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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

FORCED ENTRY OF THE SINGLE CABIN OF A 27-FOOT SAILING SLOOP TO CONDUCT A DOCUMENT AND SAFETY INSPECTION IS NOT AN UNREASONABLE SEARCH—*United States v. Thompson*, 710 F.2d 1500 (11th Cir. 1983).

After noticing that the defendants' boat was riding low in the water, the Coast Guard boarded the boat to conduct a routine document and safety inspection. The master of the ship refused to produce the vessel's registration papers and to unlock the cabin door. The officer in charge arrested the defendants, broke the lock on the door, conducted his inspection, and found bales of marijuana. The district court granted the defendants' motion to suppress the evidence because it found that the document and safety inspection was a mere pretext to conduct a search for contraband and was initiated without a reasonable suspicion of wrongdoing. The court of appeals reversed the district court decision, holding that the Coast Guard may, without any suspicion of wrongdoing, search those areas of a vessel that must be inspected to accomplish an ordinarily competent document and safety in-

spection. The subjective intent of the officer conducting the search is irrelevant. Applying this principle to the instant case, the court found that the Coast Guard had to search the cabin of defendants' vessel to complete a routine document and safety inspection. The Coast Guard's conduct of this type of search is constitutional. *Significance*—This decision clarified the standards governing Coast Guard vessel searches set forth in *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980), by establishing that document and safety inspections may be conducted without suspicion of wrongdoing and that the Coast Guard may search any area of the ship necessary to conduct a routine document and safety inspection.

II. ALIENS' RIGHTS

EXCLUDABLE ALIENS HAVE A CONSTITUTIONAL RIGHT TO A HEARING AFTER THE INITIAL PERIOD OF DETENTION—*Fernandez-Roque v. Smith*, 567 F. Supp. 1115 (N.D. Ga. 1983).

Cuban detainees who had arrived in the United States as part of the 1980 "Freedom Flotilla" from Cuba filed a class action petition for habeas corpus relief. Although these Cubans had been classified as excludable from the United States, the United States Government was detaining them indefinitely because immediate exclusion was impracticable. The district court held that although the government was authorized by statute to detain excludable aliens indefinitely without a hearing, this detention was impermissible under the Constitution. The court reasoned that after an initial period of detention, the alien's basic entitlement to liberty comes to the fore, and further detention must be justified on the basis of a procedurally adequate finding that a detainee, if released, is likely to abscond, to pose a risk to national security, or to pose a significant threat to persons or property within the United States. In addition to recognizing this constitutional right to a hearing, the court stated that the following procedural guarantees are necessary for an adequate hearing: (1) the right to written notice of the factual allegations supporting continued detention; (2) the right to compel attendance of witnesses; (3) the right to confront and cross-examine witnesses; (4) the right to a neutral decision maker; (5) the right to protection against self-incrimination; (6) the right to counsel paid for by the government; (7) the right to a presumption of innocence; and (8) if the

hearing is to revoke the parole of an excludable alien and place him in detention, the right to a preliminary hearing near the site of the alleged parole violation. *Significance*—This decision continues the trend toward providing greater procedural and substantive rights to aliens.

EXCLUSIONARY RULE BARS USE IN DEPORTATION PROCEEDINGS OF EVIDENCE OBTAINED BY INS OFFICERS IN VIOLATION OF THE FOURTH AMENDMENT—*Lopez-Mendoza v. Immigration and Naturalization Service*, 705 F.2d 1059 (9th Cir. 1983) (en banc).

Sandoval, a worker in a Pasco, Washington potato processing plant was detained by Immigration and Naturalization Service (INS) officers along with a group of other workers believed to be illegal aliens. These workers were detained because they were observed “putting their heads down, turning their heads to the sides, [and] avoiding eye contact” when the INS officers passed. Rejecting Sandoval’s contention that his detention violated his fourth amendment rights, the immigration judge, focusing on Sandoval’s oral statement to INS officers that he was a native of Mexico and that he had entered the United States without inspection, entered an order of deportation. The Board of Immigration Appeals dismissed Sandoval’s appeal without addressing the legality of his arrest. The Ninth Circuit Court of Appeals, sitting en banc, reversed, holding that Sandoval’s detention violated the fourth amendment, that his statements to the INS officials were a product of that unlawful detention, and that the exclusionary rule bars the INS from introducing in deportation proceedings evidence illegally obtained by INS agents. The court held that the INS observation of Sandoval’s behavior was “patently insufficient as a matter of law” to provide a reasonable suspicion that Sandoval was an illegal alien and that the statements obtained during Sandoval’s detention were the fruit of an illegal search. Because deportation proceedings are civil proceedings, the circuit court utilized the three-part analysis set forth in *United States v. Janis*, 428 U.S. 433 (1976), in which the Supreme Court held that the exclusionary rule did not bar the federal government’s use in a civil tax proceeding of evidence seized by state law enforcement officers in violation of the fourth amendment. Noting that the prime purpose of the exclusionary rule is to deter future unlawful police conduct, the court found that (1) because those who illegally obtained the evidence and those who seek to use it in a deportation proceeding are members of the same government entity,

the deterrent effect of the exclusionary sanction is maximized; (2) applications of the exclusionary rule outside the deportation context are not likely to deter effectively INS officers from violating the fourth amendment; and (3) the social costs of invoking the rule, a greater number of aliens who will escape deportation by the suppression of illegally obtained evidence, would be relatively low. The dissenting judges argued vigorously that the majority opinion was a radical departure from existing law limiting the application of the exclusionary rule to criminal or "quasi-criminal" proceedings and that the social and administrative costs of applying the rule outweigh its deterrent effect. *Significance*—This decision is the first to consider expressly the question of whether the exclusionary rule applies in deportation proceedings using the approach set forth by the Supreme Court in *United States v. Janis*, 428 U.S. 433 (1976).

LABOR UNION HAS STANDING TO MAINTAIN ACTION FOR VIOLATION OF DUE PROCESS RIGHTS OF ALIEN UNION MEMBERS; GRANT OR DENIAL OF EXTENDED VOLUNTARY DEPARTURE FOR SALVADORAN NATIONALS BY IMMIGRATION AND NATURALIZATION SERVICE WAS NOT A NONJUSTICIABLE POLITICAL QUESTION; ALLEGATION THAT STATE DEPARTMENT ROUTINELY RECOMMENDED DENIAL OF ASYLUM CLAIMS FILED BY SALVADORANS STATED A CLAIM—*Hotel & Restaurant Employees Union, Local 25 v. Smith*, 563 F. Supp. 157 (D.D.C. 1983).

A labor union brought an action challenging the State Department's practice of routinely recommending denial of asylum claims filed by Salvadoran nationals and the failure of the Attorney General and the Immigration and Naturalization Service to grant these nationals extended voluntary departure. Defendants moved to dismiss the complaint. The District Court held that (1) the union had standing to maintain action, (2) granting or denying extended voluntary departure was not a nonjusticiable political question, and (3) the plaintiff stated a claim upon which relief could be granted. The court's holding that the union had standing to maintain its action was based upon a finding that the plaintiff union had alleged injury to itself and its members' associational ties. The Salvadoran union members, regardless of their immigration status, come within the definition of "employees" in the National Labor Relations Act, and the union is thus prohibited from discriminating against any one group of employees. Because the union had a legal obligation to protect its alien members, the

court reasoned that the union had standing to bring the instant action. The court found the plaintiff's claim justiciable because none of the criteria of nonjusticiability set forth in *Goldwater v. Carter*, 444 U.S. 996 (1980) had been met. The court also cited cases in which federal courts have authorized judicial review of immigration decisions. Finally, the court held that plaintiffs' allegations that the State Department made its recommendations for denial of asylum and extended departure without examining the merits of the individual cases, stated a claim upon which relief could be granted. The court found that this behavior violated the fifth amendment due process rights afforded the aliens by the United States Constitution. *Significance*—This decision initiates judicial review of the Reagan administration's policy of denying asylum to all refugees of the political strife in El Salvador and suggests that a policy of grounding immigration decisions solely upon national origin is unconstitutional.

III. ARBITRATION

ARBITRATION CLAUSE THAT CONFLICTS WITH LOCAL LAW IS NOT "NULL AND VOID" UNDER THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS—*Rhone Mediterranee Compagnia v. Lauro*, 712 F.2d 50 (3rd Cir. 1983).

Plaintiff, Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazioni, sought subrogation in admiralty from defendant shipowner, Lauro, for damages to insured allegedly resulting from breach of time charter agreement, unseaworthiness, and crew negligence. The District Court of the Virgin Islands granted defendant's motion for a stay pending arbitration pursuant to an arbitration clause in the time charter agreement. Plaintiff appealed the stay on the grounds that the arbitration clause was "null and void" within the meaning of article II, section 3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The clause provided that the arbitration should take place in Italy with two arbitrators, one chosen by each party, with a provision designating a tie breaker if necessary. Under Italian law such an arbitration agreement is null and void because it calls for an even number of initial arbitrators. The Third Circuit Court of Appeals affirmed the district court's order, holding that, although the arbitration clause was contrary to Italian law, it was not "null and void" under the terms of the Convention. Because the goal of the Convention is to promote the

enforceability of international arbitration agreements, the court stated that "an agreement to arbitrate is 'null and void' only (1) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver . . . or (2) when it contravenes fundamental policies of the forum state." *Significance*—In this case the Third Circuit establishes a narrow definition of "null and void," for Convention purposes, that will usually permit arbitration when the arbitration agreement contains only a technical violation of local law.

IV. INTERNATIONAL TAXATION

TAX EXEMPTIONS IN EXECUTIVE AGREEMENT ARE VOID DUE TO CONFLICT WITH PRIOR ACT OF CONGRESS—*Swearingen v. United States*, 565 F. Supp. 1019 (D. Colo. 1983).

Plaintiffs, United States citizens employed in Panama by the Panama Canal Commission during 1979, sought a refund under 28 U.S.C. for taxes erroneously assessed by the United States. Provisions of the Executive Agreement in Implementation of Article III of the [Panama Canal] Treaty clearly purport to exempt United States employees working in Panama from all taxes on their Commission income. Recognizing the direct conflict between the Agreement and section 61(a) of the Internal Revenue Code, the district court held that executive agreements, unlike treaties, do not supersede prior inconsistent acts of Congress because they require no Senate ratification and are not directly authorized by the United States Constitution. Although the Treaty referred to the Agreement, and both were executed at almost the same time, the President chose not to include the taxation provisions in the Treaty before submitting it to the Senate for ratification. The district court, therefore, refused to confer treaty status upon the executive agreement, granted summary judgment for the United States, and declared the tax exemption void. *Significance*—The decision broadly asserts that executive agreements do not share the preeminent status of treaties with respect to prior acts of Congress, an issue not yet decided by the United States Supreme Court.

REPARATIONS PAID PURSUANT TO TREATY BY A FOREIGN GOVERNMENT FOR WARTIME INJURIES CONSTITUTE INCOME IN DETERMINING

ELIGIBILITY FOR SUPPLEMENTAL SECURITY INCOME BENEFITS
—*Grunfeder v. Heckler*, 708 F.2d 458 (9th Cir. 1983).

Plaintiff, who was separated from her mother during World War II, received lump sum payments and a monthly pension from the German government for wartime injuries, pursuant to the German Restitution Act of 1956. Characterizing the reparations as income, the Social Security Administration determined that the plaintiff was no longer eligible for supplemental security income (SSI) benefits which are intended to aid the needy. 42 U.S.C. section 1382a(a) (1976). Plaintiff subsequently sought judicial review of the administrative decision. Plaintiff asserted that the reparations were not income as defined by the applicable eligibility regulations and that some of the reparations were used to pay medical bills and thus were not income. Rejecting plaintiff's arguments, the Ninth Circuit Court of Appeals affirmed the administrative decision, holding that the payments were income. The court stated that income includes earned and unearned receipts that can be used to meet basic needs, and that none of the specific exceptions to the definition of income included the reparations. Stressing "need" as the key criterion for SSI eligibility, the court noted that neither reparations nor tort recoveries are excluded from the broad definition of income. Further, payments similar to plaintiff's pension were expressly included in that definition. While SSI regulations state that certain medical payments should not be treated as income, the court found those regulations inapplicable to unrestricted pension payments designated for plaintiff's loss in "working capacity." The Ninth Circuit summarily rejected plaintiff's additional argument that characterizing the payments as income violated notions of equal protection and international comity. *Significance*—This case of first impression affirms that a broad definition of income is appropriate for determining eligibility for SSI benefits intended to aid the needy.

V. JURISDICTION AND PROCEDURE

ACT OF STATE DOCTRINE MAY NOT CONTROL WHERE ACTIONS OF FOREIGN SOVEREIGN AFFECT PROPERTY LOCATED WITHIN THE UNITED STATES—*Bandes v. Harlow & Jones, Inc.*, 570 F. Supp. 955 (S.D.N.Y. 1983).

Bandes, the former chief executive officer and majority shareholder of a Nicaraguan corporation (INCA), fled Nicaragua dur-

ing the Sandinista revolution. Pursuant to several reconstruction decrees, the new Nicaraguan Government confiscated INCA's assets and appointed a government administrator to manage and control INCA's affairs. Bades and the Nicaraguan administrator for INCA were interpleaded by a United States corporation to resolve ownership of a sum of money received as payment from INCA for an undelivered shipment of steel. In granting Bades' motion for summary judgment, the district court applied the corollary to the Act of State Doctrine enunciated in *Republic of Iraq v. First National City Bank*, 353 F.2d 47, 51(2d Cir. 1965). That corollary provides that the judiciary must give extraterritorial effect to a foreign sovereign's attempted confiscation of property located within the United States "only if [the acts of the foreign state] are consistent with the policy and laws of the United States." It was undisputed that Bades would have been the principal representative of INCA, and thus the proper party to receive the disputed funds, had the Nicaraguan Government not intervened. The district court ruled that Nicaragua's confiscation of INCA contravened the fifth amendment to the United States Constitution, which proscribes the uncompensated taking of property by the state, and therefore, such an interventionist state action was a nullity for purposes of property located within the United States. Thus, Bades remained the rightful representative of INCA before the court and was entitled to the interpleader fund. *Significance*—This decision reiterates judicial disdain for attempts by foreign states to expropriate property located within the United States without compensating the original owner as required historically by United States law and policy, and therefore renders such attempts ineffective within the United States.

UNITED STATES COURTS WILL NOT RECOGNIZE THE JURIDICAL STATUS OF FOREIGN ENTITIES WHEN TO DO SO WOULD SERVE SOLELY TO ALLOW A FOREIGN GOVERNMENT TO BENEFIT FROM THE LAWS OF THE UNITED STATES, WHILE REMAINING FREE FROM ANY COUNTERCLAIM—*First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 103 S. Ct. 2591 (1983).

First National City Bank (Citibank) issued a letter of credit payable to Banco Para El Comercio Exterior De Cuba (Bancec), an autonomous juridical entity set up by the Cuban Government to serve as an official credit institution for foreign trade. After Citibank's Cuban assets were nationalized by the Cuban Government, Citibank refused to pay money owed on the letter of credit.

Bancec brought suit in United States District Court. Citibank counterclaimed, asserting a right to set off the value of its assets seized in the nationalization. While the suit was pending, the Cuban Government dissolved Bancec, split its assets among various government agencies, and transferred them to a new juridical entity. The district court dismissed the complaint against Citibank, rejecting Bancec's contention that Bancec's separate juridical status shielded it from liability for the acts of the government of Cuba. The Second Circuit Court of Appeals reversed, holding that Bancec was not an instrumentality of the Cuban Government for purposes of the counterclaim filed by Citibank. The court reasoned that the legal autonomy of a government instrumentality must be honored, except in situations in which the juridical entity itself played a key role in the action giving rise to the counterclaim against the state. The Supreme Court, after initially determining that the Foreign Sovereign Immunity Act of 1976, 28 U.S.C. sections 1602-1611 (1976), was not applicable to the question of Citibank's right to set off the value of its seized Cuban assets, reversed and remanded. The Court held that principles of equity prohibit a foreign government from bringing suit in United States courts while remaining immune to counterclaims through the use of juridical entities. The Court held that although the separate juridical status accorded an instrumentality by a foreign government is presumed valid, this presumption may be rebutted by a showing that the foreign government conferred the status to avoid liability for violations of international law. Juridical status is granted to protect investors, not to shield the governments. *Significance*—This decision establishes that United States courts, applying internationally recognized equitable principles, may disregard the normally separate juridical status of a government instrumentality in order to avoid injustice.

AN INTERNATIONAL TRADE AGREEMENT'S "BUSINESS FACILITATION" CLAUSE THAT WAIVES IMMUNITY FROM "OTHER LIABILITY" DOES NOT EXPLICITLY WAIVE IMMUNITY FROM PREJUDGMENT ATTACHMENTS UNDER SECTION 1610(d)(1) OF THE FOREIGN SOVEREIGN IMMUNITIES ACT—*S & S Machinery Co. v. Masinexportimport*, 706 F.2d 411 (2d Cir. 1983).

A domestic corporation purchased goods delivered by a Romanian trading company and paid for them by irrevocable letters of credit issued by a Romanian bank for the trading company's account. The corporation brought suit on the purchase

agreement in the New York Supreme Court because it was dissatisfied with the quality of the goods delivered. The corporation also demanded a prejudgment attachment of defendant bank and defendant trading company's assets located in the United States. The state court granted an order of attachment. After removal of the action to federal district court, the defendants' motion to vacate attachment was granted. The court of appeals affirmed, holding that: (1) the Romanian bank and trading company were "agencies or instrumentalities" of a foreign state under section 1603(b) of the Foreign Sovereign Immunities Act (FSIA) and thus were protected by the Act; (2) Romania did not explicitly waive its immunity from prejudgment attachment under section 1610(d)(1) of the Act; and (3) an injunction could not be issued to enjoin negotiation or use of drafts if such relief could not be granted by the FSIA. The waiver of immunity issue presented the court with a question of first impression. The plaintiffs claimed that a "business facilitation" clause of a trade agreement between the United States and Romania that waived immunity from "other liability" was an explicit waiver of immunity from prejudgment attachments under section 1610(d)(1) of the Foreign Sovereign Immunities Act. The court disagreed, reasoning that the phrase "other liability" does not include prejudgment attachments, which are more properly classified as provisional remedies. *Significance*—This decision implies that courts will narrowly construe the "explicit waivers" requirement of the Foreign Sovereign Immunities Act and that parties engaged in international trade should draft "waiver of immunity" agreements that specifically encompass section 1610(d)(1) prejudgment attachments.

A FOREIGN CORPORATION IS NOT SHIELDED FROM COMPLIANCE WITH DISCOVERY REQUESTS, PURSUANT TO THE FEDERAL RULES OF CIVIL PROCEDURE, BY THE HAGUE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL AND COMMERCIAL MATTERS—*Lasky v. Continental Products Corp.*, 569 F. Supp. 1227 (E.D. Pa. 1983).

In a suit seeking damages for injuries sustained in an automobile accident allegedly caused by defectively manufactured tires, the defendant German manufacturer moved for a protective order shielding it from the plaintiff's interrogatories and requests for documents served pursuant to the Federal Rules of Civil Procedure. As a German licensed and incorporated entity, the defendant sought an order requiring the plaintiff to conduct discovery pursuant to the Hague Convention on the Taking of Evidence

Abroad in Civil and Commercial Matters, to which the United States is a party. The district court denied the motion. The court recognized that the Hague Convention provides discovery methods which differ from those of the Federal Rules, but stated that the Hague Convention does not supersede the discovery provisions of the Federal Rules of Civil Procedure nor prevent their use in an action against a foreign entity. The court reasoned that a foreign entity subject to federal jurisdiction is likewise subject to the Federal Rules. The court noted, however, that international comity considerations may require judicial restraint if the court's order would require a party to take actions in violation of the law of a foreign state, or which may infringe upon the sovereignty of a foreign state. The court concluded that the protective order should not be issued because compliance with the discovery request did not appear to require the defendant to violate German law or impinge upon the sovereignty of the Federal Republic of Germany. *Significance*—This decision determines that the Hague Convention does not supersede the discovery provisions of the Federal Rules of Civil Procedure when compliance will not violate principles of international comity.

VI. SECURITIES

SECURITIES FRAUD CONSISTING OF SIGNIFICANT MISREPRESENTATIONS IN THE UNITED STATES, SOLELY BETWEEN FOREIGN PARTIES, CONFERS SUBJECT MATTER JURISDICTION ON UNITED STATES COURTS—*Gruenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983).

All parties in this case are either foreign citizens or corporations. The securities were common stock in the defendant corporation. The alleged violations of sections 12(2) and 17(a) of the Securities Act of 1933, 15 U.S.C. sections 77l and 77q(a), and section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. section 78j(b), occurred in four separate meetings. Three of these meetings occurred outside the United States, and the fourth meeting, at which the agreement was executed, took place in Los Angeles, California. The district court ruled that it did not have subject matter jurisdiction over the case because the securities transaction did not affect United States investors or markets, and because the only illegal act that occurred in the United States was a repetition of a prior misrepresentation. The Ninth Circuit Court of Appeals reversed, holding that the defendant's conduct

in the United States conferred subject matter jurisdiction because it consisted of a misrepresentation that was significant with respect to the alleged violation. The court of appeals applied *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979), which stated that United States courts have subject matter jurisdiction in transnational securities fraud cases, involving only foreign parties, if defendant's conduct concerned the use of instrumentalities of interstate commerce, was not merely preparatory in nature, furthered the fraudulent scheme, and was a significant aspect of the violation. The court of appeals stated that a lesser standard would allow the United States to become a base for fraudulent securities schemes among foreign parties. *Significance*—This decision continues the trend of broadening subject matter jurisdiction of the United States courts in cases concerning transnational securities fraud and multinational parties.