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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 apply established legal principles to new and different factual situations. The cases are grouped in topical categories, and references are provided for further research.

TABLE OF CONTENTS

I. ALIENS

DURESS IS AVAILABLE DEFENSE IN MITIGATION OF CHARGES OF ILLEGALLY TRANSPORTING ALIENS INTO THE UNITED STATES—*Pollgreen v. Morris*, slip op. No. 84-5217 (11th Cir. Sept. 17, 1985).

The owners of thirty vessels which carried aliens from Mariel Harbor, Cuba to Key West, Florida in 1980, challenged the seizure of their vessels and imposition of fines by the Immigration and Naturalization Service (INS) pursuant to 8 U.S.C. Section 1323. The INS determined that duress was not a defense to the fines exacted under the statute. The district court ruled that duress was indeed available in mitigation of charges of illegally transporting aliens, and determined that duress was clearly established in the record. The Eleventh Circuit affirmed that duress is an available defense under the statute, but reversed and remanded to the INS for its adjudication of whether each vessel owner established an adequate defense. The court stated that a party asserting a defense of duress must show that he performed the unlawful act because: (1) he, or a third party, was under an

immediate threat of death or serious bodily injury; (2) he had a well grounded fear that the threat would be carried out; and (3) he had no reasonable opportunity to escape the threat. *Significance*—In one of several issues surrounding the Mariel boatlift currently before the courts, the Eleventh Circuit firmly established that duress is a defense available in mitigation of charges of illegally transporting aliens. Further, the court enunciated guidelines for establishing the defense and ruled that the INS must, in the first instance, use these guidelines in making factual determinations concerning the adequacy of the asserted defense.

II. BANKRUPTCY

FOREIGN DEBTOR NOT COMPELLED TO FILE FOR ANCILLARY PROCEEDING UNDER BANKRUPTCY CODE; COURT MAY GRANT COMITY TO PENDING FOREIGN BANKRUPTCY PROCEEDING—*Cunard Steamship Co. Ltd. v. Salen Reefer Services A.B.*, 773 F.2d 452 (2d Cir. 1985).

Plaintiff-appellant Cunard, a British corporation, appealed from an order of the United States District Court for the Southern District of New York, which vacated an attachment Cunard had obtained against the defendant-appellee Salen, a business established under Swedish law. The United States Court of Appeals for the Second Circuit upheld the District Court, ruling that, although the United States Bankruptcy Code provides a preferable remedy, the district court nonetheless has the discretion, in accordance with public policy, to extend comity to a pending Swedish bankruptcy proceeding and the affiliated stay on creditor actions. The Second Circuit noted section 304 of the Bankruptcy Code, 11 U.S.C. Section 304 (1982), which provides, *inter alia*, that the representative of a foreign bankrupt may commence an ancillary proceeding in United States courts, rather than a full bankruptcy case, to seek a stay of actions and enforcement of judgments against the debtor or the debtor's property. Nonetheless, the appellate court held that the section's language is permissive, not mandatory, and its legislative history suggests maximum flexibility for courts in handling such cases to maintain respect for judgments and law of other nations. The appellate court reasoned that since the Swedish court had proper jurisdiction over the bankrupt, the basic principles of Swedish bankruptcy law closely paralleled those of the United States Bankruptcy Code, and deference to the Swedish proceedings would not prejudice any

United States citizen, granting comity, though perhaps not preferable, is within the bonds of sound public policy. Further, the Second Circuit rejected Cunard's claim that vacating the attachment contravenes public policy in favor of arbitration, ruling that the public interest in fair and efficient distribution of assets in a bankruptcy is equally significant. Moreover, the court held that Salen fulfilled the requirements of Rule 44.1 of the Federal Rules of Civil Procedure, which provides for written notice of a party's intent to raise an issue concerning foreign law. *Significance*—This decision is the first to hold that the remedy provided a foreign bankrupt under Section 304 of the Bankruptcy Code is not exclusive. In so ruling, the Second Circuit has provided guidelines for the discretionary granting of comity to pending foreign bankruptcy proceedings.

III. FORUM SELECTION CLAUSES

FORUM SELECTION CLAUSE IN CONTRACT BETWEEN TWO SOVEREIGNS IS NOT WAIVER OF RIGHT TO REMOVE—*Proyecfin de Venezuela v. Banco Industrial de Venezuela*, 760 F.2d 390 (2d Cir. 1985).

Plaintiff, a Venezuelan developer, and defendant, a Venezuelan guarantor bank, entered into two written contracts. The first contract contained an express waiver of immunity under the Foreign Sovereign Immunities Act (FSIA) and expressed amenability to the jurisdiction of various courts, in any legal action arising out of the agreement. The second contract expressly adopted all the provisions of the first contract but contained a clause designating the city of Caracas, Venezuela as the special and exclusive domicile for any actions arising out of the second agreement. Plaintiff sued for breach of the second contract in New York state court, and defendant subsequently removed the action to federal district court. The district court denied plaintiff's motion to remand and dismissed the action with prejudice for lack of subject matter jurisdiction. On appeal, the Second Circuit reversed in part and affirmed in part. Applying basic tenets of contract law, the appellate court held *inter alia* that the waiver of immunity contained in the first contract was valid as to a breach of the second contract. The court affirmed the district court's refusal to remand the action to state court, even though the plaintiff cited cases in which a forum selection clause in a contract operated as a waiver of the right to remove under 28 U.S.C. § 1441 (1982). The court

stated that Congress' intent in enacting the Foreign Sovereign Immunities Act was to channel cases against foreign sovereigns away from state courts and into federal courts. As part of this scheme, Congress amended § 1441, broadening the removal statute to encourage the development of a uniform body of law in federal courts in the sensitive area of actions against foreign states. *Significance*—The instant decision indicates that, although contrary case law has held that a forum selection clause may operate as an express waiver of the right to removal, the liberal removal rules relating to actions against foreign sovereigns will be upheld by the courts in order to effectuate Congress' intent to develop a uniform body of federal case law under the FSIA.

IV. INTERNATIONAL ARBITRATION

FIFTH CIRCUIT OVERRIDES ADMIRALTY RULE AND INVOKES PROVISIONS OF ARBITRATION TREATY—*Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co.*, 767 F.2d 1140 (5th Cir. 1985).

Sedco, a United States corporation, brought third party claims against Perforaciones Marinas del Golfo, S.A. (Permargo), a Mexican corporation, for breach of a charter agreement and indemnity for amounts Sedco had paid in settlement of claims arising from the largest oil spill in history. Permargo chartered a drilling vessel from Sedco to drill oil wells in the Gulf of Mexico for the Mexican state owned oil company, Petroleos Mexicanos (Pemex). The drilling led to a massive blowout, resulting in a nine-month-long oil spill. Sedco's third party action in the U.S. District Court for the Southern District of Texas included the claim that Permargo breached an indemnity clause in the charter agreement. Permargo's pivotal defense was the arbitration clause in the agreement. The district court denied Permargo's motions for an order directing arbitration and a stay of all proceedings pending arbitration. The United States Court of Appeals for the Fifth Circuit reversed the district court and remanded with instructions that the trial court order the parties to perform their arbitration agreement. The appellate court noted that in *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454 (1935), the United States Supreme Court held that Courts of Appeals lacked jurisdiction to hear an appeal from a district court's stay of admiralty proceedings pending arbitration. Nonetheless, the Fifth Circuit invoked its jurisdiction over the matter, reasoning, *inter alia*, that the

Convention on the Recognition and Enforcement of Foreign Arbitral Awards and its implementing legislation, the Federal Arbitration Act, require United States courts to enforce arbitration agreements which conform with the treaty's standards and authorize courts to order parties to proceed with a Convention arbitration even outside the United States. The court explained that in the time since the Supreme Court handed down the *Schoenamsgruber* rule, the convention has become the supreme law of the land. The court held that because the rule's "mummified" prohibition of appeals of stays in admiralty contravenes Congress' intent, it must give way to the Convention's provisions. Further, the Fifth Circuit found the arbitration agreement in question broad enough to satisfy the Convention's requirement. Moreover, the appellate court rejected the district court's use of the intertwining doctrine, which states that when a party asserts several causes of action, at least one of which falls within exclusive federal jurisdiction, the entire dispute must remain in federal court notwithstanding the existence of an arbitration clause. *Significance*—The Fifth Circuit has carved out a new area of jurisdiction for federal appeals courts, and in so doing, has attempted to bolster the effectiveness of the treaty and legislative provisions promoting international arbitration.

V. JURISDICTION AND PROCEDURE

JUDICIAL REVIEW OF MEXICAN BANK'S COMPLIANCE WITH ITS GOVERNMENT'S EXCHANGE CONTROL REGULATIONS PRECLUDED BY ACT OF STATE DOCTRINE DESPITE JURISDICTION UNDER SOVEREIGN IMMUNITY EXCEPTION—*Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985).

Plaintiffs, United States citizens holding certificates of deposit with defendant Mexican bank, brought breach of contract action due to the bank's compliance with Mexican exchange control regulations requiring payment of deposits in pesos at a rate far below market exchange rate. The district court held that Bancomer was an instrumentality of the Mexican government and thus dismissed for lack of jurisdiction pursuant to the Foreign Sovereign Immunities Act (FSIA). The Fifth Circuit disagreed on the issue of sovereign immunity, ruling that the FSIA's commercial activity exception allowed jurisdiction. Nonetheless, the court upheld dismissal on the basis of the act of state doctrine, which, under cer-

tain circumstances, precludes judicial review of the public acts of a foreign sovereign. The court refused to apply the commercial activities exception to the doctrine, articulated by a plurality of the Supreme Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976). The Fifth Circuit ruled that the "relevant acts" of commercial activity were necessarily broader for act of state purposes than for sovereign immunity analysis. Under act of state, the court held, "relevant acts" included any governmental acts of which the validity would be called into question, and would not be restricted to the particular breach alleged in the case. Further, the court rejected the treaty exception to the doctrine, ruling that the International Monetary Fund Agreement, if applicable at all, was not violated by Bancomer's actions. Moreover, the court rejected the debt situs exception, ruling that the incidents of the certificates of deposit clearly place them in Mexico. *Significance*—The Fifth Circuit, after upholding jurisdiction under the FSIA, rejected plausible exceptions and invoked the Act of State Doctrine in a case involving delicate issues of foreign affairs. The court refused to render the Mexican regulations "nugatory," an act the court felt the Mexican government would find "very vexing indeed."

UNITED STATES DISTRICT COURTS HAVE JURISDICTION OVER PERMISSIVE COUNTERCLAIMS FILED BY UNITED STATES NATIONALS SUED BY IRAN BECAUSE THE UNITED STATES-IRAN AGREEMENTS FOR THE RELEASE OF AMERICAN HOSTAGES WERE NOT SELF-EXECUTING—*Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279 (9th Cir. 1985).

Plaintiff, the Islamic Republic of Iran (Iran), filed suit against the Boeing Company (Boeing) and Logistics Support Corporation (LSC) in 1979. The suit related to the crash of a jet which Iran owned, Boeing built, and LSC maintained. LSC counterclaimed alleging that Iran breached its end of the maintenance contract. In June 1980, the district court granted summary judgment in favor of Boeing and LSC on Iran's claims, but did not pass on LSC's counterclaim. In 1981, Boeing and LSC asserted permissive counterclaims. The district court granted default judgments on those claims. Iran now appeals arguing that the claims settlement agreement of 1981 between Iran and the United States, which secured the release of the American hostages and set up the Iran-United States Claims Tribunal, divested the district court of jurisdiction over the counterclaims. Iran's reasoning was that the

agreement was self-executing so it precluded the district courts from entertaining claims between United States nationals and Iran and vested such jurisdiction in the Iran-United States Claims Tribunal. Iran also asserted that the agreement did not permit the assertion of permissive counterclaims against Iran in a suit commenced prior to the hostage crisis. The United States Court of Appeals for the Ninth Circuit affirmed the district court's judgment on the counterclaims in light of the Agreement. The court held that both the language and intent of the Agreement reveal that it was not meant to be self-executing. Consequently, the court rejected Iran's argument that the agreement divested the district court of jurisdiction over the counterclaims. Next, the court analyzed the agreement and concluded that the agreement did not contemplate the Claims Tribunal's assertion of jurisdiction over the counterclaims of nationals against the parties to the agreement. The court explained that the Claims Tribunal has jurisdiction only over counterclaims brought by either Iran or the United States against a national of the other nation and the original claim brought by a national. *Significance*—This decision determines that United States courts have jurisdiction over the counterclaims of United States nationals who have been sued by Iran in the United States.

FOREIGN SOVEREIGN IMMUNITIES ACT PROVIDES THE SOVIET UNION IMMUNITY FROM A SPOUSE'S SUIT FOR VIOLATIONS OF HUMAN RIGHTS—*Frolova v. Union of Soviet Socialist Republics,* 761 F.2d 370 (7th Cir. 1985).

Plaintiff, the American wife of a Soviet citizen, sued the Soviet Union in federal district court for its refusal to allow her husband to emigrate. She sought an injunction and damages. Ten days after suit was filed and almost one year after his original visa application, the plaintiff's husband was granted an exit visa. Plaintiff then dropped her request for injunctive relief, but retained her claim for damages based on mental anguish, physical distress, and loss of consortium. Acting *sua sponte*, the district court dismissed the claim concluding that the Soviet Union's denial of emigration was an act of state unreviewable in United States courts. The court of appeals found it unnecessary to rule on the act of state issue. Instead, the court found that the Foreign Sovereign Immunities Act (FSIA),which provides the exclusive means of jurisdiction over a sovereign party, precluded the action. The court disagreed with the plaintiff that the action fell within one of the

FSIA exceptions for sovereign immunity. First, the court found that the action could not qualify under the violation of international agreements exception because the United Nations Charter and the Helsinki Accords are not enforceable by private litigants. Second, the court held that the Soviet Union's failure to respond to the plaintiff's suit was not an implicit waiver of sovereign immunity. Third, the court stated that the alleged tort was not the kind contemplated by Congress in the FSIA's tortious act or omission exception. *Significance*—Because of the court's narrow reading of the FSIA tortious act or omission exception, the court cast doubt on whether United States courts will have subject matter jurisdiction over torts which arise out of a refusal to allow emigration.

VI. MANDAMUS

VIOLATION OF INTERNATIONALLY SET WHALING QUOTAS DIMINISHES THE EFFECTIVENESS OF THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING AND MANDATES THE SECRETARY OF COMMERCE TO CERTIFY THAT FACT TO THE PRESIDENT—*American Cetacean Society v. Baldridge*, 768 F.2d 426 (D.C. Cir. 1985).

Plaintiffs, wildlife conservation organizations, sought declaratory relief and an injunction to compel the Secretary of Commerce to certify to the President that Japanese whaling "diminished the effectiveness" of the International Convention for the Regulation of Whaling (ICRW), Nov. 10, 1948, T.I.A.S. 1849. Defendant and intervenor, Japan Whaling Association, argued that certifying or imposing sanctions would violate the ICRW because Japanese whaling continued pursuant to a valid objection to the 1984 quotas set by the International Whaling Commission (ICW). They contended further that a writ of mandamus was improper because the Secretary of Commerce's duty to certify was discretionary rather than ministerial. The court of appeals disagreed and affirmed the district court's decision to grant the writ. The court stated that nothing in the ICRW prevented a nation from certifying a violation and imposing sanctions unilaterally. After analyzing the legislative histories of the Pelly and Packwood-Magnuson Amendments, the court concluded that Congress intended to make the Secretary's duty nondiscretionary. In addition, the court found that Congress intended that whaling activities in excess of internationally established quotas should automatically trigger a determination that such actions were per

se "diminishing the effectiveness" of the ICRW. The court reasoned that the writ of mandamus was properly issued because the Secretary failed to perform his statutory duty, the plaintiffs were entitled to relief, and no other relief was appropriate. The dissent argued that the case was not justiciable because of its impact on executive discretion in diplomacy and foreign affairs. *Significance*—The District of Columbia Circuit has made bold moves in foreign affairs, an area in which the executive customarily enjoys great judicial deference. The court's determination of justiciability along with its broad reading of the ICRW and issuance of a writ of mandamus constitute uncommon judicial activism in the realm of foreign affairs.