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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 given for further research.

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I. Admiralty

EMPLOYEE WHO SPENDS "SOME PORTION OF WORK TIME IN MARITIME ACTIVITIES" IS AN "EMPLOYEE" COVERED BY THE LONGSHOREMEN'S AND WORKERS' COMPENSATION ACT—*Schwabenland v. Sanger Boats*, 683 F.2d 309 (9th Cir. 1982)

An employee of a recreational boat manufacturing firm, whose duties included inspecting boats in production, test driving new models, and performing occasional maintenance, sought recovery under the Longshoremen's and Workers' Compensation Act, 33 U.S.C. sections 901-950 (Act), after he was injured during the testing of a new model. The Benefits Review Board held that the plaintiff was not an "employee" under section 902(3) of the 1972 amendments to the Act because he did not spend a "substantial portion" of his overall employment performing maritime duties. The Ninth Circuit Court of Appeals reversed, holding that the section 902(3) "employee" status requirement was met when "some portion" of the employee's work time involved maritime activities. The court followed the Supreme Court's lead, *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), in rejecting the board's recent attempts to determine section 902(3)

"maritime employee" status relative to the employee's overall job activities. *Boudlache v. Howard Trucking Co.*, 11 BRBS 687, BRB no. 78-383 (1979), *rev'd*, 632 F.2d 1346 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). The liberal view of the court of appeals that the coverage of the Act furthers the legislative intent to provide continuous and uniform recovery for amphibious harbor workers whose duties call them to work both on shore and on deck. *Significance* — Despite the board's repeated attempts at limiting the 1972 amendments to the Act, this circuit gave full effect to the congressional intent (as evidenced by the 1972 amendments) to expand the remedial purposes of the Act.

UNITED STATES CARRIAGE OF GOODS BY SEA ACT EXEMPTS DEFENDANT FROM LIABILITY FOR SHIP DAMAGE INCURRED WHILE DISCHARGING CARGO — *Seven Seas Transportation Ltd. v. Pacifico Union Marina Corp.* [1982] 2 Lloyd's L.R. 465

Plaintiff, carrying grain from the United States to India, chartered ship from defendant to assist in lightening plaintiff's cargo to permit entry into shallow Indian port. Defendant's navigational negligence damaged plaintiff's vessel during lightening. Under contractual agreement and the United Kingdom's Arbitration Act this litigation became a consultative case pending final arbitration. The charter contained an incorporation of the United States Carriage of Goods by Sea Act (COGSA) which in part exempts a ship from responsibility for loss or damage arising from neglect while managing the ship. Section 2 of COGSA clarifies this exception by stating an exemption applies while handling, loading, and discharging goods. The lower court arbitrator determined that COGSA applied to the lightening operation and that defendants were exempt from liability for loss and damage. The instant court affirmed, holding that COGSA's reference to "loss or damage" includes ship damage incurred while handling cargo. The court partly relied on *Anglo-Saxon Petroleum Co. v. Adamastos Shipping Co.* [1957] 2 All E.R. 211, which held that "loss or damages" was not limited only to physical cargo. *Adamastos* exempted damages for delay and detention stating that such damages were "in connection" or "in relation" to the goods if such a relation was within the handling or discharge of the goods. The instant court also referred to *R.W. Miller & Co. v. Australian Oil Refining, Ltd.*, 117 C.L.R. 288 [1967], which exempted damage to a wharf because of a clause similar to section 4 of COGSA. *Significance* — This decision continues the expansive

view of COGSA found in *Adamastos* and *Australian Oil Refining*. The instant case is contrary to United States decisions which appear to limit COGSA to cargo loss or damage.

II. Aliens' Rights

IMMIGRATION AND NATURALIZATION SERVICE DISTRICT DIRECTOR IS ENTITLED TO BROAD DISCRETION IN WEIGHING CRITERIA FOR PAROLE DETERMINATION OF UNADMITTED ALIENS — *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982)

A group of unadmitted aliens brought suit challenging their detention by the Immigration and Naturalization Service (INS) and the denial of parole by an INS District Director pending a final decision on the aliens' requests for political asylum. Finding that the New York area District Director had granted parole to a "similarly situated" group of non-Haitian aliens, the district court concluded that the Director had abused his discretion by discriminating against the Haitians on the basis of national origin or race. The Second Circuit Court of Appeals reversed and remanded, holding that the criteria used by the Director to determine whether parole should be granted were neither unreasonable nor irrational and that the district court had exceeded its review power by substituting its own judgment regarding the weight and applicability of those criteria for the Director's judgment. The Second Circuit concluded that had the district court not used its own judgment to evaluate the validity of the parole petitions, a comparative analysis of the Haitian and non-Haitian groups might have shown that the Haitians were not the victims of racial discrimination. *Significance* — The Second Circuit recognized that although the discretionary powers of INS District Directors are susceptible to judicial review, the district court may not reverse a decision simply because it believes that the Director did not appropriately weigh the applicable criteria.

III. Criminal Law — Terrorism

THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT DOES NOT APPLY TO POLITICAL TERRORIST ACTIVITIES LACKING A MONETARY MOTIVE — *United States v. Ivic*, No. 81-1350 (2d Cir. Jan. 25, 1983)

Criminal charges were brought against four members of a Croatian nationalist organization for terrorist activities, including con-

spiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. sections 1961-1962. The defendants were convicted in district court on six counts of a seven count indictment and were sentenced to twenty to thirty-five years. The Second Circuit Court of Appeals affirmed the judgment, except it reversed count one (RICO) and vacated counts five and six remanding the cause for resentencing by the district judge. Although the court acknowledged that the attempts by the terrorists to use explosives to damage certain buildings could have supported the RICO conspiracy count, it disagreed that the conduct constituted an offense under 18 U.S.C. section 1962(d), because no economic motive was alleged or shown. The court reasoned that the term "enterprise" in RICO connotes a money making organization which neither described nor applied to the nationalist movement to separate Croatia from Yugoslavia. The terrorists were considered not to meet the definition of "racketeer" and their acts for independence were deemed not to fall under the definition of "corrupt" within the meaning of the statute. The inapplicability of RICO to political terrorism lacking a monetary purpose was supported further by the court's review of the legislative history emphasizing its intended application to organized crime and illegal business activities. The court also read *United States v. Turkette*, 452 U.S. 576 (1981), to require a monetary motive for which legitimate enterprises would be infiltrated to trigger the application of RICO. The court declined to address the question whether RICO would apply to a terrorist organization which illegally obtained financing for its activities. *Significance* — This decision requires a showing of a monetary motive on the part of the defendants to trigger application of RICO, thus excluding from the scope of the statute terrorist acts for purely political purposes.

IV. Customs and Trade Regulation

PAYMENT TO SELLER UNDER IRREVOCABLE LETTER OF CREDIT NOT BARRED BY MISREPRESENTATION OF THIRD PARTY, SEPARATE ATTEMPT TO EVADE EXCHANGE CONTROL REGULATIONS — *United City Merchants v. Royal Bank of Canada*, [1982] 2 All E.R. 720

Plaintiffs, British sellers of manufacturing equipment, sued defendant Canadian bank to enforce payment under an irrevocable letter of credit in an transaction with a Peruvian buyer. Plaintiff had agreed to double the invoice price of goods to allow the buyer

to evade Peruvian exchange control regulations. Defendant refused to pay plaintiff after an agent of the loading broker, without plaintiff's knowledge, fraudulently misrepresented that goods had been shipped within the period specified by the letter of credit. The trial court rejected defendant's contention that a bank has the right to refuse payment of a document acceptable upon its face even if the document includes a misrepresentation of a material fact. The trial court, however, held the entire contract unenforceable since the agreement of the parties to evade Peru's exchange control regulations violated the British act giving effect to the Bretton Woods Agreement of 1945 because it could not be severed from the contract for the sale of goods. The Court of Appeal reversed the trial court on the Bretton Woods issue allowing separate consideration of the agreement for the sale of goods. The appellate court declined to enforce payment, however, accepting defendant's modified argument that a bank need not honor a letter of credit in favor of a seller if any of the documents presented under the letter of credit contain material misrepresentations false to the knowledge of the person issuing the document and intended to deceive. The House of Lords affirmed the Court of Appeal on the Bretton Woods issue, deciding that contracts contrary to exchange control regulations are not "illegal" under English law but merely unenforceable, and following *Wilson, Smithett & Cope, Ltd. v. Teruzzi*, 1976 Q.B. 683, held that the treaty does not affect separate agreements for the sale of goods. The House of Lords also agreed with plaintiffs and the trial court that a letter of credit is enforceable by an innocent seller even when there is misrepresentation by a third party. The court stated that a contrary holding would "undermine the whole system of financing international trade by means of documentary credits," and that permitting banks to reject documents because of material misstatements would "destroy the autonomy of the documentary credit which is its raison d'etre." *Significance* — The decision reemphasizes the critical role of stable, dependable, predictable methods of finance in promotion of international trade.

V. European Court of Human Rights

IMPRISONMENT OF A RECIDIVIST UNDER MINISTERIAL DISCRETION MUST BE ACCOMPANIED BY PERIODIC JUDICIAL REVIEW OF THE LAWFULNESS OF THE DETENTION — *van Droogenbroeck v. Belgium*, 4 Eur. Hum. Rts. Reps. 443 (Eur. Ct. of Human Rights, June 24,

1982)

Applicant, a Belgian national, complained before the European Court of Human Rights that his detention as a recidivist by the Belgian Government violated the Articles of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention). The applicant alleged, *inter alia*, that he was denied access to a court to determine the lawfulness of his detention in violation of article 5(4) of the Convention. The applicant, having an extensive history of criminal offenses, was found to be a recidivist, and the Belgian court placed him "at the disposal of the Government" for up to ten years under the Belgian Social Protection Act. The Belgian Minister of Justice had initial authority to determine a detention period for the applicant. The European Court of Human Rights held that the Convention required procedure for review by the court of the Minister of Justice's determination of the detention period. The court reasoned that judicial review of the Minister's decision was necessary because the conditions initially justifying detention as a recidivist could change and cause such detention to become unlawful. Because access to the review courts was based on unsettled areas of Belgian case law the court rejected the Belgian Government's contention that adequate judicial review existed. The court held that the existence of a remedy must be sufficiently certain to meet the accessibility and effectiveness requirements of article 5(4) of the Convention. *Significance* — By introducing a uniform standard, the court has instructed signatories to the Convention to alter their criminal justice system to afford periodic review of detained individuals when there is a possibility that the reasons for detention might change.

VI. International Tax

STATE PROPERTY TAX ON GOODS STORES UNDER BOND IN A CUSTOMS WAREHOUSE ARE PREEMPTED BY CONGRESS COMPREHENSIVE REGULATION OF CUSTOMS DUTIES — *Xerox Corp. v. Harris County*, 103 S. Ct. 523 (1982)

Xerox Corporation sought declaratory and injunctive relief from nondiscriminatory ad valorem property taxes assessed by the city of Houston, Texas and the county of Harris. Xerox argued that the property taxes, levied upon copying machines stored in customs bonded warehouses and destined for foreign markets, were unconstitutional because they violated the import-

export clause and the commerce clause of the Constitution. The Texas Court of Civil Appeals denied relief, but the United States Supreme Court reversed and remanded to that court, finding that the state property tax scheme had been preempted by a congressionally created customs system that established customs supervised bonded warehouses where imported goods could be stored duty free for prescribed periods. The Court reasoned that: (1) the customs system was created under commerce clause power; (2) the benefit bestowed upon United States industry by the duty avoidance scheme was largely offset by the state tax; and (3) the absence of the state tax was necessary in order to achieve the congressional objective. *Significance* — This decision establishes that goods stored under bond in a customs warehouse pursuant to the congressionally created customs system are exempt from state property taxes.

THE JURISDICTION OF THE INTERNATIONAL COURT OF TRADE HAS BEEN EXPANDED TO INCLUDE TONNAGE CASES COMMENCED BY THE UNITED STATES — *United States v. Biehl & Co.*, No. 82-36 (Ct. Int'l Trade May 10, 1982)

An internal audit by the United States Customs Service in 1978 revealed a tonnage tax deficiency of $7,012.80 incurred by the *S.S./Pyramid Veteran* while in port at Galveston, Texas in 1975. Recovery was sought under the Customs Court Act of 1980 (Act), 28 U.S.C. section 1582(2) (1980). Defendant moved for dismissal alleging the suit did not fall under the purview of the Act. In this case of first impression the Court of International Trade denied defendant's motion and *sua sponte* transferred the case to the Southern District of Texas, Galveston Division. Citing section 1581(i) of the Act the court found that its expanded jurisdiction does include tonnage cases, but only where the action is commenced by the United States. *Significance* — For no discernible reason Congress has divided the jurisdiction over tonnage cases between the International Court of Trade and the district courts depending solely upon the party who commenced the action. Thus, a plaintiff seeking relief against the United States for excessive tonnage taxes may expect to appear in the Court of International Trade while someone being sued for tonnage taxes should plan to appear in the appropriate district court.