. 1921).

immune merely because the United States is an owner or stockholder.[57]

Turning to the presumptive constitutionality of acts of Congress on which the majority relied, the dissent argued that although Congress could withhold jurisdiction from the federal courts in these cases, once jurisdiction was granted it could not be conditioned on the denial of constitutional rights.[58] While Judge Sloviter agreed that deference must be paid congressional actions, he stated, "[n]onetheless, [it is] the responsibility of the judiciary to determine when Congress has exceeded the permissible scope of its powers. . . ."[59] Accordingly, the constitutionality of the enactment was questioned by the assertion that the F.S.I.A. goes beyond the primary purposes of the Act: its overly broad definition of "foreign states" "collide[s] with the fundamental interest in providing jury trials in civil cases."[60] Thus, the conclusion of the dissent was that the provision limiting jurisdiction to nonjury trials should be severed from the Act.[61]

It is clear that the circuit courts were correct in holding that under the F.S.I.A. a jury trial cannot be granted in an action against a corporation owned by a foreign sovereign. These decisions were required by the Act itself and the clear intention of Congress expressed in its legislative history.[62] It is not as clear that the F.S.I.A. denial of jury trial rights can be reconciled with the seventh amendment. As the *Rex* dissent points out, the relevant case law points to the "rights and remedies" rather than the nature of the parties to determine whether the right to jury trial attaches.[63]

These three cases leave unexplored the question of fairness. A United States citizen cannot exercise the right to jury trial in an action against a foreign sovereign.[64] However, under some circumstances, the foreign sovereign may consent to jury trial if it is advantageous to the foreign state.[65] In addition, a foreign sovereign plaintiff may demand a jury trial in a suit against a

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[57] 660 F.2d at 73. *Cf.* Sloan Shipyards Corp. v. United States Fleet Corp., 258 U.S. 549 (1922); United States v. Strang, 254 U.S. 491 (1922); Bank of the United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904 (1824).

[58] 660 F.2d at 75.

[59] *Id.*

[60] *Id.* at 76.

[61] *Id.* at 75-76.

[62] *See* H.R. Rep. No. 1487, *supra* note 9, at 6613.

[63] 660 F.2d at 70.

[64] *Id.* at 65, 639 F.2d at 878.

[65] Where the action is brought in a State court, it may be tried before a jury. Only the foreign sovereign has the right to remove it to a federal court. *See supra* note 6.

United States citizen.[66] It is difficult to understand why Congress should give any profit-making corporation, regardless of sovereign ownership, the tactical advantage afforded by the singular right to choose whether to submit a case to a jury. This is especially so when that advantage is given by arguably withdrawing a constitutional guarantee.

Finally, the F.S.I.A. definition of "foreign states" should be considered over-inclusive,[67] as it not only protects corporations wholly owned by foreign governments, but shields minority nonsovereign stockholders from this cost of doing business. It is to be argued that the jury trial right extended by the seventh amendment should not be limited by foreign policy considerations when the defendant "foreign state" is a profit-making corporation.

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[66] 28 U.S.C. § 1332(a)(4) provides that a foreign state may sue a U.S. citizen under diversity jurisdiction, which provides for jury trial.

[67] *See supra* note 3.