

# AVIATION AND SPACE LAW

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## Collecting from the Foreign Sovereign: Putting Their Money into Your Client's Pocket

### ABOUT THE AUTHORS



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

Experienced lawyers know that winning a judgment is only the first step in having a satisfied client: the victory is only complete when you have been able to collect on the judgment that you worked so hard to attain. Frequently, it is not easy to locate a judgment debtor's assets in the country where you sued. This problem is multiplied if the judgment debtor is a foreign sovereign, as was the case in *Kuwait Airways Corporation v. Republic of Iraq*, 2010 SCC 40 (2010) where the Supreme Court of Canada, on appeal from the Court of Appeal of Quebec, allowed enforcement of a foreign judgment. The judgment against the Republic of Iraq exceeded \$890 million Canadian and was issued by the English High Court of Justice after lengthy litigation. The litigation arose from Iraq Airways Company's misappropriation of Kuwait Airways' aircraft during Iraq's invasion and occupation of Kuwait in 1990. The basis for the judgment was that the Republic of Iraq had controlled, funded and supervised Iraq Airways' legal defense, that the defense included suborning of perjury, and that as a result, Iraq Airways was ordered to pay over \$1 billion Canadian, with the Government of Iraq having to pay \$84 million Canadian in costs. Iraq's acts in controlling the defense of Iraq Airways were held by the English court not to be sovereign acts of the Government of Iraq but rather fell within the commercial exception principles of state immunity under the UK State Immunity Act.

### **Enforcement of Judgment: A Two Step Analysis**

Kuwait Airways sought recognition of the English judgment in Quebec Superior Court and attempted to enforce the judgment against aircraft that Iraq Airways Company had purchased from Bombardier Aerospace in Quebec but which had not yet been delivered to Iraq Airways. Iraq opposed the

proceedings, arguing that under the Canadian Sovereign Immunity Act, the English judgment should not be afforded recognition because the acts of Iraq, even if wrongful, were sovereign acts and were entitled to immunity under Canadian law.

The decisions of both the Quebec Superior Court and the Quebec Court of Appeal declined to recognize the English judgment, finding that the acts of Iraq, even if they were wrongful, remained sovereign acts and therefore could not be enforced under Canadian law. Two issues were raised on appeal to the Supreme Court of Canada: (1) did the State Immunity Act apply to an application for recognition of a foreign judgment; and (2) if so, does the immunity granted to foreign states preclude a Canadian court from granting the application to enforce a judgment or was there an exception to immunity on the basis of which the Court can enforce the judgment?

Kuwait Airways, the appellant before the Supreme Court of Canada, argued that the State Immunity Act did not apply to an application for recognition because the English courts had already ruled on the issue and concluded that there was no immunity. Hence, argued Kuwait Airways, the Quebec courts did not have jurisdiction to reconsider the merits of the case. Alternatively, Kuwait Airways argued that the acts in question were not sovereign acts but rather were commercial acts for which there was an exception to sovereign immunity.

The Supreme Court rejected Kuwait Airways' argument that the issue of state immunity could not be relitigated in the application for recognition of the English judgment. The Supreme Court ruled that the Canadian State Immunity Act constituted a statutory framework that governed the application of

immunities to which foreign states were entitled in public international law. Although the English Court had entered a judgment against the Republic of Iraq, the Canadian courts were obligated, under their analysis of public international law, to consider whether Iraq was entitled to immunity from jurisdiction. The Court examined the statute and the exceptions to it, principally the commercial activity of the foreign state exemption, and found that the State Immunity Act of Canada was applicable to an application for recognition of a foreign judgment. The Supreme Court found that the burden of proof was on Kuwait Airways to establish the exception to immunity, an issue which needed to be decided under Canadian law. The Supreme Court of Canada rejected the view that the English Court's decision on the issue was *res judicata* because the English courts could not preclude the jurisdiction of the Canadian courts. While the Supreme Court agreed it could not review the merits of the decision, the issue of state immunity had to be considered within the framework of Canadian law, including the State Immunity Act.

In reaching its decision on the commercial activity exception to sovereign immunity, the Canadian Court looked at the Foreign Sovereign Immunities Act of 1976, enacted in the United States, as well as the English Sovereign Immunities Act, *i.e.*, the State Immunity Act of 1978. The Court concluded that in both the United Kingdom and the United States "state immunity seems to be limited in the modern case law to true sovereign acts, with the exceptions being used to confirm an interpretation that corresponds to the restrictive theory of state immunity that has been developed in public international law". *Slip op.* at 21. The Supreme Court found that the judgments made by the Quebec Superior Court and Court of Appeal were

clear and compelling. While the acts alleged against Iraq in suborning testimony and frustrating the litigation in the UK were carried out by the Government of Iraq for the benefit of a state owned corporation, that did not make the acts sovereign acts. Essentially, the English litigation, in which the Iraq Government had intervened to defend its government owned airline, concerned the retention of aircraft after they had been seized by Iraq Airways. Finding that there was no connection between the commercial litigation and the initial sovereign act of seizing the aircraft, the Court found that the Government of Iraq could not rely on sovereign immunity to shield it from the English judgment. Accordingly, the appeal was allowed, the judgments of the Quebec Court of Appeal and the Quebec Superior Court overturned and enforcement of the judgment ordered.

### **U.S. Courts Likely to Follow Canadian Analysis**

Would a United States court have reached the same result as the Supreme Court of Canada?

At first blush, this case appears as one that was correctly decided but for the wrong reasons! If there was: (1) a valid foreign judgment; (2) personal jurisdiction over the defendant; and (3) an opportunity for the defendant to have a full hearing, the judgment should be enforceable by a U.S. court under the Uniform Foreign Country Money-Judgments Recognition Act.

Kuwait Airways' argument was simple: since the English courts had entered a valid judgment over a defendant who had appeared before its courts, that judgment should be enforceable in the Canadian courts. Nevertheless, the Canadian courts held that there had to be a determination as to whether Iraq was entitled under Canadian law to assert

the sovereign immunity defense as to the underlying actions, rather than rote application of the principle of recognition of the foreign judgment.

The Canadian Supreme Court cited to the Foreign Sovereign Immunities Act of 1976. Cases decided under the Act show that U.S. courts would perform analysis similar to Canadian courts to determine whether there was sovereign immunity or a basis for an exception to sovereign immunity. If an exception was found, a U.S. court would then look to a domestic statute, such as the Uniform Foreign Country Money-Judgments Recognition Act, to determine whether there was a basis to enforce the foreign judgment. A United States court would have to first satisfy itself, as did the Supreme Court of Canada, that there was an exception in the Foreign Sovereign Immunities Act to the immunity of a foreign state in order for the judgment to be enforceable. In short, a United States court would have decided this case similarly to its Canadian brethren. The mere fact that there was a foreign judgment entered against Iraq would not automatically entitle that judgment to enforcement in the United States, as it was held not entitled to enforcement in Canada, unless an analysis showed that there was an exception to sovereign immunity.

While there are not an overwhelming number of cases in the United States which have decided the issue, an excellent law journal article has discussed the legal framework for enforcing court judgments against foreign states and their instrumentalities. *See, Foster, Collecting from Sovereigns: the Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals For its Reform*, 25 Ariz. J. Int'l & comp. Law 665 (2008). The article points out the framework for enforcement in the United

States courts of a foreign court judgment: there first must be subject matter jurisdiction, *i.e.*, a waiver of sovereign immunity under the Foreign Sovereign Immunities Act and then a domestic statute allowing judgment enforcement (*e.g.*, Uniform Foreign Money-Judgment Recognition Act or, a later version, the Uniform Foreign-Country Judgment Recognition Act).

### **Recent Litigation in New York Federal Court is Consistent with the Canadian Decision**

The case which is factually closest to *Kuwait Airways Corporation v. Republic of Iraq* case is a recent Southern District of New York decision, *Servaas Inc. v. Republic of Iraq*, 686 F. Supp.2d 346 (S.D.N.Y. 2010). *Servaas* filed an action in the United States District Court for the Southern District of New York pursuant to New York's Uniform Foreign Country Money-Judgments Recognition Act against the Republic of Iraq seeking recognition of a final money judgment in the amount of \$14,152,800 entered in April of 1991 in favor of *Servaas* and against the Ministry of Industry of the Republic of Iraq by the Paris Commercial Court in France. The Republic of Iraq moved to dismiss the Complaint, arguing *inter alia* that there was no exception to foreign sovereign immunity under the Foreign Sovereign Immunities Act. Iraq further contended that the issue of whether Iraq was the same person as the Ministry of Industry for purposes of the Court's jurisdiction over Iraq was not a question of United States law but was instead one of Iraqi law which had been decided contrary to plaintiff's assertion that the Ministry of Industry and the Iraqi Government were one and the same.

The District Court found that the case came within the "commercial activity" exception to

sovereign immunity under the Foreign Sovereign Immunities Act and that the contract, which had been entered into between the plaintiff and the Republic of Iraq or the Ministry of Industry, had a sufficient “direct effect” in the United States to vest the Court with jurisdiction under 28 U.S.C. § 1605(a)(1). The Court accepted the plaintiff’s argument that the defendant’s commercial activities had a direct effect in the United States since all of the machinery, plans and technologies were delivered to the defendants by Servaas, a United States company and that defendants had failed to pay Servaas in the United States pursuant to the terms of the contract. The Court rejected the argument that the Ministry of Industry did not enter into the contract on behalf of the Republic of Iraq since the contract required that the Ministry of Industry receive approval from “appropriate governmental authority of Iraq” before the agreement could be finalized. The agreement was in fact finalized and had been approved by the appropriate governmental authorities.

Having found that the plaintiff satisfied the exception to sovereign immunity under the Foreign Sovereign Immunities Act, the Court then turned to the question of the enforceability of the French judgment in the United States. New York’s Uniform Foreign Country Money-Judgments Recognition Act governs enforcement of foreign judgments and the Court held that the judgment was enforceable. *See also, Seetransport Wiking Trader v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir 1979) where the Court found that a French arbitration award was enforceable under the New York’s Uniform Foreign Country Money-Judgments Recognition Act after ruling that there was no foreign sovereign immunity.

### **Other Cases Show Consistent Application of the Two Step Analysis**

Recently, in *Kensington International Limited v. Republic of Congo*, 461 F.3d 238 (2d Cir. 2006), plaintiff filed a Complaint against the Republic of Congo seeking to have the Court recognize a judgment which had been obtained in England. The Court found that there had been a waiver of immunity under the Foreign Sovereign Immunities Act since the loan agreement executed between the parties stated that the Republic of Congo had agreed “not to claim and waives such immunity to the full extent permitted by the law of that jurisdiction intending, in particular that in any proceedings taken in New York the foregoing waiver of immunity shall have effect and be construed in accordance with the United States Foreign Sovereign Immunities Act of 1976”. *Kensington*, 461 F.3d at 243.

Given the airtight language of such a clause in the contract, it is hardly surprising that the District Court found that the Republic of Congo had indeed waived sovereign immunity. Given the Congo’s history of litigating the case, the District Court had ordered the Congo to post security for costs. The Second Circuit found that the Congo’s attempted appeal of the order requiring it to post security was a nullity since it was not a final order ripe for appeal. Treating the attempted appeal as a petition for a writ of mandamus, the Court dismissed it, finding that there was no clear abuse of discretion by the District Court in ordering the Congo to post bond for security for costs on the \$57 million judgment which had been obtained against the Congo in England. In response to the Congo’s argument that the case should be



sent back for trial before a different judge due to the presiding judge's "hostility" toward it, the Second Circuit noted wryly that "should the Congo persist in its pattern of obstruction and recalcitrance, it may find that more and more judges seem hostile". 461 F.3d. at 245.

Another case reaching the same result as the Supreme Court of Canada in *Kuwait Airways v. Republic of Iraq* is *Corzo v. Banco Central De Reserva Del Peru*, 243 F.3d 519 (9th Cir. 2001). In *Corzo*, the plaintiff had secured a judgment in Peru against the Banco Central De Reserva Del Peru on a claim that the Bank had failed to reimburse plaintiff's assignor for losses due to currency exchanges when the exchange rate between the Peruvian and United States currency shifted unfavorably. Plaintiff's assignor sued the Bank in Peru and obtained a recovery, a result which was affirmed by the Supreme Court of Peru. Quite remarkably, plaintiff's assignor judgment was voided when nine months later the Peruvian Supreme Court declared its previous judgment "null and void" and held the original judgment in favor of plaintiff's assignor had been issued "by mistake" without the justices having been aware that the document they were signing included a decision with the opposite outcome they wished for. *Corzo*, 243 F.3d at 522.

One year later, after some head scratching by all concerned, *Corzo*, the assignee of the judgment in Peru, attempted to enforce it in the Federal District Court in Los Angeles. As might be expected, the District Court was reluctant to enforce a judgment which had already been reversed by the foreign sovereign's highest Court. The District Judge concluded that the bank was entitled to sovereign immunity and dismissed the case for lack of jurisdiction. *Corzo* appealed, claiming that there were both waiver and commercial exceptions to foreign sovereign

immunity. Both arguments were rejected by the District Court and affirmed by the Court of Appeals, with the Ninth Circuit finding that there was no explicit waiver of sovereign immunity by the Bank and that none of the commercial activity exceptions applied. The Court explained that the underlying lawsuit had to do with the denial of the application for exchange rate compensation, a denial which had been made by the National Bank of Peru, an agency or instrumentality of the Peruvian Government. The denial was not a commercial activity but a sovereign act. Given that it was a sovereign act, there was immunity for the bank. Said the Ninth Circuit:

Exchange rate compensation is clearly a sovereign activity, and is therefore not subject to suit in the United States on this particular claim. A private party does not have the power to regulate currency exchange rates.

*Corzo*, 243 F.3d at 525 citing *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992).

The Ninth Circuit also commented that *Corzo* did not appear to have a final and valid Peruvian judgment that United States courts may feel comfortable enforcing. While *Corzo* may have been right that the Peruvian Supreme Court's decisions overturning the judgment in its favor were null and void, that was not an issue for the United States courts to decide under the doctrine of comity. "Nothing would be more repugnant to the principle of comity than for United States courts to allow a defendant's assets to be attached to enforce a Peruvian judgment when the highest court of Peru has declared that

judgment null and void”. *Corzo*, 243 F.3d at 526.

### **A Look at the Commercial Activity Exception Under the Foreign Sovereign Immunity Act**

In determining whether to enforce a foreign judgment, the Court will first determine whether there is an exception to sovereign immunity. The commercial activity exception in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) holds that a foreign state shall not be immune from jurisdiction in a court of the United States in any case in which the action is based upon *a commercial activity carried on in United States, or upon an act performed in the U.S. in connection with a commercial activity elsewhere, or upon an act outside the United States’ territory which causes a direct effect in the United States*. The “nexus” requirement in the statute mandates that the foreign state’s commercial acts be tied to the United States and that such commercial acts form the basis of the plaintiff’s cause of action.

In *Strategic Technologies PTE, Ltd. v. Republic of China*, 2007 WL 1378492 (D.D.C. 2007), the District Court declined to enforce a foreign judgment entered against the Republic of China in Singapore on the grounds that the judgment was not “based upon” commercial activities which satisfied the exception for recognition of the judgment. In *Strategic Technologies*, the parties had entered into an agreement whereby the Republic of China had awarded a contract to Strategic Technologies to supply an underground test range measuring system. Strategic Technologies sued the Republic of China in the High Court of the Republic of Singapore and obtained a judgment in excess

of \$1.5 million. However, the District Court found that Strategic Technologies had not satisfied the requirement of the Foreign Sovereign Immunities Act that the commercial activity that provides the jurisdictional nexus must be the same activity on which the lawsuit is based.

While the parties agreed that the claim on which the suit was based was for the enforcement of a foreign judgment, that the Singapore Court had personal jurisdiction and service over the Republic of China and that there were due process safeguards, and that there was a final enforceable judgment which existed, there was nevertheless no allegation that the Complaint related to the Republic of China’s commercial activity connected to the United States. Accordingly, since plaintiff could not satisfy the first step under the Foreign Sovereign Immunities Act, the Court did not need to proceed to the second step, *i.e.* a domestic United States statutory basis for enforcement of a foreign money judgment, since there was no basis for finding that there was an exception to sovereign immunity. The Court concluded that the Republic of China was immune from suit in the United States and dismissed the Complaint seeking enforcement of the Singapore judgment.

This result is entirely consistent with the Canadian Court’s opinion in the *Kuwait Airways* matter. *See also AF-Cap Inc. v. The Republic of Congo*, 383 F.3d 361 (5th Cir. 2004) where the Court allowed garnishment by a judgment creditor seeking to enforce an English judgment which had been obtained against the Republic of Congo by seizing mining and tax royalties payments located in Texas banks. The Court found that these tax and royalty obligations had been used by the Congo for explicitly commercial purposes and accordingly allowed the garnishment. The Court found that using these monies to

pay off commercial debts of the Congo would not shock or disturb the public affairs of the Congo. The Court also found that the property was in the United States, a prerequisite for its attachment. Accordingly, the Court allowed royalty and tax obligations to be used to pay the judgment and that the tax and royalty obligations were not protected by sovereign immunity.

## **CONCLUSION**

Courts analyzing the issue of enforceability of a foreign judgment in the United States will first look to see whether there is an exception to sovereign immunity and then determine whether the prerequisite for satisfaction of the foreign judgment, *i.e.*, a final judgment, where the defendant had notice and opportunity to appear and there was personal jurisdiction over the defendant, were met. Assuming both these questions are answered in the affirmative and there is a domestic state law statute allowing the enforcement, a money judgment obtained against a foreign sovereign in a third country can be enforced in the courts of the United States.



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