Law360 Expert Analysis

The Foreign Sovereign Immunities Act: 'Bedlam' Redux

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September 22, 2017, 11::00 AM EDT

After four decades attempting to apply the commercial-activity exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), the "most significant" exception to sovereign immunity, Republic of Argentina v. Weltover Inc., 504 U.S. 607 (1992), indeed the ratio legis of the act, no court has ever decided the meaning of the heart of the exception, and with it the FSIA.

Its leading "clause one" withdraws immunity in any "action based upon a commercial activity carried on in the United States by a foreign state," 28 U.S.C. § 1605(a)(2)(cl.1), which as statutorily defined "means commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e). Remarkably, no court or commentator has ever been able to say what "substantial contact" means, the primary nexus Congress prescribed for U.S. jurisdiction over foreign states.

Nor has that term, upon which proper construction of clauses two and three of the exception flows, ever been construed by the U.S. Supreme Court. The lower courts anticipated 25 years ago that Saudi Arabia v. Nelson would resolve the "thicket of statutory interpretation and gloss," Tubular Inspectors Inc. v. Petroleos Mexicanos, 977 F.2d 180 (5th Cir. 1992), but the Supreme Court held the Nelsons' suit over police detention and torture was "not based upon any commercial activity," and thus it "need not reach the issue of substantial contact," 507 U.S. 349 (1993), leaving for future resolution a four-way conflict, which has widened since.

Two years ago, the court had occasion again to address clause one in OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015). The Ninth Circuit en banc cited the recurring confusion below, noting "'substantial contact' is not clearly defined in the FSIA or by our circuit or our sister circuits," Sachs v. Republic of Austria, 737 F.3d 584 (9th Cir. 2013), citing Shapiro v. Republic of Bolivia, 930 F.2d 1013 (2d Cir. 1991), and Maritime International Nominees Establishment v. Republic of Guinea, 693 F.2d 1094 (D.C. Cir. 1982), overruled on other grounds by Weltover. But the Ninth Circuit also did not define the term, finding it met under any standard by the U.S. internet sale of a Eurail pass in a case

arising from the purchaser's injury on a rail platform in Austria. The Supreme Court reversed, holding suit was "based upon" the injury, not the ticket sale, and rejected Sachs' revised theory that "OBB's entire railway enterprise" had the "requisite 'substantial contact'" as not raised below and "forfeited," still not deciding what it means.

Today "substantial contact" remains undecided four decades after enactment, through mass oversights and mere textual assumptions, at staggering cost to thousands of affected cases and federal law itself. What is straightforward has confounded courts, practitioners and commentators, a meaning long hidden in (double) plain sight.

From "Confusion" to "Bedlam," to "Abuse of Trust" and Dithering by the Courts

"To understand the effect of the Act, one must know something about the regime it replaced." Republic of Argentina v. NML Capital Ltd., 134 S. Ct. 2250 (2014) (Scalia, J.).

The transition from centuries of applying the international law rule of absolute sovereign immunity, by which foreign states could disown commercial obligations with impunity, to a new "restrictive theory" that developed in the 20th century with the rise of state trading and shipping companies during the world wars, "engender[ed] much confusion and conflict" in the courts. Republic of Mexico v. Hoffman, 324 U.S. 30 (1945) (Frankfurter, J., concurring). Under the restrictive theory, a foreign state's immunity is restricted to cases based on its sovereign or governmental acts and does not extend to its commercial or nonpublic acts, i.e., when it engages in commercial activity like any private player in the marketplace.

In 1952, the U.S. Department of State stepped in with the "Tate Letter," announcing "the United States should change its policy" to formally recognize the restrictive theory, and that henceforth it would consider foreign requests and make "suggestions of immunity" to the courts. But as Justice Antonin Scalia summarized in NML Capital, they "'thr[ew] immunity determinations into [further] disarray,' since 'political considerations sometimes led the Department to" suggest immunity not available under the restrictive theory. "Further muddling matters," immunity was determined variously by the department and the courts, "'subject to a variety of factors, sometimes including diplomatic considerations,'" under standards "'neither clear nor uniformly applied.'"

Congress "abated the bedlam in 1976," codifying the restrictive theory in the FSIA, and "replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime" with a "'comprehensive set of legal standards governing claims of immunity'" in U.S. courts.

Missing from Justice Scalia's narrative rhetoric was a salient point: From at least 1952 when the State Department adopted the modern rule of restrictive immunity, through 1976 when

the FSIA codified it, foreign states were subject to suit and jurisdictional standards like any party in interstate or foreign commerce. As Judge Irving Kaufman recounted in an early seminal decision: “Before the FSIA, plaintiffs enjoyed a broad right to bring suits against foreign states, subject only to State Department intervention,” and Congress “certainly did not intend significantly to constrict jurisdiction; it intended to regularize it.” Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981).

In subcommittee hearings on the FSIA bill, the Justice Department advised: “almost all countries in Western Europe followed the restrictive theory” and “permitted the maintenance of suit against the United States in contract and tort where the necessary contacts with the forum were present.” The Legal Adviser of the Department of State further advised, “following the example of most other countries” it was decided, as to the key question of whether activity was sovereign or commercial, “to put our trust in the courts to work that out.” With remarkable prescience a subcommittee member replied: “I hope that trust would not be abused by the courts” (June 2, 1976 Hearing, Rep. B. Jordan).

Congress’ trust in the courts over the threshold issue: whether the nature of the activity the action is “based upon” is “sovereign” or “commercial,” generally has not been abused following early guidance by the circuit courts and Supreme Court (apart from over-reading “based upon” which continues to this day). What has been thoroughly “abused” is the jurisdictional issue: whether activity found to be commercial has the nexus Congress prescribed under the primary clause of the commercial-activity exception, an issue the courts have not decided and simply abdicated for decades, despite an obligation to exercise jurisdiction given them by Congress.

Remedial Legislation to Open U.S. Courthouses like Other Nations

The FSIA was major remedial legislation enacted to bring U.S. practice in line with international law. 28 U.S.C. § 1602. Including as its statutory purpose an intent to “protect the rights of … litigants in United States courts,” and provisions treating foreign states like private parties, Congress for the first time provided “‘our citizens … access to the courts’” and effective remedies against foreign states. Verlinden BV v. Central Bank of Nigeria, 461 U.S. 480 (1983).

The FSIA’s “general purpose is simple: To assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would.” (House Hearing, testimony of State Legal Adviser). As the bill was being considered, the court in Alfred Dunhill of London Inc. v. Republic of Cuba, 425 U.S. 682 (1976), noting the “injury to the private party, who is denied justice through judicial deference to a raw assertion of sovereignty,” recognized “the need for merchants ‘to have their rights determined in courts[.]’”

A “Statutory Labyrinth” and “Gordian Knot”

The FSIA, “a constant bane of the federal judiciary,” has been variously characterized as “remarkably obtuse,” a “statutory labyrinth” and a “Gordian knot.” Better described as a “marvel of compression,” it combines in interlocking provisions traditionally separate questions: the availability of immunity, subject matter jurisdiction over the action, and personal jurisdiction over the defendant. This “economy of decision,” as early noted in Texas Trading, came “at the price of considerable confusion in the district courts.” Confusion soon extended to the circuit courts.

The commercial-activity exception withdraws immunity when the suit is “based upon” “commercial activity” or “acts” of the foreign state, and creates jurisdiction in three circumstances: when the commercial activity or act has “substantial contact with the United States” (clause one), is “performed in the United States” (clause two), or “causes a direct effect in the United States” (clause three). The courts, accustomed to applying state long-arm statutes and the “minimum contacts” jurisprudence of constitutional due process in cases against domestic and foreign defendants engaged in interstate and foreign commerce, including all those owned by foreign states prior to 1976, have simply assumed the term “substantial contact” was a peculiar new standard, requiring more than “minimum contacts” in cases against foreign states, without ever deciding what it meant, or recognizing that it codified that jurisprudence.

The confusion has been most acute in the two circuits often called upon to decide cases under the FSIA: the Second Circuit encompassing the New York commercial center, and the D.C. Circuit having special venue over foreign governments. Early on Texas Trading, one of a series of eight cases before the Second Circuit arising out of Nigeria’s breach of massive cement contracts, observed: “These cases present an opportunity to untie the FSIA’s Gordian knot, and to vindicate the Congressional purposes behind the Act.” Noting clauses one and two might apply, the Second Circuit, setting what became a 40-year pattern, “look[ed] no further than the third clause” to find jurisdiction, not addressing the meaning of the first clause and “substantial contact.”

Superficial Textualism: “Substantial Contact” Must Be More than “Minimum Contacts”

Then in 1982 the D.C. Circuit did address clause one in Maritime, but “read ‘substantial contact’ as demanding more than ‘minimum contacts,’” and based solely on that superficial textual comparison declared: “in choosing those words, Congress made clear that the immunity determination under the first clause diverges from the ‘minimum contacts’ due process inquiry.” Without deciding what “substantial contact” meant, the D.C. Circuit

improperly reversed a district court finding that U.S. contract meetings and other contacts were “more than sufficient” to satisfy clause one, and held it lacked jurisdiction to confirm a $25 million arbitral award — the type of case that Congress intended U.S. courts to hear. Later the D.C. Circuit reaffirmed that substantial contact “is stricter than that suggested by the minimum contacts due process inquiry” in Zedan v. Saudi Arabia, 849 F.2d 1511 (D.C. Cir. 1988), abrogated on other grounds by Weltover, still not deciding what it meant.

The Second Circuit, following Maritime, similarly declared “it is clear that Congress intended a tighter nexus,” and “the ‘substantial contact’ standard … requires a closer nexus than the ‘minimum contacts’ necessary for due process,” Shapiro v. Republic of Bolivia, 930 F.2d 1013 (2d Cir. 1991). Noting “caselaw giving content to the term ‘substantial contact’” remained “scant” on this “critical question,” it supplied none itself.

Two decades after the FSIA became law, the D.C. Circuit acknowledged it had “never decided precisely what ‘substantial contact’” means, In re Papandreou, 139 F.3d 247 (D.C. Cir. 1998), reasserting its textualist assumption that “it requires more than the minimum contacts sufficient to satisfy due process,” still not deciding it.

Three decades after enactment, both circuits began eliding not only what “substantial contact” meant, but that “critical” term altogether. In Kirkham v. Société Air France, 429 F.3d 288 (D.C. Cir. 2005), abrogated by Sachs, the D.C. Circuit, applying the Supreme Court’s decision in Nelson and not the statute, extended Nelson’s “elements” test for determining sovereign conduct to jurisdictional nexus, which Nelson expressly did not reach. Misreading Nelson, the D.C. Circuit created an oddly worded requirement that there be U.S. activity which “establishes a fact without which the plaintiff will lose,” a test unexpressed in the statute, and bearing no relation to “substantial contact” which it nowhere mentioned. The Second Circuit also did not mention “substantial contact” in Kensington International Ltd. v. Itoua, 505 F.3d 147 (2d Cir. 2007), improperly reversing a finding that clause one was satisfied by the sale of millions of oil barrels to U.S. purchasers and million-dollar payments through a New York bank.

Today, four decades after enactment, the two leading FSIA circuits have yet to decide the meaning of clause one. Yet the D.C. Circuit instructs district courts that the FSIA is “not a particularly generous” basis for jurisdiction over a foreign state. Peterson v. Saudi Arabia, 416 F.3d 83 (D.C. Cir. 2005). And sidelining clause one under the pattern set early on in Texas Trading, the D.C. Circuit commonly analyzes clause one cases under clause three. For example in Cruise Connections Charter Management 1 LP v. Attorney General of Canada, 600 F.3d 661 (D.C. Cir. 2010), a suit based on the termination of a $54 million contract with a U.S. cruise operator to charter ships for the Vancouver Olympics, the D.C. Circuit confined its analysis to finding a “direct effect” under clause three, not considering whether the substantial U.S. contacts satisfied clause one.

More recently, the Ninth Circuit en banc in Sachs, citing Maritime and Shapiro, concluded it is “generally agreed” substantial contact “sets a higher standard for contact than the minimum contacts standard,” 737 F.3d at 598. Far from “generally agreed,” the meaning of “substantial contact” was and remains hopelessly divided and undecided.

As of 1993 in Nelson, the Eleventh Circuit below had noted the “varying interpretations of the jurisdictional reach of the first clause,” citing Vencedora Oceanica Navigacion SA v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195 (5th Cir. 1984): “Despite strong congressional intent to promote uniformity,” the courts “announced widely varying formulations … divided into four categories: (1) a ‘literal’ approach; (2) a ‘nexus’ approach; (3) a bifurcated literal and nexus approach; and (4) a ‘doing business’ approach.” Though Nelson left unresolved the four-way conflict, paradoxically several circuits misread it to impose a fifth “elements” test on an issue it did not reach, reworked by the D.C. Circuit in Kirkham into a sixth “fact-lose” test, which the Ninth Circuit adopted in Sachs. In 2015, the Supreme Court in Sachs overruled the “elements” and “fact-lose” tests as “overreading” and “flatly incompatible” with Nelson. Beyond overruling the Ninth Circuit’s variant, the Supreme Court still did not decide the meaning of “substantial contact” or the remaining four-way split.

Reflecting the resurgent bedlam and futility, the Sixth Circuit in Triple A International Inc. v. Democratic Republic of the Congo, 721 F.3d 415 (6th Cir. 2013), insisting “substantial contact” is “far from clear,” and that the statutory definition “only confuses [clause one]’s meaning,” indeed would “make nonsense of it,” decided instead “what the definition does not mean” to uphold dismissal of a $14 million contract entered with a Michigan corporation to broker the supply of military equipment from Korea.

Obvious Meaning Hidden in Double Plain Sight

Clearing up the decades of confusion, conflict and indecision could not be easier. It can be shown two ways: either through a simple overlooked pincite in the FSIA’s legislative history, or by the “settled meaning” found throughout in personam jurisprudence that “substantial contact” means “minimum contacts.”

1. A Simple Pincite in Legislative History that Textualist Courts Disdain

The legislative history of the act, disdained by textualists and dismissed by the D.C. Circuit in Maritime, explains in the authoritative House Report:

> (b) Personal Jurisdiction. —Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states … . The requirements of minimum jurisdictional contacts …

> are embodied in the provision. Cf. International Shoe Co. v. Washington, 326 U.S. 310 (1945), and McGee v. International Life Insurance Co., 355 U.S. 220, 223 (1957) … . Significantly, each of the immunity … sections 1605-1607, requires some connection between the lawsuit and the United States … . These immunity provisions … prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction.

Of the two in personam jurisdiction cases cited, most lawyers know International Shoe and its constitutional due process test, requiring "certain minimum contacts" such that "suit does not offend 'traditional notions of fair play and substantial justice.'" Less known but as significant, McGee is the seminal case that first defined "minimum contacts" a decade later. The House Report gave a pincite only to McGee, where it defined "minimum contacts" as a "substantial connection" with the forum. 355 U.S. at 223 ("It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State.")

What Maritime did to this legislative history, as the saying goes, shouldn't happen to a dog. Asserting the "history does not contradict the clear import of the words Congress chose," referring to "substantial contact" and its own textual assumption, the D.C. Circuit paraphrased that the three clauses "'prescribe the necessary contacts [the 'minimum contacts' requirement of International Shoe Co. v. Washington, 326 U.S. 310 (1945)] which must exist before our courts can exercise personal jurisdiction,'" and concluded: "To read 'substantial contact' as demanding more than 'minimum contacts' is fully compatible with this statement." Bracketing only International Shoe and dropping McGee, its confident assumption was not compatible at all with McGee and its pincite, both of which the D.C. Circuit entirely overlooked.

The courts, practitioners and academy, mystified for decades over the meaning of "substantial contact" and misled by Maritime, have all missed the obvious: that Congress lifted that term and the language of clause one almost verbatim from McGee, just as Congress made clear in the legislative history. A comparison of McGee's holding with clause one graphically makes the point:

Jurisdiction over an out-of-state defendant is allowed when
"the suit was based on a contract
which had substantial connection with that State."

McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)

Jurisdiction over a foreign state is provided when
"the action is based upon a commercial activity"

"having a substantial contact with the United States."

FSIA, 28 U.S.C. §§ 1603(e), 1605(a)(2) (cl. 1) (1976)

2. "Settled Meaning" that "Substantial Contact" Meant "Minimum Contacts"

Canons of construction permit resort to legislative history when a term is ambiguous, as "substantial contact" has been perceived for 40 years. Such resort should not have been necessary. Two decades of controlling long-arm jurisprudence alone made the term plain and unambiguous in 1976, as have four more decades of such jurisprudence since.

"Where Congress uses terms that have accumulated settled meaning," as it did in clause one, "a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning[.]" NLRB v. Amax Coal Co., 453 U.S. 322 (1981).

As noted above, McGee, a unanimous decision, defined "minimum contacts" for the first time as a "substantial connection" with the forum. The next year in Hanson v. Denckla, 357 U.S. 235, 252-53 (1958), another seminal decision, the Supreme Court reaffirmed McGee, using "substantial connection" and "contact" interchangeably. As should have been obvious, what Congress invoked 20 years later in requiring a "substantial contact" with the forum was its settled meaning: "minimum contacts."

Reaffirmed almost every decade since, 60 years after McGee, the standard continues to govern personal jurisdiction over domestic and foreign defendants — even those half-owned by foreign states. In Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), the Supreme Court reaffirmed that, "So long as it creates a 'substantial connection' with the forum, even a single act can support jurisdiction," citing McGee. This classic application of McGee, and paradigm underlying modern "single-act" long-arm statutes, was codified by Congress in the FSIA. The House Report explained that a single act or omission can satisfy both clause one ("commercial activity" being defined to include a "course of commercial conduct," "transaction" or "act") and overlapping clause two ("act"). Further, the FSIA is a "Federal long-arm statute" "patterned after" one of the earliest single-act statutes, "the long-arm statute Congress enacted for the District of Columbia," guidance Maritime summarily dismissed.

Thereafter in Asahi Metal Industry Co. Ltd. v. Superior Court, 480 U.S. 102 (1987), the court again affirmed the "substantial connection" standard "necessary for a finding of minimum contacts," citing McGee and Burger King. And it has reaffirmed that standard at least twice in the last decade, in J. McIntyre Machinery Ltd. v. Nicastro, 564 U.S. 873 (2011), reaffirming Asahi, and Walden v. Fiore, 134 S. Ct. 1115 (2014), again citing "substantial connection" as the "minimum contacts" test.

That the courts have done just what Congress feared, abusing the trust placed in them, and defeated the clear purpose and language of the FSIA for decades, is astounding. But that the courts (with practitioners and commentators) have missed for so long two basic exegeses in plain sight — a simple pincite and classic meaning, abdicated for 40 years their obligation to decide and exercise jurisdiction given, and imposed through mere textual assumption staggering costs on parties and federal case law, is a veritable legal disgrace.

Recognition in Sachs Colloquy that "Substantial" Means "Minimum"

After the Ninth Circuit en banc cited the confusion over "substantial contact" without defining it, the petitioner in Sachs did not raise the question in the Supreme Court. Another pending petition we filed did, presenting an opportunity finally to resolve the recurring confusion and conflicts, in a case arising in the D.C. Circuit that in Maritime had created much of it.

In Odhiambo v. Republic of Kenya, 764 F.3d 31 (D.C. Cir. 2014), the D.C. Circuit sanctioned the dismissal of a case based on a contract relationship originating in Kenya that continued for years in the United States, applying Kirkham's "fact-lose" test for clause one. The panel held it "must follow" Kirkham which it insisted "is correct," still not deciding "substantial contact," while dividing (2-1) over whether clause three provided jurisdiction. Hours after oral argument in Sachs, which focused on points raised by Odhiambo and not Sachs, the court invited the solicitor general to file a brief in response to Odhiambo's petition.

Odhiambo's petition evidently resonated with justices at the outset of the argument in Sachs, some expressing agreement that "substantial contact" means "minimum contacts," and that "based upon" ensures the existence of commercial activity and traditional specific (long-arm) jurisdiction. As Justice Elena Kagan remarked:

> JUSTICE KAGAN: … [I]t doesn't seem … that wording is very different from the wording that we've used in specific jurisdiction cases. The wording here is "based on" — we've used "arising out of." … [I]t's pretty clear that the FSIA is meant to ensure that when a foreign government is acting as a commercial actor, it gets treated like a foreign corporation. … There's the insistence on … a minimum contact, and then there is the insistence on a … relationship between that contact … and the claim. … I'm having trouble of thinking why… there would be a different test.

Official Transcript, OBB Personenverkehr AG v. Sachs (Oct. 5, 2015).

Justice Scalia generally agreed:

> JUSTICE SCALIA: … It seems to me that the definition … is the due process test. The definition is, "…having substantial contact with the United States." That sounds to me like … the due process test. But … it has to be based on a commercial activity carried on in the United States. And it seems to me that is something … added to the … constitutional test.

Agreeing the "substantial contact" definition is the "due process test" (of "minimum contacts"), Justice Scalia questioned whether the clause one text, "activity carried on in the United States" adds to the definition, suggesting a "literal" reading previously "repudiated by the circuits." Vencedora, 730 F.2d at 200. Justice Sonia Sotomayor recognized the "work" of minimum contacts is found in "substantial contact":

> JUSTICE SOTOMAYOR: … I don't even understand why we're talking about "based upon."
>
> As Justice Ginsburg said, there's no dispute here that whether the based-upon is the ticket sale or the operation of the train, both of them are commercial activities.
>
> Isn't the work in substantial contact with the United States? Isn't that what we should be looking at instead? …

Indeed the courts should be looking at "substantial contact." As several justices recognized, it is simply the due-process test of "minimum contacts." As for "based upon," also used in McGee, it has no more talismanic significance than "arising from" or similar rubrics of specific jurisdiction, as the justices noted. It also ensures, bearing in mind the interlocking FSIA structure, the conduct upon which suit is based is "commercial," as several further observed. Once that threshold determination is made, the FSIA subjects foreign states to federal long-arm jurisdiction, under standards like those applied under state long-arm statutes to any private party.

Though the court eventually followed the solicitor general's recommendation (focused on international comity) to deny Odhiambo's petition, long on the SCOTUSblog "watch list," its resolution of "substantial contact" evidently was viewed by justices as being correct. And Kirkham, whose "fact-lose" test the D.C. Circuit imposed on Odhiambo as "correct," was overruled by the Sachs court as "flatly incompatible" with Nelson as Odhiambo argued.

Staggering Costs of Judging without Deciding

The costs of leaving "substantial contact" unexamined and undecided for 40 years are staggering, and three-fold.

First, decades after enactment, circuit courts routinely uphold dismissals and reverse findings of jurisdiction without deciding what clause one means, or necessarily clauses two and three. Months after the D.C. Circuit said in 1982 “it ought to be difficult” for foreign states “engaged in commercial activity with substantial American contact” to invoke immunity, Gilson v. Republic of Ireland, 682 F.2d 1022 (D.C. Cir. 1982), it then created in Maritime a “stricter” placeholder for “substantial contact,” making it far less difficult. Likewise the Second Circuit, having “cautioned” that “courts must be concerned with Congress' goal of opening the courthouse doors ‘to those aggrieved by the commercial acts of a foreign sovereign,’" Weltover Inc. v. Republic of Argentina, 941 F.2d 145 (2d Cir. 1991), aff’d sub nom., 504 U.S. 607 (1992), that same year adopted in Shapiro a “tighter” placeholder, since used to close them.

In a great irony, the two circuits that emphasized the purpose of the FSIA to restrict immunity and provide court access to U.S. interests harmed by foreign states in the global economy, quickly lost sight of that purpose. Typically used to restrict jurisdiction and deny access, their placeholders have been responsible for the dismissal of thousands of cases on jurisdictional grounds without ever reaching the merits. With each passing decade, yet more U.S. companies and citizens are left at the courthouse door, in cases Congress plainly intended the courts to hear.

Second, using a placeholder without deciding “substantial contact,” the courts have turned the entire commercial-activity exception on its head. For decades its primary prong, providing ordinary transacting business (clause one) jurisdiction, has been seldom applied; single act (clause two) jurisdiction, which overlaps clause one, has been rarely invoked; and effects (clause three) jurisdiction, ordinarily a residual basis, has become the default into which most cases are shoehorned by the courts. This skewed application, contrary to the language, purpose, structure and history of the act, is the exact reverse of how long-arm jurisdiction customarily is applied.

Third, the federal courts, as courts of limited jurisdiction, “possess no warrant to create jurisdictional law of their own.” Insurance Corp. of Ireland Ltd. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694 (1982). Yet that is what they’ve done for 40 years, creating a parallel universe of jurisdictional case law, on a mere textual assumption, one governing the vast majority of cases against domestic and foreign defendants including those half-owned by foreign states, and another for cases against foreign states and their majority-owned enterprises.

The parallel case law is not only misguided as to clause one, but also clauses two and three, to the extent the courts fail to apply to any of them the “minimum contacts” standard Congress prescribed for each. Just last year the Sixth Circuit, rejecting a concurrence in its recent Triple A decision “that reads the ‘minimum contacts’ requirement into the statute”

from the legislative history, which it dismissed as not “appropriate,” flatly held “the ‘direct effect’ element [of clause three] does not incorporate the "minimum contacts" test,” Rote v. Zel Custom Mfg. LLC, 816 F.3d 383 (6th Cir. 2016), which is flatly wrong.

Time to Abate the Resurgent Bedlam and Finally Decide the Heart of the FSIA

Nothing in the FSIA permits such dismissals, skewed application, and parallel universe. Without knowing the meaning of a jurisdictional statute, it is unclear how the courts, having an “unflagging obligation ... to exercise the jurisdiction given them,” Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), can determine whether they are exercising it. A statutory term for jurisdiction is “not mere whimsy,” Insurance Corp., and the courts have “no option to throw up” their hands. Nelson, 507 U.S. at 359. Thwarting these mandates, or unable to meet them without guidance, the courts have defeated the clear intent of Congress for decades.

“Knowledge is essential to understanding; and understanding should precede judging,” Justice Louis Brandeis once noted. The corollary, that deciding should precede judging, should be even more obvious. Both have been ignored for decades by the courts, overlooking a simple pincite in legislative history too often disdained, and 60 years of controlling jurisprudence. The mass oversights, abdication of jurisdiction given, and abuse of trust placed by Congress in the courts, has gone on far too long.

It’s past time to cut the FSIA’s most basic “Gordian knot,” to “vindicate the Congressional purposes behind the Act,” Texas Trading, 647 F.2d at 307, and actually decide it. After Congress abated the “bedlam” over sovereign immunity in 1976 and placed its trust in the courts, bedlam redux has raged ever since. Proper construction and application of the long-arm statute Congress enacted could not be more straightforward, and “critical.” It still awaits decision, 40 years later.

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