Overview

First Tuesday Update is our monthly take on current issues in commercial disputes, international arbitration, and judgment enforcement.

This month we are discussing sovereign immunity amid the COVID-19 pandemic. In over half a year, the virus has spread world-wide—leaving in its trail tragic losses in virtually every country it has touched. While the actual "costs" of the virus will likely never be quantified, the question of "who should pay for this?" is already being posed in American courts. Given that the virus likely originated in Wuhan, China and the current administration’s messaging, it is perhaps not surprising that China has become an early target of lawsuits regarding the virus.

To date, over a dozen lawsuits have already been filed against China with plaintiffs ranging from putative classes of medical providers and small businesses to laid off workers to the state of Missouri. The allegations range from covering-up the spread of the virus, hoarding personal protective equipment (PPE), and deploying a "terrorist-related weapon of mass destruction." Each of these cases remains in its early stages, and, while the allegations are wide-ranging, most of the cases will start with the same bedrock question—can a sovereign government, like China, be sued in American courts for losses due to the virus? As a general rule, the Foreign Sovereign Immunities Act (the FSIA) renders foreign governments and their representatives immune from lawsuits in American courts. But the FSIA, along with certain other federal statutes, offer a number of exceptions to this general rule. Cases targeting China have focused on three of these exceptions, in particular.

First, plaintiffs have relied on the "commercial activities exception," which applies to instances where a sovereign engages in the type of actions by which a private party engages in "trade and traffic or commerce . . . ."[1] In other words, was the sovereign "acting like a sovereign" or like a private player in international commerce? These cases especially focus on Chinese manufacturing of PPE, operating healthcare systems, performing infectious disease research, and operating social media platforms as possible "commercial activities." If these activities do qualify as "commercial," plaintiffs would still need to show that the activities had a "direct effect" in the United States in order to defeat immunity from suit.

Second, plaintiffs have relied on the "noncommercial tort exception," which applies to instances where one seeks money damages for "personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment."[2] This exception, likewise, has considerable limitations. For example, the exception does not apply to "discretionary functions," which could include making administrative decisions on social, economic, and political policy grounds.[3] Lower courts have also found that the entirety of the tortious conduct must occur within the forum state rather than just the effects of the tort felt within the state.[4]

Third, plaintiffs have relied on the "international terrorism exception," a fairly new provision updated as recently as 2016.[5] The exception permits a plaintiff to seek relief against sovereigns and their representatives for damages in the United States caused by international terrorism. Some plaintiffs have argued that this exception is satisfied because COVID-19 is
a "biological weapon" that originated in China.

Whether these arguments will be successful, of course, remains to be seen. And it bears noting that these exceptions only afford subject matter jurisdiction to American courts over the lawsuit. Plaintiffs will still need to prove the elements of their various causes of action. For example, many (if not all) will need to establish "causation" in one way or another—i.e., whether the injury was a reasonably foreseeable consequence of the alleged act. Thus, actions along the "chain of causation," including limitations on the ability to track and trace particular infections and perhaps even alleged policy failures of America's own government, could be considered intervening events that would preclude liability.

Cognizant of these challenges, some lawmakers have offered legislative proposals that would offer additional exceptions to sovereign immunity that would more definitively pave the way for lawsuits against China and other nations for injuries resulting from COVID-19. It is unclear whether these proposals will gain broader support, but it is certainly not the first time Congress has opened the US courts in the name of redressing injuries on Americans inflicted by foreign nations.

For example, in 1996, Congress passed the Flotow Amendment—named for Alisa Flotow, a victim of a suicide bomber and precursor to the current international terrorism exception—which permitted Flotow’s family and others to sue the Iranian government for their alleged support of these bombers. Likewise, in 1996, Congress passed the Helms-Burton Act, which afforded a private right of action to Americans against those who trafficked in property that was expropriated by the Cuban government during the communist revolution. While this provision laid dormant for many years, in 2019, the Trump administration has revived it and lawsuits against Cuba and other entities have begun.


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