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WILL THE REAL FSIA CHOICE-OF-LAW RULE PLEASE STAND UP?

The Foreign Sovereign Immunities Act (FSIA) allows United States courts to exert jurisdiction over foreign states and their corporations in certain specific, limited situations. However, the FSIA fails to address some of the technical problems that may arise during the trial of these suits, such as the rules for determining what substantive law applies to the merits of a case against a foreign state. To illustrate the importance of this issue, consider the following fact pattern. United States citizens, traveling to Seoul, South Korea, purchase tickets on a Korean Air Lines (KAL) flight departing from New York City. The flight refuels in Anchorage, Alaska, then proceeds southwest across the Pacific Ocean towards Seoul. Unfortunately, due to a serious navigational error on the part of the crew, the flight strays into sensitive Soviet airspace where Soviet interceptors shoot the KAL flight down. There are no survivors. The family members of the decedents bring wrongful death actions against KAL seeking both compensatory and punitive damages. Now assume that it develops that the government of South Korea owns KAL and claims sovereign immunity as a defense to the wrongful death suit. The FSIA provides that foreign sovereigns are immune from suit in the United States unless certain exceptions apply. In this instance

1. See 28 U.S.C. §§ 1605, 1607 (1988) (listing exceptions to general rule of sovereign immunity). Among these exceptions are:
   (1) implied and explicit waivers of sovereign immunity by the foreign sovereign;
   (2) claims based on commercial activities of the sovereign which have a nexus with the United States;
   (3) some expropriation claims against the sovereign;
   (4) claims against the sovereign involving immovable, inherited or gift property located in the United States;
   (5) non-commercial torts of the sovereign committed in the United States;
   (6) claims involving maritime liens against foreign sovereigns; and;
   (7) certain counterclaims asserted against foreign sovereigns.


2. See infra note 13 and accompanying text (discussing FSIA's lack of explicit choice-of-law rule).

3. In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 1477 (D.C. Cir. 1991). Although the Korean Air Lines Disaster case serves as the basis for the fact pattern in the text, the Korean government did not own the airline defendant in this case, as the textual discussion states. The author added this element to make the fact situation similar to one that would involve the application of the FSIA.

4. Id.

5. Id. at 1478.

6. Id. at 1476.

7. Id. at 1477.

8. See supra note 1 and accompanying text (discussing exceptions to general rule of sovereign immunity).
the commercial activities exception9 probably would apply giving the United
States courts jurisdiction over KAL on the wrongful death claims. However,
after the court decides that immunity is not present, it must decide which
body of substantive law applies to the claims of the decedents' family
members.

The court must decide whether the substantive law of the United States
or of some specific state, such as New York, applies. Alternatively, the
court may determine that foreign substantive law, such as the law of Korea
or the law of the place of the “accident”—the Soviet Union—controls. In
fact, the court may determine that general international law principles govern
a case such as this. This choice-of-law determination will most likely have
a very important effect on the outcome of the case. The choice-of-law
determination will be especially important in the areas of liability, damages,
and statutes of limitation.10 While punitive damages will not be an issue in
this FSIA case,11 general damage limitations imposed by international,
foreign, or state law may drastically affect the outcome of the case. Any
of these potentially applicable bodies of law may impose strict limits or
caps on the amount of liability to which KAL may be subject.12

Although the FSIA goes a long way toward resolving many of the
questions that arise when a plaintiff contemplates a suit against a foreign

sovereign immunity). The FSIA defines the term “commercial activity” as “either a regular
course of commercial conduct or a particular commercial transaction or act.” Id. § 1603(e);
see also Vishny, supra note 1, at 702 (discussing commercial activities exception and providing
examples of activities that are not commercial under FSIA). Under the FSIA’s definition, “the
commercial character of an activity shall be determined by reference to the nature of the
course of conduct or particular transaction or act, rather than by reference to its purpose.”

10. See Philip M. Foss & Rodney K. Adams, Pre-Trial Strategy in American Air Disaster
cases); see also In re Air Crash Disaster at Boston, Mass. July 31, 1973, 399 F. Supp. 1107
(D. Mass. 1975) (discussing applicability of different substantive law based on decedent’s
domicile). Although not an FSIA case, Air Crash Disaster at Boston graphically illustrates the
importance of the choice-of-law determination. In this case, the court found that its choice-
of-law rules required the application of the wrongful death statutes of the decedent’s domiciles
to the individual claims. Id. at 1107-08. A recovery ceiling under Massachusetts law applied
only to decedents from Massachusetts. Id. at 1115. No such similar provision applied to
decedents with domiciles in Vermont, id. at 1112, New Hampshire, id. at 1114-1115, or Florida,
Id. at 1119. Thus, although all decedents died in the same crash, id. at 1107-08, their recoveries
varied not on degree of injury nor culpability of the airline, but on the mere basis of where
they had chosen to live.

11. See 28 U.S.C. § 1606 (1988) (stating that punitive damages are not recoverable in
wrongful death action brought pursuant to FSIA).

12. See Barkanic v. General Admin. of Civil Aviation of P.R.C., 923 F.2d 957, 958 (2d Cir.
1991) (recognizing China’s $20,000 limitation on damages in wrongful death actions);
Schoenberg v. Exportadora de Sal, 930 F.2d 777, 782 (9th Cir. 1991) (noting that Mexican
law limits recovery of damages in wrongful death actions); see also Desmond T. Barry, Jr.,
Choice of Law Problems in General Aviation Accident Cases: Liability and Damages, PLI
LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES No. 312 (1986) (surveying various limitations
on damages in each of fifty states).
sovereign, the FSIA does not resolve them all. Specifically, once the court has determined that sovereign immunity is inapplicable and has asserted its jurisdiction, the FSIA fails to establish explicit choice-of-law rules for determining what law to apply to the substantive issues. This omission, which perhaps is due to congressional oversight, has given rise to a divergence of opinion among both legal scholars and the United States courts. For example, the Ninth Circuit and the Second Circuit recently have split on this choice-of-law issue. The Ninth Circuit has advocated a federal common-law choice-of-law rule while the Second Circuit has chosen to utilize the choice-of-law rules of the forum state. An analysis of both the Ninth and Second Circuits' approaches shows that they are not reconcilable. Further, this analysis coupled with an analysis of the legislative history of the FSIA demonstrates the need for either Congress or the Supreme Court to take affirmative action to definitively resolve the FSIA's choice-of-law dilemma.

In Barkanic v. General Administration of Civil Aviation of the People's Republic of China, a Chinese plane en route from Nanjing to Beijing, China crashed, killing two American passengers. The surviving family members brought a wrongful death action against the Civil Aviation Administration of the People's Republic of China (CAAC), an agency of the Chinese government that provides air services to passengers flying to and

13. See Harris v. Polskie Line Lotnicze, 820 F.2d 1000, 1003 (9th Cir. 1987) (holding that FSIA, unlike Federal Tort Claims Act, does not contain explicit choice-of-law rule); see also Clyde H. Crockett, Choice of Law Aspects of the Foreign Sovereign Immunities of 1976, 14 LAW & Pol'Y INT'L BUS. 1041, 1085-1100 (1983) (stating that FSIA fails to expressly dictate choice-of-law rule or applicable substantive law of liability); A. N. Yiannopoulos, Foreign Sovereign Immunity and the Arrest of State-Owned Ships: The Need for an Admiralty Foreign Sovereign Immunity Act, 57 Tul. L. Rev. 1274, 1320 (1983) (declaring that if court has jurisdiction to entertain action against foreign state, it will first determine applicable law in accordance with its own choice-of-law rules). But see First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611, 622 n.11 (1983) (stating that FSIA requires application of law of place where act or omission occurred); Barry, supra note 12, at 4 (same).

14. See Joseph W. Dellapenna, Suing Foreign Governments and Their Corporations 221 (1988) (discussing various approaches to choice-of-law determinations in FSIA cases); Desmond T. Barry, Solving Choice of Law Problems in Foreign Sovereign Immunity Act Cases, 55 DEF. COUNS. J. 255 (1988) (arguing that FSIA has explicit choice-of-law rule in § 1606); see also Crockett, supra note 13, at 1099-1100 (calling for congressional action to clarify § 1606).

15. See Schoenberg, 930 F.2d at 782 (applying federal common-law choice-of-law rules); Barkanic, 923 F.2d at 959 (applying choice-of-law rules of the forum state).

16. See Schoenberg, 930 F.2d at 782 (holding that federal common law applies to choice-of-law rule determination); see also Liu v. People’s Republic of China, 892 F.2d 1419, 1426 (9th Cir. 1989) (same); Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1004 (9th Cir. 1987) (same).

17. See Barkanic, 923 F.2d at 959 (stating that FSIA implicitly directs courts to apply choice-of-law rules of forum state).

18. 923 F.2d 957 (2d Cir. 1991).

from airports within China.\textsuperscript{20} The United States District Court for the
Eastern District of New York dismissed the action on the basis of sovereign
immunity, but the United States Court of Appeals for the Second Circuit
reversed, finding sovereign immunity lacking on the basis of the commercial
activities exception\textsuperscript{21} of the FSIA.\textsuperscript{22} Having found that the FSIA provided
jurisdiction over the CAAC, the Second Circuit remanded the case to the
district court for trial.\textsuperscript{23}

On remand the district court faced the choice-of-law problem of whether
Chinese law or the law of the decedents' domiciles, the District of Columbia
and New Hampshire, respectively, applied.\textsuperscript{24} Chinese law limited an airline's
liability for the wrongful death of a noncitizen to twenty thousand dollars.\textsuperscript{25}
However, neither New Hampshire law nor the law of the District of
Columbia contained such a limitation. In resolving this choice-of-law ques-
tion, the district court determined that the FSIA required the application
of the choice-of-law rules of the place where the accident occurred—China.\textsuperscript{26}
China's choice-of-law rules required the application of Chinese law, thus
the district court held that the damage limitation applied.\textsuperscript{27} Arguing that
the district court should have applied the forum's choice-of-law rules, rather
than the choice-of-law rules of the place of the accident, the plaintiffs
appealed.\textsuperscript{28} According to the plaintiffs, had the district court applied New
York's choice-of-law rules as the plaintiffs believed the FSIA compelled,
the law of the plaintiffs' domiciles would have governed the damages issue.\textsuperscript{29}

On appeal, the Second Circuit affirmed the district court's ruling that
Chinese law controlled the substantive issues of the case.\textsuperscript{30} However, the
Second Circuit rejected the district court's determination that the FSIA
mandated the use of Chinese choice-of-law rules and instead held that the
choice-of-law rules of the forum, in this case New York, govern FSIA

\textsuperscript{20} Id.
\textsuperscript{21} See supra note 9 and accompanying text (discussing commercial activities exception).
\textsuperscript{22} Barkanic v. General Admin. of Civil Aviation of P.R.C., 822 F.2d 11 (2d Cir.),
\textsuperscript{23} Id.
\textsuperscript{24} Barkanic, 923 F.2d at 958.
\textsuperscript{25} Id.
\textsuperscript{26} Id. at 959. The district court in Barkanic based its determination that the FSIA
required the application of the choice-of-law rules of the place where the accident occurred
on an analogy between the FSIA and the Federal Tort Claims Act (FTCA), 62 Stat. 983
(codified as amended in scattered sections of 28 U.S.C.). The FTCA provides that the United
States, in claims properly brought under the FTCA, is to be liable according to the law of
the place where the act or omission occurred, with the exception that the United States is not
similar language with respect to punitive damages; however, it lacks the explicit choice-of-law
direction. See Id. § 1606.
\textsuperscript{27} Barkanic, 923 F.2d at 959.
\textsuperscript{28} Id. at 958-59.
\textsuperscript{29} Id.
\textsuperscript{30} Id. at 959.
cases. The Second Circuit reached this result by relying primarily on 28 U.S.C. § 1606, which provides that, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." The Second Circuit determined that, in order to "best effectuate Congress' overall intent," a federal court should use the same choice-of-law rules it would apply if all the parties to the action were private—in this case, the choice-of-law rules of the forum state, New York. In determining that the use of the forum's choice-of-law rule is indeed in conformity with congressional intent, the Second Circuit relied heavily on the legislative history of the FSIA. However, the Second Circuit erroneously interpreted this legislative history.

The Second Circuit dismissed CAAC's argument that, because a federal question provides the basis for the court's exercise of jurisdiction in FSIA cases, the application of the forum's choice-of-law rule was inappropriate. Although the court agreed with CAAC that federal question jurisdiction provides the basis for suit under the FSIA, such an argument, according to the court, misconstrued the extent of a federal court's power to choose the

31. Id. The Second Circuit did not agree with the plaintiffs' contention that the application of New York's choice-of-law rules would require the application of the substantive law of the plaintiffs' domiciles to the damages issue. Id. Instead, the circuit court found that New York's choice of law rules would mandate the application of Chinese law to the substantive claims of the parties. Id. Thus, the circuit court was able to affirm the result reached by the district court. Id.

32. Id. at 959-61. The Second Circuit based its findings upon a footnote from a recent Supreme Court case, First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611 (1983), which stated that, "where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." First Nat'l City Bank, 462 U.S. at 622 n.11. However, the rule referred to in this case is not a choice-of-law rule, but instead a rule of liability. See infra notes 101-11 and accompanying text (criticizing Justice O'Connor's conclusion to contrary in First Nat'l City Bank).


34. Barkanic, 923 F.2d at 959. It is arguable that the Second Circuit's analysis of the language of § 1606 is improper. See infra notes 109-28 and accompanying text (arguing that Second Circuit's interpretation of § 1606 is wrong).

35. Barkanic, 923 F.2d at 959.

36. See infra notes 84-111, 123-42 and accompanying text (analyzing legislative history and arguing that Second Circuit's call for application of forum choice-of-law rules in FSIA cases potentially leads to impermissible forum shopping which clearly contravenes congressional intent).

37. See 28 U.S.C. § 1331 (1988) (defining federal question jurisdiction). Section 1331 defines federal question jurisdiction as follows: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Id.

38. Barkanic, 923 F.2d at 960.
applicable law. The court recognized that in diversity cases, the rules of *Erie Railroad Co. v. Tompkins* and *Klaxon Co. v. Stentor Electric Manufacturing Co.* govern the choice-of-law determination, but the court

39. *Id.*


The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

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

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and;

(4) a foreign state ... as plaintiff and citizens of a State or of different States ... *Id.*

41. 304 U.S. 64 (1938). In *Erie* the United States Supreme Court confronted the issue of whether federal courts sitting in diversity must apply state substantive law or whether they may apply federal common law instead. *Id.* at 65. The plaintiff instituted a negligence action in the United States District Court for the Southern District of New York, claiming that a door projecting from one of the defendant’s moving train cars had injured the plaintiff as the plaintiff walked along the defendant’s right of way in Hughestown, Pennsylvania. *Id.* at 69. The district court had diversity jurisdiction because the plaintiff resided in Pennsylvania and the defendant’s state of incorporation was New York. *Id.* The defendant denied liability, arguing that because the plaintiff was a trespasser the defendant’s duty to the plaintiff was substantially lower than the duty owed to a nontrespasser. *Id.* at 69-70. Additionally, the defendant asserted that the court must apply Pennsylvania law to determine the extent of the duty owed by the defendant to the plaintiff. *Id.* at 70. Pennsylvania common law accords persons who use pathways along the railroad right of way the status of trespassers, and railroads are not liable for injuries to undiscovered trespassers resulting from the railroad’s negligence unless a court finds the railroad’s negligence to be wanton or willful. *Id.* The plaintiff argued that because this was a state common-law rule and because there was no statutory formulation of this rule, the federal court should determine the extent of the railroad’s liability based on general federal common law. *Id.* The district court agreed with the plaintiff and entered a judgment in favor of the plaintiff for $30,000. *Id.* The United States Court of Appeals for the Second Circuit affirmed the district court’s judgment. *Id.* However, the United States Supreme Court reversed, holding that,

except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.


42. 313 U.S. 487 (1941). In *Klaxon* the United States Supreme Court confronted the issue of whether federal courts sitting in diversity must apply the choice-of-law rules of the forum state. The respondent, a New York corporation, had transferred its entire business to the petitioner, a Delaware corporation. *Id.* at 494. The petitioner contracted to use its best efforts to further the manufacture and sale of certain patented devices covered by the agreement and to share profits resulting from these efforts with the respondent. *Id.* Ten years later the respondent, alleging that the petitioner had failed to use its best efforts, instituted a suit in
reasoned that in federal question cases a federal court should first look to the choice-of-law rules enunciated by Congress in the statute that gives rise to jurisdiction.43

The court decided that in a federal question case where the statute contains no such provision, federal courts may apply federal common-law rules or conversely may choose to apply state choice-of-law rules if that would best effectuate Congress's overall intent.44 The court determined that the FSIA did not contain an explicit directive from Congress requiring the application of a particular set of choice-of-law rules in FSIA cases.45 But the court also determined that the FSIA does not compell the use of federal common-law choice-of-law analysis merely because a court is exercising its federal question jurisdiction.46 In this particular case the circuit court concluded that the application of the forum state's choice-of-law rules did in fact effectuate the congressional intention that foreign states be liable in the same manner and to the same extent as a private individual under like circumstances.47

Several other courts48 and James Moore in his work on the federal

the United States District Court for the District of Delaware which had jurisdiction on the basis of diversity of citizenship. Id. The district court found in favor of the respondent in the amount of $100,000. Id. Based on a provision of New York law, the respondent moved to correct the judgment by adding interest from the date the respondent had initiated the action. Id. at 494-95. The district court, believing that New York governed the rights of the parties, granted the motion. Id. The United States Court of Appeals for the Third Circuit affirmed, relying upon the Restatement (First) of Conflict of Laws § 413 for a choice-of-law rule. Id. at 495-96. However, the United States Supreme Court reversed, holding that the prohibition of Erie extended to the field of conflict of laws. Id. at 496. Hence, federal courts sitting in diversity must apply the choice-of-law rules of the forum state. Id. The Supreme Court has recently reaffirmed Klaxon in strong terms in Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4 (1975) (per curiam). In Day the Court reversed an appellate court determination that, as matter of federal choice of law, a federal court could not apply the choice-of-law rule of the state in which it sat if that jurisdiction had no policy interest in the case.

43. See Barkanic v. General Admin. of Civil Aviation of P.R.C., 923 F.2d 957, 959 (2d Cir. 1991) (holding that in federal question cases court should look to statute giving rise to jurisdiction for choice of law guidance). See also Richards v. United States, 369 U.S. 1 (1962) (holding that in FTCA case statute itself provides for proper choice-of-law rules); 1 JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.66[4] (2d ed. 1992) (arguing that section 1606 of FSIA explicitly calls for similar application).

44. Barkanic, 923 F.2d at 961.
45. Id. at 959.
46. Id. at 961.
47. Id. (quoting 28 U.S.C. § 1606 (1988)).
48. See Cimino v. Raymark Ind., 739 F. Supp. 328, 336 (E.D. Tex. 1990) (holding that federal court must apply choice-of-law rules of forum state in which it sits); see also Gilson v. Ireland, 606 F. Supp. 38, 42-44 (D.D.C. 1984) (stating that it is incumbent upon federal court in FSIA case to apply forum's choice-of-law rules). One should note that the court in Cimino reached the result that federal courts must apply the forum's choice-of-law rules after stating that it agreed with the Ninth Circuit's construction of the FSIA in Harris v. Polskie Line Lotnicze, 820 F.2d 1000 (9th Cir. 1987). Cimino, 739 F. Supp. at 336. In Harris the Ninth Circuit determined that federal common law, as enunciated by the RESTATEMENT (SECOND) OF CONFLICTS OF LAW §§ 6, 175 (1971), not forum law, governed the choice-of-law determination
practice advocate the approach followed in Barkanic. However, none of the courts gave any reason for its decision to apply the forum's choice-of-law rules, and none seems to rely on section 1606 of the FSIA, as the Second Circuit did in Barkanic. Moore predicates his determination exclusively upon section 1606's mandate that a foreign state be liable in the same manner and to the same extent as a private individual under like circumstances. While this approach appears logically sound and highly workable, the question remains as to whether this is the approach Congress intended. It is definitely not the only approach suggested by commentators and other courts. The Ninth Circuit appears to have its own view of what choice-of-law rule Congress intended to govern FSIA cases.

In Schoenberg v. Exportadora de Sal the Ninth Circuit, like the Second Circuit in Barkanic, confronted the difficult issue of determining the applicable choice-of-law rule in an FSIA case. Schoenberg, like Barkanic, involved wrongful death claims against a foreign sovereign—in this case Mexico. The deaths resulted when an airplane chartered by Exportadora de Sal (Exportadora), a corporation owned in part by the Mexican government, crashed near San Diego, California, while attempting to land in

in FSIA cases. Harris, 820 F.2d at 1003. Given this confusion, Cimino's holding is questionable. However, the fact that Texas courts follow the Restatement's choice-of-law approach may partially explain the Cimino court's confusion. Cimino, 739 F. Supp. at 337.

49. See 1 Moore et al., supra note 43 (arguing that § 1606 of FSIA explicitly calls for similar application). Moore believes that § 1606's statement that foreign states subject to jurisdiction under the FSIA be liable "in the same manner and to the same extent as a private individual in like circumstances" clearly calls for the application of the forum state's laws. Id. However, at least one commentator has criticized Moore's strict reading of § 1606 as placing too much emphasis on the first portion of the passage and ignoring the second. See Dellapenna, supra note 14, at 222. Dellapenna states that this language still does not reveal what law courts are to apply "in the same manner and to the same extent" in any circumstance. Id.

50. See Barkanic, 923 F.2d at 961 (relying on legislative history of FSIA and explicit language of § 1606 to conclude that federal courts are to apply forum choice-of-law rules in FSIA cases).

51. See 1 Moore et al., supra note 43 (calling for application of forum's law in FSIA cases).

52. See Schoenberg v. Exportadora de Sal, 930 F.2d 777 (9th Cir. 1991) (espousing federal common-law choice-of-law rules); Liu v. People's Republic of China, 892 F.2d 1419 (9th Cir. 1989) (same); Harris v. Polskie Line Lotnicze, 820 F.2d 1000 (9th Cir. 1987) (same); see also Barry, supra note 14, at 265 (calling for application of "whole law" of place where event giving rise to liability occurred); Crockett, supra note 13, at 1050 (arguing for an international choice-of-law rule).

53. See Schoenberg, 930 F.2d at 783 (calling for application of federal common law choice-of-law rule in FSIA cases).

54. 930 F.2d 777 (9th Cir. 1991).


56. Id. at 778.

57. See 28 U.S.C. § 1606(b) (1988) (defining agencies and instrumentalities as those terms are used in FSIA). The FSIA applies both to actions against foreign sovereigns themselves and to actions against their "agencies and instrumentalities." Section 1603(b) defines agencies
Tijuana, Mexico. The district court, ruling that Exportadora's actions fell under the commercial activities exception of section 1605(a)(2) of the FSIA, rejected Exportadora's claim for sovereign immunity. The district court further determined that California law applied to the substantive claims brought by the relatives of the decedents. The district court granted Exportadora's request for an interlocutory appeal on these issues.

On appeal, the Ninth Circuit first determined that the district court had correctly found that sovereign immunity was lacking. The Ninth Circuit then analyzed the district court's ruling on the choice-of-law question. In determining this issue, the court recognized that in a diversity action a federal court must apply the conflict-of-law rules of the forum state. However, according to the circuit court, diversity jurisdiction does not provide the basis for claims under the FSIA; federal question jurisdiction does. Thus, the court stated that in a federal question case federal courts should apply federal common-law choice-of-law rules. The Ninth Circuit further found that the federal common law follows the approach set out in the Restatement (Second) of Conflict of Laws (the Restatement) for

and instrumentalities as an entity:

1. which is a separate legal person, corporate or otherwise, and
2. which is 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. which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

Id. In Schoenberg the Mexican government owned 51% of Exportadora's stock. Schoenberg, 930 F.2d at 778.

58. Schoenberg, 930 F.2d at 778.
59. See supra notes 8-9 and accompanying text (discussing commercial activities exception to FSIA).
60. Schoenberg, 930 F.2d at 778.
61. Id.
62. Id. Interlocutory appeals of district court rulings that involve controlling questions of law as to which there is substantial ground for difference of opinion and for which an immediate appeal may materially advance the ultimate termination of the litigation are allowed under 28 U.S.C. § 1292(b) (1986).
63. Id. at 782 (holding that commercial activity exception applies where foreign government owns 51% of corporation that arranged for trip from United States to Mexico originating in and terminating in United States).
64. Id.
65. Id. (citing Harris v. Polskie Linie Lotnicze, 820 F.2d 1000 (9th Cir. 1987) for proposition that federal common-law choice-of-law rules apply in FSIA cases); see also, Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) (holding that choice-of-law rules are substantive law under Erie analysis and that, therefore, forum choice-of-law rules must be applied in diversity cases).
66. Schoenberg, 930 F.2d at 782.
67. Id. at 782. See also Aaron Ferer & Sons, Ltd. v. Chase Manhattan Bank, 731 F.2d 112 (2d Cir. 1984) (holding that in federal question case courts are to apply federal common-law choice-of-law rules); Corporacion Venezolana de Fomento v. Vintero Sales, 629 F.2d 786, 794-95 (2d. Cir. 1980) (same), cert. denied, 449 U.S. 1080 (1981).
68. The Ninth Circuit applied the test of section 175 in conjunction with section 6(2) of
determining choice-of-law questions. 69

One final question needs analysis before leaving Schoenberg: Why and how did the Ninth Circuit conclude that the Restatement embodies the federal common law? The Ninth Circuit based this determination upon a line of cases it had decided previously. Beginning with several cases that arose in Hawaii 70 and continuing through the recent case of Harris v. Polskie Linie Lotnicze, 71 the Ninth Circuit had reached the position that the Restatement represented a source of general choice-of-law principles and an appropriate starting point for applying federal-common law in FSIA cases. 72 However, none of the previous decisions asserted that the Restatement contained the federal common law. The decisions go no further than to utilize the Restatement as a basis for the choice-of-law analysis. Consequently, the Ninth Circuit's assertion that the federal common law follows the approach of the Restatement is without basis—the court provided no real support for this conclusion.

Although none of the Hawaiian cases involved the FSIA, Harris did. 73 In fact, Harris appears to be the first FSIA case in which a federal court has espoused a federal common-law choice-of-law rule. The Harris court based this conclusion on the fact that federal question jurisdiction serves the Restatement to conclude that the law of California applied to the substantive issues of the case. Schoenberg, 930 F.2d at 777. Section 175 of the Restatement states:

an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship . . . to the occurrence and the parties, in which event the local law of the other state will be applied.

RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 175 (1971). Section § 6(2) of the Restatement lists seven factors for determining when "some other state has a more significant relationship":

a. the needs of the interstate and international systems;

b. the relevant policies of the forum;

c. the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;

d. the protection of justified expectations;

e. the basic policies underlying the particular field of law;

f. the certainty, predictability and uniformity of result; and;

g. the ease in the determination and application of the law to be applied.

Id. § 6(2).

69. Schoenberg, 930 F.2d at 777.

70. See Commercial Ins. Co. v. Pacific-Peru Constr. Corp., 558 F.2d 948, 952 (9th Cir. 1977) (holding that where Hawaiian law does not provide appropriate conflicts rule, court is to apply general choice-of-law rules and that Restatement (Second) of Conflicts of Laws provides guidance as to general conflicts principles); Dashiell v. Keauhou-Kona Co., 487 F.2d 957, 960 (9th Cir. 1973) (holding that where federal court sitting in diversity is unable to find any Hawaiian conflict-of-law rules on point, court should look to conflict of law rules generally applied by courts of this country); Gates v. P. F. Collier, Inc., 378 F.2d 888, 892 (1967) (holding that where there are no Hawaiian decision bearing upon what law governs, federal court should apply conflict-of-law rules generally applied by courts in this country).

71. 820 F.2d 1000 (1987).

72. Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1003 (9th Cir. 1987).

73. Id. at 1000.
as the foundation for a suit pursuant to the FSIA. According to the *Harris* court, in a federal question case, absent specific statutory guidance, a federal court is free to choose its own common-law choice-of-law rule.

As with the Second Circuit’s approach, several other courts and one commentator have espoused the Ninth Circuit’s approach. Therefore, the question remains as to which method is correct and one can reconcile them. Possibly neither approach is proper for resolving the choice-of-law question in FSIA cases.

While both the Ninth Circuit and the Second Circuit were correct in their conclusion that the federal question jurisdiction of United States courts serves as the basis for claims brought pursuant to the FSIA, this conclusion alone does not resolve the choice-of-law problem. The split of decision between the Ninth and Second Circuits emphatically illustrates this point. With the exception of cases brought under the court’s diversity

74. *Id.* at 1003.

75. *Id.* The *Harris* court stated that, “absent specific statutory guidance, we prefer to resort to the federal common law for a choice-of-law rule.” *Id.* (emphasis added). The court relied on Corporacion Venezola de Fomento v. Vintero Sales Corp. 629 F.2d 786, 795 (2d Cir. 1980) (holding that in federal question case federal common-law choice-of-law rules apply), *cert. denied*, 449 U.S. 1080 (1981). However, *Fomento* did not involve the FSIA.

76. *See* Morgan Guaranty Trust Co. v. Republic of Palau, 693 F. Supp. 1479 (S.D.N.Y. 1988) (stating that because case arose under FSIA, court must apply federal common-law choice-of-law analysis). *Cf.* Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, 731 F.2d 112 (2d Cir. 1984) (holding that in federal question case federal common-law choice-of-laws rules apply); Corporacion Venezola de Fomento v. Vintero Sales Corp. 629 F.2d 786, 795 (2d Cir. 1980) (same), *cert. denied*, 449 U.S. 1080 (1981); Citibank, N.A. v. Benkoczky, 561 F. Supp. 184 (S.D. Fla. 1983) (ruling that in case where 12 U.S.C. § 632 provides basis of jurisdiction federal common-law choice-of-law rules apply). It is important to note that only *Morgan* involved application of the FSIA. However, because federal question jurisdiction provides the basis for actions under the FSIA and because the other cases deal with various federal questions and reach an agreement with respect to the application of federal common-law choice-of-law rules, these cases arguably provide support for the Ninth Circuit’s position. Indeed, the Ninth Circuit in *Harris* relied explicitly on *Fomento*. *See* Harris, 820 F.2d at 1003 (quoting *Fomento* for proposition that Supreme Court has sanctioned use of federal common law in specialized areas where jurisdiction is not based on diversity since day *Erie* was decided).

77. *See* Chow, *supra* note 41, at 168 (calling for federal common-law choice-of-law rules in FSIA cases).

78. *See* Schoenberg v. Exportadora de Sal, 930 F.2d 777, 782 (9th Cir. 1991) (stating that FSIA cases are based on federal question jurisdiction); *Harris*, 820 F.2d at 1003 (same).

79. *See* Barkanic v. General Admin. of Civil Aviation of P.R.C., 923 F.2d 957, 961 (2d Cir. 1991) (acknowledging that FSIA case is federal question case).

80. *See* Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480 (1983). The federal question jurisdiction referred to in *Verlinden* was Article III federal question jurisdiction, which is to be distinguished from statutory federal question jurisdiction. Also, the Court in *Verlinden* refused to reach the issue whether section 1606 of the FSIA rendered every claim against a foreign sovereign a federal cause of action. Indeed, the Court specifically noted that, where at least one of the plaintiffs in an FSIA case is a citizen of the United States, constitutional diversity jurisdiction would provide a sufficient basis for a federal court to exercise jurisdiction over the case. *Id.* at 492 n.18.
jurisdiction, under which a clear choice-of-law rule exists,81 and cases brought pursuant to a particular statutorily granted cause of action containing its own choice-of-law provision,82 courts appear to be free to pick and choose whatever choice-of-law rules justice may require. The alternatives might include federal common law choice-of-law, the choice-of-law rules of the forum, or some other set of choice-of-law rules. However, the maxim that a court should apply a statute so as to best effectuate the overall intent of Congress limits this discretion.83 With regard to the FSIA this intent is unclear and perhaps contradictory.84

When Congress enacted the FSIA, Congress clearly stated that its purpose was fourfold:85 First, to codify the so-called “restrictive” principle of sovereign immunity;86 second, to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby ensuring the consistent application of the restrictive principle of immunity in the United States courts;87 third, to provide a statutory procedure for making service upon and obtaining in personam jurisdiction over a foreign state;88 and fourth, to restrict the then-existing broad execution immunity rules and


82. See Richards v. United States, 369 U.S. 1 (holding that, based on statutory language, Federal Tort Claims Act cases are governed by choice-of-law rules of place where act or omission occurred); see also Harris, 820 F.2d at 1003 (suggesting that court should first look for specific statutory guidance before applying federal common law).

83. See Barkanic, 923 F.2d at 959 (stating that because FSIA does not contain express choice-of-law provision, courts must infer from statutory language choice-of-law analysis that best effectuates Congress’s overall intent).

84. See Barry, supra note 14, at 255 (stating that confusion is created by FSIA’s imprecise language and that confusion is complicated by lack of guidance in legislative history).


86. Id. at 6605. Under the “restrictive” principle of sovereign immunity, “the immunity of a foreign state is ‘restricted’ to suits involving a foreign state’s public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)”. Id. The restrictive principle of sovereign immunity has been followed in the United States since 1952, when it was adopted by the State Department, and is applied regularly against the United States in the courts of foreign states. Id. See also Vishny, supra note 1, at 701 (defining restrictive principle of sovereign immunity and discussing history of its application); Barry, supra note 14, at 256 (same).

87. House Report, supra note 85, at 6605-06. Prior to the enactment of the FSIA, decisions of immunity were functionally made by the State Department. Id. at 6606. Although the courts had the power to determine questions of sovereign immunity, the courts usually deferred to State Department determinations. Id. By requiring courts to make determinations of immunity, Congress hoped to reduce the foreign policy implications that had often prompted a finding of immunity by the State Department before the enactment of the FSIA. Id. In addition, judicial determinations of sovereign immunity assure litigants that the crucial immunity determination is made on purely legal grounds and according to procedures which ensure due process. Id.

88. Id. at 6606.
allow a creditor some remedy if a foreign state or its enterprise fails to satisfy a final judgment. Of key importance in the present discussion is the second purpose, the desire to ensure the consistent application of the restrictive principle of sovereign immunity in the United States courts. This particular desire for uniformity echoes throughout the legislative history of the FSIA. In fact, one of the main justifications for denying jury trials under the act is to promote uniformity of decision in cases involving foreign governments. To further encourage uniformity of decision, Congress granted broad jurisdiction to the United States courts in section 2 of the FSIA. Additionally, in section 6 of the FSIA Congress granted foreign states “clear authority” to remove actions brought against them in state courts to a federal forum. Again, as justification for this broad authority to remove FSIA cases to federal courts, Congress cited its desire to develop a uniform body of law in the foreign sovereign immunity area. Congress recognized that actions against foreign states were of a particularly sensitive nature and that uniformity of decision was necessary to prevent adverse foreign relations consequences that might result from a disparate treatment of cases involving foreign governments.

89. Id.
90. See id. at 6611 (stating that FSIA’s broad jurisdictional grant should be conducive to uniformity, which is desirable because disparate treatment of cases involving foreign governments may have adverse foreign relations consequences); id. at 6611-12 (noting that reason for denying jury trials in FSIA cases is to promote uniformity of decision); id. at 6631 (recognizing potential sensitivity of actions against foreign states and importance of developing uniform body of law in sovereign immunity area).
91. Id. at 6611-12.
92. Id. at 6611.
(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state... as to any claim for relief... with respect to which the foreign state is not entitled to immunity. . . .
(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) . . . .

Id.
94. Id. § 6, 90 Stat. at 2898 (codified at 28 U.S.C. § 1441(d) (1988)). Section 6 provides: Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based on this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

Id.
95. See HOUSE REPORT, supra note 85, at 6631-32 (describing removal provisions of FSIA).
96. Id.
97. Id.
98. Id. at 6611. See Republic of Iraq v. First Nat’l City Bank, 353 F.2d 47, 50-51 (2d
However, in section 1606 of the FSIA\textsuperscript{99} Congress explicitly stated that, in FSIA cases in which a foreign state could not rely on sovereign immunity as a defense, courts should hold the foreign state liable in the same manner and to the same extent as a private individual under similar circumstances.\textsuperscript{100} The Supreme Court has attempted to interpret this language in only one case, \textit{First National City Bank v. Banco para el Comercio Exterior de Cuba},\textsuperscript{101} and then only in a footnote.\textsuperscript{102} In this footnote Justice O'Connor,
finding the language of section 1606 to be nearly identical to the language of the Federal Tort Claims Act (FTCA), stated that where state law provided a rule of liability governing private individuals, the FSIA required the application of that rule to foreign states in similar circumstances. Various commentators have strongly criticized Justice O'Connor's reasoning, however. In fact, as recognized by the Second Circuit in Barkanic, while both the FSIA and the FTCA contain almost identical language with respect to punitive damages, only the FTCA contains explicit choice-of-law language. The FTCA in section 1346(b) authorizes courts to hold the United States liable in accordance with the law of the place where the act or omission occurred. The FSIA contains no such provision. By its terms, the language of section 1606 relates only to the issue of punitive damages, not to the general question of choice-of-law. Thus, any direct analogy between the FTCA and the FSIA with respect to choice-of-law determinations is inappropriate.

recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice." Id. (quoting National City Bank, 348 U.S. at 361-62 (footnote omitted)).

102. See First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611, 622 n.11 (1983) (stating that where state law provides rule of liability governing private individuals, FSIA requires application of that rule to foreign states in same circumstances).


104. First National City Bank, 462 U.S. at 622 n.11.

105. See DELLAPENNA, supra note 14, at 220 (stating that Justice O'Connor misread choice-of-law import of FTCA and thus one cannot be too confident of her description of import of section 1606); see also Barry, supra note 14, at 260 (stating that Supreme Court did not intend to set forth choice-of-law rules to be applied in FSIA cases and noting that interpretations to contrary are "clearly erroneous").

106. Compare 28 U.S.C. 2674 (1988) (stating that, "if the law of the place where the act or omission complained of occurred provides ... for damages only punitive in nature, the United States shall be liable for actual or compensatory damages ... in lieu thereof") with 28 U.S.C. § 1606 (1988) (stating that, "if ... the law of the place where the action or omission occurred provides ... for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages").

107. See 28 U.S.C. § 1346(b) (1988). Section 1346(b) states that in FTCA actions, "the United States ... [will] be liable to the claimant in accordance with the law of the place where the act or omission occurred." Id.

108. Id.

109. See Barkanic v. General Admin. of Civil Aviation of the P.R.C., 923 F.2d 957, 959 (2d Cir. 1991) (stating that FSIA lacks choice-of-law provision similar to that found in FTCA); Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1003 (9th Cir. 1987) (same); see also Cimino v. Raymark Ind., 739 F. Supp. 328, 336 (E.D. Tex. 1990) (holding that FSIA lacks even implicit choice-of-law rule for negligence actions); see also Yiannopoulos, supra note 13 at 1320 (stating that FSIA does not establish rules of choice-of-law with respect to cases involving international contacts).

110. See Barkanic, 923 F.2d at 959 (holding that comparisons between FSIA and FTCA on choice-of-law question is misfounded); see also Harris, 820 F.2d 1000, 1003 (9th Cir. 1987) (rejecting analogy between FTCA and FSIA). But see DELLAPENNA, supra note 14, at 219-20 (arguing that 28 U.S.C. § 1606 is virtually identical to FTCA, and therefore, that Congress must have assumed that effect of § 1606 was generally to direct use of law of place where wrongful act or omission occurred).
Justice O'Connor made explicit reference to Congress's desire for developing a uniform body of law, and, certainly, her call for the mandatory application of the substantive law of the place where the act or omission occurred would provide a uniform choice-of-law rule. However, if the law is in fact some body of foreign law that does not allow for a particular cause of action, or has a very short, strict statute of limitations, or has some other facet that makes its application unjust by American standards, the mandatory application of the law of the place where the act or omission occurred would seem to preclude due process. Such a result is unquestionably contrary to Congress's desire to open up the American courts and ensure due process to plaintiffs injured by acts of foreign sovereigns. Nevertheless, it is possible to achieve Congress's goal of uniformity and still allow courts sufficient discretion to eliminate this type of injustice.

One district court has attempted a novel approach for justifying the use of the forum's choice-of-law rule in FSIA cases. In *Boxer v. Gottlieb* the United States District Court for the Southern District of New York, relying on the Second Circuit's opinion in *Verlinden B.V. v. Central Bank of Nigeria*, held that the *Erie* doctrine applied to FSIA cases and therefore that the federal courts must apply the choice-of-law rules of the forum. For this proposition, the district court relied primarily on a footnote in *Verlinden* that quoted a passage of the 1973 hearings on the first proposed version of the FSIA. This footnote stated that the issue of whether courts will apply state or federal law in FSIA cases will depend on the nature of the claims before the court and not the presence of a foreign state and further that, under the *Erie* doctrine, courts will apply state substantive law, including state choice-of-law rules, if the issue before the court is

112. See Barry, *supra* note 14, at 265 (arguing that application of "whole law" of place where omission occurred would provide objective standard that would promote FSIA's goal of uniformity and predictability).
113. See *supra* notes 10-12 and accompanying text (discussing problems which might arise if foreign law is applied in FSIA cases).
114. See *supra* note 87 and accompanying text (discussing Congress's desire to ensure United States plaintiffs due process in against foreign states under FSIA).
115. See *infra* notes 132-67 and accompanying text (reconciling Congress's desire for uniformity with use of federal common-law choice-of-law analysis).
119. See id. (relying on Verlinden B.V. v. Central Bank of Nig., 647 F.2d 320, 326 (2d Cir. 1981), rev'd on other grounds, 461 U.S. 480 (1983) for proposition that *Erie* doctrine requires federal courts to apply forum choice-of-law rules in FSIA cases); see also *Verlinden*, 647 F.2d at 326 n.19 (discussing legislative history of 1973 version of FSIA). The 1973 version of the FSIA was introduced as S. 566, 93rd Cong., 1st Sess. (1973), and H.R. 3493, 93rd Cong., 1st Sess. (1973). The sponsors of the 1973 bills withdrew and re-introduced them as revised in S. 3553, 94th Cong., 2d Sess. (1976), and H.R. 11315, 94th Cong., 2d Sess. (1976). The house version, H.R. 11315 was enacted as the FSIA.
Although the Supreme Court reversed *Verlinden* on appeal, the Court predicated the reversal on other grounds. However, this fortuitous result should not legitimize the *Boxer* court's reliance on the legislative history of the 1973 version of the FSIA. The legislative history of the enacted FSIA explicitly states:

The committee wishes to emphasize that this section-by-section analysis supersedes the section-by-section analysis that accompanied the earlier version of the bill in the 93rd Congress; . . . the prior analysis should not be consulted in interpreting the current bill [1976 version] and its provisions, and no inferences should be drawn from the differences between the two.

Consequently the district court, while taking a somewhat novel approach, was incorrect to rely on the legislative history of the 1973 version of the FSIA as quoted by the Second Circuit in *Verlinden*. The legislative history of the 1976 version fails to include the discussion of choice-of-law problems that was present in the 1973 version's legislative history, and any mention of *Erie* or *Klaxon* is lacking.

Hence, if Congress truly seeks uniformity, one must ask how Congress believed it could achieve uniformity while, at the same time, calling for courts to hold foreign states involved in FSIA litigation liable in the same manner and to the same extent as a private party under similar circumstances. If courts accord foreign states the status of private parties, be

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120. *Verlinden*, 647 F.2d at 326 n.19 (quoting *Hearings on H.R. 3493 before Subcomm. on Claims and Governmental Relations of the Comm. on the Judiciary*, 93rd Cong., 1st Sess. 18, 47 (1973) (Dept't of State, Section-by-Section Analysis of 1973 bill)).

121. *See Verlinden B. V. v. Central Bank of Nig.*, 461 U.S. 480, 485-86 (1983) (reversing *Verlinden B. V. v. Central Bank of Nig.*, 647 F.2d 320 (2d Cir. 1981)). The Second Circuit had determined that 28 U.S.C. § 1330, the FSIA’s jurisdictional provision, was an unconstitutional grant of jurisdiction in that it exceeded the scope of Article III of the Constitution. *Verlinden*, 647 F.2d at 322. According to the Second Circuit, neither the diversity clause, nor the “arising under” clause of Article III was broad enough to support jurisdiction over actions brought by foreign plaintiffs against foreign sovereigns. *Id.* at 325, 327. Thus the Second Circuit affirmed a dismissal for want of jurisdiction by the district court. *Id.* at 330. The Supreme Court reversed, holding that the “arising under” clause was indeed sufficiently broad to support Congress’s grant of jurisdiction over foreign sovereigns, even when brought by a foreign plaintiff. *Verlinden*, 461 U.S. at 491. The Court additionally noted that where a United States citizen was a plaintiff in a suit against a foreign sovereign, the diversity clause of Article III might be a sufficient basis for a grant of jurisdiction as well. *Id.* at 492 n.18. However, the Court did not comment on the Second Circuit’s choice-of-law statement, nor did the Court comment on the Second Circuit’s reliance on the legislative history of the 1973 Act.


123. *Compare House Report*, supra note 85 (explaining application of enacted version of FSIA and failing to mention choice-of-law problems) *with Hearings on H.R. 3493 before Subcomm. on Claims and Governmental Relations of the Comm. on the Judiciary*, 93rd Cong., 1st Sess. 18, 47 (1973) (Dept't of State, Section-by-Section Analysis of 1973 Bill) (discussing choice of law explicitly and making direct reference to *Erie* and *Klaxon*).

124. *See House Report*, supra note 85 (failing to mention either *Erie* or *Klaxon*).

125. *See supra notes* 49-51 and accompanying text (discussing James Moore’s interpretation of congressional intent behind use of “in the same manner and to the same extent as a private party under like circumstances” language of section 1606).
they alien or domestic, the courts' diversity jurisdiction would serve as the
basis for claims against the foreign state. In such a case, as previously
noted, the Klaxon rule would require the application of the forum's choice-
of-law rule. However, under this interpretation and application of section
1606, Congress would appear to have called for the application of fifty
different choice-of-law rules, rather than having uniform treatment of
foreign states under the FSIA. The only factor that would determine
which choice-of-law rule a court would apply in a particular case would be
the plaintiff's forum selection.

Accordingly, a plaintiff might choose to bring suit in California if
California's choice-of-law rules would call for the application of a body of
substantive law that would be beneficial to the plaintiff's case. Or, if the
choice-of-law rules of New York, Arkansas, Arizona or some other state
would be more favorable to the plaintiff's case, the plaintiff could institute
his claim in one of these states. Of course the minimum contacts doctrine
of personal jurisdiction and the FSIA's own venue provisions would
serve to limit the plaintiff's forum selection. However, these limitations

126. See 28 U.S.C. § 1332 (1988) (defining jurisdiction based on diversity of citizenship). Indeed, the Second Circuit in Barkanic proposed an analysis which is similar to the choice-
of-law analysis employed when jurisdiction is predicated on diversity of citizenship.

127. See supra notes 41-42 and accompanying text (discussing application of Klaxon rule which requires use of forum's choice-of-law rules in cases where federal courts' jurisdiction is based on diversity of citizenship).

128. See In re Air Disaster at Lockerbie, Scotland on December 21, 1988, 928 F.2d 1267, 1275-76 (2d Cir. 1991) (noting that adoption of state choice-of-law rules as federal law would lead to variation between one state and another and also variation between one federal court and another, such that federal law would not be constant). It is interesting that the Second Circuit recognizes the certain variation which would result by the application of state choice-
of-law rules in federal cases, yet still clings to its determination that the FSIA requires the application of the forum's choice-of-law rules. See id. In fact, the Second Circuit notes the fact that its approach varies with the approach of the Ninth Circuit, but fails to recognize that its approach is incorrect. Id.

129. See supra notes 13-41 and accompanying text (discussing forum selection and forum
shopping problems which are present when choice-of-law rule is that of forum).

130. See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (stating that before any court may exercise jurisdiction over defendant, such defendant must have sufficient "minimum contacts" with forum such that maintenance of suit does not violate "traditional notions of fair play and substantial justice"); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) (noting that minimum contacts test is satisfied when suit is based on contract which had "substantial connection" with state).

131. See 28 U.S.C. § 1391(f) (1986). Section 1391(f) states that a civil action may be
brought against a foreign state:

(1) in any judicial district in which a substantial part of the events or omissions
giving rise to the claim occurred . . . ;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated
. . . ;

(3) in any judicial district in which the agency or instrumentality [of the foreign
state] is licensed to do business or is doing business . . . ;

(4) in the United States District Court for the Distrit of Columbia . . . ;

Id.
alone are unlikely to provide Congress with any increased degree of uniformity. Indeed, the holdings of several FSIA cases which state that the minimum contacts required of foreign states under the FSIA are even more "minimal" than those generally required in cases not concerning the FSIA serve to increase the danger of forum shopping. Thus, the above interpretation of section 1606 seems to encourage the very consequence Congress sought to avoid—a lack of uniformity of decision. Additionally, this broad reading of section 1606 seems to encourage forum shopping, an evil long since disdained by the courts of the United States. The application of the *Erie* doctrine to FSIA cases could lead to the very forum shopping that *Erie* sought to prevent. Congress, while calling for uniformity and consistency, could not have intended such a nonuniform and inconsistent result. A more likely conclusion is that Justice O'Connor and the Second Circuit in *Barkanic* have merely misinterpreted the legislative intent. Thus the Ninth Circuit's interpretation in *Schoenberg*, at least its determination that in FSIA cases courts should apply federal common law to the choice-of-law question, is more in accord with the goal of uniformity of decision sought by Congress in enacting the FSIA.


133. See supra notes 90-98 and accompanying text (discussing desire for uniformity permeating legislative history of FSIA).

134. See Salve Regina College v. Russell, 111 S. Ct. 1217, 1222 (1991) (disdaining result arrived at by trial court which would vary substantive law applied to dispute depending on plaintiff's choice of forum and noting that *Erie's* main goal was elimination of such forum shopping); Hanna v. Plummer, 380 U.S. 460, 468 (1965) (stating that twin aims of *Erie* doctrine are: Discouragement of forum shopping and avoidance of inequitable administration of laws); see also *Henry M. Hart & Herbert Wechsler, The Federal Courts and the Federal System* 742, 745-756 (Paul M. Bator et al. eds., 2d ed. 1973) (discussing forum shopping).

135. See *Hanna*, 380 U.S. at 468 (noting that discouragement of forum shopping was major purpose of *Erie*).

136. See supra notes 100-14 and accompanying text (analyzing Justice O'Connor's interpretation of section 1606 of the FSIA).

137. See supra notes 31-36 and accompanying text (discussing Second Circuit's analysis of legislative history of FSIA).

138. See supra notes 64-77 and accompanying text (reviewing Ninth Circuit's view that federal common law applied to choice of law under FSIA).

139. See supra notes 90-98 and accompanying text (discussing Congress's key desire for uniformity of decision in FSIA cases). Although the Ninth Circuit did not explicitly engage in a determination of the legislative intent behind the FSIA, the court seems to have effectuated Congress's desires almost by default.
The lack of any mention of the *Erie* or *Klaxon* doctrines in the legislative history of the 1976 version of the FSIA\(^{140}\) provides additional support for the Ninth Circuit's conclusion and serves as a further rejection of the Second Circuit's approach, preferring the application of the forum's choice-of-law rules. Had Congress intended for the *Erie* analysis to apply to the 1976 version of the FSIA, Congress would have simply reaffirmed its commitment to its statement in the 1973 legislative history.\(^{141}\) Because the 1976 legislative history contains no such reference to either *Erie* or to the language of the 1973 legislative history, and indeed, because the 1976 legislative history contains an explicit admonition against the use of the 1973 legislative history as an interpretive tool with respect to the 1976 version of the FSIA,\(^{142}\) Congress must have implicitly assumed that the *Erie* doctrine would not apply and that federal common law, not forum law, would govern in FSIA cases. Certainly, Congress recognized that the application of *Erie* in FSIA cases would contravene the very goal against forum shopping that *Erie* sought to achieve.\(^{143}\)

Although the legislative history of the 1976 act does state that one cannot draw inferences based on the differences in the two versions of the act,\(^{144}\) Congress stated no such prohibitions against drawing inferences from differences in the respective legislative histories of each version of the act. In reality, given the explicit prohibition against using the earlier version of the legislative history to interpret the 1976 act, Congress seems to have rejected any use of the language of the 1973 legislative history. Hence, Congress has impliedly rejected the application of the *Erie* doctrine in FSIA cases.

Based on this reasoning, it is possible to reconcile the apparent contradiction in the legislative intent.\(^{145}\) If Congress never intended the *Erie* doctrine to apply in FSIA cases, Congress must have intended all cases brought under the FSIA to be essentially federal in nature,\(^{146}\) even though state law might at times provide the underlying cause of action.\(^{147}\) Thus,

\(^{140}\) See *House Report*, supra note 85. Nowhere in the legislative history of the final version of the FSIA is *Erie* or *Klaxon* even alluded to.

\(^{141}\) See supra notes 119-20 and accompanying text (reciting 1973 legislative history which refers explicitly to *Erie* and *Klaxon*); see also supra notes 122-24 and accompanying text (declaring that 1976 legislative history states that 1973 legislative history is to be of no effect with regard to interpretation of 1976 version of FSIA).

\(^{142}\) See supra notes 122-24 and accompanying text (rejecting use of 1973 legislative history as interpretive tool for use with 1976 act).

\(^{143}\) See supra notes 134-35 and accompanying text (discussing goals of *Erie* doctrine).

\(^{144}\) House Report, supra note 85, at 6611.

\(^{145}\) See supra notes 119-39 and accompanying text (discussing apparent contradiction between § 1606 of FSIA and Congress' express desire for uniformity of application and decision that runs throughout legislative history of FSIA).

\(^{146}\) See *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 793 (2d Cir. 1980) (stating that cases essentially federal in nature are governed by federal common law), cert. denied, 449 U.S. 1080 (1981).

\(^{147}\) See *Wheedlin v. Wheeler*, 373 U.S. 647, 659 (1963) (Brennan, J. dissenting) (arguing
Congress's command in section 1606 of the FSIA that courts hold foreign states liable in the same manner and to the same extent as a private individual under similar circumstances would not conflict with Congress's desire for uniformity.\textsuperscript{148} A private individual sued in federal court, in an action essentially federal in nature, would be subject to the court's federal question jurisdiction.\textsuperscript{149} In such a situation, the federal court would be free to apply federal common-law choice-of-law principles, provided there were no statutory directives on the choice-of-law question.\textsuperscript{150} Consequently, federal common law might indeed best effectuate the overall intent of Congress that courts treat foreign states not entitled to immunity in a uniform manner. Given the above analysis, the use of federal common-law choice-of-law rules would serve the mandate of section 1606 equally as well.

Therefore, if federal common-law choice-of-law rules are in fact what Congress intended to apply in FSIA cases, the difficulty becomes determining what the federal common-law choice-of-law rules are. Apparently, only the Ninth Circuit and those federal courts within its jurisdiction have followed the approach of \textit{Harris} and \textit{Barkanic} and merely relied upon the Restatement as the embodiment of the federal common law. Thus, one must question this reliance. The Ninth Circuit's decision that the Restatement embodies the federal common law is subject to serious question.\textsuperscript{151}

The Ninth Circuit based its decision on a dubious line of cases that never state clearly why federal courts should utilize the Restatement as embodying the federal common law in the choice-of-law area.\textsuperscript{152} In fact, the three Hawaii cases upon which the Ninth Circuit relied simply cite to the Restatement as a starting point for determining the federal common law.\textsuperscript{153}

that Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921), remains firm authority for principle that where federal law has inserted itself into texture of state law, claim founded on national legislation could be brought into a federal forum even if right of action was state created); see also Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971) (noting that once federal question jurisdiction is established federal courts are to resolve federal questions even though they are enmeshed with state law questions); United States v. D'Amato, 436 F.2d 52, 54 (3rd Cir. 1970) (stating that power to decide state law questions is not limited to cases brought under federal court's diversity jurisdiction).

\textsuperscript{148} See supra note 145 and accompanying text (stating that it is possible to reconcile Congress's desire for uniformity with language of § 1606 of FSIA).

\textsuperscript{149} See supra note 37 and accompanying text (defining federal question jurisdiction of federal courts).

\textsuperscript{150} See Barkanic v. General Admin. of Civil Aviation of P.R.C., 923 F.2d 957, 959 (2d Cir. 1991) (noting that court should look for specific statutory direction for choice of law and absent such direction should determine choice of law based on legislative intent); Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1003 (9th Cir. 1987) (recognizing that court should first look to specific statutory guidance before fashioning common-law rules for choice of law).

\textsuperscript{151} See In re Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475, 1497 (D.C. Cir. 1991) (Mikva, C.J. dissenting) (criticizing Ninth Circuit's adoption of Restatement in \textit{Harris} as dubious and declaring that Restatement contains widely criticized \textit{lex loci delicti} rule for tort cases).

\textsuperscript{152} See supra notes 70-75 and accompanying text (analyzing Ninth Circuit's position and cases on which Ninth Circuit bases its position).
law in this area.\textsuperscript{153} \textit{Harris,} the fourth and most recent case prior to the \textit{Schoenberg} decision, was the first to conclude that the Restatement is indeed the "source" of the federal common law in the choice-of-law area.\textsuperscript{154} However, \textit{Harris} based this conclusion on the language of the three prior Hawaiian cases, none of which states this proposition. Hence, the Ninth Circuit's conclusion that the Restatement embodies the federal common law is merely conclusory.

While a federal court has discretion to choose the appropriate choice-of-law rule in a case not based on diversity jurisdiction,\textsuperscript{155} where there is a specific legislative desire for uniformity of decision, as in FSIA cases, the court should choose the choice of law rule that best effectuates this legislative intent.\textsuperscript{156} The Ninth Circuit, unlike the Second Circuit,\textsuperscript{157} made no attempt to determine the existence of legislative intent before determining the proper choice of law rule.\textsuperscript{158} The Ninth Circuit stated only that in the absence of specific statutory guidance, the court preferred to resort to the federal common-law for a choice-of-law rule.\textsuperscript{159} Therefore, one can conclude only that while the Ninth Circuit may have reached the proper result—the application of federal common-law choice-of-law rules in FSIA cases—it did so based on an improper analysis and an improper assumption—that in a case based on federal question jurisdiction a federal court is free to apply whatever choice-of-law rules it sees fit.\textsuperscript{160}

The Ninth Circuit should have looked to the legislative history of the FSIA, and, although the court would have reached the same result, its reasoning then would have been proper. In addition, although the Ninth Circuit's reliance on the \textit{Harris} line of decisions may have been unjustified, the court's conclusion that the Restatement embodies federal common-law choice-of-law rules has some support.\textsuperscript{161} In fact, such a conclusion may be the only way to best effectuate the congressional desire for uniformity of

\begin{itemize}
\item \textsuperscript{153} See supra note 70 and accompanying text (discussing three Hawaiian cases which preceded \textit{Harris}).
\item \textsuperscript{154} \textit{Harris}, 923 F.2d at 1003.
\item \textsuperscript{155} See supra notes 81-83 and accompanying text (discussing diversity jurisdiction as opposed to federal question jurisdiction).
\item \textsuperscript{156} See supra note 83 and accompanying text (stating that absent specific choice-of-law direction courts should look to legislative intent for guidance).
\item \textsuperscript{157} See Barkanic v. General Admin. of Civil Aviation of P.R.C., 923 F.2d 957, 959 (2d Cir. 1991) (analyzing legislative intent behind enactment of FSIA).
\item \textsuperscript{158} See Schoenberg v. Exportadora de Sal, 930 F.2d 777, 782 (9th Cir. 1991) (holding that FSIA cases are not based on diversity and therefore that court should apply federal common-law choice-of-law rules).
\item \textsuperscript{159} Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1003 (9th Cir. 1987) (emphasis added). The Ninth Circuit in \textit{Schoenberg} cites to this language from \textit{Harris} as the justification for its decision in \textit{Schoenberg} to apply federal common-law choice-of-law rules in FSIA cases. See \textit{Schoenberg}, 930 F.2d at 782.
\item \textsuperscript{160} See supra note 75 and accompanying text (discussing Ninth Circuit's determination in \textit{Harris} to apply federal common-law choice-of-law rules in FSIA cases).
\item \textsuperscript{161} See supra notes 76-77 and accompanying text (citing several courts and commentators which have espoused use of Restatement as federal common law for choice of law).
\end{itemize}
decision and still provide plaintiffs with a just and proper forum. If in every FSIA case courts apply the Restatement’s version of choice-of-law, courts would ensure the achievement of the goals of uniformity and predictability, at least with respect to choice-of-law questions. Attorneys, courts and parties involved in FSIA cases would have but one source to look to for determining what substantive law would govern their claims. This predictability seems to be the only way to ensure the fulfillment of the desires of Congress.

One final issue requires consideration: Whether the Second Circuit would have reached a different result had it applied the federal common-law choice-of-law rules of the Restatement to the case before it in Barkanic. Because Barkanic involved a wrongful death action, one must first look to section 175 of the Restatement, which states:

In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.  

Thus, unless the circuit court would have found that New York had a more significant relationship to the claim and the parties, the law of China, the state where the injury occurred, still would have governed the substantive issues.

According to section 175, a court should evaluate whether some state other than the forum state has a more significant relationship to the claim by applying the factors of section 6, which are:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of law to be applied.

Had the Second Circuit applied section 175 and section 6 to the facts before it in Barkanic, it would most likely have reached the same result—

163. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §175 (1971). The Restatement defines “state” as “a territorial unit with a distinct general body of law.” Id. § 3. Therefore, all foreign states, states of the United States, and the United States itself qualify as a state under the Restatement’s definition.
164. Id. § 6(2).
application of the law of China. Indeed, in applying New York's-choice-of-law rules to the facts, the court concluded that there was no connection between the parties and the occurrence, on the one hand, and the state of New York, on the other hand, other than the fact that the plaintiff had chosen New York as his forum. Therefore, it is apparent that even under the Restatement's approach the court would have applied Chinese substantive law. However, this uniformity of result should not cloud the issue—the fact that the application of the forum's choice-of-law rules is both manifestly different from the application of federal common-law choice-of-law rules and in FSIA cases contrary to Congressional intent.

**Conclusion**

It is clear that neither the Ninth Circuit nor the Second Circuit was completely correct in its decision. Although the Ninth Circuit relied on the proper choice-of-law rules and reached the proper result, its basis for choosing federal common-law choice-of-law rules for FSIA cases and its basis for finding these rules to be embodied by the Restatement leave something to be desired. And while the Second Circuit has chosen the proper substantive law in the cases it has decided thus far and has looked to the proper source for determining which choice-of-law rules apply in an FSIA case—the legislative history of the act—the Second Circuit has misinterpreted the legislative history and, thus, applied the wrong choice-of-law rules. The legislative history of the 1976 version of the FSIA, properly interpreted, clearly calls for the application of federal common-law choice-of-law rules in FSIA cases. However, because there is at least some question as to whether the Restatement or some other source in fact constitutes the federal common-law choice-of-law rules, it is incumbant on the Supreme Court to clarify the issue. Additionally, Congress could remove any doubt as to whether federal common-law choice-of-law analysis was intended to apply in FSIA cases by passing a simple amendment to the act stating its preference—federal common law, or the forum's choice-of-law rules, or even by explicitly stating that the local law of the place where the conduct or omission occurred is to govern claims under the FSIA. Until Congress acts, or the Supreme Court decides to review either Barkanic, Schoenberg or some other FSIA case raising the issue of choice-of-law, this area is likely to remain unsettled.

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165. See Barkanic, 923 F.2d at 963 (affirming district court's application of Chinese law).
166. Barkanic, 923 F.2d at 964.