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No. 13-1067

In The
Supreme Court of the United States

ÖBB PERSONENVERKEHR AG,
Petitioner,
v.
CAROL P. SACHS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE INTERNATIONAL RAIL TRANSPORT COMMITTEE ("CIT") IN SUPPORT OF ÖBB PERSONENVERKEHR AND REVERSAL

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BRIEF OF AMICUS CURIAE

International Rail Transport Committee (known as "CIT" for *Comité International des Transports Ferroviaires*) submits this brief in support of ÖBB Personenverkehr AG.[1]

INTEREST OF AMICUS CURIAE

Founded in 1902, CIT is a nonprofit association of over 200 railway undertakings and shipping companies, primarily in Europe, that provide international passenger and freight services. Specifically, CIT consists of about 120 direct members and approximately 80 organizations linked indirectly as associate members. Headquartered in Bern, Switzerland, CIT is an association under Swiss law. (See www.CIT-rail.org.)

CIT represents the interests of rail carriers vis-à-vis legislators, regulatory authorities, and other tribunals. CIT helps railways implement international rail transport law. CIT drafts and maintains legal publications and template documents for international rail traffic; standardizes contractual relationships between

[1] CIT's counsel authored this brief in whole, and no other person or entity other than CIT, its members, or counsel made monetary contributions for the preparation or submission of this brief. CIT's counsel notified counsel for the parties of its intent to file this amicus brief and received their consent.

customers, carriers and infrastructure managers; and provides regular briefings, training courses and legal advice to its members.

CIT is funded by its members' annual dues, paid in proportion to the volume of international passenger or freight traffic they transport. The minimum annual subscription is approximately €1700. Each full member has one vote, regardless of the amount of its dues.

ÖBB-Holding AG, the parent entity over subsidiaries ÖBB-Personenverkehr AG (Österreichische Bundesbahnen, i.e., Austrian Federal Railways for passengers) and Rail Cargo Austria AG, is a CIT member, and pays membership fees of about €202,000. ÖBB-Holding made no special payment for this amicus brief.

Approximately 90 percent of CIT's railway members are, like ÖBB, government entities. Tens of thousands of Americans purchase Eurail Passes annually, and many more American passengers use other CIT member railways. Thus CIT's members may find themselves in the same situation as ÖBB—that is, having their foreign sovereign immunity defeated by the "commercial activities" exception (28 U. S. C. §1605(a)(2)) simply because an American passenger purchased a ticket through a travel agency in the United States. As a result, European railways could be

forced to defend tort actions in the United States arising from accidents occurring entirely in Europe.

The Ninth Circuit's opinion affects not only petitioner ÖBB, but many railways around the world, and especially CIT's membership. The opinion exposes CIT's members to litigation in American courts in new and unexpected ways, contrary to existing understanding of American and international law.

If sovereign immunity is so easily bypassed as in this case, foreign governments and international treaty organizations may respond in kind, diminishing their own immunity rules. Many Europeans use American railways, yet those railways presumably do not expect to be haled into European courts to resolve personal tort claims for accidents in the United States. At the very least, without this Court's corrective action, European railways will be forced to change their business practices to avoid exposure to American lawsuits. Such changes are likely to make it more inconvenient for Americans to purchase international railway passage.

In short, as the interface between the law and business practices of the European railway industry, CIT has a vital interest in the issues raised by this case. CIT is able to present an industrywide and broader international law perspective that may be helpful to the Court.

SUMMARY OF ARGUMENT

The Ninth Circuit's opinion expanded the reach of American courts beyond existing precedent and the governing law of agency. See, *e.g., Daimler AG* v. *Bauman*, 571 U. S. __, 134 S. Ct. 746 (2014). Reversal is necessary to rectify that erroneous decision that stretches beyond the bounds of both American and international law.

An International Perspective: Plaintiff Carol Sachs' voyage falls under international conventions that regulate it in mandatory ways, including setting the rules on the railway's liability and establishing procedural aspects of claims and legal actions. Ms. Sachs should have filed suit in Austria, and doing so would have well protected her rights. She could have obtained many forms of redress and damages, possibly even remedies beyond what American law provides. The Ninth Circuit's approach is out of step with the governing conventions of international rail law.

Furthermore, with regard to American law, immunity is supposed to protect foreign states unless that state engages in commercial activity in the United States and the lawsuit is "based upon" that commercial activity. Neither element is satisfied in this case.

Error Regarding Agency: The Ninth Circuit found that ÖBB engaged in commercial activity in the United States based on the acts

of an agent's subagent. But the connection between ÖBB and the American travel agency—which actually involved subagencies across three continents over which ÖBB had no control—is far too attenuated to support the conclusion of commercial activity in the U.S. by ÖBB. The necessary control by a principal is entirely lacking in this scenario involving ticket vendors through multiple subagents.

The Ninth Circuit used common-law agency principles to broadly interpret this exception to immunity. But applying common law creates possible different outcomes for various American jurisdictions. Instead, the court should have interpreted the exception narrowly and should have done so using federal precedent. As Judge O'Scannlain noted in his dissent: "Courts should guard against overly broad readings because expanding federal jurisdiction in this area can have serious foreign policy consequences." (App. to Pet. for Cert. 43.)

Finally, Ms. Sachs' injuries do not really derive from the asserted "commercial activity" of purchasing a ticket on the Internet. To say that her claims involving a platform accident in an Austrian railway station are "based on" the commercial activity of purchasing her Eurail Pass stretches the concept of connecting the accident to American commerce beyond recognition.

REASONS FOR REVERSING THE NINTH CIRCUIT

ÖBB cogently explains why it did not engage in commercial activity in the United States through any agent. It explains how the Ninth Circuit misapplied the Foreign Sovereign Immunity Act's definition of "agency" of a "foreign state," contradicting this Court's governing law, such as *First National City Bank* v. *Banco para el Comercio Exterior de Cuba*, 462 U. S. 611 (1983). ÖBB further outlines how Ms. Sachs' claims were not "based upon" any commercial activity in the United States, but rather on alleged torts occurring in Austria. This, too, contradicts this Court's governing law. See, *e.g., Saudi Arabia* v. *Nelson*, 507 U. S. 349 (1993).

ÖBB also describes how the Ninth Circuit dramatically expanded American jurisdiction over foreign sovereigns by erroneously interpreting immunity narrowly and the commercial-activities exception broadly—precisely the opposite of how existing law requires courts to interpret those concepts.

CIT endorses and echoes those arguments. From CIT's vantage, however, this litigation presents issues not merely in an "American case" but rather needs to consider European viewpoints and applicable law as well.

I.
THE EUROPEAN PERSPECTIVE: MS. SACHS HAD AMPLE REMEDIES IN EUROPE AND THUS NO NEED TO RESORT TO AMERICAN JURISDICTION

Underlying the Ninth Circuit's opinion may have been the unexpressed fear that without a means to overcome sovereign immunity, Americans like Ms. Sachs would lack redress for injuries suffered on European railways. That notion is unfounded.

Ms. Sachs' intended journey from Austria to the Czech Republic is subject to the Convention Concerning International Carriage by Rail (COTIF), which governs rail travel in nearly 50 nations in Europe, Caucasia, the Maghreb, and the Middle East. Both Austria and the Czech Republic ratified the Convention and it is thus mandatory for all international rail journeys between the two countries.[2]

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[2] That the contract of carriage between Ms. Sachs and ÖBB is governed by the COTIF/CIV is further confirmed by the notation "CIV" on the rail pass itself (as required by CIV article 7) and is explicitly mentioned in the general terms and conditions applicable to the pass. (JA at 35, 39, 82.) Thus, when Ms. Sachs entered into the contract of carriage, she accepted the terms and conditions, including the applicable law and jurisdiction, governed by COTIF/CIV.

The Convention's Appendix A sets forth the Uniform Rules concerning the Contract for International Carriage of Passengers by Rail (CIV, for *Convention Internationale pour le transport des Voyageurs*), which contains detailed provisions governing carrier liability for passengers who suffer delays or accidents. The CIV also details procedural rules determining the jurisdiction and applicable national law in civil litigation.

The CIV's liability system is a modern system of law that strikes a fair balance between the interests of passengers and carriers. It is well accepted in the railway business, similar to how the Montreal Convention governs international air travel and the Athens Convention covers international sea travel. Since December 2009 it has also become applicable as domestic law in the member states of the European Union. See Regulation (EC) No. 1371/2007 (on rail passengers' rights and obligations), art. 11 (liability for passengers, citing the CIV).

The CIV's article 5 provides that "any stipulation which, directly or indirectly, would derogate from the CIV shall be null and void." In Ms. Sachs' case, her Eurail Pass was subject to the mandatory provisions of the CIV.

The CIV makes clear that a rail passenger injured in an accident may hold liable the carrier that was contractually bound to provide

passenger service. (CIV art. 26, §5.) The CIV provides that the "carrier shall be liable for the loss or damage resulting from the death of, personal injuries to, or any other physical or mental harm to, a passenger, caused by an accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from railway vehicles whatever the railway infrastructure used." (CIV art. 26, §1.) A carrier may raise the "fault of the passenger" as a defense. (CIV art. 26, §2.) In this case, ÖBB was the carrier, and thus would be 100 percent liable unless it could reduce its liability by proving some percentage of fault by Ms. Sachs.

The CIV also outlines types of recoverable damages for personal injuries. (CIV art. 28.) For Ms. Sachs, these could include necessary costs for medical treatment and transport, compensation for financial loss caused by a total or partial inability to work (e.g., loss of earnings and future earnings), and expenses incurred to cover her increased needs in light of her injuries.

Additionally, the CIV expressly allows supplemental damages for bodily injury as provided under the national law of the jurisdiction where the action is brought. (CIV art. 29.) These could include, for example, *pretium doloris* (pain and suffering damages)

and compensation for impairment to the enjoyment of life.

Articles 56 and 57 outline which court has jurisdiction (i.e., the domicile of the defendant) and explicitly exclude courts outside the member states of the Intergovernmental Organization for International Carriage by Rail (OTIF). In this case, only Austrian courts would have jurisdiction.

OTIF, the international organization responsible for establishing and developing the COTIF, has published commentary to the Convention and its Appendixes for use as an aid in interpreting the Convention. See Vienna Convention on the Law of Treaties art. 32 (supplementary means of interpretation). That commentary explains, under CIV article 57, why the OTIF member states decided to exclude the jurisdiction of other states' courts, referring explicitly to the situation of American citizens traveling in Europe.

International passengers contracting with railways within the COTIF's scope are bound by the Convention. The same, of course, is true for the railways—they cannot choose the applicable law, but are bound by the Convention as well. This equality serves the interests of both passengers and carriers.

Ms. Sachs could and should have filed suit in Austria, where the accident occurred and

where the courts would have been competent to fairly hear and resolve her case, and award damages under the Convention, the CIV, and Austrian law. (See JA at 71.)

CIT emphasizes that any *European* passenger coming from a country other than Austria would have been in the same position as Ms. Sachs. For example, a Portuguese passenger would have had to sue ÖBB in Austria, not at home in Portugal. This rule is widely accepted internationally and should hold true for passengers contracting with European carriers for European voyages, regardless of where they are from or where they were located when they formed a contract by purchasing a ticket (even, as in this case, when using the Internet). This accords with the general principle of international law that contractual disputes between private parties should be venued in the defendant's domicile. That has been the law for hundreds of years. The Ninth Circuit's analysis is well outside international standards and should be rejected.

II.
THE NINTH CIRCUIT ERRED IN FINDING AGENCY THROUGH MULTIPLE SUBAGENTS NOT UNDER ÖBB'S CONTROL

CIT disputes that ÖBB engaged in commercial activity in the United States. The district court and original Ninth Circuit panel correctly recognized that the connection between ÖBB and the American travel company The Rail Pass Experts (RPE), from which Ms. Sachs purchased a Eurail Pass over the Internet, was too attenuated. In fact, the connection in this case, and in most similar situations, is even weaker than it appears.

The Ninth Circuit's en banc opinion notes that while at home in California, Ms. Sachs purchased her Eurail Pass over the Internet from RPE, located in Massachusetts. What the opinion does not note is that RPE was a subagent of Flight Centre Travel Group Limited, based in Brisbane, Australia, which bills itself as the "world's largest travel agency." (See www.FlightCentre.com.) Flight Centre acted as the general sales agent for the Eurail Group G.I.E. (www.EurailGroup.org), an association of 30 European railways (29 of which are CIT members) responsible for the marketing and management of Eurail products,

notably Eurail Passes such as the one Ms. Sachs purchased.[3]

Thus there is actually a chain of three purported "subagents"—based in three different countries on three different continents—separating Ms. Sachs and ÖBB: RPE in America, Flight Centre in Australia, and Eurail in Europe. Although this point may be dehors the limited appellate record in this particular case, it remains generally relevant to CIT's members because this arrangement is not only common, but is an industry norm.

As Judge O'Scannlain's dissenting opinion notes, a significant level of control—amounting to an alter ego relationship—is necessary before a principal may be saddled with the acts of an alleged agent in this context. (App. to Pet. for Cert. 51–56.) Here, however, no single railway member controls Eurail; nor does any railway exert control over the general travel agency companies that Eurail works with to market and sell Eurail Passes, let alone over the various subagents. In light of the reality of this arrangement, it simply makes no sense to

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[3] In contrast to individual point-to-point tickets, Eurail Passes, which started in 1959, are special tickets that allow non-Europeans unlimited passage for a set period of time on normally scheduled trains operated by the participating railways. (See JA at 77.)

conclude that ÖBB, several steps removed, was conducting commercial activity in the United States.

This is not to say that international law negates agency liability entirely or in general. To the contrary, CIV article 51 imputes liability to a carrier for "servants and other persons whose services [are used] for the *performance of the carriage* . . ."; and similarly article 39 imposes liability where a "carrier has entrusted the *performance of the carriage* . . . to a substitute carrier . . ." (emphasis added). But note that such imputed liability must relate to the actual "performance of the carriage," not matters beyond the immediate control of the railway, such as retail ticketing services.

If the Ninth Circuit is affirmed, CIT will be forced to advise its members that they may be drawn into American courts by virtue of ticket sales by third-party subagents. That is likely to fundamentally alter the way Eurail Passes are marketed and sold, to the detriment of American travelers.

III.
A RAILWAY'S "COMMERCIAL ACTIVITY" IS TRANSPORTATION SERVICES, NOT TICKET SALES; THE ACCIDENT HERE BEARS NO CONNECTION TO THE TICKETING PROCESS

The "commercial activity" exception to foreign sovereign immunity requires that the foreign sovereign engage in commercial activity in the U.S. Here, ÖBB did not engage in any such commercial activity. The Ninth Circuit concluded that the sale of tickets via agents via the Internet was sufficient commercial activity. This Court should reject that position.

The "commercial activity" of European railways is providing passenger and freight carriage in Europe. In so doing, they are subject to numerous regulations at the international level, European Union level, and national level. The sale of tickets on the Internet (by entities other than the railway) cannot be sufficient for these companies to become subject to foreign jurisdictions around the world. Their core activities linked to passenger service are provided exclusively in Europe, and are regulated by specific laws and conventions that should not be bypassed by lawsuits in courts outside Europe.

The sale of a ticket is merely the formation of a carriage contract between passenger and carrier. The actual service to be provided is the

carriage itself. The ticket sale has little role in the performance of the contract, let alone any alleged negligence in performance. The sale can happen anywhere on the Internet, while the carriage can only be provided in a specific area by a specific carrier in Europe. Venue for disputes regarding a carrier's performance of its transportation duties should be determined by where that true primary service was rendered and not by the "place" where the contract was formed.

Furthermore, as Judge Kozinski analyzed the situation, because Ms. Sachs' case "arises from events that transpired entirely in Austria," it is not "based upon" the commercial activity of ticket sales in the United States. (App. to Pet. for Cert. 62 ["This would be true even if Austria were itself selling train tickets from a kiosk in Times Square."].)

CONCLUSION

This case is of great concern to foreign sovereigns, even those outside the transportation realm. The Ninth Circuit's ruling ignores this Court's precedent and conflicts with other courts and international law. That radical deviation from existing law will have harmful consequences. If allowed to stand, American courts will have to resolve disputes that have essentially no connection to the United States.

Moreover, faced with the potential for having to defend personal injury actions in American courts, foreign railways will alter their business and ticketing practices in ways that will undoubtedly inconvenience American travelers. This Court should reverse the Ninth Circuit's opinion.

Respectfully submitted,

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