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THE FOREIGN SOVEREIGN IMMUNITIES ACT:
WHOSE CONFLICTS LAW? WHOSE LOCAL LAW?
*BARKANIC v. GENERAL ADMINISTRATION OF
CIVIL AVIATION OF THE PEOPLE'S REPUBLIC OF
CHINA**

*David E. Seidelson***

INTRODUCTION

Peter Barkanic, domiciled in the District of Columbia, and Donald Fox, domiciled in New Hampshire, both American businessmen contemplating a trip to China, purchased tickets for a China Airlines flight from Nanjing to Beijing. The tickets were purchased from a travel agent in Washington, D.C., acting on behalf of Pan American World Airways ("Pan Am") under an arrangement between China Airlines and Pan Am whereby the former authorized the latter to issue tickets for passenger travel in China.¹ Barkanic and Fox died when the Chinese plane crashed en route to Beijing. Personal representatives of their estates brought wrongful death actions against the General Administration of Civil Aviation of the People's Republic of China ("CAAC") in federal District Court for the Eastern District of New York, asserting subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA").² After the United

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

** Lyle T. Alverson Professor of Law, George Washington University. I wish to express my gratitude to David F. Hayes, Esq., counsel for the plaintiffs, and John K. Weir, Esq., counsel for the defendant, for their kindness and graciousness in providing me with information and documents relevant to the case. None of the assertions or conclusions set forth in the article should be imputed to either counsel. All are the responsibility of the author.

¹ *Barkanic v. General Administration of Civil Aviation of the People's Republic of China*, 822 F.2d 11, 13 (2d Cir.), *cert. denied*, 484 U.S. 964 (1987). It was in this opinion that the Second Circuit concluded that the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a)(4), 1391(b), 1441(a), 1602-1611 (1988) [hereinafter *FSIA*], gave the federal district court subject matter jurisdiction. The arrangement between China Airlines and Pan Am was an important element in that conclusion.

² *Id.*

States Court of Appeals for the Second Circuit held that such jurisdiction was appropriate,³ the defendant asserted that its liability should be governed by Chinese municipal law that limits an airline's liability for the wrongful death of a non-citizen to \$20,000.⁴ Neither the local law of the District of Columbia⁵ nor

³ *Barkanic*, 822 F.2d at 13.

⁴ *Barkanic v. General Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 958 (2d Cir. 1991). Defendant's expert witness testified to the Chinese law: Witness: The maximum amount is twenty thousand dollars U.S. dollars which was established according to the preference treatment and the Hague Convention pertaining to foreigners, overseas Chinese and compatriots of Hong Kong.

Q. What is the limitation of liability for Chinese nationals?

.....

A. The maximum compensation for Chinese residents is five thousand IB, Chinese dollars.

Q. Where in China law are those limitations set forth?

A. On December 25, 1982 and December 27, 1982 the State Council of China issued two orders to amend the 1951 regulations on this matter.

Q. So is it your testimony that the limitations of liability in Chinese law are found in the regulations of 1951 as they were amended in 1982, is that correct?

A. Yes, as amended in 1982.

Hearing Transcript, Motion for Partial Summ. J., Nov. 24, 1987, at 25. Defendant's expert witness testified that Chinese conflicts law would lead to the Chinese ceiling on recovery:

Q. Considering the fact [sic] of this case, Mr. Ze, and applying the conflict rule set forth in Article 146, what is your opinion as to what law would be applied in this case?

.....

A. Chinese laws.

Id. at 47.

Elaborating on the reason for having a higher ceiling for non-citizens than for citizens, defendant's expert testified:

[T]aking into consideration the living expense and the special situation of compatriots of Hong Kong, overseas Chinese as [sic] foreigners, special principles have been, will be, will be adopted in accordance with the Hague Convention.

These people, referring to the overseas Chinese, foreigners and compatriots of Hong Kong, will be treated with special preference in accordance with the standards of the Hague Convention in which China is a member.

The maximum compensation for them, we are referring to compatriots of Hong Kong, overseas Chinese and foreigners, the maximum compensation for them is twenty thousand U.S. dollars . . . [With regard to domestic passengers,] the maximum total amount for all these funds will be limited to five thousand dollars. Chinese dollars.

Id. at 65-66.

The Witness: The present maximum compensation for compatriots of Hong Kong, for overseas Chinese or foreigners is twenty thousand U.S. dollars . . . which is taken into consideration in the Hague Convention.

Id. at 72.

that of New Hampshire⁶ would have imposed any ceiling on recovery.

This confronted the court with a choice-of-law problem. Which state's local law should be applied, that of China or that of the District of Columbia in the *Barkanic* action, that of China or that of New Hampshire in the *Fox* action? That choice-of-law problem, in turn, raised a preliminary issue. In resolving the choice-of-law problem, whose conflicts law should be applied, that of China, the place where the defendant's act or omission occurred, that of the federal court hearing the action, or that of New York, the forum state?

The District Court . . . found that, as a result of an aircraft accident which occurred in 1982 in China, the government amended its regulations to increase compensation to foreigners involved in domestic accidents . . . Citizens of China would be paid an amount equivalent to \$1,500 U.S., while foreigners would be compensated to a maximum of \$20,000 U.S. The Court found that the limitation was established "on the basis of favorable treatment and with reference to the limitation set forth in the Hague Protocol [to the Warsaw Convention] that China has acceded to."

Appellee's Brief at 8, *Barkanic*, 923 F.2d 957 (2d Cir. 1991) (No. 562, 90-7641) (footnote omitted).

The reader interested in contemporary Chinese law generally may wish to read Nicholas P. Hansen, *The Codification of Chinese Tort Law*, 5 UCLA PACIFIC BASIN L. J. 172 (1986); Whitmore Gray et al., trans., *General Principles of Civil Law of the People's Republic of China*, 34 AM. J. COMPAR. L. 715 (1986).

According to the Second Circuit, "[plaintiffs did] not dispute CAAC's interpretation of Chinese law." 923 F.2d at 958 n.1.

⁵ D.C. CODE ANN. § 16-2701 (1989).

⁶ N.H. REV. STAT. ANN. §§ 556:12, 13, 14 (1974). Section 13 imposes a ceiling of \$50,000 "except in cases where the plaintiff's decedent has left either a widow, widower, child, father, mother, or any relative dependent on the plaintiff's decedent in which event there shall be no limitation." *Id.* at 556:13. Donald Fox, decedent, left a widow, one of the plaintiffs in the *Barkanic* action. Those relatives specifically named in section 13 need not be financially dependent on the decedent for the ceiling to be inapplicable. *Merrill v. Great Bay Disposal Service, Inc.*, 484 A.2d 1101 (N.H. 1984). Although the New Hampshire statute is entitled a wrongful death statute, it "limits damages to the injuries suffered by the decedent and his or her estate . . . Damages are not assessed based on the loss suffered by surviving relatives." *Siciliano v. Capital City Shows, Inc.*, 475 A.2d 19, 24 (N.H. 1984) (citations omitted). In effect, then, the statute is more akin to a survival statute than to a wrongful death statute. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 125A, 126, 127, at 940-54 (5th ed. 1984). That being the case, a question arises as to why the applicability or inapplicability of the ceiling on recovery turns on the identity of the decedent's survivors. Perhaps the New Hampshire legislature is content to assume that those survivors specifically named or those survivors who are in fact dependent on the decedent are likely to share in the decedent's estate and be beneficiaries of the action. N.H. REV. STAT. ANN. § 556:14 (1974).

I. WHOSE CONFLICTS LAW?

A. *The FSIA-FTCA Connection*

CAAC argued that the FSIA mandated the application of Chinese conflicts law (which presumably would have led to the application of Chinese local law and the \$20,000 ceiling).⁷ CAAC analogized the FSIA and the Federal Tort Claims Act ("FTCA").⁸ Both contain similar language:

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.⁹

Since, under the FTCA, the United States Supreme Court in *Richards v. United States*¹⁰ mandated application of the conflicts law of the state where the act or omission occurred, and in light of the similar language used in the two acts, CAAC reasoned that the court should apply the conflicts law of China.¹¹ The district court accepted that reasoning.¹²

The Second Circuit did not follow suit. First, it noted that the two similar provisions relate only to punitive damages—an issue not involved in *Barkanic*.¹³ Second, and presumably more significant, the FTCA contains an explicit conflicts rule providing that the liability of the United States shall be determined "in accordance with the law of the place where the act or omission occurred."¹⁴ It was this explicit rule that the Supreme Court had interpreted in *Richards* as requiring the application of the conflicts law of that state. Since there is no similar explicit conflicts rule in the FSIA, the Second Circuit concluded that it was not required to apply Chinese conflicts law.¹⁵

Why do these two acts contain similar provisions "sup-

⁷ "[The district court] found that, under China's choice of law provisions, the law of the place where the tortious act occurred would apply to suits seeking compensation for loss caused by tortious acts." Appellee's Brief at 9, *Barkanic*, 923 F.2d 957 (2d Cir. 1991) (No. 562, 90-7641). See *supra* note 4.

⁸ 28 U.S.C. §§ 1346(b), 2401(b), 2402, 2671-80 (1988).

⁹ *Barkanic*, 923 F.2d at 959 (quoting 28 U.S.C. § 1606).

¹⁰ 369 U.S. 1 (1962).

¹¹ 923 F.2d at 959.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* (quoting 28 U.S.C. § 1346(b) (1988)).

¹⁵ 923 F.2d at 959-60.

planting" punitive damages, if exclusively provided for by the law of the state where the act or omission occurred, with compensatory damages? The FTCA immunizes the United States from punitive damages.¹⁶ Thus, if the conflicts law of the state where the act or omission occurred referred to the local law of that state, and that state's local law provided only punitive damages, absent the supplanting provision the victim of the government's negligence would be without a remedy. Why the similar supplanting provision in the FSIA? It immunizes the foreign state from punitive damages.¹⁷ Thus, if whatever conflicts law the court utilized referred to the local law of the state where the act or omission occurred, and that state's local law provided only punitive damages, absent the supplanting provision the victim of the foreign state's conduct would be without a remedy.

Why does the FSIA immunize the foreign state from punitive damages? There may be at least three reasons. First,

damages designated punitive have rarely been awarded by international tribunals. As explained in M. Whiteman, *Damages in International Law* 716-17 (1937), the international law of damages has developed chiefly in the resolution of claims by one state on behalf of its nationals against the other state, and the failure to assess exemplary damages as such against a respondent government may be explained by the absence of malice or *mala mens* on the part of an impersonal government.¹⁸

Second, Congress may have sensed an impropriety in subjecting a foreign state to a form of damages under the FSIA that may not be imposed on the United States under the FTCA. And, third, Congress may have sensed the impropriety of subjecting a foreign state to the punitive law of any other state. While in *Barkanic* the act or omission occurred within the defendant state, that, of course, won't always be the case. Whatever conflicts law the forum may utilize could refer to the local law of the state where the act or omission occurred and that might be some state other than the defendant state. If that local law provided only punitive damages, the impropriety of imposing such a punitive law on the defendant state would arise, or the victim of the

¹⁶ 28 U.S.C. § 2674 (1988).

¹⁷ 28 U.S.C. § 1606 (1988).

¹⁸ *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 865 (E.D.N.Y. 1984). The court, however, did award punitive damages against the private individual defendant. *Id.*

defendant state's conduct would be without remedy, absent the supplanting provision of the FSIA. The reasons underlying the supplanting provision in the FSIA, complemented by the reasons for that act's immunizing foreign states from punitive damages, suggest to me that the Second Circuit was correct in concluding that the similar supplanting provisions in the two acts did not require the court hearing an FSIA action to utilize that conflicts law mandated by the Supreme Court in FTCA actions. Add to that the fact that the explicit conflicts rule in the FTCA, as interpreted by the Supreme Court in *Richards*, has no counterpart in the FSIA, and the Second Circuit's conclusion that *Richards* isn't controlling in FSIA actions is strongly corroborated.

B. *The FSIA and Congressional Intent*

But why does the supplanting section of the FSIA refer to the possibility of "damages only punitive in nature"¹⁹ in "*the law of the place where the action or omission occurred?*"²⁰ It could be asserted that the italicized language strongly implies that Congress intended that in FSIA actions the local law to be applied was that of the occurrence state and that Congress simply neglected to include an explicit conflicts rule so providing. Frankly, I'm just skeptical enough of the ability of Congress to draft lucid, comprehensive legislation that I'm inclined to extend a certain credence to the argument that the absence of such an explicit conflicts rule may have been the result of inadvertence. Were I a federal appellate court judge, however, I would be loath to impute such carelessness to Congress, especially if an alternative explanation exists. The supplanting provision of the FSIA, like the similar section of the FTCA, stated more fully than set forth in the Second Circuit's opinion, provides:

a foreign state . . . shall not be liable for punitive damages; if, however, in any case wherein death was caused, 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 measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action

¹⁹ 28 U.S.C. § 1606 (1988).

²⁰ *Id.* (emphasis added).

was brought.²¹

This language suggests a couple of explanations other than congressional inadvertence. First, it is hornbook law that American courts view wrongful death actions as creatures of statutes.²² For a wrongful death action to be legally cognizable, there must be an applicable wrongful death statute in the jurisdiction where the death-producing injuries were sustained. If such a statute exists in the occurrence state, but provides only for punitive damages, absent the supplanting provision, the statute might be deemed inapplicable to the foreign state immunized from punitive damages simply as a matter of statutory construction. Or, to put it another way, absent the supplanting provision, such a wrongful death action against the foreign state might be deemed not legally cognizable. Second, Congress, having consciously elected not to legislate an explicit conflicts rule for FSIA actions, recognized that whatever conflicts law the court utilized might refer to the local law of the occurrence state. If that state's wrongful death statute provided for punitive damages only, absent the supplanting provision, the foreign state would be immunized from liability to the decedent's dependent survivors as a result of the choice-of-law conclusion thus achieved.

Neither of these explanations imputes any inadvertence to Congress. On the contrary, each imputes to Congress a rather sophisticated insight, the first with regard to American jurisprudence and the second with regard to the choice-of-law process. Each of these explanations is consistent with the conclusion that the supplanting provision of the FSIA does not imply a congressional intent that the court apply the local law of the occurrence state in every case or even in every wrongful death action. Apparently the Second Circuit was correct in its conclusion that, in enacting the FSIA, Congress did not explicitly or implicitly impose any conflicts law on courts.

Might it be argued that the portion of the supplanting provision which asserts that "the foreign state shall be liable for actual or compensatory damages measured by the pecuniary in-

²¹ 28 U.S.C. § 1606 (1988).

²² "The common law not only denied a tort recovery for injury once the tort victim had died, it also refused to recognize any new and independent cause of action in the victim's dependents or heirs for their own loss at his death." KEETON ET AL., *supra* note 6, § 127, at 945 (footnotes omitted).

juries resulting from such death which were incurred by the persons for whose benefit the action was brought"²³ represents a congressional decision that the decedent's dependent survivors are to receive full compensatory damages, unlimited by any arbitrary ceiling? To one possessing a rather strong plaintiff-oriented bias in personal injury and wrongful death actions (as I do), the argument has a certain appeal. After all, the statutory language does provide for *actual* damages measured by the pecuniary injuries sustained by the survivors.

Ultimately, though, I think the argument should be rejected for several reasons. First, the language does not explicitly exclude the utilization of any potentially applicable ceiling on recovery. Second, for a court to infer such an exclusion would be to impute to Congress a chauvinistic attitude invariably favoring domestic survivors over a foreign state defendant irrespective of the reason for the foreign state's limitation and the significance of that reason in a particular case. This implied jingoism would seem particularly inept with regard to a statute—the FSIA—that focuses on circumstances in which a foreign state may be subjected to the *jurisdiction* of a federal district court and does not generally attempt to establish new rules of *liability*.²⁴ Finally, the other reasons we have identified for the supplanting provision suggest explanations quite apart from establishing unlimited liability in all wrongful death actions.

C. *A Federal Conflicts Law: The Search For Uniformity*

Well, if the federal court hearing the FSIA action is not required to apply the conflicts law of the foreign state where the act or omission occurred, is not compelled by congressional implication to apply the local law of that foreign state, and is not required in all cases to award the survivors unlimited damages, should the court, in determining which state's local law to apply, utilize its own conflicts law or the conflicts law of the forum state? It could be argued, I suppose, that since an FSIA action is a federal cause of action, that is, one created by congressional enactment, the federal court should apply its own (federal) con-

²³ 28 U.S.C. § 1606 (1988).

²⁴ If the foreign state is subject to jurisdiction under the FSIA, it is to be liable "in the same manner and to the same extent as a private individual under like circumstances" 28 U.S.C. § 1606 (1988).

flicts law. Indeed, that argument has been accepted judicially. "[J]urisdiction in this case is based on FSIA, not diversity Therefore, federal common law applies to the choice of law rule determination."²⁵ There are, however, several problems with that conclusion.

First, the FSIA recognizes the existence of concurrent jurisdiction; such an action may be brought in either a federal or a state court.²⁶ This suggests that while the FSIA may be necessary to provide subject matter jurisdiction to Article III courts,²⁷ the congressionally recognized continuing capacity of state courts to entertain actions against foreign states may make the "federal" characterization of such actions more theoretical than practical. If such an action is brought in a state court and that court finds itself confronted with a choice-of-law problem, it seems unlikely that the state court will utilize a federal conflicts law, rather than the court's state conflicts law, to resolve the problem, absent a Supreme Court mandate to the contrary, and such a mandate seems equally unlikely.²⁸ Thus, if the federal court utilizes federal conflicts law and the state court utilizes state conflicts law, the different forums may well achieve inconsistent choice-of-law results. This would be an unseemly consequence of the federal court's utilization of federal conflicts law in FSIA actions.

Second, as the Second Circuit noted, the FSIA provides that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances."²⁹ Had all of the parties in *Barkanic* been private individuals in federal court because of diversity jurisdiction, the Supreme Court's opinion in *Klaxon Co. v. Stentor Elec. Mfg. Co.*³⁰ would have required the court to resolve the choice-of-law issue precisely as it would be resolved by the highest appellate court of the forum state, New York. Or, as the Second Circuit put it in terms more specific to *Barkanic*: "To ensure identity of liability between CAAC and a private defendant . . . the court should . . . appl[y] New York's choice of law rules even though CAAC is an

²⁵ *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991).

²⁶ 28 U.S.C. § 1602 (1992); 28 U.S.C. § 1441(d) (1988).

²⁷ U.S. CONST. art. III, § 1.

²⁸ See *infra* note 33.

²⁹ 28 U.S.C. § 1606 (1988).

³⁰ 313 U.S. 487 (1941).

instrumentality of a foreign state."³¹

The Second Circuit addressed only in a footnote³² the congressional decision and underlying reason to permit a foreign state sued in state court to remove the action to a federal court. When Congress enacted the FSIA, it also amended the removal statute by adding subsection (d): "Any civil action brought in a State court against a foreign state as defined in [the FSIA] 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"³³ The underlying rationale for that amendment was that "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts."³⁴ There is a striking facial inconsistency between the Second Circuit's decision to utilize the conflicts law of the forum *state* and the congressional desire to achieve uniformity by providing for removal to *federal* courts "in view of the potential sensitivity of actions against foreign states."³⁵ While it's true that the Second Circuit's conclusion would achieve uniformity as between state and federal courts sitting in the same state, it would hardly achieve the federal uniformity apparently sought by Congress. Can that facial inconsistency be resolved?

Perhaps a more basic question should be asked: If Congress desired uniformity among federal courts, why did it not enact a conflicts law to be applied by federal courts hearing FSIA ac-

³¹ 923 F.2d 957, 960 (2d Cir. 1991).

³² 923 F.2d at 959-60 n.2.

³³ 28 U.S.C. § 1441(d) (1988). In view of the ability of a foreign state sued in a state court to remove the action to a federal court, and in view of the conclusions achieved in this article as to the propriety of using state conflicts rules to resolve post-jurisdiction choice-of-law problems in FSIA actions, see *infra* text accompanying notes 37-55. There seems little purpose in having the Supreme Court require state courts hearing such actions to resolve choice-of-law problems under some federal conflicts law. If the choice-of-law problem relates to a post-jurisdiction issue, the state court's use of its own conflicts law would be entirely appropriate. Even if the choice-of-law problem went to a jurisdictional issue, and the foreign state had failed to remove the action to federal court, it could be said that the foreign state had "waived" its right to have the issue resolved by the application of some federal conflicts law.

³⁴ H.R. REP. No. 1487, 94th Cong., 2d Sess. 32 (1976), *reprinted in* 1976 U.S.C.A.N. 6604, 6631.

³⁵ *Id.*

tions? Earlier on we asked why Congress had not enacted an explicit conflicts law in light of the supplanting provision's reference to "the law of the place where the act or omission occurred."³⁶ To that inquiry, we found satisfactory answers other than mere inadvertence. But now the inquiry must be more basic. Why did Congress not provide for the uniformity it apparently desired by enacting an explicit conflicts law for application by all federal courts hearing FSIA actions? The FTCA provides for liability against the government "under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*"³⁷ Obviously, Congress knows how to fashion a conflicts law when it wishes to do so. Yet, the FSIA provides that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances" with no conflicts law.³⁸ Seemingly, in drafting the FSIA, Congress drew upon some of the language of the FTCA. Consequently, the absence of an explicit conflicts law in the FSIA hardly seems to have been the result of inadvertence (even to a skeptic like me). Is it possible that Congress chose to provide no explicit conflicts law similar to that of the FTCA because Congress wished to avoid the *renvoi* interpretation given by the *Richards* court to the FTCA's conflicts law? That hardly seems likely. Surely Congress had the capacity to recognize that it could have avoided such an interpretation simply by inserting one additional word into the conflicts law: "in accordance with the *local* law of the place where the act or omission occurred." Then why didn't Congress do so?

The answer may lie in that aspect of FSIA actions where "the potential sensitivity of actions against foreign states" seems most likely to be realized and, therefore, where the congressional desire for uniformity is the most cogent.³⁹ The most sensitive aspect of any FSIA action is whether the foreign state defendant may be subjected to the jurisdiction of a federal district court. Indeed, "[t]he purpose of the [FSIA] is to provide when and

³⁶ 28 U.S.C. § 1606 (1988).

³⁷ 28 U.S.C. § 1346(b) (1988) (emphasis added).

³⁸ 28 U.S.C. § 1606 (1988).

³⁹ H.R. REP. NO. 1487, 94th Cong., 2d Sess. 32 (1976), reprinted in 1976 U.S.C.A.N. 6604, 6631.

how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity."⁴⁰ The FSIA was intended to codify the "restrictive"⁴¹ principle of sovereign immunity, presently recognized in international law, limiting the immunity of a foreign state to "suits involving [its] public acts (*jure imperii*) and not [extending such immunity] to suits based on its commercial or private acts (*jure gestionis*)."⁴²

A principal purpose of [the FSIA] is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.⁴³

It is in making the basic determination of jurisdiction over a foreign state that FSIA actions present the most sensitive issue and where uniformity among federal courts is most important.

The Supreme Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*⁴⁴ noted 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."⁴⁵ But, the Court added, the FSIA "is silent . . . concerning the rule governing the attribution of liability among entities of a foreign state."⁴⁶ In this latter instance, implicating the act of state doctrine, the issue is not to be resolved by "divergent and perhaps parochial state interpretations."⁴⁷ There "Congress expressly acknowledged 'the importance of developing a uniform body of law' concerning the amenability of a foreign sovereign to suit in United States courts."⁴⁸ In that sensitive area, the Court concluded, the "governing"⁴⁹ principles "are common to both international law and federal common law,

⁴⁰ H.R. REP. NO. 1487, 94th Cong., 2d Sess. 6 (1976), reprinted in 1976 U.S.C.C.A.N. 6604.

⁴¹ *Id.* at 7.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 462 U.S. 611 (1983).

⁴⁵ *Id.* at 622 n.11.

⁴⁶ *Id.* (emphasis in original).

⁴⁷ *Id.* (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964)).

⁴⁸ *Id.* at 622 n.11.

⁴⁹ *Id.* at 623.

which . . . is necessarily informed both by international law principles and by articulated congressional policies.”⁵⁰

This affords a wholly rational explanation for the absence of an explicit conflicts law in the FSIA, notwithstanding the congressional desire for uniformity. If the need for uniformity is most important with regard to the jurisdictional issue, and that issue is to be resolved by a combination of international law and federal common law, with the latter informed by international law principles and congressional policies, how would that explicit conflicts law read? I suppose Congress could have provided that “in resolving the jurisdictional issue, federal courts are to apply a combination of international law and federal common law, with the latter informed by international law principles and congressional policies.” Perhaps that would have been preferable to the lacuna actually created by Congress which has generated the divergent results achieved by the various circuits.⁵¹ Still, such a conflicts law would have been one legislative mouthful, and a mouthful necessarily followed by another conflicts law to be applied to post-jurisdiction issues. All of that, I think, would be too much to expect of Congress.

The Second Circuit, although addressing the amendment to the removal statute and the congressional desire for uniformity underlying that amendment only in a footnote, did pick up on the Supreme Court’s opinion in *Banco Para* and the distinction between jurisdictional and post-jurisdiction issues.⁵² Since the application or non-application of the Chinese ceiling on recovery was a post-jurisdiction liability issue, the Second Circuit concluded that the issue was to be resolved by the application of the forum state’s conflicts law.⁵³

Is there an undue awkwardness in utilizing an informed federal conflicts law in resolving the jurisdictional issue and then using the conflicts law of the forum state in resolving post-jurisdiction issues? The Ninth Circuit has so concluded:

If a different choice of law rule applied to determine the . . . jurisdic-

⁵⁰ *Id.*

⁵¹ Compare *Barkanic*, 923 F.2d 957 (2d Cir. 1991) with *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777 (9th Cir. 1991) and with *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989). See *supra* note 25 and accompanying text.

⁵² *Barkanic*, 923 F.2d at 959-60 n.2.

⁵³ *Id.* at 959-60.

tional [issue from that used to resolve issues on the merits], it would be cumbersome, present grave difficulties, and could result in different substantive laws being applied in the same suit. We do not believe that Congress intended different choice of law rules to apply. We therefore hold that the federal choice of law rule controls . . . both for jurisdiction under the FSIA and on the merits.⁵⁴

Is the complaint justified? I think not. If, in resolving the jurisdictional issue, the court utilizes federal law, informed by international law principles and congressional policies (as suggested by the Supreme Court in *Banco Para*), the court will decide that jurisdiction does or does not exist. If it does not exist, the court will confront no choice-of-law problems on the merits. If jurisdiction does exist, and the court confronts a choice-of-law problem on the merits, resolving that problem by applying the conflicts law of the forum state would seem to be entirely consistent with the congressional intent that the foreign state be treated "as a private individual under like circumstances."⁵⁵ Thus, using an informed federal conflicts law to resolve jurisdictional issues would seem to achieve the uniformity sought by Congress in that sensitive area and utilizing the forum state's conflicts law to resolve post-jurisdiction issues would achieve the "private individual"⁵⁶ result sought by Congress in that less sensitive area. Should that dual approach result in the application of one state's local law in resolving the jurisdictional issue and another state's local law in resolving the post-jurisdiction issue, there would be no inherent impropriety. *Depeçage* has become commonplace⁵⁷ and this particular *depeçage* would be one entirely consistent with the apparent congressional intent with regard to each issue.

More recently, the Ninth Circuit, in concluding that federal conflicts law should be exclusively utilized in FSIA actions, identified that federal conflicts law as the Restatement (Second) of Conflict of Laws.⁵⁸ I suppose that, as a general proposition, each

⁵⁴ *Liu*, 892 F.2d at 1426.

⁵⁵ 28 U.S.C. § 1606 (1988).

⁵⁶ *Id.*

⁵⁷ See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 3.4, at 71 (3d ed. 1986); *Stutsman v. Kaiser Found. Health Plan of the Mid-Atl. States, Inc.*, 546 A.2d 367, 373 (D.C. 1988) ("[T]he issue-by-issue approach of interest analysis makes it far more likely that the law of one jurisdiction will be found to govern one aspect of a case while the law of another jurisdiction will control another aspect of that case.").

⁵⁸ *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991).

circuit has a right to embrace whatever conflicts law it wishes. For example, the Second Circuit in a recent opinion seemed to embrace as its federal conflicts law one "invok[ing] similar considerations" as New York's interest analysis.⁵⁹ This freedom of choice, however, strikes me as inappropriate in resolving a jurisdictional issue under the FSIA. In this sensitive area, Congress has indicated a strong desire for uniformity, amending the removal statute as one means of achieving that uniformity. Consequently, federal courts confronting a choice-of-law problem with regard to such a jurisdictional issue should follow the lead of the Supreme Court and apply as the appropriate conflicts law federal law, informed by both international law principles and congressional policies, rather than the federal conflicts law each circuit might utilize in other contexts.

If this is done, and jurisdiction under the FSIA is found to exist, the court would be virtually compelled to utilize some other conflicts law in resolving post-jurisdiction choice-of-law problems. It seems fairly clear that the FSIA was not intended to change the substantive law applicable to foreign states; they are to be treated in the same manner "as a private individual under like circumstances."⁶⁰ Consequently, the court confronting a choice-of-law problem with regard to a post-jurisdiction issue could hardly apply a conflicts law informed by congressional policies. Necessarily, therefore, the court would utilize one conflicts law to resolve jurisdictional issues and a different conflicts law to resolve post-jurisdiction issues. That dual approach, found "cumbersome" by the Ninth Circuit, is not only appropriate, but apparently required to remain true to the different congressional intentions applicable to the sensitive area of jurisdiction and the non-sensitive area where the foreign state is to be treated "as a private individual."⁶¹ As the Supreme Court implied in *Banca Para* and the Second Circuit concluded in *Barkanic*, choice-of-law problems going to non-sensitive post-jurisdiction issues should be resolved by application of the conflicts law of the forum state, just as they would be if the foreign state were a private individual. The Second Circuit's decision to resolve the

⁵⁹ *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 936 F.2d 723, 726 (2d Cir. 1991) (quoting district court opinion at 695 F. Supp. 1450, 1453-54 (1988)).

⁶⁰ 28 U.S.C. § 1606 (1988).

⁶¹ *Id.*

choice-of-law problem before it pursuant to the conflicts law of the forum state, New York, seems to me to have been precisely correct.

II. IDENTIFYING NEW YORK'S CONFLICTS LAW

Having concluded that New York's conflicts law was to be applied in resolving the choice-of-law issue in *Barkanic* how did the Second Circuit interpret that law? The court reviewed the choice-of-law decisions of the New York Court of Appeals from *Kilberg v. Northeast Airlines, Inc.*⁶² through *Schultz v. Boy Scouts of America, Inc.*⁶³ The Second Circuit concluded that, prior to *Schultz*, the New York court had adopted interest analysis as its method for resolving choice-of-law problems.⁶⁴

How would interest analysis have worked in *Barkanic*? Presumably the reason underlying the Chinese law limiting an airline's liability for the wrongful death of a non-citizen to \$20,000 was to protect the economic integrity of China Airlines. Since the defendant was the surrogate for that airline, that reason for the Chinese ceiling on recovery would convert into a significant interest on the part of China in having its ceiling applied. The reason underlying the laws of the District of Columbia and New Hampshire, neither imposing any ceiling on wrongful death action recoveries, presumably is to assure that decedent's dependent survivors do not become indigent wards of those states.⁶⁵

⁶² 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S. 133 (1961).

⁶³ 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985).

⁶⁴ "Although *Kilberg* was decided before New York adopted an 'interest analysis' approach to choice of law questions in *Babcock v. Jackson* . . . after *Babcock* New York courts continued to hold that the law of decedent's domicile governs the issue of damages in wrongful death actions." *Barkanic*, 923 F.2d at 962 (citations omitted).

⁶⁵ In 1885 Congress enacted the Wrongful Death Act for the District of Columbia, which is now codified at D.C. CODE ANN. §§ 16-2701 *et. seq* (1981). The statute confers a right to bring an action for wrongful death upon only one person, the "personal representative of the deceased person," *id.*, § 16-2702, who may pursue such an action for the sole benefit of "the spouse and the next of kin of the deceased person." *Id.*, § 16-2701. *Cole, Raywid & Braverman v. Quadrangle Dev.*, 444 A.2d 969, 971 (D.C. 1982) (citations and footnotes omitted).

[The District of Columbia Wrongful Death Act] is designed to provide a remedy whereby close relatives of the deceased, who might naturally have expected maintenance or assistance from the deceased had he lived, may recover compensation from the wrongdoer commensurate with the loss sustained. Thus, proper recovery under this Act is based on the pecuniary benefits that the statutory beneficiaries might reasonably be expected to have derived from the de-

Assuming decedent's dependent survivors were domiciled in those states,⁶⁶ each state's reason would convert into a significant interest on the part of each in having its law applied. Confronted with this true conflict, the court would be compelled to decide which state's interest in having its law applied was the more significant and apply the local law of that state. Arguably, an adverse choice-of-law result would be more likely to cause the indigence of the dependent survivors than the bankruptcy of the airline. This would suggest that, as between China and the District of Columbia in the *Barkanic* action, the local law of the District should be applied and, as between China and New Hampshire in the *Fox* action, the local law of New Hampshire should be applied. But have we done justice to the reasons underlying the Chinese ceiling?

A. *Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*⁶⁷

In *Tramontana*, the court found that one purpose of a Brazilian ceiling on recoveries in personal injury or wrongful death actions against Brazil's airline was to protect an enterprise whose success "is a matter not only of pride and commercial well-being, but perhaps even of national security."⁶⁸ I suppose that same "national security" concern could be found to be a reason for the Chinese ceiling in *Barkanic*. Moreover, the *Tramontana* court emphasized that "the Brazilian limitation in terms applies only to airplane accidents, unlike the Massachusetts provision rejected in *Kilberg*, which was an across-the-

ceased had he lived.

Semler v. Psychiatric Institute of Washington, D.C., 575 F.2d 922, 924-25 (D.C. Cir. 1978)(footnotes omitted). For a discussion of the New Hampshire wrongful death statute, see *supra* note 6.

⁶⁶ While Donald Fox's wife was domiciled in New Hampshire, Peter Barkanic, though domiciled in the District of Columbia, was a bachelor who left no dependent survivors domiciled in the District. The plaintiff in the *Barkanic* action was the decedent's mother, domiciled in Maryland. See *infra* notes 71-73 and accompanying text. At this point in the text, I am assuming, contrary to fact, that Barkanic's dependent survivors were domiciled in the District of Columbia for the purpose of engaging in interest analysis based on that assumption. Subsequently in the text, I shall consider how the domicile in Maryland of Barkanic's mother might influence that interest analysis. See *infra* note 71 and accompanying text.

⁶⁷ 350 F.2d 468 (D.C. Cir. 1965).

⁶⁸ *Id.* at 471.

board ceiling on recovery for wrongful death in that state. The focus of Brazilian concern could hardly be clearer."⁶⁹ This specificity suggested an enhanced interest on the part of Brazil in having its ceiling applied. Again, the same could be said of the Chinese ceiling in *Barkanic*; it is applicable only to airline liability. On the other hand, the no-ceiling laws of the District of Columbia and New Hampshire are of general applicability in all wrongful death actions. Consequently, following the lead of *Tramontana*, and considering both China's national security interest and the specificity of its ceiling law, interest analysis might lead to the conclusion that China had a more significant interest in the application of its ceiling law than either the District or New Hampshire had in applying its no-ceiling law.

In *Tramontana*, the court, utilizing interest analysis, also noted that Maryland, the domicile state of the dependent survivors, retained *lex loci delicti* as its conflicts rule in tort actions. Consequently, if the action had been brought in a Maryland court, that court would have imposed the Brazilian ceiling even to the economic jeopardy of the Maryland dependent survivors. From that, the court inferred a diminished interest on the part of Maryland in protecting its dependent survivors: if a Maryland court would not disregard Brazilian law for the benefit of one of its own residents in a suit brought there, why should a court sitting in the District of Columbia do so at the expense of substantial and legitimate interests of Brazil?⁷⁰

In the *Barkanic* action, although decedent had been domiciled in the District of Columbia, the plaintiff was decedent's mother, a domiciliary of Maryland.⁷¹ Since decedent had been a bachelor, he left no widow or children and no other dependent survivors domiciled in the District.⁷² Rather, his mother—the

⁶⁹ *Id.*

⁷⁰ *Id.* at 475. I confess that I am aware of no opinion of the New York Court of Appeals that considered the conflicts law of an interested state other than the forum in resolving a choice-of-law problem through interest analysis. I have considered this aspect of *Tramontana* only for the sake of completeness and in light of the possibility that some time in the future the New York court might follow suit.

⁷¹ Telephone conversation with Daniel F. Hayes, Esq., counsel for the plaintiffs. Mr. Barkanic is survived by his mother, Louise Kimball of Annapolis, Maryland, a brother, Stephen A., of New York City, New York, and three sisters, Donna L. Barkanic of Tucson, Arizona, and Lucie M. and Mary A. Barkanic, both of Annapolis, Maryland. See *Obituaries*, WASH. POST, Jan. 28, 1985, at D4.

⁷² *Id.*

dependent survivor—was a Maryland domiciliary.⁷³ Again following the lead of *Tramontana*, and noting that Maryland retains *lex loci delicti*,⁷⁴ if the *Barkanic* action had been brought before a Maryland court, that court presumably would have imposed the Chinese ceiling even to the economic jeopardy of the Maryland dependent survivor. This would suggest further that in *Barkanic* China had the more significant interest in applying its local law imposing the ceiling. Consequently, interest analysis could very well have led to the conclusion that the Chinese ceiling should have been applied in *Barkanic*.

B. *Rosenthal v. Warren*⁷⁵ and *Neumeier v. Kuehner*⁷⁶

In *Barkanic*, the Second Circuit, in reviewing New York's application of interest analysis before *Schultz*, considered several cases involving a choice-of-law problem as to the application of the no-ceiling wrongful death statute of the domicile state of the dependent survivors or the application of the ceiling law of the occurrence state. In each case, the New York court had concluded that the state of domicile had the greater interest in the application of its law, therefore the court applied the no-ceiling local law.⁷⁷ In none of those cases, however, was there any "national security" interest on the part of the occurrence state and in each case the ceiling law applied "across-the-board" with no particular activity given that unique protection.

The Second Circuit also considered its own pre-*Schultz* opinion in *Rosenthal v. Warren*.⁷⁸ There, the court, exercising diversity jurisdiction, was required to make an educated judicial guess as to whether the New York Court of Appeals would apply the no-ceiling law of the dependent survivor's domicile or the ceiling law of the occurrence state. In *Rosenthal*, the court considered *Neumeier v. Kuehner*.⁷⁹ In *Neumeier*, the New York

⁷³ *Id.*

⁷⁴ *Jacobs v. Adams*, 505 A.2d 930 (Md. Ct. Spec. App.), *cert. denied sub. nom.*, *Stephenson v. Tseronis*, 505 A.2d 260 (Md. 1986).

⁷⁵ 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973).

⁷⁶ 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

⁷⁷ *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 962 (2d Cir. 1991).

⁷⁸ 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973). The opinion in *Rosenthal*, like that in *Barkanic*, was written by Judge Oakes.

⁷⁹ 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

Court of Appeals adopted three rules for resolving the choice-of-law problems regarding the application of an asserted guest statute.⁸⁰ Ultimately, the *Neumeier* court applied the guest statute of the occurrence state. In *Rosenthal*, however, the Second Circuit concluded that "[i]n no way . . . did the [*Neumeier*] court retreat from the position it had staked out in *Kilberg* and *Miller*, refusing to apply other states' wrongful death limitations in the case of a New York domiciliary."⁸¹ Consequently, the Second Circuit in *Rosenthal* concluded that the New York Court of Appeals would apply the no-ceiling law of New York, the domicile of the dependent survivor.

C. *Schultz v. Boy Scouts of America, Inc.*⁸²

But then came *Schultz*. The Second Circuit read *Schultz* as "suggest[ing] . . . that *Rosenthal* is no longer an accurate interpretation of New York law."⁸³

In *Schultz*, the court applied the first and third *Neumeier* rules to dismiss a wrongful death suit pursuant to a New Jersey statute rendering charitable entities immune from suit. . . . In reaching its conclusion, the court noted that "rules . . . limiting damages in wrongful death actions, vicarious liability rules, [and] immunities from suit," should all be governed under the same choice of law analysis. . . . As such, it appears to us that New York courts would now apply the

⁸⁰ These are the three rules of *Neumeier*:

(1) When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.

(2) When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.

(3) In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.

Neumeier, 31 N.Y.2d at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70.

⁸¹ *Rosenthal*, 475 F.2d at 442.

⁸² 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985).

⁸³ *Barkan v. Gen. Admin. of Civil Aviation of People's Republic of China*, 923 F.2d 957, 963 (2d Cir. 1991) (footnote omitted).

Neumeier rules to all post-accident loss distribution rules, including rules that limit damages in wrongful death cases. . . . Accordingly, based on the second *Neumeier* rule, we affirm the district court's application of Chinese law.⁸⁴

I confess that *Schultz* has always been something of an enigma to me. The Schultz family was domiciled in New Jersey where the two sons, Richard, aged 13, and Christopher, 11, attended parochial school and were members of a local Boy Scout troop. One of their school teachers was Brother Edmund Coakeley, supplied by the Brothers of the Poor of St. Francis, Inc., under an agreement between the Archdiocese of Newark and the Franciscan Brothers. Coakeley was also the Scoutmaster of the Boy Scout troop to which the boys belonged. The complaint alleged that, during two campouts in New York, Coakeley sexually abused each of the boys, continued to abuse Christopher upon their return to New Jersey, and threatened both boys with harm if they revealed what had occurred. As a result of Coakeley's alleged conduct, Christopher committed suicide, Richard sustained severe emotional distress, and their parents sustained severe emotional distress. Wrongful death and personal injury actions were brought against the Boy Scouts and the Franciscan Brothers, alleging negligent hiring and supervision. Asserting New Jersey's charitable immunity law, both defendants moved to dismiss the complaint. Plaintiffs resisted the motion, arguing that New York law, repudiating charitable immunity, should be applied. The trial court granted the defendants' motion, the intermediate appellate court affirmed, and ultimately the New York Court of Appeals affirmed.⁸⁵

The Court of Appeals noted that it had utilized interest analysis in resolving choice-of-law problems.⁸⁶ The court also noted, however, that in *Neumeier v. Kuehner* it had embraced three rules for resolving choice-of-law problems involving guest statutes.⁸⁷ These rules apparently were intended to codify (my word) and simplify the interest analysis methodology in guest statute cases. In *Schultz*, the court concluded that these three rules were intended to apply to all choice-of-law problems in-

⁸⁴ *Id.* (emphasis added).

⁸⁵ *Schultz*, 65 N.Y.2d at 192-94, 480 N.E.2d at 681-82, 491 N.Y.S.2d at 92-93.

⁸⁶ *Id.*, 65 N.Y.2d at 196-97, 480 N.E.2d at 683-84, 491 N.Y.S.2d at 94-95.

⁸⁷ *Id.*, 65 N.Y.2d at 197, 480 N.E.2d at 684, 491 N.Y.S.2d at 95; see *supra* note 80.

volving conflicting laws that "relate to allocating losses that result from admittedly tortious conduct . . . such as those limiting damages in wrongful death actions, vicarious liability rules, or immunities from suit" ⁸⁸ Finding that the conflicting laws of New Jersey and New York were such loss allocation rules, the court applied rule one (involving litigants having a common domicile) to the actions against the Boy Scouts and rule three (involving litigants having different domiciles) to the actions against the Franciscan Brothers. Both rules led the *Schultz* court to apply the local law of New Jersey that recognized charitable immunity.

The lone dissenter was the only member of the court to discern a conduct-regulating reason underlying New York's law that rejected charitable immunity. Since the sexually abusive conduct—the ultimate consequence of the defendants' alleged negligent hiring and supervision—had been initiated in New York, the dissent found that underlying reason converted into a significant interest on the part of New York in having its law applied. Not surprisingly, the dissent concluded that New York's interest in the application of its law, intended to protect and preserve human life, was more significant than New Jersey's admittedly legitimate interest in protecting the economic integrity of charities, thereby encouraging their good works in that state. ⁸⁹

The first aspect of *Schultz* that continues to puzzle me is why only one member of the court perceived a conduct-regulating reason underlying New York's repudiation of charitable immunity. As the dissent noted, in the very case in which New York had rejected that doctrine, the court offered two reasons for its conclusion that respondeat superior should be imposed on charities as well as all other employers: "insistence upon *respondeat superior* and damages for negligent injury serves a two-fold purpose, for it both assures payment of an obligation to the person injured and *gives warning that justice and the law demand the exercise of care.*" ⁹⁰ This italicized language makes it rather

⁸⁸ *Id.*, 65 N.Y.2d at 198, 480 N.E.2d at 685, 491 N.Y.S.2d at 96.

⁸⁹ *Id.*, 65 N.Y.2d at 205-12, 48 N.E.2d at 690-94, 491 N.Y.S.2d at 101-5.

⁹⁰ *Id.*, 65 N.Y.2d at 208, 480 N.E.2d at 691-92, 491 N.Y.S.2d at 103, *quoting* *Bing v. Thunig*, 2 N.Y.2d 656, 666, 143 N.E.2d 3, 8, 163 N.Y.S.2d 3, 11 (1957) (emphasis added in *Schultz*).

clear that New York's rejection of charitable immunity was intended to have a conduct-regulating purpose. Had the other members of the *Schultz* court recognized that conduct-regulating reason, they could not have characterized New York's law as simply one "relat[ing] to allocating losses that result from admittedly tortious conduct . . . "91 thereby making "less important"92 New York's "admonitory interest."93 Rather, had the majority discerned New York's conduct-regulating interest, presumably New York, as the state where the sexually abusive conduct was initiated, would have had "a predominant, if not exclusive, concern . . . because [of its] interest . . . in the admonitory effect that applying its law [would] have on similar conduct in the future . . . [which concern would] outweigh any interests of the common-domicile jurisdiction [of New Jersey]."94

The second aspect of *Schultz* that puzzles me is how to interpret the choice-of-law technique utilized by the court. Did the majority repudiate interest analysis or did it merely utilize the three rules of *Neumeier* as a simplified manner of applying interest analysis to competing laws viewed by the court as being aimed exclusively at loss allocation? I suppose that *Barkanic* could be read as implying the former conclusion. After noting that before *Neumeier* the New York court had "adopted an 'interest analysis' approach to choice of law questions,"95 *Barkanic* concluded that *Neumeier* "directed courts to apply the law of the place of the accident unless the plaintiff and defendant were domiciliaries of the same state."96 That sounds like *lex loci delicti* generally, with *lex domicilii* as the potential alternative. Yet *Barkanic* itself noted that *Schultz* directed the application of *lex domicilii* only where the competing laws went exclusively to loss allocation, for example, "rules . . . limiting damages in wrongful death actions, vicarious liability rules, [and] immunities from suit,"97 none going to conduct regulation, at least in the view of the *Schultz* majority.

⁹¹ *Schultz*, 65 N.Y.2d at 198, 480 N.E.2d at 685, 491 N.Y.S.2d at 96.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*, 65 N.Y.2d at 198, 480 N.E.2d at 684-85, 491 N.Y.S.2d at 95-96.

⁹⁵ *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 962 (2d Cir. 1991).

⁹⁶ *Id.*

⁹⁷ *Id.* at 963.

But if one of the competing laws has an underlying purpose of conduct regulation, and that law exists in the state where the conduct occurred, what does *Schultz* mandate? *Schultz* seems to say *lex loci delicti*: in those circumstances "the locus jurisdiction's interests . . . [will] outweigh any interests of the common-domicile jurisdiction" ⁹⁸ It's true, of course, that a state's interest in conduct regulation, an interest aimed at protecting and preserving human life, must be afforded a high priority. ⁹⁹ Does that mean that interest must prevail over any competing interest of the other state, whether or not the common domicile? ¹⁰⁰ And what if the other state's competing law is also aimed at protecting and preserving human life? ¹⁰¹ Should *Schultz* be read as invariably requiring application of the conduct-regulating law of the locus state? I am inclined to think not. In describing the development of New York conflicts law, *Schultz* noted that "[i]nterest analysis became the relevant analytical approach to choice of law in tort actions Under this formulation, the significant contacts are, almost exclusively, the parties' domiciles and the locus of the tort" ¹⁰² It was this interpretation of interest analysis and the majority's characterization of New York's and New Jersey's laws as loss allocation rules that led *Schultz* to the application of New Jersey's law. Given competing state laws, both aimed at protecting and preserving human life, I am not sure that any of *Neumeier*'s three rules would be, or were intended to be, applicable. Consequently, I am inclined to read *Schultz* not as a repudiation of interest analysis, but rather as an application of that methodology "simplified" by *Neumeier*'s three rules to a case in which the court concluded that those rules were applicable.

⁹⁸ *Schultz*, 65 N.Y.2d at 198, 480 N.E.2d at 684-85, 491 N.Y.S.2d at 95-96.

⁹⁹ David E. Seidelson, *Resolving Choice-of-Law Problems Through Interest Analysis in Personal Injury Actions: A Suggested Order of Priority Among Competing State Interests and Among Available Techniques for Weighing Those Interests*, 30 Duq. L. Rev. 869, 875 (1992).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Schultz*, 65 N.Y.2d at 197, 480 N.E.2d at 684, 491 N.Y.S.2d at 95.

D. *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*¹⁰³

How does all of that relate to *Barkanic*? It's fairly apparent that China's ceiling on recovery is a loss allocation rule. If the laws of the District of Columbia and New Hampshire, neither imposing a ceiling on wrongful death action recoveries, are also loss allocation rules, then, under *Schultz*, which local law should be applied? It can't be that of the common domicile since the defendant is domiciled in China and the two decedents were domiciled in different states of the United States. Consequently, *Neumeier's* second rule would seem to come into play. Since the defendant's conduct occurred in its domicile (China) and that state imposes a ceiling on recovery, Chinese law should be applied. And, of course, that's precisely the result achieved by the Second Circuit.¹⁰⁴

But suppose that the unlimited recovery laws of the District of Columbia and New Hampshire had two underlying reasons: (1) to assure that dependent survivors domiciled in those states did not become indigent wards and (2) to deter culpable conduct threatening the lives of domiciliaries of those states, that is, conduct regulation.¹⁰⁵ What then? Well, in the first place, the result in *Schultz* would no longer be controlling. This result grew out of the majority's disinclination to perceive a conduct-regulating reason underlying New York's rejection of charitable immunity. Second, the assumption of *Schultz* that such an "admonitory interest"¹⁰⁶ can arise only on behalf of the "locus jurisdiction"¹⁰⁷ would be demonstrably disproven. Third, the language of *Schultz* suggests that an admonitory interest (perhaps on the part of any state) generated by a conduct-regulating law would outweigh any competing interest. Of course, the competing interest before the *Schultz* court, and apparently the only competing interest contemplated by the court, was New Jersey's interest in protecting the economic integrity of the defendant charities. As our earlier interest analysis suggested, China's interest in pro-

¹⁰³ 923 F.2d 957, 963 (2d Cir. 1991).

¹⁰⁴ *Barkanic*, 923 F.2d at 963.

¹⁰⁵ See, e.g., *Hurtado v. Superior Court*, 522 P.2d 666 (Cal. 1974); *Johnson v. Spider Staging Corp.*, 555 P.2d 997 (Wash. 1976).

¹⁰⁶ *Schultz*, 65 N.Y.2d at 198, 480 N.E.2d at 684-85, 491 N.Y.S.2d at 96.

¹⁰⁷ *Id.*, 65 N.Y.2d at 198, 480 N.E.2d at 684, 491 N.Y.S.2d at 96.

tecting its airline may go beyond mere economic concern and encompass national security concerns. As between those competing interests, protecting and preserving human life on the part of decedents' domiciles and national security on the part of the defendant's domicile, which should prevail? *Schultz*, of course, never confronted that conflict. And none of *Neumeier*'s three rules contemplated such a conflict. After all, those three rules, even as perceived by the *Schultz* court, which gave the rules an application far beyond guest statute cases, govern only conflicts between loss allocation laws. How would the New York Court of Appeals (and therefore the Second Circuit in *Barkanic*) resolve that conflict?

I think the New York court would feel compelled to engage in interest analysis to resolve that choice-of-law problem. Clearly, the "admonitory" concern represented by the no-ceiling laws of the decedents' domiciles, aimed at protecting and preserving human life, would be entitled to a high priority. Yet China's law, directed toward a national security interest, also implicates the protection and preservation of human life—as many as one billion lives. Which represents the more significant interest? I'm inclined to think that the New York Court of Appeals (and therefore the *Barkanic* court) would find China's interest to be the more significant and would apply its ceiling on wrongful death action recoveries.

Thus, two conclusions emerge. First, given the limited applicability of the three *Neumeier* rules, even as applied in *Schultz*, those rules cannot be dispositive of all choice-of-law problems in tort actions. With regard to those problems unresolved by the three rules, the foundation of those rules and the pre-existing "relevant analytical approach to choice of law in tort actions," interest analysis subsists in New York. Second, even had the Second Circuit in *Barkanic* utilized interest analysis and even if the no-ceiling laws of the District and New Hampshire had an underlying conduct-regulation reason, given the national security interest of China, the Second Circuit may still have imposed the Chinese ceiling.

Does either the District of Columbia or the New Hampshire law have the kind of underlying conduct-regulating reason we hypothesized above? Apparently not. Although the highest appellate courts of at least a couple of states have found such a reason for their no-ceiling wrongful death action damage provi-

sions,¹⁰⁸ neither the District nor the New Hampshire courts have. In their view, apparently, the unlimited recovery provisions are intended only to protect domiciled dependent survivors from indigence. In these circumstances, *Barkanic* presented the Second Circuit with competing laws concerned only with loss allocation or, with regard to the Chinese ceiling on recovery, loss allocation and a national security interest aimed at protecting and preserving human lives. And *Schultz* indicates, as the *Barkanic* court concluded, *Neumeier's* second rule would point toward China's ceiling law.

CONCLUSION

The distinction drawn by *Barkanic* between jurisdictional issues and post-jurisdiction issues in FSIA actions, with choice-of-law problems going to the former to be resolved by federal conflicts law informed by international law principles and congressional policies, and choice-of-law problems going to the latter to be resolved by the conflicts law of the forum state, is consistent with the approach suggested by the Supreme Court in *Banco Para*.¹⁰⁹ Furthermore, this distinction comports with the two different congressional intentions reflected by the FSIA: uniformity as among federal circuits with regard to the sensitive jurisdictional issues and, with regard to the non-sensitive post-jurisdiction issues, treatment of foreign states as "private individuals."¹¹⁰ Consequently, the Second Circuit's decision to resolve the post-jurisdiction extent of liability issue before the *Barkanic* court by applying New York's conflicts law seems to me the correct conclusion. Moreover, having decided to utilize New York's conflicts law, the Second Circuit's conclusion that, under *Schultz* and its simplified form of interest analysis, the New York Court of Appeals would apply the Chinese ceiling on recovery also seems to me the correct conclusion.

Both issues confronted by the Second Circuit were difficult. The first was made difficult because of the absence of any explicit conflicts law in the FSIA and the divergent manifestations of congressional intent as to jurisdictional and post-jurisdiction issues. The second was difficult because of the lack of clarity ex-

¹⁰⁸ See *supra* note 105.

¹⁰⁹ 462 U.S. 611 (1983); see *supra* notes 44-50 and accompanying text.

¹¹⁰ 28 U.S.C. § 1606 (1988).

isting as to the nature of New York's conflicts law, a lack arising out of the *Neumeier-Schultz* treatment of interest analysis. In resolving both issues in a manner consonant with the appropriate legislative and judicial intentions, the Second Circuit earned for itself kudos and even emulation by the other federal circuits.