

Second Circuit Rules FSIA Sovereign Immunity Defenses May Be Raised Where a Defendant Gains Sovereign Status After the Lawsuit Is Filed

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The U.S. Court of Appeals for the Second Circuit recently held in *Bartlett v. Baasiri* that a defendant who gains sovereign status after a lawsuit is filed can assert sovereign immunity as a defense under the Foreign Sovereign Immunities Act (“FSIA”), even though it was not a foreign sovereign at the time of the conduct underlying the suit or when the suit was filed.¹

The *Bartlett* plaintiffs brought terrorism-related civil claims against various Lebanese banks, one of which was liquidated and acquired by Lebanon’s central bank after the suit was filed. The district court held that sovereign immunity could not be raised, as sovereign status must be determined at the time the suit is filed. The Second Circuit reversed, finding that the FSIA’s structure, purpose, and history all weighed in favor of allowing a defendant who gains sovereign status mid-suit to assert sovereign immunity as a defense.

The decision potentially expands the availability of sovereign immunity defenses in U.S. court. It also raises interesting questions of how the FSIA framework will apply in such cases, since that framework often involves analysis of the conduct underlying the suit.

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¹ *Bartlett, et al., v. Baasiri, et al.*, No. 21-2019, 2023 WL 5437815 (2d Cir. Aug. 24, 2023) (“*Bartlett*”).
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Background

The *Bartlett* plaintiffs are American military service members (or their relatives) who were killed or injured in Iraq between 2004 and 2011 by alleged proxies of Hezbollah, a U.S. designated Foreign Terrorist Organization. In 2019, plaintiffs sued several Lebanese banks under the Anti-Terrorism Act (as amended by the Justice Against Sponsors of Terrorism Act) for allegedly aiding and abetting the attacks by laundering money for Hezbollah.

Shortly after the suit was filed, the U.S. government designated defendant Jammal Trust Bank (“JTB”) as a Specially Designated Global Terrorist. In response, Lebanon’s central bank liquidated JTB’s operations. Based on this, JTB sought to raise a sovereign immunity defense against the lawsuit under the FSIA, which immunizes a foreign sovereign defendant from suit unless a specified exception to sovereign immunity applies.²

The district court held that JTB could not assert sovereign immunity since the liquidation began after the lawsuit was filed. It based its ruling on language from a U.S. Supreme Court case that sovereign status must “be determined at the time suit is filed.”³

The Second Circuit’s Decision

On appeal, the Second Circuit reversed. Accepting arguments set forth by the U.S. State Department in an amicus brief, it held that the “most natural reading” of the FSIA is that it “gives foreign sovereigns immunity even when they gain their sovereign status mid suit.”⁴ The Second Circuit cited the structure, purpose, and historical context of the FSIA, which focuses on protecting foreign sovereigns “from the inconvenience of suit as a gesture of comity.”⁵ Such protection, the Second Circuit held, should be guided by “current political realities” and is implicated where “a foreign sovereign is subject to the burdens of suit at any point before judgment.”⁶ Thus sovereign immunity should be determined based on the defendant’s *present* status.

As to the U.S. Supreme Court language cited by plaintiffs about determining status “at the time suit is filed,” the Second Circuit distinguished that case as concerning a defendant that lost sovereign status before the suit was filed, rather than gaining it after filing as here. The two situations, and other cases cited by plaintiffs, “raise[] quite different concerns.”⁷

Lastly, the Second Circuit noted “real concerns” raised by plaintiffs “that allowing post-filing changes in sovereign status will encourage gamesmanship” by sovereigns.⁸ But those issues were not implicated here, since “the U.S. designation of JTB as a terrorist organization, not any attempt by Lebanon to avoid this lawsuit” led to the liquidation at issue.⁹ The case was remanded for the district court to decide if JTB was in fact a foreign sovereign entity.

Takeaways

The Second Circuit’s ruling makes sovereign immunity defenses available to a wider array of defendants in U.S. court. But it leaves open critical questions of how sovereign immunity determinations will be made where a defendant only gained sovereign status during the course of a lawsuit.

For example, the FSIA’s “commercial activity” exception abrogates sovereign immunity under certain circumstances based on the conduct giving rise to the suit. Thus a plaintiff may argue that even if a defendant gains sovereign immunity mid-suit, the court should recognize an exception to that immunity since the underlying conduct was by a commercial actor. However, since the commercial activity exception (like other FSIA exceptions) refers to conduct “by the foreign state,” there may be arguments that it does not apply where a defendant was *not* a foreign state at the time of the conduct. Alter ego status, another key immunity issue, is also determined as of the time of the underlying conduct.

Such questions may be avoided here depending on whether JTB is found to have sovereign status at all, but could arise elsewhere, and will require close reading of the FSIA’s text in the context of each situation.

² 28 U.S.C. §§ 1602 *et seq.*

³ *Bartlett* at *2 (citation omitted) (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 12 (2003)).

⁴ *Bartlett* at n.2.

⁵ *Bartlett* at n.2, *4.

⁶ *Bartlett* at *4.

⁷ *Bartlett* at *6.

⁸ *Bartlett* at *6.

⁹ *Bartlett* at *6.