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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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I. ANTITRUST

A PRELIMINARY INJUNCTION TO PREVENT A PARTY FROM TAKING ACTION IN A FOREIGN JURISDICTION THAT WOULD DESTROY UNITED STATES JURISDICTION DOES NOT VIOLATE PRINCIPLES OF PRESCRIPTIVE JURISDICTION OR INTERNATIONAL COMITY — *Laker Airways, Ltd. v. Sabena, Belgian World Airlines,* 731 F.2d 909 (D.C. Cir. 1984).

Plaintiff Laker Airways filed for a preliminary injunction to restrain two defendant airlines from joining as parties in a British action designed to prevent United States courts from deciding plaintiff's antitrust claims. The British Government had determined that Laker's original complaint threatened "to damage the trading interests of the United Kingdom," and had invoked the British Protection of Trading Interests Act, 1980, ch. 11, which commands persons doing business in the United Kingdom to disobey all orders of a foreign court. As a consequence, the British court had issued injunctions preventing Laker Airways from pursuing antitrust claims against two British airlines and two other foreign airlines. The United States district court then had granted the preliminary injunction to prevent Sabena and KLM Royal Dutch Airlines from joining the British action. On appeal,

defendants contended that the injunction violated international rules of comity as well as their right to take part in parallel actions. The United States Court of Appeals for the District of Columbia Circuit affirmed the district court's decision, holding that Great Britain and the United States had concurrent prescriptive jurisdiction over the claims and that the defensive use of an injunction to preserve its jurisdiction to entertain an antitrust action does not violate the principles of comity and concurrent jurisdiction. The court focused on the nature of the British proceedings and noted that the sole purpose of the proceedings was to leave Laker Airways without a forum by removing United States jurisdiction over the antitrust claims. The court further stated that no judicial decision would eliminate the conflict between the laws of the United States and Great Britain; therefore, absent action by the executive or legislative branch, plaintiff's domestic suit should be allowed to proceed free from interference by foreign courts. *Significance*—The case is the first to uphold the defensive use of a preliminary injunction to block actions in foreign courts that would leave one party without adequate judicial remedies by eliminating the jurisdiction of United States courts.

INTERNATIONAL CARRIERS ARE SUBJECT TO THE PRIVATE LAWS OF A FOREIGN STATE WHEN CARRIERS ARE PARTY TO TRADE AGREEMENTS WITH THAT FOREIGN STATE AND ARE DOING BUSINESS WITHIN ITS TERRITORIAL JURISDICTION — *British Airways Board v. Laker Airways, Ltd.*, [1984] 3 W.L.R. 413; 23 I.L.M. 727.

Prior to the instant British action, bankrupt Laker Airways brought suit in a United States district court against members of the International Air Transport Association (IATA) for antitrust violations and tortious activity. Two British airlines, co-defendants in the United States case, responded to the suit by seeking injunctive relief in the British courts. The injunction would have left Laker Airways without a forum for its antitrust claims because British law does not comprehend antitrust matters. The British airlines argued that Laker Airways' United States suit represented unconscionable conduct and, as such, should be enjoined. As a defendant in the British action, Laker Airways sought judicial review of a British order protecting British trading interests implicated in United States antitrust suits. A British lower court granted the injunction, pending appeal, and denied the application for judicial review of the British order. On appeal, the House of Lords reversed the lower court's injunction by hold-

ing that prosecution of the United States suit was not shown to be unconscionable and that the British airlines could be sued in United States district court. The House of Lords noted that no equivalent cause of action existed in the British courts and held that suit in the United States was possible because the British airlines were parties to the Bermuda II Treaty respecting transatlantic fare arrangements (Agreement on Air Transport Services, July 23, 1977, United States—United Kingdom, 28 U.S.T. 5367, T.I.A.S. 8641), and because the carriers had become subject to United States antitrust laws by operating in the United States. The House of Lords affirmed refusal of Laker Airways's request for review, however, because Laker had failed to show that unless special permission were granted, the British order did not reach legislation prohibiting British citizens from providing information to United States litigants in civil antitrust actions. *Significance*—The court issued the first British decision to determine whether injunctive relief is appropriate when such relief effectively would preclude adjudication of a foreign party's claims.

II. CUSTOMS AND TRADE REGULATION

COURT OF INTERNATIONAL TRADE HAS JURISDICTION OVER CLAIMS CHALLENGING REGULATIONS GOVERNING THE IMPORTATION OF GOODS BEARING GENUINE TRADEMARKS — *Vivitar v. United States,* 585 F. Supp. 1419 (Ct. Int'l Trade 1984).

Plaintiff, owner of the Vivitar trademark, sought a mandatory order directing the Customs Service to deny entry of all merchandise bearing the Vivitar trademark unless plaintiff consented to its importation. Plaintiff had licensed foreign subsidiaries only to manufacture photographic equipment bearing the Vivitar trademark and not to market the goods in the United States. Plaintiff's action arose when the Customs Service failed to exclude equipment bearing the Vivitar trademark that had been imported into the United States by unrelated third parties. Plaintiff claimed the Customs Service had improperly administered and enforced the statutes governing exclusion of imports. The Government, on the other hand, contended that under 19 U.S.C. sections 1526(a) and (b) trademark owners do not have the right to exclude foreign merchandise containing its authorized trademark when the owner has authorized foreign manufacturers to use the trademark. The Government moved to dismiss the action for lack of subject matter jurisdiction, contending that the case only in-

volved a trademark dispute and that the district courts, not the Court of International Trade, have jurisdiction over trademark law. The Court of International Trade held that it had jurisdiction under 28 U.S.C. sections 1581(i)(3) and (4) because the gravamen of the owner's claim involved international trade regulation. The court reasoned that because the owner was attacking the regulations used to administer and enforce the customs laws, not an alleged infringement of its trademark, the central issue was the regulation of international trade. The court explained that 28 U.S.C. section 1581(i)(4) creates a residual independent jurisdictional basis for challenging the Customs Service failure to exclude imports under 19 U.S.C. section 1526(a) and (b) because under 19 U.S.C. section 1514, the failure to exclude merchandise is not protestable, and thus jurisdiction to contest that denial under 28 U.S.C. section 1581(a) is unavailable. The court concluded that jurisdiction under section 1581(i)(3) also was proper because the section provides a jurisdictional basis for customs law cases involving quantitative restrictions on the importation of goods other than toxic substances, foods, drugs, or cosmetics. *Significance*—The decision is the first to determine that the Court of International Trade has jurisdiction over causes of action arising from the Customs Service's administration and enforcement of statutes that govern the importation and exclusion of merchandise bearing a genuine trademark.

III. JURISDICTION AND PROCEDURE

FOREIGN SOVEREIGNTY IS NOT SUBJECT TO UNITED STATES JURISDICTION WHEN COMPENSATION CLAIMS AGAINST SOVEREIGNTY WERE NOT WITHIN THE "IMMOVABLE PROPERTY" OR "TORTIOUS ACT" EXCEPTIONS TO THE FOREIGN SOVEREIGN IMMUNITIES ACT — *Asociacion de Reclamantes v. United Mexican States,* 735 F.2d 1517 (D.C. Cir. 1984).

Plaintiffs were successors in interest to Mexican and Spanish land grants covering twelve million acres in Texas and whose claims against the United States for divestiture of title previously had been espoused and settled by the Mexican Government. They brought this action in United States district court seeking compensation from Mexico for the alleged conversion of their claims of divestiture of title. Plaintiffs sought to establish subject matter jurisdiction over the Mexican Government under the "immovable property" and "tortious act" exceptions under section

1605(a) of the Foreign Sovereign Immunities Act (FSIA). The court of appeals affirmed the district court's dismissal of the complaint by holding that neither exception applied. The claims did not concern "rights in immovable property" within FSIA section 1605(a)(4) because they could not affect property interests in or rights to possession of land located in the United States. The present suit concerned only compensation for the taking of previously held land claims; the claims themselves had been extinguished when Mexico reached a settlement with the United States. Furthermore, the suit fell outside the scope of the "tortious act" exception of FSIA section 1605(a)(5) because none of the actions complained of—espousal, presentation and settlement of the claims—was tortious. Moreover, there was an insufficient nexus with the United States because the actions in question had occurred primarily in Mexico. *Significance*—The court's definition of immovable property potentially could permit the United States to expropriate alien-owned domestic property and then agree to a settlement with the aliens' sovereign that both extinguishes the aliens' property rights without consideration and leaves the aliens without recourse against either government.

EXPLICIT WAIVER OF IMMUNITY TO PREJUDGMENT ATTACHMENT OF ASSETS REQUIRES A HIGH STANDARD OF PROOF UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT — *Banque Compafina v. Banco de Guatemala,* 583 F. Supp. 320 (S.D.N.Y. 1984).

Plaintiff Banque Compafina sued to recover on six promissory notes guaranteed by defendant Banco de Guatemala. Plaintiff filed suit to confirm an order of the New York Supreme Court that directed New York county sheriffs to levy on property in which defendant had an interest. Defendant removed the case to district court and moved to vacate the order on the grounds that its property was protected from prejudgment attachment by sections 1611(b)(1) and 1610(d)(1) of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. sections 1602-1611 (1982). Defendant contended that property subject to the provisions of section 1611(b)(1) is immune from prejudgment attachment and that such immunity, unlike immunity from postjudgment attachment, cannot be waived as a matter of policy. Defendant also argued that even if certain of its assets held in the United States were subject to section 1610(d)(1) as assets used for commercial purposes, no explicit waiver of immunity from prejudgment attachment of these assets had been made under section 1610(d)(1).

Plaintiff contended that section 1611(b)(1) permitted waiver of immunity from prejudgment attachment if the waiver was explicit, and that certain waivers contained in the notes qualified as explicit waivers under sections 1611(b)(1) and 1610(d)(1). The district court first found that the attached property was noncommercial and thus subject to the provisions of section 1611(b)(1). The court then suggested that a strict reading of section 1611(b)(1) was proper, but declined to hold expressly that immunity from prejudgment attachment may not be waived. Instead, the court determined that the waivers contained in the notes were not explicit waivers of immunity to prejudgment attachment, and vacated the order of attachment. *Significance*—The decision implies that immunity to prejudgment attachment of property under the FSIA may not be waivable and establishes stringent requirements for the explicit waiver of such immunity. The decision encourages foreign governments to store assets in the United States because it makes prejudgment attachment of the assets less likely.

VESSEL OWNED BY A SUBDIVISION OF THE ITALIAN GOVERNMENT IS IMMUNE FROM ARREST — *O'Connell Machinery Co. v. M.V. Americana*, 734 F.2d 115 (2d Cir. 1984).

A United States machinery company sued the Italian Line, a ship line owned by a subdivision of the Italian Government, and its ship the *Americana* for damage sustained by one of the company's generators during passage from Genoa to New York. After the company threatened to arrest the *Americana* unless the line posted a letter of guarantee, Italian Line posted the letter and filed a motion to dismiss the case. The district court dismissed the complaint and held that the ship was immune from arrest by virtue of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. section 1605(b) (1982). The court of appeals affirmed, holding: (1) the shipping line was an agency or instrumentality of the Republic of Italy within the meaning of the FSIA; (2) the Italian Government did not waive its right to assert sovereign immunity from prejudgment attachment by signing the Treaty of Friendship, Commerce, and Navigation between the United States and Italy, February 2, 1948, 63 Stat. 2255, T.I.A.S. No. 1965; and (3) the FSIA is not unconstitutional. The court explained that the legislative history of the FSIA clearly proves that Congress intended the FSIA to immunize all governmental units under the central government, including shipping lines. The court, relying on *S & S*

Machinery Co. v. Masinexportimport, 706 F.2d 411, 416-48, *cert. denied*, ____ U.S.____, 104 S.Ct. 161 (1983), rejected the company's argument that article XXIV(6) of the treaty waived Italy's immunity. The court also argued that Congress can alter substantive maritime law without violating article III, section 2, of the Constitution and noted that before passage of the FSIA the Supreme Court already had determined that ships owned by foreign governments were immune from arrest. *Significance*—The decision extends the protection of foreign sovereign immunity to vessels owned by subdivisions of a foreign government.

UNITED STATES CITIZEN'S POLITICAL ASSASSINATION IN IRAN NOT SUFFICIENT TO AVOID IRANIAN SOVEREIGN IMMUNITY IN WRONGFUL DEATH ACTION — *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329 (9th Cir. 1984).

The wife and children of a deceased United States citizen brought a wrongful death action against Iran and an Iranian revolutionary group for the political assassination of the deceased while he was employed in Iran by a California engineering firm. The court of appeals affirmed the lower court's dismissal of the case and held that the incident was not within the scope of the commercial activity exception to the jurisdictional immunity of a foreign state, as enumerated in the Foreign Sovereign Immunities Act, 28 U.S.C. sections 1330, 1605(a)(2) (1982), because the numerous acts did not occur "in connection with" decedent's job and did not "cause" a direct effect in the United States. Moreover, the court found that Iran's sovereign immunity was undisturbed by the Treaty of Amity, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853. Only enterprises doing business in the United States, not the Iranian sovereign itself, may be sued by United States citizens under the limited waiver of sovereign immunity in the Treaty of Amity. *Significance*—The decision is the first to hold that neither the Foreign Sovereign Immunities Act nor the Treaty of Amity serves as a waiver of Iranian sovereign immunity in a wrongful death action arising from a political assassination within that country.