

08-1783-cv (L), 08-2358-cv (XAP)  
Mortimer Off Shore Servs., Ltd. v. The Fed. Republic of Germany

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT  
3

4 August Term 2008

5 (Argued: May 13, 2009 Decided: July 26, 2010)

6 Docket Nos. 08-1783-cv (L), 08-2358-cv (XAP)

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8 MORTIMER OFF SHORE SERVICES, LTD.,

9  
10 Plaintiff-Appellant-Cross-Appellee,

11 -- v. --

12  
13  
14 THE FEDERAL REPUBLIC OF GERMANY,

15  
16 Defendant-Appellee-Cross-Appellant.

17  
18 -----x

19  
20 B e f o r e : WALKER, WESLEY, and WALLACE,\* Circuit Judges.

21  
22 Plaintiff-Appellant-Cross-Appellee Mortimer Off Shore  
23 Services, Ltd. appeals from the judgment of the United States  
24 District Court for the Southern District of New York (Lynch,  
25 Judge) dismissing Mortimer's action to enforce bearer bonds  
26 valued at \$400,000,000 against Defendant-Appellee-Cross-Appellant  
27 the Federal Republic of Germany ("FRG") for failure to state a  
28 claim. Mortimer also appeals from the denial of its subsequent

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1 \* The Honorable J. Clifford Wallace, of the United States  
2 Court of Appeals for the Ninth Circuit, sitting by designation.

1 motions to amend the judgment and for leave to file an amended  
2 complaint. The FRG cross-appeals from the denial of its motion  
3 to dismiss for lack of subject matter jurisdiction pursuant to  
4 the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq.

5 On appeal, we AFFIRM the district court's dismissal of  
6 Mortimer's action for failure to state a claim with regard to the  
7 Bonds issued in territory that became West Germany. We agree  
8 with the district court that Mortimer cannot seek to enforce the  
9 West German Bonds without first complying with the statutory  
10 validation procedures aimed to ensure that the Bonds represent  
11 valid, legal obligations. We further AFFIRM the motion to  
12 dismiss with regard to the Bonds issued in territory that became  
13 East Germany, however, we do so on alternative grounds. We grant  
14 the FRG's motion to dismiss for lack of subject matter  
15 jurisdiction with respect to the East German Bonds because  
16 Mortimer failed to allege an "action [by East Germany or the FRG]  
17 . . . based upon a commercial activity." 28 U.S.C. § 1605(a)(2),  
18 that, if proven, would give rise to jurisdiction over a foreign  
19 sovereign. Finally, we AFFIRM the district court's denial of  
20 Mortimer's motions to amend the judgment and for leave to file an  
21 amended complaint in regard to both the West German Bonds and the  
22 East German Bonds.

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21 Amici Curiae Supporting Plaintiff-  
22 Appellant-Cross-Appellee.

23  
24 JOHN M. WALKER, JR., Circuit Judge:

25 Plaintiff-Appellant-Cross-Appellee Mortimer Off Shore  
26 Services, Ltd. ("Mortimer") appeals from the dismissal by the  
27 United States District Court for the Southern District of New  
28 York (Gerard E. Lynch, Judge) of Mortimer's action to enforce 351  
29 bearer bonds ("Bonds") valued at over \$400,000,000 (as of the  
30 filing of the complaint) against the Federal Republic of Germany  
31 ("FRG")<sup>1</sup> for failure to state a claim. See Mortimer v. The Fed.

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1 <sup>1</sup> The Federal Republic of Germany has existed since 1949, but  
2 only included in its territory that of the former German  
3 Democratic Republic beginning in 1990, when the two countries  
4 unified. Throughout our decision, "FRG" refers to the present-  
5 day Federal Republic of Germany, post-unification, "West Germany"  
6 refers to the Federal Republic of Germany prior to unification,  
7 and "East Germany" refers to the former German Democratic  
8 Republic.

1 Republic of Germany, No. 05 Civ. 10669 (GEL), 2007 WL 2822214  
2 (S.D.N.Y. Sept. 27, 2007). The complaint alleged that the FRG  
3 assumed liability for the Bonds, which were issued after the  
4 First World War by banks located in the state of Prussia in  
5 territory later comprising West Germany and East Germany.

6 We hold that Mortimer's claim seeking to enforce the Bonds  
7 issued in territory that became East Germany ("East German  
8 Bonds") must be dismissed for lack of subject matter  
9 jurisdiction, because Mortimer failed to allege an "action [by  
10 East Germany or the FRG] . . . based upon a commercial activity,"  
11 28 U.S.C. § 1605(a)(2), that, if proven, would give rise to  
12 jurisdiction over a foreign sovereign. We further hold that  
13 Mortimer cannot seek to enforce the Bonds issued in territory  
14 that became West Germany ("West German Bonds") without first  
15 complying with the statutory validation procedures aimed to  
16 ensure that the Bonds represent valid, legal obligations.

17 Next, Mortimer appeals from the denial of its subsequent  
18 motions to amend the judgment and for leave to file an amended  
19 complaint. We determine that leave to amend would be futile  
20 because the proposed amended complaint did not cure the original  
21 complaint's deficiencies, either by providing a basis for subject  
22 matter jurisdiction to enforce the East German Bonds, or by  
23 showing that the validation procedures do not apply to the West  
24 German Bonds.



1 reunified to make up the present-day FRG.<sup>1</sup> The Bonds contained  
2 coupons from December 1944 and matured on June 1, 1958. The  
3 thirty-year Bonds were "listed on the New York Stock Exchange,"  
4 were marketed in the Southern District of New York, were made  
5 "payable . . . in the Borough of Manhattan," New York City, and  
6 "entitle[d] the holder to payment upon demand." (Compl. ¶¶ 6, 8,  
7 & 13) According to Mortimer, each obligor bank is severally  
8 liable for a value of the Bonds proportionate to its share of the  
9 underlying loans, and obligor banks located in West Germany and  
10 East Germany are liable for 35.5 and 64.5 % of the Bonds' debt,  
11 respectively. Mortimer, 2007 WL 2822214, at \*1.

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The FRG asserts on appeal that only nine of the issuer banks are located in its territory, and that the other five are located in present-day Poland and Russia. However, the FRG cites no support for this proposition, which is contradicted by its own representations to the district court. At the February 16, 2007 district court proceedings, Judge Lynch had the following exchange with Mortimer:

[MORTIMER'S COUNSEL]: Well, it's a question of fact as to where the issuers were actually located and whether the law--

THE COURT: But that's not in dispute. We know who the 14 issuers were; there's no factual dispute about where those banks were located. You can give me a map and point to where the boundaries of the former VRD [sic] and the former democratic republic were, and nobody is fighting about that, we don't need discovery, everybody knows where the banks were.

(Tr. 35:5-12.) At no point during these proceedings did the FRG contend that some of the obligor banks were in Poland, Russia, or anywhere outside of former West German and East German territory.

1     **I.     Historical and Legal Background**

2             **A.     German History**

3             The FRG, as it “exists today[,] is the product of a long,  
4     contentious, and disparate history.” Martin A. Rogoff, The  
5     European Union, Germany, and the Länder: New Patterns of  
6     Political Relations in Europe, 5 Colum. J. Eur. L. 415, 417  
7     (1999). For many centuries, German territory, then part of the  
8     Heiliges römisches Reich (Holy Roman Empire or “First Reich”),  
9     consisted of “several hundred discrete political units.” Id.

10            The modern German nation-state was formed in 1871, when most  
11    of these units were “united into one [centralized] state under  
12    the leadership of [the Kingdom of] Prussia,” id., a monarchy, and  
13    officially called the Deutsches Reich (“German Reich” or “Second  
14    Reich”). In 1919, after World War I ended, the King of Prussia  
15    abdicated his throne and the Deutsches Reich was declared the  
16    Weimar Republic.<sup>2</sup> The German Reich was made up of several states  
17    or Länder, the largest of which was the “Free state of Prussia,”  
18    Michael Stolleis, A History of Public Law in Germany, 1914-1945,  
19    108-09 (Thomas Dunlap trans., Oxford Univ. Press 2004), that  
20    encompassed territory later comprising both West Germany and East

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1     <sup>2</sup> Mortimer’s complaint alleged that the FRG succeeded to the  
2     debts of the “German Reich.” (Compl. ¶ 11.) Because Mortimer  
3     seeks to enforce bonds issued in 1928, during which German  
4     territory was part of the Weimar Republic’s Deutsches Reich, we  
5     interpret Mortimer’s references to, and employ the term, “German  
6     Reich” to refer to the Weimar Republic.

1 Germany.

2 In 1933, as a result of growing discontentment with the  
3 Weimar government, the Nazi Party rose to power and Adolf Hitler  
4 was appointed Chancellor of Germany. Over the next few years,  
5 the Drittes Reich ("Third Reich"), formally abolished the Länder  
6 parliaments, Rogoff, 5 Colum. J. Eur. L. at 418, and became a  
7 centralized totalitarian state. In 1939, under Hitler's  
8 dictatorship, the Third Reich invaded Poland, and in 1941,  
9 attacked the Soviet Union and declared war on the United States,  
10 thereby beginning World War II in Europe. See generally William  
11 L. Shirer, The Rise and Fall of the Third Reich: A History of  
12 Nazi Germany (1960).

13 In 1949, four years after World War II ended, the western  
14 eleven Länder that were controlled by France, the United Kingdom,  
15 and the United States merged to form West Germany, a market  
16 economy, and the five Länder in the eastern sector occupied by  
17 the Soviet Union became East Germany, a communist Eastern block  
18 state that remained under the Soviet Union's political and  
19 military control.

20 On October 3, 1990, West and East Germany were reunified,  
21 thereby creating the present-day FRG.

## 22 **B. Foreign Currency Bonds**

23 After the First World War, German enterprises sold a large  
24 number of bearer bonds which were underwritten, marketed, and



1 payable in the United States. See Abrey v. Reusch, 153 F. Supp.  
2 337, 339-42 (S.D.N.Y. 1957) (detailing the history of the  
3 validation laws and treaties relating to the bearer bonds); Dix  
4 v. Comm'r, 34 T.C. 837, 838-39 (1960) (same); J. L. Simpson, The  
5 Agreement on German External Debts, 6 Int'l & Comp. L.Q. 472,  
6 472-86 (1957) (same). Prior to World War II, the issuers  
7 repurchased many of these bonds for eventual retirement and  
8 submitted them to meet sinking fund and amortization  
9 requirements. Abrey, 153 F. Supp. at 339. After World War II  
10 began, it became "impossible to present such bonds to the  
11 American trustees or paying agents for cancellation." Id. As a  
12 result, German bank vaults held "large numbers" of reacquired,  
13 yet uncanceled foreign currency bonds, in negotiable form, that  
14 "no longer represented valid obligations." Id.

15 After Germany surrendered in 1945, Russian occupation forces  
16 seized and returned to circulation many such bonds with an  
17 estimated total face value of \$350,000,000, while bona fide  
18 purchasers possessed approximately \$250,000,000 in valid bearer  
19 bonds. Id. The invalid, but uncanceled bearer bonds posed a  
20 significant problem, both domestically and internationally, as  
21 there was a

22 real possibility that the eventual holders of the looted  
23 bonds would share the available assets . . . of the  
24 German obligors equally with the legitimate bondholders,  
25 a large number of whom were nationals of the United  
26 States. Moreover, the free and open trading in the

1 United States of all German Dollar Bonds was impeded by  
2 the [resulting] uncertainties . . . .

3  
4 Id. This problem of reacquired, yet uncanceled bonds is  
5 integral to the issues on appeal and several legislative acts and  
6 treaties that West Germany and the United States subsequently  
7 signed.

8 The parties have asserted that the following laws,  
9 agreements, and treaties bear on the question of whether the FRG  
10 has assumed liability for the Bonds Mortimer seeks to enforce:  
11 (1) the Validation Law<sup>3</sup> and accompanying 1953 Treaty,<sup>4</sup> (2) the  
12 London Debt Accord,<sup>5</sup> (3) the 1960 Treaty,<sup>6</sup> and (4) the  
13 Unification Treaty.<sup>7</sup> We briefly summarize the relevant portions  
14 of each of these documents.

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1 <sup>3</sup> Gesetz zur Bereinigung von deutschen Schuldverschreibungen,  
2 die auf ausländische Währung lauten (Bereinigungsgesetz für  
3 deutsche Auslandsbonds-AuslWBG) [Validation Law for German  
4 Foreign Currency Bonds], Aug. 25, 1952, BGBI.I, at 553 (F.R.G.),  
5 translated in BGBI.II, at 305 (hereinafter Validation Law).

1 <sup>4</sup> Certain Matters Arising from the Validation of German Dollar  
2 Bonds, U.S.-F.R.G., Apr. 1, 1953, 4 U.S.T. 886, T.I.A.S. No. 2794  
3 (entered into force Sept. 16, 1953) (hereinafter 1953 Treaty).

1 <sup>5</sup> Agreement on German External Debts, U.S.-F.R.G., Feb. 27,  
2 1953, 4 U.S.T. 445 (hereinafter London Debt Accord).

1 <sup>6</sup> Second Agreement Regarding Certain Matters Arising from the  
2 Validation of German Dollar Bonds, U.S.-F.R.G., Aug. 16, 1960, 12  
3 U.S.T. 944 (hereinafter 1960 Treaty).

1 <sup>7</sup> Vertrag zwischen der Bundesrepublik Deutschland und der  
2 Deutschen Demokratischen Republik über die Herstellung der Einheit  
3 Deutschlands (Einigungsvertrag) [The Treaty between the Federal  
4 Republic of Germany and the German Democratic Republic on the  
5 Establishment of German Unity (Unification Treaty)], Aug. 31,  
6 1990, BGBI.II, at 889, translated in 30 I.L.M. 457 (hereinafter  
7 Unification Treaty).

1           1.    Validation Law and 1953 Treaty

2           The 1953 Treaty and Validation Law were part of the overall  
3 process of quelling uncertainty about, and facilitating the  
4 "orderly settlement of," debts owed by territory that became West  
5 Germany after World War II, 1953 Treaty, 4 U.S.T. at 888.  
6 Specifically, the 1953 Treaty, to which West Germany, the United  
7 States, and various other Western Allied nations were  
8 signatories, incorporated by reference the 1952 Validation Law,  
9 see id., pursuant to which West Germany allegedly assumed  
10 liability for certain specified foreign currency bonds issued  
11 before the end of World War II, see Validation Law, BGBI.II, at  
12 327, Schedule C.IV, and implemented a series of procedures to  
13 determine the validity of such bonds and to screen out invalid  
14 ones. The Agricultural Bonds, the category of bonds at issue in  
15 this case, are included in the schedule of foreign currency bonds  
16 covered by the Validation Law, see id. at 327, Schedule C.IV  
17 (19), and therefore subject to the Validation Law's procedures,  
18 see id. at 306, Arts. 1-2.

19           The Validation Law requires, inter alia, that the specified  
20 bonds held on January 1, 1945, outside West German borders as  
21 they existed in 1937, be registered, submitted along with  
22 relevant evidence, and validated after an administrative hearing  
23 by a Board for the Validation of German Bonds in the United  
24 States ("Validation Board") in Germany or the country of

1 offering. See id., at 306, Art. 3; id. at 407, Art. 8; id. at  
2 310-11, Art. 23.

3 2. London Debt Accord

4 Negotiated contemporaneously in 1953, the London Debt Accord  
5 - signed by West Germany, the United States and several other  
6 nations, but not East Germany - aimed "to remove obstacles to  
7 normal economic relations" with other nations and to  
8 "facilitat[e] a resumption of payments on [its] external debts."  
9 London Debt Accord, 4 U.S.T. at 446. The London Debt Accord  
10 represented the culmination of the parties' settlement  
11 negotiations respecting West Germany's pre-World War II external  
12 debts. See Simpson, Agreement on German External Debts, 6 Int'l  
13 & Comp. L.Q. at 472-74. West Germany agreed, in relevant part,  
14 to satisfy its "pecuniary obligations arising out of loan or  
15 credit contracts entered into before 8th May, 1945." London Debt  
16 Accord, 4 U.S.T. at 448, Art. 4(1)(b). In doing so, it did not  
17 repeal the validation requirements, stating that "[o]nly such  
18 creditors shall be entitled to benefit under [the Accord], as . .  
19 . accept the offer, or, in the case of other debts, assent to the  
20 establishment in accordance with such provisions of terms of  
21 payment and other conditions in respect of such debts." Id. at  
22 453, Art. 15(1).

23 The parties to the London Debt Accord anticipated the  
24 possibility of the reunification of West Germany and East Germany

1 by agreeing to "review the present Agreement" and to "mak[e]  
2 equitable adjustments" respecting East Germany's debts upon  
3 reunification. Id., at 459, Art. 25. However, they refrained  
4 from delineating what those adjustments would be. As such,  
5 despite the discussion of East Germany's debts, the London Debt  
6 Accord did not obligate West Germany, after reunification, to  
7 compensate holders of bonds issued in what became East Germany  
8 after reunification. See id.

### 9 3. 1960 Treaty

10 Seven years later, West Germany and the United States  
11 executed the 1960 Treaty, which amended the 1953 Treaty by  
12 extending the Validation Law to seven categories of bonds issued  
13 by utilities and mining corporations in territory that became  
14 East Germany. See 1960 Treaty, 12 U.S.T. at 944-45. The 1960  
15 Treaty, however, did not extend the Validation Law to the  
16 Agricultural Bonds issued in the territory that became East  
17 Germany.

### 18 4. Unification Treaty

19 On August 31, 1990, West Germany and East Germany signed the  
20 Unification Treaty reuniting the two nations into the present-day  
21 FRG. Unification Treaty, BGBI.II, at 889. Subject to certain  
22 limitations, West Germany's then-existing laws and legal  
23 obligations continued to be valid and were extended to the former  
24 East Germany: West German federal law applied in former East

1 German territory "unless [a given law's] area of applicability  
2 [wa]s restricted to [West Germany] and unless otherwise provided  
3 in this Treaty, notably Annex I," id. at 469-70, Art. 8, as did  
4 "international treaties . . . to which [West Germany wa]s a  
5 contracting party," id. at 471, Art. 11.

6 Article 11 then provided exceptions for "the treaties named  
7 in Annex I." 30 I.L.M. at 471. Annex I, in turn, prohibited  
8 "the entry into force of federal law" of "the Securities  
9 Validation Act in the revised version published in Part III of  
10 the Federal Law Gazette under no. 4139-2, as most recently  
11 amended by Article 95(3) of the Law of December 14, 1976 (BGBl.1,  
12 p.3341)." Unification Treaty, App. I Ch. IV.A.I(9), translation  
13 available at <http://www.juris.de> (German Ministry of Justice,  
14 juris GmbH). Mortimer alleges that this language means that the  
15 Validation Law was not extended to cover the East German Bonds.

16 The Unification Treaty also provided that the FRG "shall  
17 take over the sureties, guarantees and warranties assumed by  
18 [East Germany] and debited to its state budget prior to  
19 unification." Unification Treaty, 30 I.L.M. at 479, Art. 23(6).

## 20 **II. Procedural Background**

### 21 **A. Original Complaint**

22 In December 2005, Mortimer commenced this action, claiming  
23 that the FRG "guaranteed, succeeded to, and/or assumed [liability  
24 for] the outstanding and unpaid principal and interest" under the

1 Bonds. (Compl. ¶ 11.)

2 In June 2006, the FRG filed a motion to dismiss this action  
3 pursuant to Federal Rules of Civil Procedure 12(b)(1) and  
4 12(b)(6), for lack of subject matter jurisdiction pursuant to the  
5 Foreign Sovereign Immunities Act (the "FSIA"), 28 U.S.C. § 1602  
6 et seq., and for failure to state a claim, respectively. See  
7 Mortimer, 2007 WL 2822214, at \*2, 6. In response, Mortimer  
8 submitted declarations of support from two of its attorneys  
9 asserting first, that discovery was necessary to determine the  
10 scope and validity of the Validation Law, the validation  
11 procedures, and the Reunification Treaty, and second, that after  
12 unification, the validation procedures no longer apply.

13 On September 27, 2007, the district court denied the FRG's  
14 motion to dismiss for lack of subject matter jurisdiction.  
15 Mortimer, 2007 WL 2822214, at \*6. Analogizing the FRG's alleged  
16 assumption of "garden-variety" bond liability to routine, private  
17 commercial transactions, the district court held that the FSIA's  
18 commercial activity exception, 28 U.S.C. § 1605(a)(2), applies,  
19 thereby conferring subject matter jurisdiction over this case.  
20 Mortimer, 2007 WL 2822214, at \*4-6.<sup>8</sup>

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1 <sup>8</sup> The district court also found unavailing the FRG's  
2 contention that its alleged assumption of liability pursuant to  
3 an international treaty was not commercial and only constituted a  
4 "political act." See Mortimer, 2007 WL 2822214, at \*5-6. We  
5 consider this argument abandoned, because the FRG did not  
6 reassert it on appeal. See Storey v. Cello Holdings, L.L.C., 347  
7 F.3d 370, 380 n.6 (2d Cir. 2003) (holding that a party abandoned  
8 an argument by failing to raise it in its appellate brief).

1           The district court, however, granted the FRG's motion to  
2 dismiss on the basis that Mortimer's complaint failed to state a  
3 claim. Id. at \*11. The district court noted that "unlike  
4 private parties, sovereigns can only assume liability for debt of  
5 predecessor states through explicit acts that leave traces in  
6 legal documents." Id. at \*9 (emphasis in original). With  
7 respect to the West German Bonds, the district court determined  
8 that "the Validation Law is the only apparent source of [the  
9 FRG]'s liability," id. at \*7, and that Mortimer could not  
10 "receive relief on its claim" because it had "not yet complied  
11 with the administrative process created by the Validation Law,"  
12 id. at \*11. As for the East German Bonds, the district court  
13 found that West Germany had not assumed liability under the  
14 London Debt Accord, and that, even assuming arguendo that West  
15 Germany had done so by way of the Validation Law and 1953 Treaty,  
16 Mortimer's "failure to comply with [the validation procedures]  
17 doom[ed] [its] claim." Id. at \*10.<sup>9</sup> The district court  
18 concluded that Mortimer did not "affirmatively plead the source  
19 of [the FRG]'s obligation to satisfy the Bonds," id. at \*8, and  
20 thus failed to "state a claim to relief that is plausible on its  
21 face," id. at \*6 (quoting Bell Atl. Corp. v. Twombly, 550 U.S.

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1           <sup>9</sup> The district court did not discuss whether East Germany  
2 assumed liability for the East German Bonds, although it  
3 impliedly rejected such a conclusion by requiring Mortimer to  
4 affirmatively plead the source of the FRG's alleged assumption of  
5 liability for the Bonds.



1 544, 570 (2007)).

2 **B. Proposed Amended Complaint**

3 On December 12, 2007, Mortimer filed motions pursuant to  
4 Federal Rule of Civil Procedure 59(e) to amend the judgment and  
5 for leave to file an amended complaint. With respect to the West  
6 German Bonds, the proposed amended complaint alleged that the  
7 London Debt Accord and 1953 Treaty do not require bondholders  
8 seeking to enforce their bonds against the FRG to comply with the  
9 validation procedures, and that, in any event, the Validation Law  
10 no longer applies after unification. As for the East German  
11 Bonds, the proposed amended complaint listed various "acts of  
12 recognition" by which Mortimer alleged that the FRG "repeatedly  
13 recognized its obligation for the pre-war external debt of the  
14 German Reich and the [s]tate of Prussia." (Proposed Am. Compl. ¶  
15 15.) The proposed amended complaint also averred that the  
16 Unification Treaty exempts the East German Bonds from the  
17 validation procedures.

18 On April 9, 2007, the district court denied Mortimer's  
19 motion as "essentially an effort to reargue the basic rationale"  
20 underlying the dismissal of the claim. Mortimer, No. 05 Civ.  
21 10669, Order at 1. The district court reasoned that Mortimer's  
22 added allegations that the FRG adopted the obligations of former  
23 East Germany by taking over its territory and by entering into  
24 the Unification Treaty of 1990 "d[id] not explain how the former

1 East German state assumed any liability on the [B]onds, or how  
2 the provisions of the Validation Law [were] overcome." Id. The  
3 district court also concluded that "the relation of the present  
4 Federal Republic to the pre-war governments of Germany is a  
5 classic example of state succession" and not simply a change of  
6 government. Id. at 2.

7 Mortimer appealed, challenging both the dismissal of its  
8 complaint for failure to state a claim, and the denial of its  
9 motions to amend the judgment and for leave to file an amended  
10 complaint. The FRG cross-appealed, challenging the district  
11 court's holding that it had subject matter jurisdiction over  
12 Mortimer's claim under the FSIA.<sup>10</sup>

## 13 **DISCUSSION**

### 14 **I. Subject Matter Jurisdiction Pursuant to the FSIA**

15 The FSIA, which "is the sole source for subject matter  
16 jurisdiction over any action against a foreign state," Cabiri v.  
17 Republic of Ghana, 165 F.3d 193, 196 (2d Cir. 1999), provides  
18 that a foreign sovereign "shall be immune from the jurisdiction  
19 of the courts of the United States," 28 U.S.C. § 1604, unless one  
20 of the FSIA's exceptions applies, 28 U.S.C. §§ 1605-07. In  
21 deciding subject matter jurisdiction pursuant to the FSIA, we

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1 <sup>10</sup> Tai-Heng Cheng, Associate Professor of Law at New York Law  
2 School, and Roger P. Alford, Professor of Law at Pepperdine  
3 University School of Law, filed an amici curiae brief in support  
4 of Mortimer.

1 review district court factual findings for clear error and legal  
2 conclusions de novo. Karaha Bodas Co. v. Perusahaan Pertambangan  
3 Minyak Dan Gas Bumi Negara, 313 F.3d 70, 80 (2d Cir. 2002).

4 The burden is on the defendant seeking sovereign immunity to  
5 show it is a foreign sovereign. Matar v. Dichter, 563 F.3d 9, 12  
6 (2d Cir. 2009). If the defendant makes this showing, the burden  
7 then shifts to the plaintiff to show that a FSIA-enumerated  
8 exception to sovereign immunity applies. Id. Under the FSIA, in  
9 the context of a Rule 12(b)(1) motion based on factual  
10 insufficiency, a court may look beyond the pleadings, to the  
11 evidence properly before it, and assess the substance of the  
12 allegations "to determine whether one of the exceptions to the  
13 FSIA's general exclusion of jurisdiction over foreign sovereigns  
14 applies." Id. at 140 & n.6 (citations omitted). The district  
15 court should make this determination recognizing that "a motion  
16 to dismiss based on an assertion of sovereign immunity has  
17 particular significance because . . . [s]overeign immunity under  
18 the FSIA is immunity from suit, not just from liability."  
19 Robinson, 269 F.3d at 141 (internal quotation omitted).

20 The question we must answer in this case is whether the  
21 commercial activity exception to foreign sovereign immunity

1 provided by section 1605(a)(2) of the FSIA applies. Section  
2 1605(a)(2) states, in relevant part, that a foreign state is not  
3 immune where

4 the action is based [i] upon a commercial activity  
5 carried on in the United States by the foreign state; or  
6 [ii] upon an act performed in the United States in  
7 connection with a commercial activity of the foreign  
8 state elsewhere; or [iii] upon an act outside the  
9 territory of the United States in connection with a  
10 commercial activity of the foreign state elsewhere and  
11 that act causes a direct effect in the United States.

12  
13 28 U.S.C. § 1605(a)(2). Mortimer relies upon the third clause of  
14 section 1605(a)(2) to establish jurisdiction; thus, we need  
15 consider only “whether this lawsuit is (1) ‘based . . . upon an  
16 act outside the territory of the United States’; (2) that was  
17 taken ‘in connection with a commercial activity’ of [the foreign  
18 state] outside this country; and (3) that ‘cause[d] a direct  
19 effect in the United States.’” Republic of Argentina v.  
20 Waltover, Inc., 504 U.S. 607, 611 (1992) (quoting 28 U.S.C. §  
21 1605(a)(2). The parties agree that the alleged acts at issue  
22 took place outside of the United States and caused direct effects  
23 in the United States. Mortimer, 2007 WL 2822214, at \*3.  
24 Accordingly, our concern is whether, upon the complaint, an  
25 alleged act occurred and, if so, whether it occurred “in  
26 connection with a commercial activity of the foreign state.” 28

1 U.S.C. § 1605(a) (2). If either of these did not occur then the  
2 foreign state enjoys sovereign immunity under the FSIA and the  
3 claim against the state must be dismissed for lack of subject  
4 matter jurisdiction.

5 We begin our analysis by "identifying the particular conduct  
6 on which [Mortimer's] action is 'based' for purposes of the Act."  
7 Saudi Arabia v. Nelson, 507 U.S. 349, 356-57 (1993) (internal  
8 citation omitted). The act is defined by the "elements of a  
9 claim that, if proven, would entitle [Mortimer] to relief under  
10 [its] theory of the case." Id. The alleged conduct that forms  
11 the basis of Mortimer's action is the assumption of liability by  
12 the FRG, and earlier by West Germany and East Germany, for the  
13 Bonds issued by banks in the territory that became West Germany  
14 and East Germany.

15 The next step in our analysis is to determine (a) whether  
16 the foreign state (in this case, the FRG, West Germany, or East  
17 Germany) actually assumed liability for the Bonds, (b) whether  
18 the state committed an action in doing so, and (c) whether the  
19 assumption of liability was an action "in connection with a  
20 commercial activity" of the state that assumed liability.  
21 Mortimer seeks to recover bonds issued by banks in the territory

1 that became both West Germany and East Germany, and we address  
2 each in turn.

3 **A. The West German Bonds**

4 Mortimer's original complaint contended that West Germany,  
5 and subsequently the FRG, assumed liability for the Bonds, 35.5%  
6 of which were issued in what later became West Germany. It  
7 alleged that West Germany obligated itself to honor the terms of  
8 these bonds by enacting the Validation Law, see Validation Law,  
9 BGBI.II at 306, Arts. 1-3; id. at 327, Schedule C.IV, and by  
10 adopting the 1953 Treaty; it further alleged that upon  
11 reunification the FRG agreed to honor West Germany's laws and  
12 treaties, resulting in the FRG's assumption of West Germany's  
13 obligation for its share of the Bonds. See Unification Treaty,  
14 30 I.L.M. at 471, Art. 11. The FRG disagrees, contending that it  
15 did not assume liability for any bonds that were issued in what  
16 later became West Germany and that, pursuant to the London Debt  
17 Accord, its responsibility in relation to properly validated West  
18 German Bonds was only that of a "transfer agent." We need not  
19 determine the FRG's obligations respecting properly validated  
20 West German Bonds to resolve this appeal because the FRG waived  
21 its "transfer agent" argument by failing to present it to the

1 district court. See Paese v. Hartford Life & Accidents Inc. Co.,  
2 449 F.3d 435, 446 (2d Cir. 2006) (failure to raise an argument  
3 below generally bars appellate consideration of it); Suez Equity  
4 Investors, L.P. v. Toronto-Dominion Bank, 250 F.3d 87, 104 (2d  
5 Cir. 2001).

6 Before the district court, the FRG neither contended that it  
7 was not liable for properly validated West German Bonds, nor  
8 contested Mortimer's allegations that the FRG assumed liability  
9 for payment of the relevant bond obligations under the Validation  
10 Law and the 1953 Treaty. In its motion to dismiss for lack of  
11 subject matter jurisdiction, the FRG agreed that it had assumed  
12 liability for properly validated West German Bonds but asserted  
13 that this assumption of liability was sovereign in character and  
14 therefore entitled to immunity pursuant to the FSIA. Likewise,  
15 in its motion to dismiss for failure to state a claim, the FRG  
16 did not dispute Mortimer's allegation that the FRG had assumed  
17 liability for properly validated West German Bonds. The FRG  
18 argued instead that Mortimer had not, and could not, state a  
19 claim because Mortimer had failed to comply with the requirements  
20 of the Validation Law.

1           Because the FRG presented no argument to the district court  
2     disputing its liability for properly validated West German Bonds,  
3     the district court's order simply set forth a then-undisputed  
4     proposition: "West Germany assumed liability for certain bonds  
5     issued prior to the end of World War II, and by operation of the  
6     [1953] Treaty, its liability was extended to bonds offered in the  
7     United States." Mortimer, 2007 WL 2822214, at \*1. The statement  
8     was a summary of facts assumed as true by both parties. As a  
9     consequence of the FRG's failure to dispute its assumption of  
10    liability over properly validated West German Bonds to the  
11    district court, it may not raise that argument on appeal.

12           Starting from the premise that West Germany and the FRG  
13    assumed liability for properly validated West German Bonds, we  
14    conclude that this affirmative assumption of liability plainly  
15    constitutes an action under section 1605(a)(2) of the FSIA. The  
16    FSIA defines commercial activity as "a regular course of  
17    commercial conduct or a particular commercial transaction or act"  
18    whose "character . . . shall be determined by reference to the  
19    nature of the course of conduct or particular transaction or act,  
20    rather than by reference to its purpose." 28 U.S.C. § 1603(d).  
21    In Weltover, the Supreme Court held that Argentina's issuance of



1 "garden-variety" bonds as an "emergency measure[]" to refinance  
2 the country's debt constituted commercial activity for FSIA  
3 purposes. 504 U.S. at 609, 615. The Supreme Court clarified  
4 that the "nature" and not the "purpose" of a transaction  
5 "control[s] in determining commerciality" under section  
6 1605(a)(2). Id. at 615. Applying this principle, the Weltover  
7 Court determined that "when a foreign government acts, not as  
8 regulator of a market, but in the manner of a private player  
9 within it, the foreign sovereign's actions are 'commercial'  
10 within the meaning of the FSIA." Id. at 614 (emphasis omitted).

11 Private parties can and often do assume liability for bonds  
12 in trade or commerce. This would occur, for example, when, after  
13 issuing bonds, Company A is acquired by and merged into Company  
14 B, which then assumes liability for Company A's bonds. By  
15 allegedly assuming obligations under the Bonds, the FRG, like  
16 Argentina in Weltover, engaged in activity routinely undertaken  
17 by private parties. There is "nothing distinctive about [the  
18 FRG]'s assumption of debt (other than perhaps its purpose) that  
19 would cause it . . . to be classified" as non-commercial  
20 activity. Id. at 615; see also Jackson v. People's Republic of  
21 China, 550 F. Supp. 869, 873 (D. Ala. 1982) (applying the

1 commercial activity exception to bonds issued by China on the  
2 basis that “[i]t is clear that the sale, issuance of sale and  
3 authorization of issuance for sale in the United States  
4 constitutes a ‘commercial activity’”); cf. In re Terrorist  
5 Attacks on Sept. 11, 2001, 538 F.3d 71, 92 (2d Cir. 2008)  
6 (finding no commercial activity where defendants allegedly made  
7 “donations to charity” that were not “part of the trade and  
8 commerce engaged in by a merchant in the marketplace” (internal  
9 quotation marks omitted)). The commercial nature of the act of  
10 assuming the West German Bonds “is confirmed by the fact that  
11 [the Bonds] are in almost all respects garden-variety debt  
12 instruments: They may be held by private parties; they are  
13 negotiable and may be traded on the international market . . . ;  
14 and they promise a future stream of cash income.” Weltover, 504  
15 U.S. at 615.

16 The FRG does not challenge the conclusion that assumption of  
17 liability of the Agricultural Bonds would be an act in connection  
18 with a commercial activity under the FSIA; rather, it argues, as  
19 it did below, that even if it has assumed liability for properly  
20 validated West German Bonds, the commercial activity exception  
21 would not apply to Mortimer’s West German Bonds because Mortimer

1 failed to satisfy the settlement conditions set forth in the  
2 London Debt Agreement by not complying with the validation  
3 procedures. We are unpersuaded that non-compliance with the  
4 validation procedures undermines the applicability of the  
5 commercial activity exception to the FSIA. The issue of whether  
6 Mortimer complied with the validation procedures does not touch  
7 upon any of the requirements of the commercial activity  
8 exception, which is concerned with the conduct of the foreign  
9 state and not the allegedly aggrieved party. Mortimer's alleged  
10 lack of compliance does not implicate whether the challenged  
11 conduct occurred outside of the United States, was based upon an  
12 act in connection with the commercial activity of the foreign  
13 state, or caused a direct effect in the United States. 28 U.S.C.  
14 § 1605(a)(2). Taking up the validation issue at the  
15 jurisdictional stage would thus be premature. See Ex parte  
16 McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) ("Jurisdiction is  
17 power to declare the law, and when it ceases to exist, the only  
18 function remaining to the court is that of announcing the fact  
19 and dismissing the cause."); Robinson, 269 F.3d at 141  
20 ("[J]urisdiction is not defeated by the possibility that the

1 averments might fail to state a cause of action.'" (quoting Bell  
2 v. Hood, 327 U.S. 678, 682 (1946)).

3 Finally, even if we were to accept the FRG's contention that  
4 it did not assume liability and merely acted as a transfer agent,  
5 this court would still have jurisdiction over Mortimer's action  
6 pursuant to the FSIA's commercial activity exception. In  
7 Transamerican Steamship Corp. v. Somali Democratic Republic, 767  
8 F.2d 998, 1002-03 (D.C. Cir. 1985), the only case upon which the  
9 FRG relies for its transfer agent theory, the D.C. Circuit  
10 rejected a similar argument and found that the Somali embassy  
11 "exceeded the bounds of ordinary diplomatic behavior" by  
12 "collecting and holding funds and advising a principal as to  
13 their receipt." As the D.C. Circuit stated, "[t]he proper  
14 inquiry is whether [the state] acted in a sovereign or  
15 essentially private capacity." Id. at 1002. Because private  
16 parties frequently take on similar "transfer agent" obligations,  
17 this court would have jurisdiction even if the court were to  
18 accept the FRG's argument that it merely acted as a transfer  
19 agent.

20 Accordingly, we agree with the district court that the  
21 FSIA's commercial activity exception applies to the West German

1 Bonds and affirm the district court's denial of the FRG's motion  
2 to dismiss Mortimer's claims on the West German Bonds for lack of  
3 subject matter jurisdiction.

#### 4 **B. The East German Bonds**

5 Turning to the East German Bonds, our jurisdictional  
6 determination is different. Looking to the allegations in the  
7 complaint and the proposed amended complaint, as well as the  
8 evidence properly before us, we hold that Mortimer failed to meet  
9 its jurisdictional burden with respect to enforcing the East  
10 German Bonds against the FRG.

11 Mortimer seeks to enforce the 64.5% of the Bonds issued by  
12 Prussian banks located in territory that became East Germany.  
13 Mortimer argues that jurisdiction is appropriate under two  
14 theories. Its first theory, predicated on successor state  
15 liability, alleges that liability exists on the basis of the  
16 FRG's formal takeover of "the territory covering the East German  
17 provincial and communal debt . . . represented by the Bonds."  
18 (Proposed Am. Compl. ¶ 15.) Its second theory, predicated on  
19 affirmative assumption of liability, alleges that the FRG  
20 "entered into an agreement . . . in which it assumed liability  
21 for the pre-war external debt of the German Reich," and

1 "acknowledg[ed] and confirm[ed] [its] payment obligations under  
2 the Bonds" (Compl. ¶¶ 11, 20); however, the complaint neither  
3 specified nor provided copies of treaties or other legislative  
4 documents as sources of that alleged liability. In contrast,  
5 Mortimer's proposed amended complaint identified various "acts of  
6 recognition" by which the FRG allegedly "recognized its  
7 obligation for the pre-war external debt of the German Reich[,]  
8 the [s]tate of Prussia," and East Germany, but it proffered no  
9 evidence of an explicit assumption of liability. (Proposed Am.  
10 Compl. ¶ 15.)

11 We hold that automatic assumption of liability by a  
12 successor state, even if established, would not meet the  
13 requirements of the FSIA's commercial activity exception. We  
14 further find that there is no evidence presented that East  
15 Germany and the FRG explicitly assumed liability for any East  
16 German Agricultural Bonds, unlike West Germany, which  
17 affirmatively and unequivocally assumed liability for valid West  
18 German Agricultural Bonds by enacting the Validation Law and  
19 subsequent treaties, see, e.g., Validation Law, BGBI.II, at 327,  
20 Schedule C.IV(19). Accordingly, we find that subject matter

1 jurisdiction is lacking over Mortimer's cause of action against  
2 East Germany.

3 1. Successor State Assumption of Liability

4 State succession occurs when one State is replaced by  
5 another in its "responsibility for the international relations of  
6 territory." Paul Williams & Jennifer Harris, State Succession to  
7 Debts and Assets: The Modern Law and Policy, 42 Harv. Int'l L.J.  
8 355, 362 & n.21 (2001) (internal quotation marks and citations  
9 omitted). The Third Restatement of Foreign Relations Law  
10 provides that "where part of the territory of a state becomes  
11 territory of another state, local public debt [is] transferred to  
12 the successor state; [and] where a state is absorbed by another  
13 state, the public debt . . . pass[es] to the absorbing state."  
14 Restatement (Third) of Foreign Relations Law § 209(2) (a)-(b)  
15 (1987).

16 Mortimer alleges that East Germany and the FRG automatically  
17 acceded to liability for the East German Bonds as successor  
18 states of Prussia and that this assumption of liability  
19 constitutes an "action . . . based upon a commercial activity"  
20 28 U.S.C. § 1605(a) (2). While we have our misgivings as to  
21 whether successor state liability is even applicable in this

1 case,<sup>11</sup> we need not reach that question. Even if we were to find  
2 successor state liability, Mortimer's cause of action would

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1 <sup>11</sup> See 767 Third Ave. Assocs. v. Consulate Gen. of Socialist  
2 Federation of Yugoslavia, 218 F.3d 152, 161 (2d Cir. 2000)  
3 (stating that "[t]here is no [absolute] rule of law that  
4 automatically subrogates successor states to their predecessor's  
5 debt"); Restatement (Third) of Foreign Relations Law, at IX  
6 (stating that the Restatement is "in no sense an official  
7 document of the United States," because "a number of particulars  
8 . . . in [it] are at variance with positions that have been taken  
9 by the United States Government." (internal quotation marks  
10 omitted)). Successor state liability for the debts of the  
11 predecessor state is a far from settled issue of law. See  
12 Tai-Heng Cheng, Renegotiating the Odious Debt Doctrine, 70 Law &  
13 Contemp. Probs., Summer 2007, at 7, 11 (stating that "[t]here are  
14 no clear customary rules or multilateral treaties in force  
15 governing whether and when a successor state is responsible for  
16 the debts of its predecessor state" and that "[j]urists are  
17 divided on what the applicable rules might be," despite urging  
18 this court in his amici curiae brief to find in favor of  
19 Mortimer); see generally Williams & Harris, *supra*; Jeff A. King,  
20 Odious Debt: The Terms of the Debate, 32 N.C. J. Int'l L. & Com.  
21 Reg. 605, 609 & n.9 (2007) (providing numerous, conflicting  
22 sources). In 767 Third Avenue, we underscored the policy and  
23 institutional dangers of finding successor state liability,  
24 namely, that "[s]uch an outcome would directly 'interfere with  
25 executive foreign policy prerogatives.'" 218 F.3d at 160  
26 (quoting Can v. United States, 14 F.3d 160, 163 (2d Cir. 1994)).  
27

28 For example, reinforcing our concerns regarding interference  
29 with executive foreign policy prerogatives, the FRG has disavowed  
30 any liability for the East German Bonds throughout this  
31 litigation, and the FRG's Federal Court of Justice, its highest  
32 court for civil and criminal matters, recently denied the claim  
33 of a United States holder of German dollar bonds issued in 1925  
34 in a city located in what later became East Germany, concluding  
35 that neither East Germany nor the FRG succeeded to such debt  
36 automatically, under international law, or by way of an  
37 affirmative legislative act and treaty. See Bundesgerichtshof  
38 [BGH] [Federal Court of Justice] Oct. 25, 2005, 25 Entscheidungen  
39 des Bundesgerichtshofes in Zivilsachen [BGHZ] 353/04 (F.R.G.);  
40 cf. James V. Feinerman, Odious Debt, Old and New: The Legal  
41 Intellectual History of an Idea, 70 Law & Contemp. Probs., Fall  
42 2007, at 193, 197 n.17 ("Successor regimes that have renounced  
43 the debts of their predecessors include . . . East Germany.").



1 nevertheless not lie because it would fail to allege an "action .  
2 . . based upon a commercial activity." § 1605(a)(2). Accession  
3 to liability by the rules of customary international law entails  
4 no action by the successor state with respect to the commercial  
5 activity at issue - the assumption of liability. The state  
6 performs no action when it automatically assumes liability. This  
7 stands in sharp contrast to a country's assumption of liability  
8 through an explicit act, such as West Germany did here. E.g.,  
9 Weltover, 504 U.S. at 609, 615 (holding that Argentina's issuance  
10 of bonds was an action that satisfied the FSIA's commercial  
11 activity exception). Because no "action" within the meaning of §  
12 1605(a)(2) occurs when a successor state accedes to liability,  
13 the requirements of FSIA's commercial activity exception are not  
14 met in that context and jurisdiction under the FSIA based on such  
15 an accession will not lie.

16 2. Affirmative Assumption of Liability

17 Mortimer also alleges that the FRG acceded to obligations  
18 under the East German Bonds through various legislative documents  
19 and treaties referenced in the original and proposed amended  
20 complaints as "acts of recognition." If these documents were  
21 sufficient to establish that the FRG became obligated under the

1 East German Bonds, then FSIA jurisdiction would be present;  
2 however, they are insufficient, and jurisdiction is absent here  
3 as well.

4 The complaint alleged that “[a]fter World War II, Germany  
5 entered into an agreement with the Allied High Commission in  
6 which it assumed liability for the pre-war external debt of the  
7 German Reich.” (Compl. ¶ 11.) However, the complaint provided  
8 no further specifics respecting this “agreement.” Thus, we  
9 understand the complaint’s reference to “an agreement with the  
10 Allied High Commission” to refer to the London Debt Accord, which  
11 is the only possible, reasonable interpretation of Mortimer’s  
12 complaint.<sup>12</sup>

13 In addition, Mortimer’s proposed amended complaint specified  
14 “acts of recognition” by which the FRG allegedly “repeatedly  
15 recognized its obligation for the pre-war external debt of the

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1 <sup>12</sup> The district court similarly interpreted the complaint as  
2 “vaguely allud[ing] to . . . the London Debt Accord,” see  
3 Mortimer, 2007 WL 2822214, at \*10, and Mortimer has not contended  
4 on appeal that the complaint referred to a different agreement.  
5 Nor could we interpret Mortimer’s complaint as referring to the  
6 Validation Law, the 1953 Treaty, or the 1960 Treaty. With  
7 respect to the Validation Law and 1953 Treaty, neither document  
8 expressly provided for foreign currency bonds issued in the  
9 territory of East Germany and East Germany was not a signatory to  
10 the treaty. See 1953 Treaty, 4 U.S.T. at 887-91; Validation Law,  
11 BGBI.II at 305-27. As for the 1960 Treaty, although it extended  
12 the 1953 Treaty to some East German bonds, it did not do so for  
13 the Agricultural Bonds, and thus the East German Bonds at issue  
14 here. See 1960 Treaty, 12 U.S.T. at 944-45.

1 German Reich and the [s]tate of Prussia": (1) the Unification  
2 Treaty, 3 I.L.M. at 379, Art. 23(6); (2) a letter dated March 6,  
3 1951 from Konrad Adenauer, Chancellor, Federal Republic of  
4 Germany, to André François-Poncet, Chairman, Allied High  
5 Commission (Mar. 6, 1951), reprinted in 2 U.S.T. 1250, 1250,  
6 translated in 2 U.S.T. 1252, 1252 (hereinafter Adenauer Letter);  
7 and (3) a post-reunification Letter on Behalf of the Federal  
8 Republic of Germany to Office of the Chief Counsel, Securities  
9 and Exchange Commission (Feb. 18, 1994) (hereinafter SEC  
10 Filing).<sup>13</sup>

11 We examine each of these documents in turn to determine  
12 whether any of them constitutes an act conferring liability for  
13 the East German Bonds upon the FRG.

14 a. London Debt Accord

15 The FRG's Federal Court of Justice concluded in 2005 that  
16 the London Debt Accord does not govern foreign currency bonds  
17 issued in territory that became East Germany, and that applying

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1 <sup>13</sup> The fourth "act of recognition" Mortimer identified is [the  
2 FRG]'s formal takeover of "the territory covering the East German  
3 provincial and communal debt . . . represented by the Bonds."  
4 (Proposed Am. Compl. ¶ 15.) This argument is predicated upon a  
5 theory of successor state liability. Because we do not find such  
6 a theory cognizable under the FSIA's commercial activity  
7 exception, see supra, we reject this fourth "act of recognition."  
8

1 the Accord to such bonds would exceed the appropriate boundaries  
2 of judicial decision-making. See Bundesgerichtshof, 25 BGHZ  
3 353/04, at 19 ¶ 41. We agree.

4 Only two provisions of the London Debt Accord, adopted in  
5 1960 by West Germany, address West Germany's liability for the  
6 debts of either the German Reich or East Germany. Neither  
7 obligates West Germany to assume liability for the East German  
8 Bonds.

9 The first, Article 20, governs "Reich [d]ebts" and provides  
10 that West Germany will, "at the request of the interested  
11 creditors, enter into direct negotiations with regard to these  
12 debts." London Debt Accord, 4 U.S.T. at 457. This provision  
13 plainly applies only to debts of the German Reich "owing under  
14 [m]ultilateral [a]greements," meaning debts for which either the  
15 German Reich or West Germany had already assumed liability. Id.  
16 Even assuming arguendo that the East German Bonds constitute  
17 "Reich [d]ebts" for purposes of the London Debt Accord,<sup>14</sup> as  
18 Mortimer has maintained throughout this action, the Validation  
19 Law and 1953 Treaty, cover only foreign currency bonds issued in  
20 what later became West German territory. (See Tr. 30:16-19

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1 <sup>14</sup> This requires significant speculation given that Mortimer  
2 alleges only that the State of Prussia, one of the German Reich's  
3 Länder, guaranteed twelve of the fourteen obligor banks. **JA. 39.**

1 (Mortimer's counsel stated that "the validation law . . . . made  
2 every effort not to cover East Germany liabilities [sic] at the  
3 time. That's confirmed."); Tr. 36:18-21 (arguing that the 1953  
4 Treaty references and is governed by the Validation Law). Thus,  
5 Article 20 does not indicate that the Accord confers East German  
6 Bond liability upon West Germany.

7 The second provision, Article 25, specifically refers to  
8 bonds issued in territory that became East Germany, providing  
9 that "the Parties . . . will review the [Accord] on the  
10 reunification of Germany" to "mak[e] the [Accord's] provisions .  
11 . . applicable to the debts of persons residing in" East Germany.  
12 4 U.S.T. at 459. Although anticipating West and East Germany's  
13 reunification and the need to "mak[e] equitable adjustments,"  
14 respecting debts incurred in the territory of East Germany, id.,  
15 Article 25 and the remainder of the Accord refrained from  
16 delineating those possible adjustments, let alone imposing  
17 liability upon West Germany for any of East Germany's debts.  
18 Thus, we conclude that the London Debt Accord did not obligate  
19 the FRG to compensate holders of bonds issued in what became East  
20 Germany.

1                   b.    Unification Treaty

2           Mortimer's proposed amended complaint also alleged that upon  
3   unification, the FRG assumed liability for East Germany's debts,  
4   including the East German Bonds. Article 23 of the Unification  
5   Treaty provides that the FRG "shall take over the sureties,  
6   guarantees and warranties assumed by [East Germany] and debited  
7   to its state budget prior to unification." Unification Treaty,  
8   30 I.L.M. at 479, Art. 23(6). Article 23 is "based on the  
9   recognition that [the FRG] is liable for [East Germany's] state  
10   debts." Frowein, 86 Am. J. Int'l L. at 157. But, Mortimer's  
11   argument suffers from a critical flaw: the failure to allege how  
12   East Germany assumed liability for bonds issued by private banks  
13   located in the state of Prussia. As we concluded in our  
14   discussion of automatic successor liability, supra, Mortimer has  
15   failed to allege an affirmative act by which East Germany assumed  
16   liability for debt issued within the German Reich, let alone the  
17   state of Prussia. Thus, Mortimer's allegation that the  
18   Unification Treaty alone provides no basis for liability beyond  
19   speculation that East Germany assumed liability for the bonds. A  
20   claim based on such speculation is implausible. See Iqbal, 129  
21   S. Ct. at 1949.

1                   c.    Adenauer Letter and the FRG's SEC Filing

2                   The remaining documents referenced in Mortimer's amended  
3                   complaint are West German Chancellor Konrad Adenauer's letter to  
4                   the Allied Commission in 1951 opining that West Germany is  
5                   "liable for the pre-war external debt of the German Reich," 2  
6                   U.S.T. at 1252, and, the FRG's SEC filing in 1994 stating that  
7                   the FRG "is not only the successor to, but is identical with, the  
8                   German Reich under principles of international public law," and  
9                   that "holders of the interest coupons or talons . . . can look  
10                  only to the Federal Republic for payment," SEC Filing at 3.

11                  Neither document provides an independent legal basis for  
12                  holding the FRG liable for the East German Bonds. Mortimer has  
13                  identified, and we have located, no precedent holding a foreign  
14                  sovereign state liable based solely on a representation by its  
15                  head of state or an administrative filing made in the United  
16                  States on the sovereign's behalf. Moreover, neither document  
17                  expressly mentions the East German Bonds at issue; instead, each  
18                  discusses West Germany's affirmative assumption of liability for  
19                  the German Reich's pre-war external debts issued in what became  
20                  West Germany. It is at best ambiguous whether such statements  
21                  were intended to cover the East German Bonds, thereby expanding

1 the FRG's legal obligations, as opposed to discussing then-  
2 existing debts and obligations undertaken by West Germany in pre-  
3 existing multilateral agreements such as the 1960 Treaty.

4 Chancellor Adenauer's 1951 letter speaks only to West  
5 Germany's assumption of the German Reich's debt; it gives no  
6 indication that West Germany assumed more than the debt incurred  
7 in what became its territory or otherwise obligated itself to  
8 honor debt incurred in what became East Germany. Instead, the  
9 letter discusses West Germany's debts by reference to its  
10 obligation to "resume payments on the German external debt." 2  
11 U.S.T. at 1253. Moreover, Mortimer has never explained how West  
12 Germany might have assumed liability for the East German Bonds or  
13 would have had any motivation to do so prior to the 1951 letter,  
14 such as by way of a preexisting multilateral agreement.

15 The SEC filing cited by Mortimer provides that the FRG is  
16 liable for "certain bonds issued between 1924 and 1930 by the  
17 German Reich and the [s]tate of Prussia," and subsequently  
18 references "interest payments" that the present-day FRG  
19 "obligated itself to pay . . . following the reunification of  
20 Germany" under the London Debt Accord. SEC Filing at 1 (emphases  
21 added). As already explained, because the London Debt Accord



1 does not cover foreign currency bonds issued in the territory of  
2 East Germany, the SEC filing logically refers only to bonds  
3 issued in what became West German territory, bonds for which West  
4 Germany and thus the FRG repeatedly and affirmatively assumed  
5 liability, beginning with the Validation Law and 1953 Treaty.  
6 Accordingly, we conclude that neither letter expands the FRG's  
7 liability to encompass obligations for the East German Bonds.

8 After considering and rejecting all the documents identified  
9 by Mortimer's proposed amended complaint as potential bases for  
10 holding the present-day FRG liable for the East German Bonds as  
11 incapable of advancing Mortimer's claim for compensation, we are  
12 left with "mere conclusory statements," Iqbal, 129 S. Ct. at  
13 1949, in Mortimer's original complaint. These contentions fail  
14 to show anything "more than a sheer possibility," id., that the  
15 FRG assumed liability under the East German Bonds. We thus agree  
16 with the district court that leave to amend would be futile  
17 because Mortimer's proposed amended complaint did not cure the  
18 original complaint's deficiencies. See Acito, 47 F.3d at 55.

19 For the foregoing reasons, we affirm the judgment of the  
20 district court dismissing Mortimer's claim to enforce the East  
21 German Bonds, but we do so on the alternative ground that

1 Mortimer has failed to make the threshold showing necessary to  
2 invoke the commercial activity exception to the FSIA, and  
3 therefore subject matter jurisdiction is lacking. Insofar as  
4 Mortimer has moved for leave to amend the judgment and to amend  
5 the complaint with respect to the East German Bonds, we affirm  
6 the district court's denial of that motion.

## 7 **II. Mortimer's Claim to Recover on the West German Bonds**

8 Having found subject matter jurisdiction present with regard  
9 to the West German Bonds, we now consider Mortimer's claim as to  
10 those Bonds on the merits. We review the district court's order  
11 granting the FRG's motion to dismiss under Rule 12(b)(6) de novo,  
12 "consider[ing] the legal sufficiency of [Mortimer's] complaint,  
13 taking its factual allegations to be true[,] and drawing all  
14 reasonable inferences in [Mortimer]'s favor." Harris v. Mills,  
15 572 F.3d 66, 71 (2d Cir. 2009). To survive a motion to dismiss,  
16 a complaint must meet a "plausibility standard." Id. at 72.  
17 Although we "'must accept as true all of [a complaint's]  
18 allegations . . . ,' that 'tenet' 'is inapplicable to legal  
19 conclusions,' and '[t]hreadbare recitals of the elements of a  
20 cause of action, supported by mere conclusory statements, do not  
21 suffice.'" Id. (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949  
22 (2009)) (second alteration in Harris). This analysis is "'a  
23 context-specific task that requires [us] to draw on [our]

1 judicial experience and common sense.'" Id. (quoting Iqbal, 129  
2 S. Ct. at 1950).

3 As for the district court's denial of Mortimer's subsequent  
4 motions to alter the judgment and for leave to amend its  
5 complaint, although we generally review such determinations for  
6 abuse of discretion, where the determination is based upon a  
7 legal interpretation, de novo review is appropriate. See Gorman  
8 v. Consol. Edison Corp., 488 F.3d 586, 592 (2d Cir. 2007); Fed.  
9 R. Civ. P 44.1. It is well-established that "[o]ne good reason  
10 to deny leave to amend is when such leave would be futile,"  
11 specifically when "the additional information d[oes] not cure the  
12 complaint." Acito v. IMCERA Group, Inc., 47 F.3d 47, 55 (2d Cir.  
13 1995).

14 As previously noted, Mortimer's original complaint alleged  
15 that the FRG assumed liability for the Bonds, 35.5 % of which  
16 were issued in what later became West Germany. Mortimer's  
17 proposed amended complaint further alleged that "[t]he German  
18 Validation laws are no longer in force and do not currently apply  
19 to the obligations of West German origin." (Proposed Am. Compl.  
20 ¶ 22.) Because Mortimer has failed to plausibly allege that it  
21 either met the statutory validation requirements aimed to  
22 represent valid, legal obligation or was not required to do so,  
23 we conclude that it has failed to state a claim.

1 Starting from the premise that the FRG assumed liability for  
2 valid foreign currency bonds issued in the territory that became  
3 West Germany - which we accept for reasons already stated, the  
4 parties dispute whether Mortimer must comply with the validation  
5 procedures before seeking to recover on the West German Bonds in  
6 its possession. The FRG argues that no cause of action in this  
7 case lies because Mortimer failed to comply with the validation  
8 procedures. Mortimer does not assert that it complied with the  
9 validation procedures; instead, it contends that it need not do  
10 so. Specifically, Mortimer avers that "the Validation Law is no  
11 longer in effect," and that even if it is, Mortimer's claims are  
12 enforceable notwithstanding its refusal to register and submit  
13 the West German Bonds to a Validation Board. We address each  
14 argument in turn.

15 **A. Continued Applicability of Validation Procedures**

16 We first examine whether the bond validation procedures  
17 required by the Validation Law are still in force. Mortimer  
18 argues that the Unification Treaty's inclusion of the Validation  
19 Law in Annex I amounts to an implied agreement that the  
20 Validation Law is no longer in effect. This argument is without  
21 merit. Article 11 of the Unification Treaty provides that  
22 "international agreements to which [West Germany] is a party  
23 shall retain their validity, and with the exception of the  
24 treaties named in Annex I, shall also relate to [former East

1 German] territory.” 30 I.L.M. at 471. Article 11’s plain  
2 language only excludes treaties listed in Annex I from being  
3 extended to former East German territory; it in no way affects  
4 the validity of those treaties with respect to former West German  
5 territory. Cf. Reese Bros., Inc. v. United States, 447 F.3d 229,  
6 235 (3d Cir. 2006) (“The usual meaning of the word ‘and’ . . . is  
7 conjunctive, . . . unless the context dictates otherwise, the  
8 ‘and’ is presumed to be used in its ordinary sense.” (internal  
9 quotation marks omitted)). Moreover, the Validation Law is  
10 listed in the FRG’s current statutory code, with only minor  
11 amendments irrelevant to this case since its enactment.<sup>15</sup>

12 The Validation Law’s continued applicability is supported by  
13 the inclusion of both the 1953 and 1960 Treaties, which  
14 incorporate the Validation Law, in the United States Department

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1 <sup>15</sup> These amendments, the most recent of which was in December  
2 2008, replaced the names of ministries and agencies or the titles  
3 of laws referred to in the Act when these name changes occurred.  
4 See Bereinigungsgesetz für deutsche Auslandsbonds in der im  
5 Bundesgesetzblatt Teil III, Gliederungsnummer 4139-2,  
6 veröffentlichten bereinigten Fassung, das zuletzt durch Artikel  
7 82 des Gesetzes vom 17. Dezember 2008 (BGBl. I S. 2586) geändert  
8 worden ist [Securities Validation Act in the revised version  
9 published in Part III of the Federal Law Gazette under no. 4139-  
10 2, as most recently amended by Article 82 of the Law of December  
11 17, 2008 (BGBl. I S. 2586)], BGBl.III, at 4139-2 (F.R.G.)  
12 (providing most recent version of the Validation Law and noting  
13 its 2008 amendment); Introductory Act of the Fiscal Code, Gesetz,  
14 Dec. 13, 1976, BGBl.I at 3341, art. 94, no. 3 (amending the Act  
15 by replacing the word Reichsabgabenordnung (Imperial Fiscal Code)  
16 with the term Abgabenordnung (Fiscal Code) when West Germany  
17 enacted a new Fiscal Code; Bundesgesetzblatt Teil I  
18 Fundstellennachweis A 4139-2 (Dec. 31, 2008) (listing amendments  
19 in 2001, 2003, and 2008 that made similar name changes).

1 of State's list of "treaties in force" as of January 1, 2009, see  
2 United States Department of State, Treaties in Force: A List of  
3 Treaties and Other International Agreements of the United States  
4 in Force on January 1, 2009, at 100-01 (2009), available at  
5 <http://www.state.gov/documents/organization/123747.pdf> (last  
6 visited January 29, 2010). Both the 1953 and 1960 Treaties  
7 confirm that the Validation Law may not be amended or modified  
8 "except as may be agreed between [West Germany] and the United  
9 States." 1960 Treaty, 12 U.S.T. at 944; 1953 Treaty, 4 U.S.T. at  
10 888-89, Art. I. Therefore, inclusion on the "treaties in force"  
11 list suggests the conclusion that there has been no agreement  
12 between the United States and the FRG to nullify the Validation  
13 Law.

14 For the foregoing reasons, we conclude that the Validation  
15 Law's bond validation procedures continue to apply to the West  
16 German Bonds.

#### 17 **B. Enforcability of Mortimer's West German Bonds**

18 We now turn to the plausibility of Mortimer's attempt to  
19 enforce its West German Bonds as a "non-assenter"<sup>16</sup>--that is, a  
20 bondholder who neither registered nor presented its foreign  
21 currency bonds for validation in accordance with the Validation

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1 <sup>16</sup> We use the term "non-assenter" because the London Debt  
2 Accord only deems bonds enforceable if the bondholder "assent[s]  
3 to the . . . conditions in respect of such debts," 4 U.S.T. at  
4 453, Art. 15(1), which refers in the case of West German bonds to  
5 compliance with the Validation Law's procedures.

1 Law. Mortimer contends that the Validation Law's sole  
2 restriction on such a claim for compensation is that it "may not  
3 be asserted to the prejudice of holders of validated foreign  
4 currency bonds," Validation Law, BGBI.II at 317, Art. 52(1), and  
5 that because the FRG made final payments to settling creditors in  
6 1994, there is no possibility that validated bondholders would be  
7 prejudiced by a non-assenter's claim.

8 We find Mortimer's position unavailing. First, Mortimer  
9 points to no language in any enactment that abrogates the  
10 validation requirements once all validated bondholders have been  
11 compensated. In light of the express validation requirements in  
12 the Validation Law, 1953 Treaty, and London Debt Accord, see id.  
13 at 306, Art. 2 ("Foreign currency bonds remain valid only if they  
14 are validated . . . pursuant to this Law."); id. at 315, Art. 41  
15 (placing the burden of proving the bonds' validity on the  
16 bondholder) id. at 317, Art. 50 (governing the "Invalidation of  
17 Bonds which have not been validated"); 1953 Treaty, 4 U.S.T. at  
18 889, Art. II (providing that "[n]o bond . . . shall be  
19 enforceable unless and until it shall be validated" in accordance  
20 with the Validation Law); id. at 888 (providing that  
21 corresponding "benefits" "apply only to bonds which have been  
22 duly validated"); London Debt Accord, 4 U.S.T. at 453, Art. 15(1)  
23 (extending "benefit[s]" to a limited class of creditors who

1 "assent to the . . . conditions in respect of such debts"), we  
2 find Mortimer's non-assenter claim unpersuasive.

3         Additionally, we find Mortimer's argument regarding the  
4 intent of the validation procedures to be unreasonably narrow.  
5 While the validation procedures were created, in part, to  
6 facilitate assenting bondholders' receipt of payment, there is no  
7 reason to believe that prejudice to validated bondholders is the  
8 only reason to require validation. There is another significant  
9 reason to screen out and protect against illegitimate bond  
10 claims. As the 1953 Treaty explains, the Validation Law  
11 facilitates the settlement of West Germany's financial  
12 "obligations . . . with assurance that claims prejudicial to such  
13 settlement will not be asserted on the basis of bonds which were  
14 unlawfully acquired." 1953 Treaty, 4 U.S.T. at 888. See  
15 generally Abrey, 153 F. Supp. at 339-42 (detailing the historical  
16 background leading to promulgation of validation procedures).

17         In any event, even assuming arguendo that enforcing  
18 Mortimer's claims would not prejudice holders of validated bonds,  
19 Mortimer failed to comply with the additional requirements that  
20 all non-assenting bondholders must meet. In addition to the  
21 requirement, cited by Mortimer, that a claim for compensation  
22 based on non-validated bonds not "prejudice of holders of  
23 validated [bonds]," Article 52(1) also requires that a claimant  
24 establish two preconditions prior to asserting such a claim: (1)



1 that the bonds at issue were "validated upon timely  
2 registration"; and (2) that "the failure to register [the bonds]  
3 was not due to . . . gross negligence." BGBI.II, at 317.  
4 Moreover, the next paragraph of the provision, Article 52(2),  
5 states that the right to compensation for non-validated bonds  
6 created by Article 52 "can be asserted *only after it has been*  
7 *finally adjudicated* that the conditions" set forth in Article  
8 52(1) have been met. *Id.* (emphasis added). Article 52(2)  
9 further states that "[e]xclusive jurisdiction to make such  
10 adjudication shall rest with the Chamber of Settlement of  
11 Securities of the district in which the issuer has its seat."  
12 *Id.*

13 These additional requirements make plain that the absence of  
14 prejudice to the holders of validated bonds is necessary, but not  
15 sufficient, to permit Mortimer to bring claims relating to the  
16 West German Bonds under Article 52 without their prior validation  
17 pursuant to the Validation Law. As Mortimer has not alleged that  
18 the preconditions to bringing a compensation claim under this  
19 provision were adjudicated in its favor or even that, as a  
20 factual matter, the preconditions are satisfied with respect to  
21 the West German Bonds, we hold that Mortimer's argument fails on  
22 its own terms.

23 In sum, a non-assenter can only enforce bonds covered by the  
24 Validation Law after complying with the validation procedures and

1 explaining why any delay in doing so is excusable. Like the  
2 district court, we hold that Mortimer, by not satisfying either  
3 criterion, has failed to set forth a plausible basis in either  
4 the complaint or the proposed amended complaint for enforcing the  
5 West German Bonds at this stage. Indeed, allowing Mortimer to do  
6 so would undercut the purpose of the Validation Law by  
7 eliminating any guarantee that Mortimer's West German Bonds,  
8 allegedly valued at over \$400,000,000, are in fact legitimate.  
9 Our decision is consistent with past cases, which have evaluated  
10 the enforceability of foreign currency bonds covered by the  
11 Validation Law only after the bondholder has registered and  
12 submitted its bonds for evaluation in accordance with the Law,  
13 and the Validation Board has adjudicated their validity. See  
14 Teplin v. Fed. Republic of Germany, No. 81-1874, 1982 U.S. App.  
15 LEXIS 12629, at \*2-3 (D.C. Cir. Aug. 18, 1982) (per curiam)  
16 (finding a bondholder's claims to be "not properly before th[e]  
17 court" because he failed to validate the bonds, "thus making them  
18 enforceable in U.S. courts"); cf. Cavac Compania Anonima  
19 Venezolana de Administracion y Comercio v. Bd. for the Validation  
20 of German Bonds in the United States, 189 F. Supp. 205, 208  
21 (S.D.N.Y. 1960) (permitting arbitration after a Validation Board  
22 refused to validate the bonds at issue); Abrey, 153 F. Supp. at  
23 338 (permitting an independent trial respecting the bonds'  
24 validity after they were declared invalid by a Validation Board).

1 We therefore affirm the dismissal of Mortimer's claims  
2 respecting the West German Bonds and the denial of leave to  
3 amend.

4 **CONCLUSION**

5 For the foregoing reasons, the judgment of the district  
6 court is AFFIRMED, in part on alternative grounds.

7

8