

State Attribution, Extraterritorial Torts and Sovereign Immunity: A New Case to be Heard at the U.S. Supreme Court

The United States Supreme Court just last week granted a Petition for a Writ of Certiorari in *OBB Personenverkehr AG v. Sachs*, a case that involves a key issue of state attribution under the U.S. Foreign Sovereign Immunities Act (“FSIA”). This is an issue that has not been addressed by the Supreme Court for over thirty years

The plaintiff in this case is a California resident who bought a Eurail pass from an online ticket seller based in Massachusetts. She suffered severe injuries while trying to board a train in Innsbruck, Austria. She sued OBB, an agency of the Austrian government, for her injuries in U.S. federal court. The seller and OBB have no direct contractual relationship. OBB argues that United States courts lack jurisdiction because the acts of the U.S. based ticket seller cannot be imputed to OBB.

Over a strong dissent, an *en banc* panel of the Ninth Circuit Court of Appeals held that the Massachusetts-based Internet site that sold Sachs her train ticket was OBB’s agent in the U.S., and therefore the railway had conducted commercial activity in the U.S. giving rise to jurisdiction. OBB said in its petition to the Supreme Court that the appeals court ignored the FSIA’s definition of “agency” of a foreign state — creating a precedent “divorced from the statutory text” — and instead improperly relied on common law principles of agency. OBB has also argued that the Ninth Circuit was mistaken when it held that Sachs’ claims were based upon the sale of the rail pass in the U.S., rather than OBB’s alleged mistakes on the Austrian rail platform. The Solicitor General, on behalf of the United States, had urged the Court to deny certiorari in the case.

The Court will answer the following questions: (1) Whether, for purposes of determining when an entity is an “agent” of a “foreign state” under the first clause of the commercial activity exception of the Foreign Sovereign Immunities

Act, 28 U.S.C. § 1605(a)(2), the express definition of “agency” in the FSIA, the factors set forth in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, or common law principles of agency, control; and (2) whether, under the first clause of the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2), a tort claim for personal injuries suffered in connection with travel outside of the United States is “based upon” the allegedly tortious conduct occurring outside of the United States or the preceding sale of the ticket in the United States for the travel entirely outside the United States.

A date for argument has not yet been set, but it will be in the 2014 Term. The briefs filed in this case can be found [here](#).