Case Digest

Journal Staff

CASE DIGEST

This Case Digest provides brief analyses of cases that represent current aspects of international law. The Digest includes cases that establish legal principles and cases that apply established legal principles to new factual situations. The cases are grouped by topic and include references for further research.

TABLE OF CONTENTS

I. TRADE

TRANSPORTATION COSTS NOT DEDUCTIBLE FROM FOREIGN MARKET VALUE IN DUMPING ANALYSIS, *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 13 F.3d 398 (Fed. Cir. 1994).

An association of United States producers of gray portland cement and clinker filed an antidumping petition with the International Trade Administration of the Department of Commerce, claiming that Mexico was dumping gray portland cement and clinker in the United States. The Administration's investigation revealed that dumping injurious to a United States industry was occurring. Consequently, the Department of Commerce issued an antidumping duty order, which also contained the Department's determination of the dumping margin.

The association of United States cement producers challenged the Department of Commerce's dumping margin calculations contending that the Commerce Department could not subtract transportation costs from the Foreign Market Value (FMV)[1] of the cement. The Court of International Trade, however, agreed with the Department of Commerce formula. On appeal, the United States Court of Appeals for the Federal Circuit *Held: Reversed.* The FMV of goods is not to be reduced by the transportation costs in the home state when calculating the dumping margin.

Dumping occurs in the United States when a foreign company sells its goods in the United States at a price[2] less than the FMV for similar goods.[3] The relevant statutes contain complex formulas by which the Department of Commerce can determine whether dumping has occurred or is likely to occur and by which it can assess the appropriate penalty. The United States producers argued that the penalty assessed on the Mexican cement was too low because the Department of Commerce had incorrectly measured the disparity between the United States Price (USP) and the FMV.

In the absence of express statutory permission, the Department of Commerce subtracted shipping costs from the FMV. Wanting to ensure that it was comparing the cost of the product at equivalent stages in the chain of commerce, the Department reasoned that the deduction was necessary because it also had deducted these costs from the USP.[4] The Court of International Trade agreed with this approach and affirmed the Department's calculations.

On appeal, the Federal Circuit noted that the Department of Commerce had altered its usual practice in determining the FMV. The Department had justified the shipping deduction from the FMV under its administrative authority to fill any gaps in its

---

1. The FMV is the price at which the foreign company sells the goods in its own state. *See* 19 U.S.C. § 1677b((a)(1)(A) (1988). The statute does not provide for transportation costs to be deducted from the FMV.

2. The United States Price (USP) is either the purchase price, if the United States importer is independent of the foreign manufacturer, or the exporter's sales price, if the United States importer is related to the foreign manufacturer. *See* 19 U.S.C. § 1677a (1988). The statute requires the USP to be reduced by the costs of transporting goods to the United States.

3. *See* Antidumping Act, 19 U.S.C. § 1673 (1988).

4. The Department of Commerce argued that the deduction was necessary to compare post-factory prices in each state. Deducting shipping costs from only the USP resulted in a comparison of post-factory cost with post-warehouse cost, two very dissimilar values.

governing statuts. The Federal Circuit, however, found no statutory gaps, reasoning that although Congress intended to include a shipping cost deduction in the USP formula, it also intended to exclude a similar deduction from the FMV formula. Thus, the statute was not silent on the issue. Regardless whether the deduction would serve the statute's primary goal, the Department of Commerce had no authority to read the deduction into the statute.

Significance: The Department of Commerce has no authority to read into a statute elements that are contrary to clear congressional intent. The Department cannot deduct shipping costs from the FMV in dumping cases.

JUDICIAL REVIEW UNAVAILABLE FOR SANCTIONS IMPOSED FOR VIOLATIONS OF THE EXPORT ADMINISTRATION ACT, *Moller-Butcher v. U.S. Dep't of Commerce*, 12 F.3d 249 (D.C. Cir. 1994).

Brian Moller-Butcher operated a company in Boston, Massachusetts that exported certain controlled commodities[5] to Great Britain and Sweden. He knew that the equipment then was re-exported to Bulgaria, Poland, and Romania. He exported these goods without the requisite export license. As a consequence of his activities, Moller-Butcher was charged with criminal violations and was subject to a civil suit brought by the Department of Commerce. Moller-Butcher having failed to answer in the civil suit, an Administrative Law Judge entered a default judgment against him and banned him from exporting goods for twenty years.

Four years later, Moller-Butcher requested that the ALJ reduce his penalty, claiming that he had been sufficiently deterred from future export violations. The ALJ accordingly reduced the suspension to seven years, but then subsequently, the Under-Secretary of Commerce reinstated the twenty-year sanction. Moller-Butcher appealed to the United States Court of Appeals for the D.C. Circuit which *Held: Petition Dismissed.* The court lacked jurisdiction to review the Secretary's decision regarding sanctions.

---

5. The Secretary of Commerce designates items as controlled commodities for national security reasons. 50 U.S.C. app. § 2404 (1988).

Moller-Butcher claimed that, in reinstating the twenty-year penalty, the Secretary acted beyond the scope of her authority and in an arbitrary and capricious manner. Considering the reviewability of the Secretary's decision on sanctions under the Export Administration Act,[6] the Court of Appeals, however, found that it had no authority to question any of the Secretary's decisions, except with regard to liability. This statute clearly limited the judicary's jurisdiction to only those issues necessary to determine liability.[7] Moller-Butcher had challenged the penalty assessed against him, not the issue of liability, and therefore the Court of Appeals could not exercise jurisdiction over the matter.

The court did not address whether this limitation constrained it when the Secretary acted beyond the scope of her authority. Instead, the court found that the Secretary acted within her authority. Despite Moller-Butcher's argument that the Secretary had impermissibly reversed the ALJ's order, the court found that the Secretary merely had vacated the order. Although the statute is silent on the subject of reversal, it expressly permits a Secretary to vacate an ALJ decision. Thus, the Secretary acted within her authority, and judicial review was unavailable.

Significance: The D.C. Circuit will only hear appeals from the Secretary of Commerce's decision on liability in cases involving the Export Administration Act. The Secretary's decision to accept or reject an ALJ's imposition of sanctions for liability is not subject to judicial review.

NO PRIVATE RIGHT OF ACTION AGAINST SUPPORTERS OF FOREIGN BOYCOTTS, *Israel Aircraft Indus. v. Sanwa Business Credit Corp.*, 62 U.S.L.W. 2506 (7th Cir. 1994).

Israel Aircraft Industries and Quadrant Management, Inc. formed a joint venture to purchase Fairchild Aircraft Corporation out of bankruptcy. Sanwa Business Credit Corporation, the United States subsidiary of a Japanese bank, was Fairchild's principle lender. Out of respect for the League of Arab States' boycott of Israel, Sanwa refused to accept the joint venture as a substitute debtor for Fairchild. Consequently, Israel Aircraft sued Sanwa pursuant to the Export Administration Act, under which

---

6. 50 U.S.C. app. § 2401-20 (1988).
7. *See* 50 U.S.C. § 2412(c)(3) (1988).

the President issues regulations prohibiting any United States person from acting in support of a boycott by a foreign state against a state with which the United States is friendly.[8] The United States District Court for the Northern District of Illinois dismissed the case, holding that the statute did not create a private right of action for those harmed by a foreign boycott. On appeal, the United States Court of Appeals for the Seventh Circuit *Held: Affirmed.* The court will not imply a private right of action for the violations of regulations promulgated by the President pursuant to statute.

The court recognized that Sanwa is a United States person and that Israel is friendly with the United States. Accordingly, when Sanwa refused to lend to the joint venture out of respect for the foreign boycott, the bank violated the regulations issued by the President.[9] The statute, however, preempts state law claims and does not provide a corresponding federal law private remedy.

Although the statute did not create a private right of action, Israel Aircraft nevertheless urged the court to imply the existence of such a right. Citing a litany of public policy reasons, the Seventh Circuit refused to do so. The court found that creating a private cause of action would be inappropriate when Congress purposely had refused to provide such a right. Writing for the court, Judge Easterbrook noted that Congress had provided for criminal prosecution and administrative enforcement. He reasoned that Congress would have made similar provisions in the statute had it intended to permit private enforcement.

In addition, the court was persuaded by the legislative history indicating that Congress had considered creating a private cause of action and then deleted that provision from the final draft. Furthermore, the court noted that the statute in question involved particularly sensitive issues of foreign policy, and, therefore, that a court should be very wary of implying a cause of action in such a situation.

Israel Aircraft also asserted a state law claim of tortious interference with business opportunity. The Seventh Circuit affirmed the district court finding that this claim was without

8. 50 U.S.C. app. § 2407 (1988).

9. The regulations were issued through the Secretary of Commerce. *See* 15 C.F.R. § 769.2 (1993).

merit. It held that a bank does not tortiously interfere with a business opportunity by refusing to lend money.

Significance: Notwithstanding a violation of federal regulations, no private right of action exists for damages that may result when a United States entity complies with a foreign boycott.

II. ARBITRATION

"FINALLY SETTLED" LANGUAGE IN ARBITRATION CLAUSES MAY NOT BE ENOUGH TO IMPLY CONSENT TO JUDICIAL CONFIRMATION OF ARBITRAL AWARD, *Daihatsu Motor Co. v. Terraine Vehicles, Inc.*, 13 F.3d 196 (7th Cir. 1993).

Terrain Vehicles was the exclusive distributor of Daihatsu's Hi-Jet vehicle[10] in the southern United States. When Daihatsu decided not to renew the distribution agreement with Terrain, Terrain sued alleging several state law claims, including breach of contract. Daihatsu removed to the United States District Court for the Northern District of Illinois. Daihatsu then moved that the court dismiss and compel arbitration in accordance with the distribution agreement between the parties. The court granted Daihatsu's motion. Terrain objected but did not appeal the decision.

The agreement provided that the arbitration would take place in Japan, given that Daihatsu, a Japanese entity, was the defendant. After four and one half years of arbitration, the Japanese panel ruled in favor of Daihatsu. Daihatsu sought confirmation of the Japanese arbitration award in the United States District Court for the Northern District of Illinois. The court confirmed the award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention).[11] Terrain appealed, arguing that the parties had not consented to judicial confirmation of arbitration awards. On appeal, the United States Court of Appeals for the Seventh Circuit

10. Hi-Jet is an industrial vehicle used for transportation in large industrial plants and airports and similar operations.

11. United States law incorporates the Convention at 9 U.S.C. 8 201-08 (1970).

Held: Affirmed. The parties had consented to judicial confirmation of arbitration decisions.

The district court considered the Convention in conjunction with the Federal Arbitration Act (FAA).[12] Except for conflicting provisions, the FAA is applicable to the Convention.[13] The FAA has a consent-to-confirmation clause that requires the parties to agree that an arbitration award will be entered as a judgment of the court before a court can confirm an arbitration award.[14] The Daihatsu-Terrain agreement provided for all disputes to be "finally settled" by arbitration. Therefore, the district court found that the parties had consented to judicial confirmation of the arbitration decision.

The Seventh Circuit declined to address whether the Convention required a consent-to-confirmation clause. Instead, the court affirmed the lower court's finding that the parties had agreed to judicial confirmation.

The district court relied on a previous Seventh Circuit case[15] to find that the "finally settled" language in the Daihatsu-Terrain agreement alone was enough to constitute consent. In the previous case, however, the Seventh Circuit had considered the "finally settled" language along with other factors that indicated consent. Nevertheless, the court refused to revisit the lower court's decision because additional evidence of consent was also present in this case.

The court noted that the arbitration clause in the distribution agreement had a choice-of-forum provision. This indicated that the parties intended that a court confirm the arbitration award. In addition, Terrain ordinarily had wanted the arbitration held in New York. The New York arbitration would have been subject to judicial confirmation. These facts, in addition to the "finally settled" language in the agreement, which indicates that a court will not review the matter de novo, were sufficient proof that the parties agreed to have judicial confirmation of the arbitral award.

Significance: Whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards requires that the parties consent to judicial confirmation of the arbitral award remains

---

12. 9 U.S.C. § 1-16 (1947).
13. 9 U.S.C. § 208 (1970).
14. 9 U.S.C. § 9 (1947).
15. Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 639 F.2d 386, 389 (7th Cir. 1981).

unsettled in the Seventh Circuit. If "finally settled" language accompanies other evidence of consent, the Seventh Circuit will permit confirmation of the arbitral award. "Finally settled" language alone, however, may not be sufficient to show consent to confirmation.