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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.

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POINT OF FINAL LOADING AND ROUTING IS PLACE OF SHIPMENT FOR PURPOSES OF VALUING LOST CARGO; PRIVATE CARRIER'S BOTH-TO-BLAME CLAUSE IS ENFORCEABLE—*Allseas Maritime, S.A. v. M/V Mimosa*, 574 F. Supp. 844 (S.D. Tex. 1983).

Cargo interests sued the *M/V Mimosa* in maritime tort for colliding with the *Burmah Agate*, which was carrying crude oil that had been loaded at a Bahamian transshipment point, South Riding Point (SRP), and was worth forty-two dollars per barrel at the time of the collision. *Burmah Agate* had received most of her cargo from a supertanker that had left Africa when the crude was worth twenty-five dollars per barrel. SRP storage facilities supplied the rest of the cargo. Hoping to expedite settlement, the court ruled on two issues: (1) what point constituted place of shipment for purposes of valuing crude and (2) whether the both-to-blame clause in the affreightment contract was enforceable. The court held that the place of shipment of the cargo aboard the

Burmah Agate was SRP and that the both-to-blame clause was enforceable. The court concluded that the measure of damages for lost cargo is the value at the time and place of shipping, reasoning that a separate and distinct shipment began at SRP because the *Burmah Agate* had received part of her cargo from the supertanker at SRP, SRP storage had supplied the rest of the cargo, and only at SRP was the final destination of the crude oil determined. The court also noted that its interpretation complied both with legal definitions of shipping and with the rule that the risk of loss to the cargo begins when the voyage commences. It explained that *U.S. v. Atlantic Mutual*, 343 U.S. 236 (1952), does not bar both-to-blame clauses between private parties, observing that public policy bars only common carriers from contractually avoiding liability for negligence. *Significance*—The opinion is the first to establish an approach for determining place of shipment for valuation of lost cargo and limits to common carriers the scope of the *Atlantic Mutual* prohibition against both-to-blame clauses.

LAND-BASED NEGLIGENCE CAUSING AN AIRPLANE CRASH IN INTERNATIONAL WATERS FALLS WITHIN ADMIRALTY JURISDICTION—*Miller v. United States*, 18 AV. CAS. (CCH) ¶17,912 (11th Cir. 1984).

In 1976 two men were killed when a private airplane flying from the Bahamas to Florida crashed in international waters forty miles southeast of West Palm Beach, Florida. Plaintiffs, relatives of the defendants, filed suit against the United States in 1980 and 1981 under the Federal Tort Claims Act, 28 U.S.C. section 1346 (1982), alleging that the deaths resulted from the negligence of a land-based air-traffic controller. The United States Government contended that the suit should be brought under the Death on the High Seas Act, 46 U.S.C. section 746 (1976), because it involved a traditional maritime activity, the transport of passengers across international waters. The district court held that the case was cognizable as an admiralty action and dismissed plaintiffs' actions as being barred under the statute of limitations. The court of appeals affirmed, holding that this action fell within admiralty jurisdiction. The court examined the Supreme Court's analysis in *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972), which institutes a locality test that makes admiralty jurisdiction available when the wrong bears a significant relationship to traditional maritime activity. The appellate court reasoned that because the trip between the Bahamas and the United

States traditionally had been accomplished by ship, there was a maritime activity that met the *Executive Jet* test. *Significance*—The court finds admiralty jurisdiction in an action involving land-based negligence on the basis of an attenuated resemblance to traditional maritime activity.

FREIGHT FORWARDER WHO BREACHES A FIDUCIARY DUTY TO HIS SHIPPER VIOLATES THE WIRE FRAUD STATUTE—*United States v. Armand Ventura*, 724 F.2d 305 (2d Cir. 1983).

Defendant, the agent of an ocean freight forwarder, was charged with violations of the wire fraud statute, 18 U.S.C. section 1343 (1976). Defendant allegedly operated a kickback scheme by employing non-vessel-operating common carriers to increase the amount charged the shipper for shipping freight and pocketing the difference between the amount charged and the actual cost of shipping the freight. The district court convicted the defendant, and the court of appeals affirmed, holding that an agent of an ocean freight forwarder has a duty to inform his shipper that a non-vessel-operating common carrier is employed only for purposes of inflating freight charges. The court noted that the Federal Maritime Commission's regulations, the contract between the shipper and the freight forwarder, and the freight forwarder's expertise and access to information created a fiduciary relationship between shipper and freight forwarder. Within the Second Circuit, the breach of the duty constitutes "a scheme of artifice to defraud [and] for obtaining money . . . by means of false or fraudulent pretenses [or] representations" within the meaning of the wire fraud statute. *Significance*—This marks the first time the United States Government has used the wire fraud statute to convict an agent of a freight forwarder for breach of the fiduciary duty owed to his shipper.

IN PERSONAM JURISDICTION OBTAINED BY ATTACHMENT OF PROPERTY IS DIFFERENT FROM IN REM JURISDICTION—*Belcher Co. v. M/V Maratha Mariner*, 724 F.2d 1161 (5th Cir. 1984).

A fuel supplier filed an action in rem in United States federal court against a ship to secure payment for a fuel shipment delivered to it. Previously, the fuel supplier had brought another suit in the Netherlands based on the same transaction in which jurisdiction had been obtained by attachment of the vessel. The Netherlands action was pending when the plaintiff had filed suit

in the United States. The district court dismissed the claim, finding that the Netherlands action was the equivalent of an in rem action and therefore was *lis alibis pendens*. The Court of Appeals for the Fifth Circuit reversed and remanded, holding that the suit in the Netherlands was in personam and that the ultimate issues in the two suits were different. The court recognized that an in rem action could not be brought in the Netherlands and that the attachment could not convert that case into an in rem proceeding. The court reversed dismissal because in personam and in rem actions arising from the same admiralty claim are permissible if a maritime lien exists for the in rem action. The court found the in rem issues to be: (1) whether there was a delivery of fuel; (2) whether the fuel was necessary within the meaning of the Federal Maritime Lien Act, 46 U.S.C. section 971 (1976); (3) whether the amount charged was reasonable; and (4) whether the person who placed the order had authority under sections 972-973 of the Act. The sole issue in the Netherlands in personam action was whether the shipowner was contractually liable to the fuel supplier. The court held that staying the in rem proceedings until the Netherlands case was decided would avoid double recovery and repetitive litigation of issues. *Significance*—This decision contrasts an in personam proceeding in which jurisdiction was obtained by attaching property with an in rem action.

II. ALIENS' RIGHTS

CITIZEN OF THAILAND DENIED SUSPENSION OF DEPORTATION FOR FAILING TO MEET THE "CONTINUOUS PHYSICAL PRESENCE" REQUIREMENT OF SECTION 244(a)(1) OF THE IMMIGRATION AND NATIONALITY ACT—*Immigration and Naturalization Service v. Phinpathya*, 104 S.Ct. 584 (1984).

In January 1977 the Immigration and Naturalization Service initiated deportation proceedings against respondent and her husband, both citizens of Thailand, pursuant to section 241(a)(2) of the Immigration and Nationality Act (Act), 8 U.S.C. section 1254(a)(1) (1982) (as amended). Respondent had entered the United States as a nonimmigrant student and had remained without permission after her visa expired in 1971. In 1974 respondent returned to her homeland for three months. She reentered the United States with a nonimmigrant visa that she had obtained by misrepresenting her status to a United States consular officer in Thailand. During the deportation proceedings, respondent ac-

knowledged deportability and applied for suspension under section 244(a)(1) of the Act. An immigration judge denied respondent's suspension because respondent had failed to satisfy the seven year "continuous physical presence" requirement of the Act. The Board of Immigration Appeals (BIA) affirmed. The court of appeals reversed, holding that the BIA had erroneously emphasized both respondent's illegal status in the United States before her departure and the greater risk of deportation caused by her departure. The court concluded that an absence from the country cannot be "meaningfully interruptive" unless it increases the risk of deportation and decreases the hardships engendered by deportation. The Supreme Court reversed, holding that respondent did not satisfy the "continuous physical presence" requirement of section 244(a)(1). The Court stated that: (1) under general rules of statutory construction section 244(a)(1) does not permit exceptions to the "continuous physical presence" requirement; (2) a liberal approach to statutory construction is inconsistent with the congressional intent underlying the requirement; and (3) the "continuous physical presence" requirement is independent of the "extreme hardship" requirement, which also serves as a prerequisite for a suspension of deportation. *Significance*—The decision concludes that Congress intended the seven year "continuous physical presence" requirement set forth in the Immigration and Nationality Act be construed literally.

III. CUSTOMS AND TRADE REGULATION

PRE- AND POSTJUDGMENT INTEREST ABOVE THE LIABILITY LIMIT IMPOSED BY THE WARSAW CONVENTION AND MONTREAL AGREEMENT MAY BE AWARDED IN AIRLINE CRASH TORT CLAIMS—*Domangue v. Eastern Airlines, Inc.*, 722 F.2d 256 (5th Cir. 1984).

The widow of a passenger killed when defendant's commercial airliner crashed brought suit against the airline for the wrongful death of her husband. The district court limited defendant's liability to $75,000 pursuant to the Warsaw Convention, as amended by the Montreal Agreement, 49 U.S.C. section 1502 (1976). The district court refused to grant prejudgment and postjudgment interest on the $75,000 because adding to the judgment amount would have resulted in liability to the defendant in excess of the $75,000 limit, which the court viewed as absolute. The court of appeals reversed, holding that pre- and postjudgment interest above the $75,000 limit was permissible under the Warsaw Con-

vention and Montreal Agreement. The court of appeals reasoned that the Montreal Agreement, in addition to setting liability limits, was intended to increase compensation in airline crashes and encourage speedy disposition of claims; interest awards above the $75,000 limit further these objectives. Furthermore, the court stated that the United States common law rule against award of prejudgment interest on an unliquidated tort claim did not apply because the Warsaw Convention and the Montreal Agreement are uniform international law that supplants local law. In deciding to grant an interest award, therefore, the court balanced the objective of maintaining fixed and definite liability limits for international air carriers against the objectives of speedy recovery and increasing compensation to injured parties. *Significance*—The decision marks the first time a circuit court has awarded a plaintiff interest on the maximum judgment under the Warsaw Convention and Montreal Agreement, thereby awarding total damages in excess of the $75,000 liability limit.

ISSUER OF LETTER OF CREDIT NOT LIABLE FOR NONPAYMENT WHEN ORIGINAL CREDIT EXPIRED AND TRANSACTIONS CONDUCTED ON THE BASIS OF AMENDMENTS TO THE ORIGINAL CREDIT FAILED TO COMPLY WITH THEIR TERMS—*Banco Nacional de Desarrollo v. Mellon Bank*, 726 F.2d 87 (3d Cir. 1984).

A Nicaraguan bank sued for payment under a letter of credit issued by the Mellon Bank (Mellon) in favor of a Nicaraguan meat exporter (Encar). Encar had sold various shipments of meat to a Pennsylvania importer (I.B.P.). Initially, these transactions were governed expressly by Mellon's irrevocable documentary letter of credit to Encar and its advising bank (Banco Nacional). When the initial letter of credit expired, however, Encar and I.B.P. continued to do business on the basis of "amendments" Mellon made to the expired letter of credit. One amendment required I.B.P. to give written notice to Mellon that the meat had arrived in the United States as a condition to Mellon's paying Encar. I.B.P. did not notify Mellon that the shipment in dispute had arrived. As a result, Encar was never paid, and Banco Nacional brought suit to recover on Mellon's letter of credit. The district court granted summary judgment in favor of Encar on the ground that Mellon had altered impermissibly the terms of the letter of credit without Encar's approval. The court of appeals reversed, holding that nothing in the original credit obligated Mellon to pay for the disputed transaction. The court explained that

because there was no letter of credit governing the disputed shipment there could not be a modification of such a letter. The court reasoned that each "amendment" to the original credit constituted merely a new offer of credit. Thus, the written notice provision in the disputed amendment was a valid condition for payment in the transaction. *Significance*—The decision emphasizes that "amendments" to an expired letter of credit are viewed as independent offers and thus may contain different terms that do not relate back to the terms of the original credit.

IV. FOREIGN RELATIONS

DOMESTIC SHAREHOLDER OF FOREIGN CORPORATION SEEKING DECLARATORY JUDGMENT AND INJUNCTION AGAINST THE SEIZURE OF FOREIGN CORPORATE PROPERTY BY THE DEFENSE DEPARTMENT DOES NOT STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED—*Ramirez de Arellano v. Weinberger*, 724 F.2d 143 (D.C. Cir. 1983).

A Honduran corporation, its Honduran and Puerto Rican parent corporations, and the United States owner of one of the parent corporations brought suit against the Secretary of Defense claiming wrongful occupation of its real property in Honduras by United States and Honduran troops for use as a training facility for Salvadoran soldiers. The plaintiffs claimed that the Defense Department's seizure of property was unconstitutional, unauthorized by law, and a deprivation of the use and enjoyment of property without due process. Plaintiffs sought an injunction barring the Department's activities on the property, as well as a declaratory judgment and such other relief as the court deemed proper. The district court granted the defendants' motion to dismiss on two grounds: first, the suit raised a nonjusticiable political question regarding the propriety of the executive's use of military force in Honduras; and second, that adjudication of the matter would interfere with the conduct of foreign affairs and involve sensitive, confidential intergovernmental communications. The court of appeals affirmed the dismissal on different grounds, holding that, while the plaintiffs' case did not present a nonjusticiable political question, it did fail to state a claim upon which relief could be granted. The court declined to make a declaratory judgment or issue an injunction halting the Defense Department's activities on the Honduran property because such equitable relief would: (1) interfere with the conduct of United States foreign af-

fairs; (2) require continuing supervision of compliance by the court; (3) impugn Honduran law by insinuating the violation of that law by native troops; (4) necessitate the adjudication of property rights in Honduran land under Honduran law, a task better performed by courts of that state; and (5) disregard the availability to the plaintiff of a statutory means of redress under the Tucker Act, 28 U.S.C. section 1346 (1976 & Supp. V 1981), which provides monetary damages when a government agent, acting within the ordinary scope of responsibility conferred upon him by Congress, takes private property without express statutory authority.

Circuit Judge Wilkey dissented from the majority's conclusion that the plaintiff had failed to state a claim for relief, noting that the United States plaintiff's status as sole shareholder of the land-owning Honduran corporations gave rise to a property interest protected from unconstitutional and unlawful activity. He argued that the plaintiff's claims of unlawful seizure and the government's failure to afford him due process of law were properly adjudicable in federal court. Balancing the equities and prudential considerations, the dissent found that equitable relief in the form of an injunction or a declaratory judgment was available to the plaintiff because: (1) the location of the property in a foreign country did not affect the court's jurisdiction over the parties; (2) Honduran law would not be impugned by an equitable decree which would only adjudicate the rights of the plaintiff under United States law vis-à-vis the defendant government officials; (3) separation of powers concerns did not prevent judicial relief from unlawful or unconstitutional government action; and (4) enforcement and supervision problems were not presented absent the assumption that government forces would disobey the court's order. Finally, the dissent disputed whether the Tucker Act would apply to an unauthorized seizure as in the instant case and whether the majority more properly should have limited the plaintiff to that recovery. *Significance*—The decision demonstrates judicial reluctance to grant equitable relief in suits arising from the conduct of foreign affairs by the executive branch when an action for monetary recovery is available.

V. HUMAN RIGHTS

TORTURE IS AN INTERNATIONAL CRIME FOR WHICH PUNITIVE DAMAGES MAY BE AWARDED—*Filartiga v. Peña-Irala*, 577 F. Supp.

860 (E.D.N.Y. 1984).

In his official capacity as a Paraguayan police official, defendant tortured and murdered another Paraguayan citizen. Paraguay refused to file criminal charges against defendant. Plaintiffs, father and sister of the victim, brought this wrongful death action under 28 U.S.C. section 1350 (1982), which gives the federal district court "original jurisdiction of any civil action by an alien for a tort, only committed in violation of the law of nations . . . ." On remand from the court of appeals the district court held that torture is an international crime and that punitive damages were appropriate in light of the universal abhorrence of the crime. The court observed that torture is universally condemned, although not universally prosecuted, and applied substantive international law. The court noted that international law rarely provides punitive damages, but made an award of five million dollars plus compensatory damages to each plaintiff in order to further the international objective of making torture an international crime. *Significance*—The court disregards a foreign government's policy decision, and relies on equivocal universal principles to promote an international human rights objective.

VI. INTERNATIONAL PATENT AND COPYRIGHT REGULATION

REGISTRANT MAY REGISTER FOREIGN WORD TRADEMARK WHEN ONLY SIMILARITY TO ENGLISH WORD TRADEMARK IS ITS CONNOTATION—*In re Sarkli, Ltd.*, 721 F.2d 353 (Fed. Cir. 1983).

A company applied to register the foreign word "*repechage*" as a trademark for its skin care product line. A closely related product line bore the previously registered trademark "second chance." The Trademark Trial and Appeal Board denied registration because *repechage* is the French equivalent of "second chance," and thus would elicit an identical commercial impression from purchasers educated in the French language. The court of appeals reversed, holding that mere connotation is not sufficient to establish a prima facie case to deny registration under section 2(d) of the Lanham Trade-Mark Act, 15 U.S.C. section 1350 (1982). The court reasoned that the similarity of the trademarks' definitions should be weighed against the additional tests of similarity in sound and appearance established in *Sure-fit Products v. Saltzon Drapery Co.*, 254 F.2d 158 (C.C.P.A. 1958). Disregarding connotation, the court found the marks otherwise dissimilar. *Sig-*

nificance—The instant decision reaffirms that appearance, sound, *and* meaning are the criteria for determining whether a trademark is confusingly similar to a prior trademark. The decision, however, conflicts with the rule in another circuit that a trademark is confusingly similar "if it is similar in [either] sound, appearance, *or* suggestive connotation." *Watkins Products v. Sunway Fruit Products*, 311 F.2d 496 (7th Cir. 1962) (emphasis added).

VII. JURISDICTION AND PROCEDURE

DEFENDANTS NEED NOT BE ACCORDED A JURY TRIAL IN THE COMMONWEALTH TRIAL COURTS OF UNITED STATES TRUST TERRITORIES—*Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir. 1984).

Defendant, a resident of the Northern Mariana Islands (NMI), a trust territory of the United States, was convicted of possession of marijuana in violation of a local law. The court denied defendant a jury trial because the NMI provide jury trials only in criminal cases involving offenses punishable by more than five years imprisonment or a two thousand dollar fine. The maximum penalty for defendant's conviction was one year imprisonment, a one thousand dollar fine, or both. Defendant appealed to the Appellate Division of the United States District Court for the NMI, which held that the fourteenth amendment guarantees a jury trial in commonwealth courts to defendants prosecuted for serious criminal offenses. The district court further held unconstitutional section 501 of the Covenant to Establish a Commonwealth of the NMI in Political Union with the United States (Covenant) and 5 Trust Territory Code section 501(1), which provide that the sixth amendment right to jury trial does not apply to any action based on local law. The Ninth Circuit reversed, holding that the statutes do not violate the sixth or fourteenth amendments. The court implicitly held that the NMI were an unincorporated territory and asserted that the doctrine of territorial incorporation distinguishes between the constitutional rights of incorporated territories, which are intended for statehood, and unincorporated territories, which are not intended for statehood. In unincorporated territories a fundamental constitutional right applies by its own force only when the right is within those limitations upon government that are the basis of all free government. The court reasoned that although the right to jury trial was fundamental to

the Anglo-American system of justice, it was possible to have a fair and equitable criminal justice system without juries. The court concluded that Congress should have the flexibility to determine whether a jury trial might be inappropriate in a free territory unaccustomed to common law traditions. Thus, the right to trial by jury is not so fundamental that it applies by its own force to territories. *Significance*—The decision determines that the sixth amendment right to a jury trial is not a "fundamental right" of defendants in United States trust territories.

SWISS RESIDENT MUST COMPLY WITH ORDER TO COMPEL DISCOVERY DESPITE THE FACT THAT COMPLIANCE MAY SUBJECT HIM TO CRIMINAL PROSECUTION IN SWITZERLAND—*Laitram Corp. v. Hale*, No. C-1189 (4th Cir. Aug. 12, 1983).

Plaintiff corporation filed suit against a United States citizen residing in Switzerland, for breach of contract and of a fiduciary duty. After the defendant refused to make himself available for deposition, the plaintiff served interrogatories and document requests by mail. The defendant objected to the interrogatories, arguing that his response could result in criminal prosecution by Swiss authorities. The district court granted the plaintiff's motion to compel answers to the interrogatories. The court of appeals denied the defendant's writ, holding that the district court had authority to compel answers to the plaintiff's interrogatories, regardless of whether the defendant was acting in good faith in light of a real danger of prosecution by Swiss authorities. The court relied primarily on *Societé Internationale Pour Participation Industrielles et Commerciales v. Rogers*, 357 U.S. 197 (1958), in which the Supreme Court held that a federal district court had properly dismissed plaintiff's complaint for failure to produce pretrial documents, notwithstanding a finding that Swiss criminal law forbade compliance and that plaintiff had acted in good faith. *Significance*—The case expands the doctrine of *Societé Internationale* to compel response to interrogatories from a defendant whose compliance is forbidden by foreign law.

FOREIGN CORPORATION MUST ANSWER GRAND JURY SUBPOENA WHEN SUBJECT MATTER OF LITIGATION IS RELATED TO CORPORATION'S CONTACT WITH THE JURISDICTION—*In re Grand Jury Subpoena Directed to Marc Rich & Co., A.G.*, No. M-11-188

(S.D.N.Y. Dec. 13, 1983).

The United States Government launched a grand jury investigation into the 1980 and 1981 crude oil transactions of two corporations, Marc Rich & Co., A.G., (hereinafter "A.G.") and A.G.'s wholly owned subsidiary, Marc Rich & Co., International (hereinafter "International"). A.G., a Swiss corporation that was not authorized to do business in the United States, had structured its business to ensure that all titles to oil shipments passed outside the United States. International, on the other hand, had an office in the United States, and paid United States taxes. The Government alleged that these companies had violated United States tax laws, and on April 15, 1982, served a subpoena duces tecum calling for International's business records. A.G. was also served, but it refused to comply with the subpoena. A.G. contended that jurisdiction did not attach because it was not legally responsible for the acts of its subsidiary in the absence of either an agency relationship or a "puppet-puppeteer" relationship. Furthermore, A.G. alleged that complying with the subpoena would violate Swiss law against revealing Swiss companies' business records. A.G. therefore moved to quash the subpoena served on it. The district court denied the motion and held that: (1) the Government had satisfied its burden of proof by its good faith, prima facie showing that jurisdiction existed, a showing that the defendant chose not to rebut; (2) the relevant New York long-arm statute conferred the necessary jurisdiction when the subject matter of the litigation was related to the subpoenaed party's contacts with the jurisdiction; and (3) the interests of the United States outweighed the threat of penalties under Swiss law for revealing business information. The court observed that transactions such as those alleged undoubtedly would provide the minimum contacts needed to satisfy notions of "fair play and substantial justice" required by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Accordingly, the court concluded that it was reasonable to allow the Government to use the subpoena power in attempting to establish the presence of these transactions. *Significance*—The decision establishes two elements required to meet the burden of proof in a grand jury investigation: a good faith, prima facie showing by the Government, and concomitant right of rebuttal by the defendant.