Vanderbilt Journal of Transnational Law

Volume 24
Issue 3 *Issue 3 - 1991*

Article 7

1991

Case Digest

Law Review Staff

CASE DIGEST

This CASE DIGEST provides brief analyses of cases that represent current aspects of international law. The Digest includes cases establishing legal principles, as well as those applying established legal principles to new factual situations. The cases are grouped in topical categories, and references are given for further research.

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I. SOVEREIGN IMMUNITY

THE DETENTION AND TORTURE OF A UNITED STATES CITIZEN BY FOREIGN GOVERNMENT DURING THE COURSE OF HIS JOB, RECRUITED AND HIRED IN THE UNITED STATES TO SERVE AS A FOREIGN GOVERNMENT EMPLOYEE, CONSTITUTES ACTION BASED UPON COMMERCIAL ACTIVITY CARRIED ON IN THE UNITED STATES BY A FOREIGN STATE FOR WHICH THE FOREIGN GOVERNMENT IS NOT IMMUNE UNDER THE FOREIGN SOVEREIGN IMMUNITY ACT, *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991).

In 1983, Scott Nelson started work as a monitoring systems engineer for the King Faisal Specialist Hospital (Hospital) in Riyadh, Saudi Arabia. Hospital Corporation of America (HCA), an independent corporation under contract to recruit employees for the Hospital, conducted the recruitment. After an interview in Saudi Arabia, Nelson returned to Miami, Florida, entered into an employment contract in November 1983 and commenced working at the Hospital the following month. Nelson alleged that in the course of performing his duties under his employment contract with the Hospital, agents of the Saudi government detained and

tortured him in Saudi Arabia in retaliation for reporting safety violations at the Hospital. He further alleged that, during his detention, officials of the Saudi government sexually assaulted his wife.

Nelson and his wife, Vivian, brought suit against Saudi Arabia, the Hospital, and Royspec, a corporation owned and controlled by the government of Saudi Arabia. The plaintiffs sought compensatory and punitive damages under sixteen counts and asserted subject matter jurisdiction under the Foreign Sovereign Immunity Act of 1976 (FSIA). Saudi Arabia moved to dismiss for lack of subject matter jurisdiction. The district court granted defendant's motion to dismiss and concluded that Nelson's claims were not based upon the commercial activities of Saudi Arabia in the United States. It reasoned that the link between the recruitment activities and the defendants failed to establish substantial contact with the United States within the meaning of Title 28 United States Code section 1603(e). Additionally, the district court could find no nexus between these activities and Nelson's complaint.

The United States Court of Appeals for the Eleventh Circuit *Held: Reversed.* Nelson's recruitment and hiring in the United States was part of a process having substantial contact with the United States because the recruitment was conducted by HCA, an agent of Saudi Arabia, in the United States.

The court distinguished *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980), in which the Fifth Circuit dismissed the appeal, because, under Rule 54(b) of the Federal Rules of Civil Procedure, the order granting the defendant's motion to dismiss was not a final order. According to the appeals court in *Arango*, the district court would have had subject matter jurisdiction over these claims under section 1605(a)(2). Furthermore, unlike the situation in *Arango*, the defendant's actions resulted from and were attributable directly to the plaintiff's employment.

The court also distinguished *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir.), *cert. denied*, 110 S. Ct. 237 (1989), in which a Soviet newspaper published an article to enable agencies of the Soviet government to avoid their contractual obligations to the plaintiff. The court rejected plaintiff's contention that the libel was commercial activity because the activities at issue were essentially public and governmental in nature. The activities alleged in the present case, on the other hand, were clearly commercial in nature because they were so intertwined with Nelson's employment at the Hospital that they were based upon his recruitment in the United States.

The holding in the instant case was not based upon the act of state doctrine, but on the interpretation and application of the FSIA. *Signifi-*

cance—The Eleventh Circuit has expanded the interpretation of the commercial activity exception of the FSIA to include police activities by foreign governments in their own state that are intertwined with commercial activities in the United States.

INTRODUCTION OF NEGOTIABLE PROMISSORY NOTES INTO THE UNITED STATES BY FOREIGN STATES FOR PURPOSES OF RAISING CAPITAL CONSTITUTES COMMERCIAL ACTIVITY HAVING SUBSTANTIAL CONTACT WITH THE UNITED STATES BARRING THE FOREIGN STATE'S RIGHT TO SOVEREIGN IMMUNITY, *Shapiro v. Republic of Bolivia*, 930 F.2d 1013 (2nd Cir. 1991).

In September 1981, International Promotion and Ventures, Ltd. (IPVL), a Delaware Corporation with its principal place of business in New York, entered into a contract with the Bolivian Air Force. Under the contract, IPVL agreed to sell Bolivia a number of fighter jets and related equipment and services in exchange for negotiable promissory notes guaranteed by the Central Bank of Bolivia. In December 1981, pursuant to the contract, Bolivia issued a series of negotiable promissory notes (Notes), numbered 1 through 40, with a face value of nearly eighty-one million dollars. Notes 11 through 40 were issued to IPVL. IPVL received some of these Notes in Bolivia, while others, including Note 12, were sent directly to the United States. Because the United States State Department refused to issue the necessary transfer license, however, the aircrafts remained undelivered. Bolivia brought suit in the Southern District of New York against IPVL, its sole shareholder, and its president, Bernard L. Tractman. By June 1986, however, both defendants had filed petitions for bankruptcy. Consequently, the bankruptcy court denied Bolivia's application to recover the outstanding Notes.

In December 1986, plaintiff David Shapiro filed this action against Bolivia, the Bolivian Air Force, and the Central Bank of Bolivia, to recover the face value of Note 12, which he allegedly possessed. Shapiro was a citizen of the United States who resided primarily in Hong Kong, but who also maintained a residence in New York City. Before discovery, defendants-appellees, who denied any knowledge regarding how Shapiro had acquired Note 12, moved to dismiss the complaint on the grounds that the district court lacked subject matter and personal jurisdiction and on the ground of forum non conveniens. The district court granted the motion to dismiss and held that appellees had neither waived their immunity pursuant to Title 28 United States Code section 1605(a)(1) by initiating the previous proceedings, nor engaged in the commercial activity carried on in the United States that would subject them to jurisdiction under section 1605(a)(2).

The United States Court of Appeals for the Second Circuit *Held: Reversed.* While the appellees did not waive their sovereign immunity pursuant to section 1605(a)(1), they have carried on commercial activity sufficiently related to the United States to subject them to jurisdiction under section 1605(a)(2).

Because Shapiro's claim was for payment of Note 12, the overall activity giving rise to his claim was the issuance of the Notes to IPVL. The activity in question was clearly the issuance of negotiable promissory notes later brought into the United States for the purpose of raising capital. The issuance of public debt is a commercial activity within the meaning of section 1605(a)(2). The court found the substantial contact standard of due process satisfied in the present case by appellees' commercial activities. Accordingly, the court found the commercial activity exception of the FSIA satisfied.

The instant court cited *Texas Trading & Milling Corp. v. Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), as authority for equating personal jurisdiction over foreign states to subject matter jurisdiction plus valid service of process. Additionally, the court could find no unusual inconvenience to appellees in litigating this matter in the United States. According to the court, satisfaction of the substantial contact requirement and the strong United States interest in capital transactions by foreign sovereigns conducted through United States intermediaries justifies the exercise of personal jurisdiction in the United States under section 1330(b). *Significance*—The Second Circuit helped solidify judicial interpretation of the "commercial transaction" and "substantial contact" clauses relating to the FSIA.

II. Civil Rights

Title VII Does Not Apply Extraterritorially to Regulate Employment Practices of United States Employers Who Employ United States Citizens Abroad, *E.E.O.C. v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991).

The Petitioner, Boureslan, a naturalized citizen of the United States born in Lebanon and working in Saudi Arabia, was discharged by his employer, respondent Arabian American Oil Company, a Delaware corporation. Boureslan initially filed a charge against the respondent and its subsidiary Aramco Service company with petitioner Equal Employment Opportunity Commission (EEOC). He later instituted this action in the district court, seeking relief under Title VII of the 1964 Civil Rights Act for discrimination based on race, religion, and national origin. The district court granted respondents' motion to dismiss for lack of subject mat-

ter jurisdiction on the grounds that Title VII's protection does not extend to United States citizens employed abroad by United States employers. On appeal, a panel for the Fifth Circuit affirmed.

After granting both parties' petitions for certiorari, the Supreme Court of the United States *Held: Affirmed.* Title VII does not apply extraterritorially to regulate employment practices of United States employers who hire United States citizens abroad. The Court upheld as a long-standing United States tradition the principle that, unless contrary intent exists, congressional legislation applies only within the territorial jurisdiction of the United States. The Court refused to apply to Title VII the broad jurisdictional language usually extended to acts regulating commerce.

Petitioners argued unsuccessfully that Title VII's "alien exemption" clause—which renders the statute inapplicable to an employer with respect to the employment of aliens outside any State—clearly manifests the necessary congressional intent to cover employers of United States citizens working abroad. Petitioners cited as authority for this assertion *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973). The Court responded that if petitioners' argument were correct, there would be no statutory basis for distinguishing United States employers from their foreign counterparts. The Court fortified its position by citing factors that suggested a purely domestic focus for Title VII, including congressional intent not to interfere with the sovereignty and laws of foreign states. It also cited the lack of provisions addressing conflicts of law that inevitably arises from legislation that extended abroad.

The Court similarly refused to defer to the EEOC's position that Title VII should be applied abroad because the interpretation presented was neither contemporaneous with Title VII's enactment, nor consistent with an earlier, contrary position taken by the EEOC closer to the date the statute came into law. The Court was unwilling, absent clear evidence of congressional intent, to prescribe a policy that would raise difficult international legal questions by imposing employment discrimination policies of this state upon United States corporations operating abroad. Finally, the Court pointed to the numerous occasions on which Congress extended legislation extraterritorially. This, in the Court's view, was clear evidence of congressional awareness of the need to use clear language in this area.

In his dissenting opinion, Justice Marshall recognized as a canon of construction the need to apply congressional acts only within the territorial jurisdiction of the United States unless a contrary intent is apparent in the legislation. He refused, however, to accept this canon as a clear statement of the law, the application of which would relieve courts of the

duty to apply all available evidence of legislative intent. Justice Marshall rejected the arguments presented by the majority regarding the "alien exemption" clause. In his view, the history of the clause suggests congressional intent to apply Title VII extraterritorially. Furthermore, the "alien exemption" clause is an example of congressional concern for the issue of conflicts of law.

Significance—This case permits United States corporations to deal with United States citizens employed abroad without concern for the constraints of Title VII.

III. Air Carrier Liability

Punitive Damages Not Recoverable in Actions Governed by Warsaw Convention for Air Carrier's Willful Misconduct, *In re Air Disaster At Lockerbie, Scotland,* 928 F.2d 1267 (2d Cir. 1991).

Two parallel cases involving similar factual conditions and a single legal question reached the Court of Appeals for the Second Circuit. The first dealt with the crash of Pan Am Flight 103 over Lockerbie, Scotland. The second dealt with a hijacking in Karachi, Pakistan. In both cases, the surviving relatives and personal representatives of those who died sued Pan American World Airways, Inc. (Pan Am), two of its subsidiaries, and its parent corporation. All parties agreed that the Warsaw Convention (the Convention) and the Montreal Accord governed the cases. In both cases, Pan Am moved for partial summary judgment on the punitive claims, asserting that the Warsaw Convention barred the recovery of punitive damages. In the Lockerbie case, the district court granted partial summary judgment and dismissed the punitive damages claims. *Rein v. Pan American World Airways, Inc.*, 733 F. Supp. 547 (E.D.N.Y. 1989). In the Karachi case, the district court denied Pan Am's motion for partial summary judgment. *Joshi v. Pan American World Airways, Inc.*, 729 F. Supp. 17 (S.D.N.Y. 1990).

Both cases reached the Court of Appeals for the Second Circuit, in which the court *Held: Affirmed Lockerbie Case and reversed Karachi Case.* Because the purposes for the Warsaw Convention are inconsistent with an award of punitive damages, this remedy is not recoverable in actions governed by the Warsaw Convention.

The court initially concluded that the Warsaw Convention pre-empts state causes of action because state laws differ substantially as to the nature and use of punitive damages. Therefore, the award of punitive damages would result in great confusion and would destroy any hope of uniformity in applying the Convention. The court cited *Boehringer-*

Manheim Diagnostics, Inc. v. Pan American World Airways, Inc., 737 F.2d 456 (5th Cir.), *cert. denied*, 469 U.S. 1186 (1985), as authority establishing the exclusivity of causes of action arising under the Convention. Similarly, the court alluded to *In re Air Crash Disaster at Gander, Newfoundland on Dec. 12, 1985*, 684 F. Supp. 927 (W.D. Ky. 1987), in which the district court held that "state law claims for punitive damages are pre-empted by the Convention to the extent that they would prevent the application of the Convention's limitations."

The court then discussed its interpretation of article 17 of the Convention, using the laws of the states instrumental in drafting the Convention to support its interpretation of that article. In all the examples cited, the court noted the lack or rarity of punitive damages awarded for purposes of punishing the defendants. Based on the context in which the article was written, the law of the contracting parties, subsequent interpretations, and the historical translations, the court concluded that article 17 has limited the liability of air carriers to recovery of compensatory damages only.

The court agreed that the Convention leaves the measures of damages to the internal law of parties to the Convention. None of the authorities cited by the plaintiffs, however, seem to have considered whether the type of compensatory damages left to local law could include punitive damages. According to the court, the drafting history of article 24 indicates that the article focused primarily on issues of descent and distribution. The court found no evidence that the drafters intended to allow a contracting party to impose punitive damages.

With regard to willful misconduct and the application of article 25, the court still could find no evidence to support the distribution of punitive damages, even after eliminating the liability limit in article 17. Since civil law would not view article 17 as a limit on liability, it was unreasonable, in the court's view, to impose a purely common law notion on a Convention drafted primarily by civil lawyers. Finally, the court noted several policy considerations, including: (i) the need to maintain uniformity in application and interpretation of the Convention; (ii) the need to preserve carriers' ability to insure against losses; and (iii) the need to reduce the number of cases litigated and the amount of time needed to award damages in the remaining cases. *Significance*—The Court of Appeals seems to have resolved in favor of the air carriers an apparent split in the district courts regarding whether punitive damages may be recovered under the Warsaw Convention.

WARSAW CONVENTION BARS RECOVERY OF DAMAGES FOR PURELY MENTAL INJURIES, *Eastern Airlines, Inc. v. Floyd*, ____ U.S. ____, 111 S. Ct. 1489 (1991).

In 1983, an Eastern Airline flight between Miami and the Bahamas averted a crash into the Atlantic Ocean after its engines lost oil pressure. Respondent passengers brought separate suits, later consolidated into one proceeding, to recover damages solely for mental distress arising out of the incident. Eastern alleged that the engine failure and subsequent preparations for emergency landing amounted to an accident under article 17 of the Convention, which prohibits recovery of damages for mental distress without any physical injuries. The district court cited the previous interpretations of the text of article 17 in *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D.N.M. 1973), in concluding that article 17 does not encompass recovery for purely mental distress. The Court of Appeals for the Eleventh Circuit reversed, holding that its interpretation of the phrase "Lèsion corporelle" in the authentic French text of article 17 allowed plaintiff to recover damages for mental anguish alone.

The United States Supreme Court *Held: Reversed.* The term "Lèsion corporelle" as used in article 17 of the Warsaw Convention, which sets forth the conditions under which international air carriers can be held liable for injuries to passengers, means "bodily injury." Based on this translation, article 17 would prohibit an award for purely psychic injuries. As observed by the Court, neither the Warsaw Convention, nor any of the applicable legal sources, suggests that the phrase "Lèsion corporelle," as used in article 17, should be translated other than as "bodily injury." Furthermore, a review of relevant French legal materials revealed no legislation, judicial decision, or scholarly writing indicating that the original drafters in 1929 envisioned recovery for psychic injuries. Finally, the Court emphasized the negotiating history of the Convention and documentary records of the Warsaw Conference as support for its narrow interpretation of article 17.

According to the instant Court, a narrow interpretation of article 17 also was consistent with the primary purpose of the Convention: the need to limit the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry. By denying recovery for purely emotional harm, the Court hoped to strike a balance between the need for airline passengers to be compensated for their injuries and the need of air carriers to operate without fear of excessive liability. *Significance*—The Supreme Court has resolved a dispute in the lower courts regarding recovery for purely mental anguish and continues to limit the liability of air carriers under the Convention.