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Case Digest

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CASE DIGEST

This CASE DIGEST provides brief analyses of cases that represent current aspects of transnational law. The Digest includes cases that establish legal principles and cases that apply established legal principles to different factual situations. The cases are grouped in topical categories and references are given for further research.

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I. EXECUTIVE AGREEMENTS

SECRETARY OF TRANSPORTATION'S ORDER ISSUED PURSUANT TO ANTI-APARTHEID ACT, WHICH IMMEDIATELY REVOKED SOUTH AFRICAN AIRWAYS RIGHT TO SERVE UNITED STATES AIRPORTS, UPHELD NOTWITHSTANDING POSSIBLE VIOLATION OF PRIOR EXECUTIVE AGREEMENT — *South African Airways v. Dole*, 817 F.2d 119 (D.C. Cir. 1987).

In October 1986 Congress enacted the Comprehensive Anti-Apartheid Act of 1986 (the "Act"), Pub. L. No. 99-440, 100 Stat. 1086, which contained provisions designed to terminate service by South African Airways ("SAA") to the United States. Section 306(b)(1) of the Act directs the Secretary of State to terminate SAA's service pursuant to the procedures of the executive agreement (the "Agreement") between the United States and South Africa which allowed for this service since 1947. *See* Agreement between the Government of the United States of America and the Government of the Union of South Africa Relating to Air Service Between Their Respective Territories, May 23, 1947, United States-South Africa, 61 Stat. 3057, T.I.A.S. No. 1639, *as amended by* 4 U.S.T. 2205, T.I.A.S. No. 2870, *and* 19 U.S.T. 5193, T.I.A.S. No. 6512. The Agreement provides that the Secretary of State shall give South Africa notice of United States intention to terminate one year prior to actual termination. Section 306(a)(2) states that "[t]en days after the enactment of this Act, the President shall direct the Secretary of Transportation to

revoke" the SAA permit. The Secretary of State gave the one year notice prescribed by the Agreement. The Secretary of Transportation, however, issued an order that immediately revoked the SAA permit.

SAA filed a petition to set aside the order and argued essentially that because § 306(a)(2) does not require *immediate* revocation of SAA's permit, the Secretary of Transportation should be required to adopt an interpretation of the Act that does not conflict with the Agreement. SAA based this argument on the principle that a congressional statute must be construed whenever possible so that it will not require the United States "to violate the law of nations." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Moreover, SAA argued that if Congress intended to abrogate the Agreement, that purpose "must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute." *United States v. Lee Yen Tai*, 185 U.S. 213, 221 (1902); *Weinberger v. Rossi*, 456 U.S. 25 (1982).

The court of appeals denied the SAA petition to set aside and held that the Secretary of Transportation correctly interpreted § 306(a)(2) of the Act which "unambiguously calls for expedited revocation of any permit issued" to SAA even though the revocation might abrogate the prior Agreement. The court stated that while § 306(a) does not expressly direct the Secretary of Transportation to immediately revoke the SAA permit, the congressional intent gathered from circumstances surrounding the enactment of § 306(a) and its accompanying debate leads to the conclusion that Congress intended the Secretary of Transportation to act immediately. The court declined to decide whether § 306(a) in fact violates the Agreement because Congress, assuming there was a violation, has express constitutional power to regulate foreign commerce. U.S. Const. art. I, § 8. *Significance* — The court of appeals' construction of § 306 of the Act provides judicial support for the Secretary of Transportation's decision to immediately revoke the SAA permit despite the Act's possible conflict with the Agreement.

II. Extraterritorial Discovery

In Transnational Litigation, Hague Evidence Convention Is Not Mandatory, Exclusive, or Procedure of First Resort, But United States Court May Resort to Convention's Discovery Procedures To Supplement Federal Discovery Rules When Circumstances Warrant — *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of*

Iowa, 107 S. Ct. 2542 (1987).

Plaintiffs brought a products liability suit for personal injuries sustained in an airplane crash against the plane's maker and seller, two corporations owned by the Republic of France. Defendants answered plaintiffs' complaint and initial discovery request, but objected to plaintiffs' additional discovery request made according to the Federal Rules of Civil Procedure. Defendants sought a protective court order denying the additional discovery request on grounds that in transnational litigation the Hague Evidence Convention provides the exclusive and mandatory discovery procedure for obtaining documents and information located within the territory of a foreign signatory. *See* The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444. A magistrate for the United States District Court for the Southern District of Iowa denied the motion for a protective order.

Defendants sought review of the denial by a writ of mandamus from the Eighth Circuit Court of Appeals. The court of appeals denied the petition for mandamus holding that as long as the district court has jurisdiction over the foreign litigants, the Hague Convention does not apply to the production of evidence in that litigant's possession, regardless of the physical location of the evidence. 782 F.2d 120, 124 (8th Cir. 1986). Defendants sought review of this decision by the United States Supreme Court.

The Supreme Court vacated and remanded the case for further proceedings consistent with its opinion. Justice Stevens, writing for the Court, held that in transnational litigation the discovery procedures of the Hague Evidence Convention are permissive and supplementary to the Federal Rules of Civil Procedure and are not mandatory or exclusive. Justice Stevens based this interpretation on the absence of mandatory or compulsory language in the Convention's preamble and the use of permissive language throughout the Convention's text. A majority of the Court rejected a rule of first resort to the Convention and directed United States courts to resort to the Convention when the circumstances of the case warrant. In a separate opinion Justice Blackmun, joined by Justices Brennan, Marshall, and O'Connor, wrote that while he agreed that the Convention's procedures should not be exclusive, he disagreed with the case-by-case inquiry method to determine whether to use the Convention's procedures. Justice Blackmun stated that he "would apply a general presumption that, in most cases, courts should resort first to the Convention's procedures." *Significance* — This decision establishes the relation between the discovery rules of the Federal Rules of Civil Procedure and the Hague Evidence Convention that

United States courts must observe in transnational litigation. The Hague Convention provides a supplementary procedure for gathering evidence abroad which a United States court may resort to if the particular case warrants.

III. IMMIGRATION

TWO YEAR PROCESSING DELAY OF APPLICATION FOR ADJUSTMENT OF IMMIGRATION STATUS NOT ADEQUATE TO SHOW "AFFIRMATIVE MISCONDUCT" AND APPLY DOCTRINE OF EQUITABLE ESTOPPEL AGAINST IMMIGRATION AND NATURALIZATION SERVICE — *Wang v. United States*, 823 F.2d 1273 (8th Cir. 1987).

Wang, a former Taiwanese diplomat, sought adjustment of his immigration status from diplomat to permanent resident under § 13 of the Immigration and Nationality Act of September 11, 1957, Pub. L. No. 85-316, 71 Stat. 642 (amended 1981), current version at 8 U.S.C. § 1255b(b) (1982). On March 23, 1979, Wang delivered a completed application and the required supporting documents to the Immigration and Naturalization Service ("INS") in Kansas City. On April 25, 1980, Wang delivered additional completed medical examination reports to the Kansas City INS office and two weeks later Wang's entire file was forwarded for further processing to the INS office in Washington, D.C. On August 25, 1980, the Washington INS returned Wang's file to Kansas City INS requesting further information and expedition of the matter; however, Kansas City INS did not provide expedited treatment. Nine months passed before Kansas City INS contacted Wang at which time Wang resubmitted supporting documents he believed he had already submitted in March 1979. During these delays Congress amended § 13 to require the applicant to also show "compelling reasons" why the applicant is unable to return to the native country and that adjustment of status would be in the national interest of the United States. 8 U.S.C. § 1255b(b)(1982). Following the effective date of the amendments, December 29, 1981, the INS requested that Wang submit evidence to meet the additional requirements of § 13 as amended.

In response, Wang sought a declaratory judgment that the 1981 amendments did not apply to his application and that the INS must apply the prior law to his application. The district court held that the INS was estopped from applying the 1981 amendments to Wang's claim because it found that (1) Wang had reasonably relied to his detriment on timely processing, but the INS had unreasonably delayed; and (2) the INS committed affirmative misconduct by attempting to blame Wang for its own mishandling of the application. 636 F. Supp. 1208 (W.D. Mo.

1986).

The INS appealed this order claiming that Wang had not met the strict requirements for estoppel against the government. The Eighth Circuit Court of Appeals reversed and held that the INS delay and improper blaming of Wang did not constitute affirmative misconduct. The court of appeals concluded that while the INS acts were negligent and possibly in bad faith, the acts were "less egregious than, or at most, . . . substantially equivalent to government misconduct that was found not to constitute affirmative misconduct" in two similar cases decided by the Supreme Court. *See INS v. Miranda*, 459 U.S. 14 (1982) (per curiam); *Montana v. Kennedy*, 366 U.S. 308 (1961). *Significance* — Despite the obvious inequitable result, this decision is consistent with previous Supreme Court decisions, which have never upheld an estoppel against the United States.

IV. Foreign Sovereign Immunities Act

Commercial Carrier of Foreign State is not Immune from United States Jurisdiction if a Nexus Exists Between Its Commercial Activity in the United States and the Cause of Action — *Barkanic v. CAAC*, 822 F.2d 11 (2d Cir. 1987).

Plaintiffs brought a wrongful death action against China Airlines ("CAAC"), an agent of the People's Republic of China, following the crash of a domestic flight in China in which two United States passengers were killed. Those passengers purchased their tickets for the flight in the United States. Because the tickets had to be confirmed in China and the flight was entirely within China, the district court dismissed the suit and held that the "commercial activities" exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(2), did not allow for subject matter jurisdiction.

The court of appeals reversed, holding that the FSIA allows for subject matter jurisdiction over CAAC because the tickets which were bought in the United States from agents of CAAC provided the jurisdictional nexus between the cause of action and the commercial activity. The Second Circuit Court of Appeals modified its view of § 1605(a)(2) of the FSIA as previously stated in *Ministry of Supply, Cairo v. Universal Tankships, Inc.*, 708 F.2d 80 (2d Cir. 1983), to comport with the Fifth Circuit's reading of the *Ministry of Supply, Cario* opinion. *See Vancedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navagation*, 730 F.2d 195 (5th Cir. 1984).

According to the Fifth Circuit view, jurisdiction under § 1605(a)(2) requires a nexus between the commercial activity in the United States

and the cause of action. In this case the nexus occurred through a CAAC contract with Pan American Airlines, which acted as an agent in this country for CAAC and sold the tickets for the ill-fated flight to the decedents. *Significance* — In deciding this case the Second Circuit Court of Appeals has modified its interpretation of § 1605(a)(2) of the FSIA to comport with the interpretation that several other circuits have announced. *See Vencedora Ocedanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 370 F.2d 195 (5th Cir. 1984); *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982); *Velidor v. L/P/G Benghazi*, 653 F.2d 812 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982).