THE FOREIGN SOVEREIGN IMMUNITIES ACT AND ITS IMPACT ON AVIATION LITIGATION

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English common law encapsulated the theory of sovereign immunity in the familiar phrase "the King can do no wrong." Since the King of England could do no wrong, he could not be sued without his permission. However, we live in the United States, where for every wrong there must be a wrongdoer. The fact that the wrongdoer is the United States government (our King) only motivates free-living and litigious Americans all the more, and U.S. law has been established to make the government account for its wrongs. But what can be done if a foreign King is the wrongdoer? Can a King who can do no wrong in his country be made to account for wrongdoings associated with the United States? The ever-fluid Foreign Sovereign Immunities Act seeks to answer these questions. This paper will attempt to delve into the history behind the Act, trace its developments, and consider its impact on aviation manufacturers involved in U.S. litigation.

I. HISTORY OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

In the 1812 case of *The Schooner Exchange v. M'Faddon*, 7 Cranch 116 (1812), a French warship known as the Balaou was forced to dock at the Port of Philadelphia because of bad weather.[2] While the ship was in port, two United States citizens filed suit claiming that the Balaou was actually their commercial ship known as the Schooner Exchange, which had been unlawfully seized by Napoleon and converted into a battleship. The Supreme Court dismissed the suit on the ground that Napoleon could not be sued in a United States court. Chief Justice John Marshall's opinion began with the proposition that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."[3] Nevertheless, in order to promote friendly international relations, the United States had impliedly relaxed its absolute jurisdiction. Therefore, suits against friendly ships owned by foreign sovereigns would not be entertained.[4] Although *The Schooner Exchange* applied only to its specific facts, the "classical" or absolute theory of foreign sovereign immunity emerged from Justice Marshall's opinion and remained virtually unquestioned for over 100 years.[5]

Throughout the 1800's and early 1900's, the United States followed the classical theory and granted foreign sovereigns virtually absolute immunity from suit in United States courts.[6] This was done "as a matter of grace and comity," not because of any constitutional impediment to allowing foreign sovereigns to be sued.[7] From the time of *The Schooner Exchange*, the decision to grant sovereign immunity was a common law decision made by the courts,[8] but in a 1943 case the Supreme Court granted sovereign immunity to the government of Peru solely because the State Department had requested immunity.[9] Thereafter, the decision to grant sovereign immunity was *de facto* made by the U.S. State Department, as the courts invariably deferred to the State Department's decision on immunity.[10]

In 1952, in a letter from the Acting Legal Adviser of the Department of State, Jack Tate, to the Acting Attorney General (known as the "Tate letter"), the State Department departed from the "classical" theory of foreign sovereign immunity, and adopted a "restrictive" theory of sovereign immunity.[11] As the Tate letter explained:

> According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without [its] consent, be made a respondent in the court of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jures imperii*) of a state, but not with respect to private acts (*jures gestionis*).[12]

The Tate letter reasoned that since the United States government allowed itself to be sued in United States courts, and even in foreign courts if the suits concerned American ships, it was inconsistent to continue granting absolute immunity to other states for suits arising out of their commercial activities.[13] In addition, increased involvement of foreign governments in commercial activities made it necessary to create a forum where the rights of parties doing business with foreign governments could be determined.[14]

In practice, however, the restrictive theory announced in the Tate letter proved difficult to apply. The letter did not define "commercial" and "public" activities or specify who would determine which type of activity was involved.[15] Furthermore, there was no consistent method of acquiring jurisdiction over foreign sovereigns.[16] As a result, the restrictive theory was inconsistently applied and foreign sovereign immunity was often granted or denied based on political pressures or happenstance.[17]

In May, 1976, the Supreme Court endorsed the restrictive theory in *Alfred Dunhill of London v. Cuba*.[18] This case arose from the Cuban government's 1960 takeover of the five leading manufacturers of Cuban cigars.[19] The new, government-installed management (called "interventors") continued exporting cigars to the United States using the same trademarks as had been used before the takeover. The cigar companies' former owners fled to the United States, where they sued the cigar importers for trademark infringement, claiming that they, not the interventors, owned the trademarks on the cigars. The former owners also sued for the purchase price of cigars that had been shipped to the United States before the takeover. The United States cigar importers had already paid the interventors for those same cigars, and therefore demanded that the interventors refund the amounts mistakenly paid. Not surprisingly, the interventors refused to do so.

The interventors claimed that their refusal to pay was an "act of state," and therefore not subject to adjudication in United States courts.[20] The Supreme Court disagreed.[21] The act of state doctrine arises from common law and prevents United States courts from questioning the validity of a foreign government's actions within its own territory.[22] This doctrine did not allow the interventors to repudiate "purely commercial" obligations without being subject to adjudication in United States courts.[23] The plurality based its reasoning on the restrictive theory of sovereign immunity, which it discussed with approval. The Court stated that the restrictive theory was "generally accepted as the prevailing law" in the United States.[24] Under the restrictive theory, sovereign immunity should be granted only for public or governmental actions, and not for commercial activities of a type that can also be carried on by private citizens.[25] The Court concluded that allowing the interventors to repudiate a commercial debt using the act of state doctrine would be inconsistent with the restrictive approach to sovereign immunity, and therefore, could not be permitted.[26]

Alfred Dunhill's discussion of the restrictive theory has been instrumental in defining the commercial activity exception to the FSIA.[27] For example, in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the Court held that a foreign state's imprisonment and torture of an American citizen, arising from his employment at a government-owned hospital in Saudi Arabia, was not a "commercial activity" under the FSIA. The Court reasoned that "commercial" must be given the same meaning that Congress understood the restrictive theory to require when the FSIA was passed. The Court looked to *Alfred Dunhill's* discussion of the restrictive theory and determined that the restrictive theory would not have permitted suit on these facts because imprisonment and torture are not activities that can be carried on by private citizens. Therefore, suit against Saudi Arabia was barred.

Four months after the *Alfred Dunhill* decision, in October 1976, the restrictive theory was finally codified as the Foreign Sovereign Immunities Act ("FSIA").[28] The purpose of codification was to provide clear guidelines and prevent future inconsistencies in the theory's application. Under the FSIA, the courts, not the State Department, are called upon to utilize specific standards to determine whether sovereign immunity will be granted in a particular case.

II. WHY IS THE FSIA IMPORTANT IN AVIATION CASES?

An aviation manufacturer faced with litigation in the United States cannot solely look within its own company to evaluate risk, but must focus on which other parties have been sued and analyze how this might assist or deter the defense. This is particularly true when faced with a defendant or co-defendant who can be classified as a foreign sovereign. While aviation litigation does not usually include specifically named foreign states, it is very common for an aviation manufacturer to find itself in court with a foreign airport, airline, or other manufacturer which can be deemed a foreign sovereign.

A. Who is a Foreign Sovereign?

The FSIA is the only basis for subject matter jurisdiction over "foreign states."[29] It grants sovereign immunity to all foreign states, subject to a series of exceptions.[30] "Foreign state" is defined to include foreign states themselves, political subdivisions of foreign states, and "agencies or instrumentalities" of foreign states.[31] An agency or instrumentality of a foreign state is any entity which is[32]:

1. a separate legal person, corporate or otherwise, and
2. 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. neither a citizen of a State of the United States . . . nor created under the laws of any other country.[33]

1. <u>Foreign Sovereign Aviation Entities</u>

Many airlines and some aviation manufacturers are considered to be "agencies or instrumentalities" of foreign states, and therefore enjoy the protections and are subject to the special provisions of the FSIA. Airlines and aviation manufacturers most frequently qualify as agencies or instrumentalities because a majority of their shares are owned by a foreign government. Airlines that have been found to be "agencies or instrumentalities" under the FSIA include Saudi Arabia Airlines,[34] Libyan Arab Airlines,[35] Thai Airways International,[36] South African Airways,[37] Garuda Indonesia (national airline of Indonesia),[38] Surinam Airways,[39] Aerlinte (Irish commercial air carrier),[40] Air France,[41] Lot Polish Airlines,[42] Air Afrique,[43] Austrian Airlines,[44] Iberia Lineas Aereas de Espana,[45] Lufthansa German Airlines,[46] and Gulf Air, Inc.[47] Aviation manufacturers that have been found to be "agencies or instrumentalities" include Augusta S.p.A. and Siai Marchetti (Italian aircraft manufacturers),[48] Avions de Transport Regional, G.I.E. (French and Italian owned aircraft manufacturer),[49] Societe Nationale Industrielle Aerospatiale (French helicopter manufacturer),[50] Embraer-Empresa Brasileira de Aeronauticas, S.A. (Brazilian aircraft manufacturer),[51] Societe Nationale d'Etude et de Construction de Moteurs d' Aviation, S.A. (French manufacturer of aircraft engines),[52] and Airbus Industrie GIE (French aircraft designer and manufacturer).[53] In addition, entities such as the Nigerian Airport Authority,[54] the U.S.S.R. Ministry of Civil Aviation,[55] and the European Organisation for the Safety of Air Navigation (European equivalent of the Federal Aviation Administration),[56] are also agencies or instrumentalities of foreign states, thus enjoying the protections of the FSIA.

2. <u>Pitfalls in the "agency or instrumentality" determination: Tiering, Pooling, and Timing</u>

The language of the FSIA is extraordinarily confusing, and determining whether an entity qualifies as an "agency or instrumentality" is not straightforward.[57] Much of the confusion has centered on whether ownership interests may be "tiered" or "pooled" to achieve 50% ownership by a foreign sovereign. In addition, there has been confusion as to what point in time an entity's ownership structure should be considered in determining whether it is a foreign sovereign.

A. *Tiering*

"Tiering" occurs when a foreign sovereign owns a majority interest in a holding company or other intermediary entity, which in turn owns a majority interest in the entity claiming sovereign immunity. For example, South African Airways is 80% owned by Transnet Ltd., which is controlled by South Africa's Minister for Public Enterprises.[58] An entity with this type of ownership structure might reasonably be considered an agency or instrumentality without departing from the purpose of the FSIA, and until recently a majority of the lower federal courts held that a "tiered" ownership structure did not defeat a claim of sovereign immunity.[59] However, other courts have noted that a literal reading of the FSIA does not permit tiering.[60] In *Gates v. Victor Fine Foods*, the Ninth Circuit held that entities owned by foreign sovereigns though intermediaries are <u>not</u> agencies or instrumentalities under the FSIA. The court reasoned that the FSIA states that an agency or instrumentality must either be 1) an organ of a foreign state or, 2) majority owned by a *foreign state or political subdivision thereof* (emphasis added). The statute does not say that entities which are majority owned by agencies or instrumentalities are themselves agencies or instrumentalities.[61] In the recent case of *Dole Food Co. v. Patrickson*, 123 S.Ct. 1655 (2003), the Supreme Court resolved this circuit split in favor of the Ninth Circuit position, and held that entities which are indirectly owned by a sovereign government are not agencies or instrumentalities of that government. This issue will be dealt with in greater detail in Part III of this paper.

B. *Pooling*

"Pooling" occurs when two or more foreign states each individually own less than fifty percent, but collectively own greater than fifty percent, of an entity claiming sovereign immunity. For example, a majority of the shares of the now defunct airline Air Afrique were owned by a consortium of eleven African states: Benin, Burkina Faso, Central African Republic, Chad, Congo, Cote d'Ivoire, Mali, Mauritania, Niger, Senegal, and Togo.[62] However, none of these eleven states owns greater than fifty percent of Air Afrique.[63] Both United States courts which have considered cases involving Air Afrique have permitted pooling of these states' interests, and thus granted the airline foreign sovereign status.[64] Most other courts which have considered pooling have also permitted it.[65] The U.S. Supreme Court has not yet addressed this issue.

C. *Combination of Tiering and Pooling*

Entities have been permitted to employ both tiering and pooling at the same time in order to achieve the required 50% ownership. For example, Avions de Transport, Regional, G.I.E. ("ATR"), one of the manufacturers of the ATR72-210 aircraft, is approximately 75% owned by France and Italy (but less than 50% owned by each state) through a variety of double and triple tiered intermediaries and holding companies.[66] In *In re Air Crash Disaster Near Roselawn, Indiana on October 31*, 1994, 96 F.3d 932 (1994), the Seventh Circuit discussed whether ATR could reasonably qualify for foreign sovereign status notwithstanding its ownership structure.[67] The court cited "the purpose and history" of the FSIA and the legislative intent to define "foreign sovereign" broadly in concluding that ATR was indeed an agency or instrumentality of a foreign state.[68]

D. *Timing*

A third issue which affects whether an entity qualifies as an agency or instrumentality is the time period used to determine whether an entity is majority owned by a foreign state. Some courts have held that the relevant time is when the acts that the suit is based on occurred.[69] These courts have reasoned that "'the potential sensitivity of actions against foreign states' is still a concern even after the majority of the entity is no longer owned by a foreign state."[70] In addition, foreign entities should not have to worry about losing immunity for past occurrences when planning for future reorganization.[71] Other courts have held, in non-aviation contexts, that the relevant time is the time of filing.[72] The Supreme Court also resolved this issue in *Dole Food Co. v. Patrickson*, 123 S.Ct. 1655 (2003), and decided that instrumentality status is to be determined at the time of filing suit. This aspect of the *Dole* case will be discussed further in Part III.

B. Exceptions to Sovereign Immunity

The FSIA begins with a general grant of immunity to all foreign sovereigns, but then lists eight specific exceptions to immunity.[73] These exceptions are cases in which 1) the foreign state has explicitly or implicitly waived immunity, 2) suit is based on a commercial activity of the foreign state, 3) property taken in violation of international law is at issue, 4) immovable property in the United States is at issue, 5) damages were caused by the tortuous act or omission of the foreign state, 6) enforcement of an arbitration agreement is sought, 7) money damages are sought for personal injury or death caused by "an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of support or resources for such an act" (known as the state sponsored terrorism exception), or 8) suit is brought in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state.[74] If one of the statutory exceptions applies, the foreign sovereign becomes subject to suit in United States' courts, but retains the other FSIA procedural rules and protections. These statutory protections are discussed in more detail in Section II-C.

The commercial activity and state sponsored terrorism exceptions are the most relevant to aviation litigation. There are a few cases in which the courts have found that a foreign sovereign defendant unwittingly waived its immunity.[75] The remaining five exceptions are very seldom used in aviation litigation.

1. Commercial Activity

Of the eight enumerated exceptions, the "commercial activity" exception is by far the most commonly employed in aviation litigation. This exception permits foreign sovereigns to be sued if the suit is "based upon" any of three situations:

1. a commercial activity carried on in the United States by the foreign state or
2. an act performed in the United States in connection with a commercial activity of the foreign state elsewhere or

3. an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere that causes a direct effect in the United States.[76]

A foreign sovereign engages in "commercial activity" when it exercises powers that can also be exercised by private citizens acting in the marketplace.[77] A suit is "based upon" an act if "that activity establishes the elements of a claim that, if proven, would entitle a plaintiff to relief under the theory of the case."[78] In other words, "based upon" means that the activity specified in the statute must be necessary to establish an element of the plaintiff's case. Simply conducting business in the United States on a regular basis will not satisfy the commercial activity requirement.[79] Although a foreign sovereign has the burden of pleading foreign sovereign status and refuting a plaintiff's assertion that an exception applies, in many aviation cases the courts have simply assumed, without discussion, that the commercial activity exception applies, and therefore allowed the suit to proceed.[80]

2. State Sponsored Terrorism

One noteworthy, though less frequently used, exception is for suits arising out of acts of state sponsored terrorism. This exception was added to the statute in 1996 in response to Libya's involvement in the 1988 bombing of Pan American Airlines Flight 103 over Lockerbie, Scotland.[81] It provides that foreign sovereigns are not immune from suit in United States courts for money damages due to personal injury or death caused by "act[s] of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act" if the defendant is designated as a state sponsor of terrorism and the victims were United States citizens.[82] During the last four years, this amendment has made several high profile aviation lawsuits possible. In 1998, the survivors and representatives of those killed in the crash of Pan American Flight 103 sued the government of Libya for wrongful death.[83] Libya was also sued for indemnification by an insurance company that paid $485 million in claims arising from the Pan American Flight 103 bombing.[84] In 2002, a $330 million judgment was entered against The Islamic Republic of Iran and its Ministry of Information and Security for damages resulting from the hijacking of Trans World Airlines Flight 847 in 1985.[85] Most recently, the representatives of two victims of the September 11, 2001 World Trade Center attack sued and obtained a judgment against the government of Iraq.[86] While enticing to plaintiffs as a means to get to the wrongdoer in an aviation disaster, the ability to actually collect damages in such a suit is questionable at best.[87]

C. The Impact of a Foreign Sovereign Defendant on Your Case

If suit is permitted against a foreign sovereign defendant pursuant to one of the eight statutory exceptions, the FSIA provides special procedural rules and important protections for the foreign sovereign defendant. These rules can dramatically impact a plaintiff's or co-defendant's case, and must be fully considered in order to properly analyze an aviation case.

1. Federal Court Jurisdiction

The federal district courts have original jurisdiction over any action against a foreign sovereign which falls within one of the FSIA exceptions.[88] As such, a foreign sovereign defendant has the absolute right to remove any action brought in state court to the federal district court embracing the venue where the suit was brought.[89] Removal is proper even if the foreign sovereign is a third party defendant.[90] In addition, all related claims, even against non-FSIA defendants, can be removed as pendant to the FSIA jurisdiction.[91] As federal court jurisdiction is generally a goal of aviation defendants, being sued with a foreign sovereign may initially be seen as an advantage. In some cases, it could motivate an interested defendant to implead a foreign sovereign in order to ensure otherwise questionable federal jurisdiction.

2. No Jury Trials or Default Judgments

Suits against FSIA defendants are tried to the court without a jury.[92] The policy behind this rule is to protect foreign sovereigns from the potential biases and prejudices of ordinary United States citizens. If there are multiple defendants and plaintiff is entitled to a jury as to the non-FSIA defendants, the court may choose to conduct parallel bench/jury trials,[93] with the jury rendering only an advisory verdict as to the FSIA defendants.[94] While the lack of a jury is generally considered a benefit to the defendant in an aviation case, a parallel bench/jury trial creates potential difficulties for all parties. The risk of a parallel bench/jury trial is a conflict between the court's findings regarding the foreign sovereign and the jury's findings regarding non-sovereign defendants. This can become increasingly complicated in jurisdictions with unique comparative fault provisions. For example, California's Proposition 51 imposes "joint" liability on defendants for "economic" or "special" damages, but only "several" liability for "general" or "non-economic" damages. Imagine a scenario where the court finds a foreign sovereign defendant 75% at fault, and the jury finds the non-sovereign defendant 75% at fault. Or, imagine if the court absolves the foreign sovereign of liability, finds non-foreign sovereign defendant "A" 95% at fault, and finds non-foreign sovereign defendant "B" 5% at fault, while the jury does the opposite and absolves non-foreign sovereign defendant "A" of liability, finds the foreign sovereign 95% at fault, and finds non-foreign sovereign defendant "B" 5% at fault. Does defendant "B" pay 100% of the economic damages?

If the jury renders an advisory verdict as to a non-foreign sovereign defendant, there is also a risk that the judge might simply accept the jury's advisory verdict simply to avoid conflicting verdicts. These problems could be avoided by bifurcating the trial, but this seems relatively uncommon, likely due to the increased judicial time and expense and the increasingly packed federal courts.

Furthermore, the court may not enter a default judgment against an FSIA defendant. The plaintiff must always show a "claim or right to relief by evidence that is satisfactory to the Court."[95] Sometimes this will mean that the plaintiff will have to put on a case without any discovery and without any appearance by the defendant. For example, in *Smith v. Islamic Emirate of Afghanistan*, plaintiffs put on a case that Saddam Hussein and Iraq were involved in, and thus liable for, the September 11, 2001 World Trade Center attack.[96] No defense was presented. At the conclusion of the evidence, the court concluded that "plaintiffs have shown, albeit barely, 'by evidence satisfactory to the court' that Iraq provided material support to bin Laden and al Qaeda."[97] Therefore, judgment was entered for the plaintiffs.

3. <u>Damages</u>

The right to and ability to collect damages is also limited as to foreign sovereigns. The FSIA provides that foreign sovereign defendants "shall be liable in the same manner and to the same extent as a private individual in like circumstances."[98] However, punitive damages are generally not available against FSIA defendants.[99] In addition, most non-commercial property owned by the foreign state is immune from attachment to satisfy a judgment.[100] Commercial property may be attached under certain circumstances,[101] but the statutory language is especially convoluted as to when attachment is permitted.

The 1996 and 1998 terrorism amendments established exceptions to these damages rules for suits brought under the state sponsored terrorism exception. A note attached to 28 U.S.C. § 1605(a)(7) states that, in actions brought under that amendment, punitive damages may be assessed against agencies or instrumentalities of foreign sovereigns.[102] Pursuant to this amendment, a $137 million punitive damage judgment has been entered against the Cuban Air Force [103] and a $330 million punitive damage judgment has been entered against the Iranian Ministry of Information and Security.[104] In addition, the non-commercial assets of state sponsors of terrorism, including diplomatic assets, generally may be attached to satisfy judgments.[105] Furthermore, the statute provides that the Secretary of State and Secretary of the Treasury should assist plaintiffs that have obtained judgments under the state sponsored terrorism exception in locating and executing against the foreign state's property,[106] although the president may waive this provision in the interests of national security.[107] The president has chosen to waive this provision repeatedly, making it difficult, if not impossible, to collect these damages.[108]

4. <u>Service of Process</u>

Subject matter jurisdiction plus correct service of process creates personal jurisdiction over foreign sovereign defendants. Procedures for service upon foreign sovereign defendants are specified in 28 U.S.C. § 1608. There are two sets of service requirements. One applies to foreign states and their political subdivisions; the other applies to agencies or instrumentalities.[109] In addition, "foreign state" and "agency or instrumentality" are defined differently for service purposes than they are in the rest of the FSIA.[110] For service purposes, if the entity is a separate legal person and its primary functions are governmental, rather than commercial, it is served as a foreign state.[111] Entities which do not have core governmental functions are served as agencies or instrumentalities.[112]

Very specific service procedures for foreign states are set forth in 28 U.S.C. § 1608(a). Improper service on a foreign state is rarely excused and results in dismissal of the suit even if actual service was accomplished.[113] Service procedures for agencies or instrumentalities are set forth in 28 U.S.C. § 1608(b). Most air carriers and manufacturers are properly served using the procedures of § 1608(b).[114]

5. Choice of Law

Courts are currently divided as to which choice of law rules govern FSIA actions.[115] Some courts use federal common law choice of law rules to determine what substantive law applies, while others use the forum state's choice of law rules.

Federal common law uses the choice of law rules of the Restatement (Second) of Conflict of Laws.[116] Under the Restatement (Second) approach, the substantive law of the place of the wrong presumptively applies, unless another place has a more significant relationship with the case.[117] Therefore, in these courts, if an accident occurs in Poland, the substantive law of Poland will apply as long as it will not lead to an "unjust" or "anachronistic" result.[118]

Other courts apply the forum state's choice of law rules.[119] The rationale for this approach is that foreign sovereign defendants are to be liable "in the same manner and to the same extent as a private individual under like circumstances."[120] If all the parties to the suit were private, the forum state's choice of law rules would apply. Under this approach, the substantive law that applies depends on each state's individual choice of law rules. State choice of law rules tend to favor applying that state's substantive law.

Although in some cases, both choice of law rules will lead to the same result,[121] this split in the circuits could lead to forum shopping. When the wrong arguably occurred outside the United States, defense counsel may prefer a court that applies the Restatement (Second) choice of law analysis. Under the Restatement (Second) analysis, the substantive law of the place of the wrong will probably control. Many foreign countries place more limits on plaintiff recoveries than the United States does, and so application of a foreign country's substantive law is a very attractive defense option. Conversely, plaintiffs counsel are likely to prefer a court that applies the forum state's choice of law rules, where it is more likely that the substantive law of the forum state, not a foreign country, will apply.

III. RECENT DEVELOPMENTS: *Dole Food Co. v. Patrickson*

The Supreme Court handed down *Dole Food Co. v. Patrickson,* 123 S.Ct. 1655 (2003), in April, 2003. Although not an aviation case, *Dole* will have a significant effect on airlines, aircraft manufacturers, and other aviation entities' ability to claim foreign sovereign status**.** *Dole* addressed the "tiering" and "timing" problems with the agency or instrumentality definition, discussed earlier. The Court resolved both of these issues in ways that restrict the number of aviation entities that will be granted agency or instrumentality status.

A. The Decision

In *Dole*, plaintiffs, a group of farm workers, sued Dole Food Company in state court claiming injury from exposure to an agricultural pesticide. Dole impleaded Dead Sea Bromine Co., Ltd. and Bromine Compounds, Ltd. (collectively the Dead Sea Companies). The Dead Sea Companies removed to federal court, and claimed that removal was proper under the FSIA because they were agencies or instrumentalities of the state of Israel. The Dead Sea Companies actually had a tiered ownership structure. At the time of the wrong, the state of Israel wholly owned Israeli Chemicals, which owned a majority interest in Dead Sea Works, which owned a majority interest in Dead Sea Bromine and its subsidiary, Bromine Compounds. Following *Gates v. Victor Fine Foods,* 54 F.3d 1457 (9th Cir. 1995), which strictly applied the FSIA and did not permit tiering, the Ninth Circuit reversed the order allowing removal.

The United States Supreme Court accepted *certiorari* to answer two questions: 1) can a corporate subsidiary claim agency or instrumentality status when it is indirectly owned by a foreign state? and 2) when is the relevant time period for determining agency or instrumentality status?

The Supreme Court held that the Dead Sea Companies were not agencies or instrumentalities because only a foreign state's *direct* ownership of a majority of shares satisfies the statutory requirement for agency or instrumentality status. The Court explained that since Congress used the word "shares" in the statute, Congress must have intended for the statute to be interpreted with reference to formal corporate ownership structures. A basic principle of corporate law is that a corporation and its shareholders are separate and distinct entities. Since corporations and their shareholders are not treated as the same entity, Dead Sea Works' ownership of a majority of the shares in the Dead Sea Companies could not be attributed to Israel. Furthermore, the statute's reference to "other ownership interest" could not include tiered ownership structures because that phrase directly follows the statute's reference to "shares." Because of this placement, "other ownership interest" means interest other than stock ownership.

The Court also held that agency or instrumentality status must be determined based on the facts that exist when suit is filed, not the facts that existed when the wrong occurred. The Court reasoned simply that the statute is written in the present tense and its plain text required that result.

B. The Impact of *Dole*

1. <u>What Entities Will Lose Their Sovereign Immunity?</u>

Following the *Dole* decision, a number of significant aviation entities that are indirectly owned by foreign states will no longer protected by foreign sovereign status when they are sued in United States courts. Case law indicates that South African

Airways[122] and Aerolineas Argentinas,[123] for example, are or have been indirectly owned by their respective governments through a tiered ownership structure. Foreign state owned manufacturers such as Avions de Transport Regional, G.I.E.,[124] Airbus,[125] and Augusta S.p.A.,[126] also have, or have had, tiered ownership structures. In addition, since much FSIA case law has, until now, simply stated that an entity is an agency or instrumentality without giving information about that entity's ownership structure,[127] it is quite possible that many foreign government controlled aviation entities also have tiered ownership structures which are not apparent in the case law.

2. <u>Effects on the Litigation Process</u>

The practical effects of entities losing their foreign sovereign status are far reaching.

A. *Jury Trials*

Foreign owned defendants who previously were not subject to trial by American juries now must face the uncertainty, subjectivity, and potential hostility inherent in the United States jury system. Being subject to an American jury trial instead of court trial is generally accepted as tantamount to increased exposure to liability. In addition, since the entire litigation process looks toward trial, and a jury trial is dramatically different from a bench trial, both plaintiff and defense litigation strategies will have to change.

B. *Punitive Damages*

Similarly, defendants that were previously immune from punitive damages will no longer enjoy that immunity. The availability of punitive damages may shift the focus of discovery away from proving compensatory damages and towards finding evidence that the defendant possessed the mental state or knowledge required before punitive damages can be imposed. This search for evidence to support a punitive damage award can be time consuming and dramatically increase discovery costs

C. *Federal v. State Court Jurisdiction Over Cases*

Dole will also have a dramatic impact on jurisdiction over entire cases, not just isolated defendants. Aviation litigation frequently involves multiple defendants including an airline, the manufacturer of the aircraft and its component parts, the pilot, and others. Often some of the defendants will have an independent basis for removal to federal court, but others will not. However, if just one of these parties is an agency or instrumentality of a foreign state, then the federal district courts have pendant jurisdiction over the entire case.[128] This keeps the case together, saving judicial time, facilitating coordinated discovery, and ensuring that plaintiffs do not have to go to trial in multiple courts.

Following *Dole*, some defendants that provided the basis for removing a case pursuant to the FSIA have lost their foreign sovereign status. These cases will literally fall apart: the no-longer-foreign sovereign defendant will be remanded to state court dragging with them other defendants who tagged along to federal court on the FSIA bandwagon to begin with. Complex aviation litigation involving multiple plaintiffs and defendants will have to proceed with one piece of the litigation in state court and another piece of it in federal court once the common right to remove under FSIA is eliminated.

This complexity is seen in the current SQ006 litigation arising out of the crash of a Singapore Airlines 747 on the runway of Chiang Kai-Shek International Airport in Taipei, Taiwan, which killed 79 passengers and 4 crew members. All of the cases arising from this crash were centralized into multi-district litigation ("MDL") before Judge Feess in United States District Court in Los Angeles. The majority of the cases in this litigation were properly in federal court pursuant to the Warsaw Convention. However, due to the uncertainty of Warsaw jurisdiction in some cases, Singapore Airlines alternatively removed cases based upon its status as an "agency or instrumentality" of a foreign sovereign. Co-defendants Boeing and Goodrich Corporation joined in these removals.

Almost a year later, but prior to the *Dole* decision, Judge Feess found that the Republic of Singapore's indirect, or tiered, ownership of Singapore Airlines through a holding company meant that the airline was not an "agency or instrumentality" of the Republic of Singapore. The court based this decision on *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), which disallowed foreign sovereign status on the basis of tiered ownership structure.

Consequently, in the non-Warsaw cases, removal became improper. The non-Warsaw cases against Singapore Airlines were thus remanded to California Superior Court leaving the Warsaw cases in federal district court. To complicate matters further, the court found a lack of Warsaw treaty jurisdiction in certain cases and dismissed Singapore Airlines from the federal district court MDL action entirely, leaving defendants Boeing and Goodrich in federal court. In these cases now pending only against the manufacturing defendants, which had been initially removed pursuant to Warsaw and FSIA jurisdiction (both now gone), Judge Feess decided to retain jurisdiction because complete diversity had been created by the elimination of the foreign defendant.[129]

The SQ006 litigation clearly illustrates *Dole*'s far reaching impact. *Dole* placed the plaintiffs in a much better position vis-à-vis Singapore Airlines. However, the case must now proceed in two courts, consuming additional judicial time and resources and increasing plaintiffs' litigation costs. The same thing will likely happen in other cases. In addition, this teaches defense counsel that when removing to federal court on the basis of a client's agency or instrumentality status, counsel should also remove on alternative grounds, if available.

D. *Co-defendant Conflicts*

Following *Dole*, closely related co-defendants that previously would have shared common interests and a perhaps even a common defense may have very different interests and require different defense strategies. For example, a foreign state might directly own a majority of the stock in a national airline, which in turn might wholly own a subsidiary which maintains the airplanes. A situation similar to this occurred in *America West Airlines, Inc. v. GPA Group*, 877 F.2d 793 (9th Cir. 1989). Post *Dole*, if one of the airline's planes is involved in an accident and both the airline and the maintenance subsidiary are sued, the airline will be protected by the FSIA but the maintenance subsidiary will not be protected. In addition, the claims against the airline and the maintenance subsidiary will likely be adjudicated in different courts, leading to the potential of double liability or the opportunity for each entity to point fingers at the other. Furthermore, since these defendants will be unable to launch a coordinated defense, defense costs will increase.

IV. CONCLUSION

Aviation manufacturers involved in U.S. litigation must consider the impact of the Foreign Sovereign Immunities Act and must be constantly aware of the status of each defendant. The presence of a foreign sovereign defendant in a case can dramatically change how the litigation is handled.

Dole Food Co. v. Patrickson changes aviation litigation by restricting the aviation entities that may claim foreign sovereign status. Some of *Dole*'s effects have been outlined here. Others will come to light as cases like the SQ006 litigation progress. Still others may not become apparent until formerly foreign sovereign entities have faced American juries and incurred punitive damage awards. Between *Dole'*s dramatic impact on jurisdiction over currently pending cases, and the uncertainty as to its precise long term effects, it is clear that both plaintiff and defense litigation strategies must evolve in light of this important decision.

NOTES

[1] Many thanks go out to one of our Los Angeles office summer associates, Andrea Kloehn of Pepperdine University School of Law, for her work on this article.

[2] The facts of this case are not contained in the opinion itself but are found in the prior history and arguments of counsel at 1812 U.S. LEXIS 377.

[3] *The Schooner Exchange v. M'Faddon*, 7 Cranch 116, 136 (1812).

[4] *Id*. at 137.

[5] *Verlinden B.V. v. Cent. Bk. of Nigeria*, 461 U.S. 480, 486 (1983).

[6] *Id.*

[7] *Id*.

[8] *See The Schooner Exchange*, 7 Cranch 116; H*Berizzi Bros. Co.* v. *S.S. Pesaro*, 271 U.S. 562 (1926).H

[9] *Ex parte Peru*, 318 U.S. 578 (1943).

[10] *Verlinden*, 461 U.S. at 486; *Mexico v. Hoffman*, 324 U.S. 30 (1943); Andreas F. Lowenfeld, *Claims Against Foreign States – A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901, 903 (1969).

[11] *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 698 (1976).

[12] *Id*. at 711.
[13] *Id.* at 714.
[14] *Id.*
[15] Lowenfield, *supra* note 9, at 907.
[16] *Id.* at 902.
[17] *Verlinden B.V. v. Cent. Bk. of Nigeria*, 461 U.S. 480, 487-88 (1983); Fredric Alan Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUDIES IN WORLD PUBLIC ORDER 1, 2 (1976).
[18] *Alfred Dunhill*, 425 U.S. at 698-99. *Alfred Dunhill* was decided on May 24, 1976, about 4 months before the FSIA was enacted.
[19] *Id.*at 685-86.
[20] *Id.* at 690-91.
[21] *Id.* at 691.
[22] The act of state doctrine is a common law doctrine and not part of the FSIA. However, the two are based on similar rationales – respect for the sovereignty of foreign governments and avoiding embarrassment of the executive branch in its conduct of foreign relations – and often interact with each other. *See Alfred Dunhill,* 425 U.S. at 697-700. While the FSIA is a jurisdictional statute, the act of state doctrine is a choice of law rule. Unlike the FSIA, which exempts some defendants from the jurisdiction of United States courts, "the act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp, Int'l*, 493 U.S. 400, 409 (1990). Therefore, an aviation entity which cannot defeat jurisdiction by claiming sovereign immunity may assert the act of state doctrine as an affirmative defense if the entity's conduct was compelled by a foreign government acting within its own territory. *See Honduras Aircraft Registry, Ltd. v. Honduras*, 129 F.3d 543, 549-50 (11th Cir. 1997).
[23] *Alfred Dunhill*, 425 U.S. at 695. *Alfred Dunhill* was a plurality opinion. While the opinion is frequently cited, subsequent cases have questioned whether there is a "commercial activity" exception to the act of state doctrine at all. *W.S. Kirkpatrick & Co., Inc.*, 493 U.S. at 404-05.
[24] *Alfred Dunhill*, 425 U.S. at 704.
[25] *Id.*
[26] *Id.* at 705-06.
[27] *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (holding that Saudi Arabia's imprisonment and torture of an American citizen was not a "commercial activity" under the FSIA because suit would not have been permitted under the restrictive theory as described in *Alfred Dunhill*); *Republic of Argentina v. Weltover,* 504 U.S. 607 (1992) (holding that issuing bonds was a "commercial activity" because any member of the public can issue bonds and therefore suit would have been permitted under the restrictive theory as described in *Alfred Dunhill*).
[28] *Verlinden B.V. v. Cent. Bk. of Nigeria*, 461 U.S. 480, 488 (1983); LEE S. KREINDLER, AVIATION ACCIDENT LAW, REVISED §8.02, at 8-5 (2003) (citing H.R. Report No. 1487, 94th Cong. 2d Sess. 7 (1976)).

[29] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989).
[30] 28 U.S.C. § 1604 (2002).
[31] 28 U.S.C. § 1603(a) (2002).
[32]
[33] 28 U.S.C. § 1603(b)(1)-(3) (2002).
[34] *Saudi Arabian Airlines Corp. v. Tamimi*, 176 F.3d 274 (4th Cir. 1999).
[35] *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748 (2d Cir. 1998).
[36] *Koirala v. Thai Airways Int'l, Ltd.*, 126 F.3d 1205 (9th Cir. 1997).
[37] *Brink's Ltd. v. South African Airways*, 93 F.3d 1022 (2d Cir 1996).
[38] *Nysa-Ila Pension Trust Fund v. Garuda Indonesia*, 7 F.3d 35 (2d Cir. 1993).
[39] *In re Surinam Airways Holding Co.*, 974 F.2d 1255 (11th Cir. 1992).
[40] *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989).
[41] *Chukwu v. Air France*, 218 F.Supp.2d 979 (N.D. Ill. 2002).
[42] *Ryba v. Lot Polish Airlines*, 2001 U.S. Dist. LEXIS 2908 (S.D.N.Y. 2001).
[43] *Uwazurike v. Air Afrique*, 2000 U.S. Dist. LEXIS 2855 (E.D.N.Y. 2000).
[44] *Brown v. Austrian Airlines*, 1997 U.S. Dist. LEXIS 21313 (E.D.N.Y. 1997).
[45] *Aguasviva v. Iberia Lineas Aereas de Espana*, 937 F.Supp. 141 (D.P.R. 1996).
[46] *Papapanos v. Lufthansa German Airlines*, 1995 U.S. Dist. LEXIS 9159 (S.D. Fla. 1995).
[47] *LeDonne v. Gulf Air, Inc.*, 700 F.Supp. 1400 (E.D. Va. 1988).
[48] *Lyon v. Augusta S.P.A.*, 252 F.3d 1078 (9th Cir. 2001).
[49] *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, 96 F.3d 932 (7th Cir. 1996).
[50] *Gould v. Aerospatiale Helicopter Corp.*, 40 F.3d 1033 (9th Cir. 1994).
[51] *In re Air Crash Disaster Near Monroe, Michigan on January 9, 1997*, 987 F.Supp. 975 (E.D. Mich. 1997).
[52] *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990).
[53] *Kern v. Jeppesen Sanderson, Inc.*, 867 F.Supp. 525 (S.D. Tex. 1994).
[54] *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33 (2d Cir. 1993).
[55] *Filus v. Lot Polish Airlines*, 939 F.Supp. 199 (E.D.N.Y. 1996).
[56] *EAL (Delaware) Corp. v. European Organisation for the Safety of Air Navigation*, 1994 U.S. Dist. LEXIS 20528 (D. Del. 1994).
[57] Courts frequently comment on the difficultly of interpreting the FSIA. One court has characterized the statute as "vague and circuitous" and "user-unfriendly." *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, 909 F.Supp. 1083, 1088 (N.D. Ill. 1995) (collecting cases).
[58] *Musopole v. South African Airways, Ltd.*, 172 F.Supp.2d 443, 444 (S.D.N.Y. 2001).
[59] *E.g., In re Air Crash Disaster Near Roselawn, Indiana, on October 31, 1994,* 96 F.3d 932 (7th Cir. 1996); *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, (6th Cir. 1995); *Lehman Bros. Commercial Corp. v. Minimetals Int'l Non-Ferrous Metals Trading Co.*, 169 F.Supp.2d 186 (S.D.N.Y. 2001).
[60] *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1462 (9th Cir. 1995).
[61] *Id.* at 1462.
[62] *Uwazurike v. Air Afrique*, 2000 U.S. Dist. LEXIS 2855 (E.D.N.Y. 2000).
[63] *Id.*
[64] *Id.*; *Ratnaswamy v. Air Afrique*, 1996 U.S. Dist. LEXIS 12899 (N.D. Ill. 1996).

[65] *E.g.*, *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, 96 F.3d 932 (7th Cir. 1996); *Kern v. Jeppesen Sanderson, Inc.*, 867 F.Supp. 525 (S.D. Tex. 1994); *LeDonne v. Gulf Air, Inc.*, 700 F.Supp. 1400 (E.D. Va. 1988).
[66] *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, 96 F.3d 932, 935-36 (7th Cir. 1996).
[67] *Id.* at 937.
[68] *Id.* at 938-40.
[69] *Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1380-81 (8th Cir. 1993); *In re Air Crash Disaster Near Monroe, Michigan on January 9, 1997*, 987 F.Supp. 975, 978 (E.D. Mich. 1997); *Kern v. Jeppesen Sanderson, Inc.*, 867 F.Supp. 525, 530 (S.D. Tex. 1994).
[70] *Kern v. Jeppesen Sanderson, Inc.*, 867 F.Supp. 525, 530 (S.D. Tex. 1994) (quoting *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993)).
[71] *Id.*
[72] *E.g.*, *Straub v. A.P. Green, Inc.*, 38 F.3d 448, 451 (9th Cir. 1994).
[73] 28 U.S.C. § 1605(a)(1)-(7), (b) (2002).
[74] *Id.*
[75] *Coyle v. Garuda Indonesia*, 180 F.Supp.2d 1160 (D. Ore. 2001).
[76] 28 U.S.C. § 1605(a)(2) (2002).
[77] *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993); *Honduras Aircraft Registry, Ltd. v. Honduras*, 129 F.3d 543, 547 (11th Cir. 1997).
[78] *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993).
[79] *Saudi Arabian Airlines Corp. v. Tamimi*, 176 F.3d 274, 280 (4th Cir. 1999).
[80] *E.g.*, *Brinks, Ltd. v. South African Airways*, 93 F.3d 1022, 1027 (2d Cir. 1996); *In re Air Crash Disaster near Roselawn, Indiana on October 31, 1994*, 96 F.3d 932 (7th Cir. 1996); *Musopole v. South African Airways, Ltd.*, 172 F.Supp. 443 (S.D.N.Y. 2001).
[81] LEE S. KREINDLER, AVIATION ACCIDENT LAW, REVISED § 8.05[4][a], at 8-41 (2003).
[82] 28 U.S.C. § 1605(a)(7) (2002).
[83] *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748 (2d Cir. 1998).
[84] *Hartford Fire Ins. Co. v. Socialist People's Libyan Arab Jamahiriya*, 1999 U.S. Dist. LEXIS 15035 (D.D.C. 1999).
[85] *Stethem v. Islamic Republic of Iran*, 201 F.Supp.2d 78, 93 (D.D.C. 2002).
[86] *Smith v. Islamic Emirate of Afghanistan*, 2003 U.S. Dist. LEXIS 7629 (S.D.N.Y. 2003).
[87] Molora Vadnais, Comment, *The Terrorism Exception to the Foreign Sovereign Immunities Act: Forward Leaning Legislation or Just Bad Law?*, 5 U.C.L.A. J. INT'L. L. & FOR. AFF. 199 (2000); Comment, *Hell-Bent on Awarding Recovery to Terrorism Victims: The Evolution and Application of the Antiterrorism Amendments to the Foreign Sovereign Immunities Act*, 19 DICK. J. INT'L L. 213 (2000).
[88] 28 U.S.C. § 1330(a) (2002).
[89] 28 U.S.C. § 1441(d) (2002).
[90] *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, 909 F.Supp. 1083, 1090 (N.D. Ill. 1995).

[91] *Nolan v. Boeing Co.*, 919 F.2d 1058, 1064-66 (5th Cir. 1990); *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, 909 F.Supp. 1083, 1103 (N.D. Ill. 1995) (collecting cases).
[92] 28 U.S.C. §§ 1330(a), 1441(d) (2002).
[93] *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, 909 F.Supp. 1083, 1113-14 (N.D. Ill. 1995); *Williams v. Aer Lingus Irish Airlines*, 655 F.Supp. 425, 426 (S.D.N.Y. 1987).
[94] *Williams v. Aer Lingus Irish Airlines*, 655 F.Supp. 425, 426 (S.D.N.Y. 1987).
[95] 28 U.S.C. § 1608(e) (2002).
[96] *Smith v. Islamic Emirate of Afghanistan*, 2003 U.S. Dist. LEXIS 7629 (S.D.N.Y. 2003).
[97] *Id.* at 36-37.
[98] 28 U.S.C. § 1606 (2002).
[99] *Id*.
[100] 28 U.S.C. §§ 1609, 1610(a)-(b) (2002).
[101] 28 U.S.C. §§ 1610-1611 (2002).
[102] 28 U.S.C. § 1605(a) (7), note; *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 23 (D.D.C. 1998). This provision, commonly known as the Flatow amendment, was added in response to the death of American student Alisa Flatow who was killed in a suicide bombing in Israel. LEE S. KREINDLER, AVIATION ACCIDENT LAW, REVISED § 8.05[4] [b], at 8-45 (2003).
[103] *Alejandre v. Republic of Cuba*, 42 F.Supp.2d 1317, 1323 (S.D. Fla. 1999).
[104] *Stethem v. Islamic Republic of Iran*, 201 F.Supp.2d 78, 93 (D.D.C. 2002).
[105] 28 U.S.C. § 1610(a) (7), (b) (2), (f) (2002).
[106] 28 U.S.C. § 1610(f) (2) (A) (2002).
[107] 28 U.S.C. § 1610(f) (3) (2002).
[108] *Hell-bent on Awarding Recovery to Terrorism Victims*, *supra* note 85, at 214 (citing *Flatow v. Islamic Republic of Iran*, 999 F.Supp.1 (D.D.C. 1998); *Alejandre v. Republic of Cuba*, 996 F.Supp. 1239 (S.D. Fla. 1997)).
[109] 28 U.S.C. § 1608(a)-(b) (2002).
[110] *See* 28 U.S.C. § 1603(a) (2002) ("A 'foreign state,' *except as used in section 1608 of this title*, includes . . .") (emphasis added).
[111] *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151-52 (D.C. Cir. 1994).
[112] *Id.* at 152.
[113] *Id.* at 153.
[114] LEE S. KREINDLER, AVIATION ACCIDENT LAW, REVISED § 8.07[2], at 8-47 (2003).
[115] *Vargas v. Air France Freighter*, 2003 U.S. Dist. LEXIS 4524, at *5 (N.D. Ill. 2003).
[116] *Chuidian v. Philippine Nat'l Bk.*, 976 F.2d 561, 564 (9th Cir. 1992); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1003 (9th Cir. 1987).
[117] *Schoenberg v. Exportadora de Sal*, 930 F.2d 777, 783 (9th Cir. 1991); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1004 (9th Cir. 1992).
[118] *Harris v. Polskie Linie Lotnicze*, 641 F.Supp. 94, 99 n.4 (N.D. Cal. 1986).
[119] *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 961 (2d Cir. 1991).
[120] 28 U.S.C. § 1606 (2002).

[121] *Vargas v. Air France Freighter*, 2003 U.S. Dist. LEXIS 4524, at *6 (N.D. Ill. 2003).
[122] *Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1025 (2d Cir. 1996).
[123] *Gardiner Stone Hunter Int'l v. Iberia Lineas Aereas De Espana, S.A.*, 896 F.Supp. 125 (S.D.N.Y. 1995).
[124] *In re Air Crash Disaster Near Roselawn, Indiana on October 32, 1994*, 96 F.3d 932, 935 (7th Cir. 1996).
[125] *Linton v. Airbus Industrie*, 794 F.Supp. 650, 652 (S.D. Tex. 1992).
[126] *Trump Taj Mahal Ass. v. Costruzioni Aeronautiche Giovanni Augusta, S.p.A.*, 761 F.Supp. 1143 (D.N.J. 1991).
[127] *E.g.*, *Vargas v. Air France*, 2003 U.S. Dist. 4524 at *5 (N.D. Ill. 2003); *Coyle v. Garuda Indonesia*, 180 F.Supp.2d 1160, 1162 (D. Ore. 2001); *Four Corners Helicopters, Inc. v. Turbomeca S.A.*, 677 F.Supp. 1096 (D. Colo. 1988).
[128] 28 U.S.C. § 1441(d) (2002); *Nolan v. Boeing Co.*, 919 F.2d 1058, 1064-66 (5th Cir. 1990); *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, 909 F.Supp. 1083, 1103 (N.D. Ill. 1995); *Kern v. Jeppesen Sanderson, Inc.*, 867 F.Supp. 525, 530-31 (S.D. Tex. 1994).
[129] The court cited 28 U.S.C. 1332(a)(3) and *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 72-75 (1996) (upholding a denial of a motion to remand, where, although complete diversity did not exist at the beginning of a case, it existed at the cases' conclusion).