Vanderbilt Journal of Transnational Law

Volume 14
Issue 2 *Spring 1981*

Article 11

1981

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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1. ADMIRALTY

CARRIER WHO EMPLOYS STEVEDORE UNDER A LONG-TERM CONTRACT IS VICARIOUSLY LIABLE TO CARGO OWNER FOR STEVEDORE'S MISHANDLING OF CARGO EVEN AFTER UNLOADING AND STORAGE

Plaintiff, owner of a cargo of tin bars, brought suit against defendants, the carrier of the cargo and the carrier's stevedore, upon learning that five bundles of tin had disappeared following unloading and storage. Defendant carrier contended that it had discharged its obligations under the contract of carriage by making constructive delivery of goods to the stevedore's pier and by giving due notice of the arrival to the owner—who did not call for the goods during the allotted "free time." Although acknowledging that defendant-carrier had discharged its duties under the bill of lading, and was not liable for breach of contract, the District Court for the Southern District of New York nevertheless held that defendant-carrier was vicariously liable for the negligence of the stevedore. The court justified its decision on the grounds that defendant-carrier was in a better position than plaintiff-cargo-owner to protect itself, by contract or insurance, against the negligence of stevedore. Had the statute of limitations not run, the court noted, defendant-carrier could have brought a cross-claim for indemnification against the stevedore. *Significance*—This decision settles a dispute among lower courts by holding that the carrier continues to be responsible for the safety of stored goods

even after the expiration of "free time" alloted to the consignee to accept delivery. *Philipp Bros. Metal Corp. v. SS Rio Iguazu,* 498 F. Supp. 645 (S.D.N.Y. 1980).

VESSEL OWNER DENIED DUTY REMISSION BECAUSE OF PROCEDURAL FAILURE IN FILINGS WITH CUSTOMS SERVICE

Plaintiff, owner of a United States vessel, brought suit under section 466(b)(1) of the Tariff Act of 1930 to recover duties assessed on repairs made to the vessel while overseas. Plaintiff based its claim on previous filings for remission of duties pursuant to 19 C.F.R. § 4.14 of the Customs Regulations and on filings for protest for the remission of foreign repair duties pursuant to 19 U.S.C. § 1514. Defendant maintained first, that the filing for remission was faulty because it was not filed within 90 days after the posting of notice of liquidation (final duty assessment). Defendant also contended that the suit was barred because it was not filed within the 180 day statute of limitations provided by 28 U.S.C. § 2631(a). The Customs Court agreed with all of the defendant's contentions and granted its motion to dismiss the claim for lack of jurisdiction. *Significance*—In finding that both of plaintiff's filings were faulty, the court noted that plaintiff's failure to file the required evidence in a timely fashion after the filing for remission permitted defendant to liquidate the entry without notifying plaintiff of a determination of its remission petition. *American Export Lines, Inc. v. United States,* 496 F. Supp. 1320 (Cust. Ct. 1980).

WIFE OF HARBOR WORKER INJURED NONFATALLY IN STATE TERRITORIAL WATERS MAY MAINTAIN ACTION FOR LOSS OF HUSBAND'S SOCIETY

A harbor worker injured nonfatally while working aboard a vessel in New York waters sued the shipowner alleging negligence and unseaworthiness. On the authority of *Igneri v. Cie. de Transports Oceaniques,* 323 F.2d 257 (2d Cir. 1963), *cert. denied,* 376 U.S. 949 (1964), the New York Supreme Court, Special Term, denied the injured worker leave to amend the complaint to add his wife as a plaintiff for loss of society. Reasoning that *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573 (1974), had sapped the vitality of *Igneri,* the Appellate Division of the New York Supreme Court reversed the Special Term's denial, and granted the motion to amend. The New York Court of Appeals affirmed. The United

States Supreme Court, holding that general maritime law afforded a remedy to the wife of a harbor worker injured nonfatally for loss of her husband's society, upheld the court of appeals' ruling. Because it found no grounds to distinguish fatal from nonfatal injuries in authorizing recovery for loss of society, the Court extended the *Gaudet* holding to provide relief for such loss to the wife of a harbor worker. The Court ruled first, that the Death on the High Seas Act (DOHSA), 46 U.S.C. § 76-768 (1975), did not exclude federal maritime law as a source of relief for nonfatal injuries occurring within state territorial waters, and second, that the Jones Act, 46 U.S.C. § 688 (1975), did not exclusively regulate longshoremen's remedies. The Court thus concluded that neither DOSHA nor the Jones Act denied a right to recover in this case. *Significance*—This decision recognizes the right of the wife of a harbor worker to recover for loss of society when her husband is injured, but not killed, as the result of negligence of the shipowner in a maritime accident. *American Export Lines, Inc. v. Alvez,* 100 S. Ct. 1673 (1980).

2. INTERNATIONAL TAXATION

CORPORATION MAY QUALIFY FOR TAX TREATMENT AS A WESTERN HEMISPHERE TRADE CORPORATION EVEN THOUGH INCIDENTAL PURCHASES ARE MADE OUTSIDE THE HEMISPHERE

Plaintiff, elevator company, claiming to qualify for treatment as a Western Hemisphere trade corporation (WHTC) under section 921 of the Internal Revenue Code (Code), brought suit against the defendant, Commissioner of the Internal Revenue Service (Commissioner), to recover alleged overpayments of federal corporate income taxes. To qualify as a WHTC, plaintiff had to establish that it was a corporation "all of whose business (other than incidental purchases) is done in any country or countries in North, Central or South America, or the West Indies." I.R.C. § 921. As a result of plaintiff's purchases of equipment manufactured by its European subsidiaries, the Commissioner determined that plaintiff did not qualify as a WHTC during the fiscal years 1962 through 1969. The United States Court of Claims disagreed, however, and rendered judgment for plaintiff-taxpayer. Even though the transactions at issue accounted for as much as 15.7 percent of plaintiff's gross receipts for a single fiscal year, the court concluded that they were "incidental" (i.e., minor in relation to the entire business, or nonrecurring or unusual in charac-

ter) within the purview of Code section 921 and Treasury Regulation 1.921-1(a)(1). Turning next to the structure of the transaction, the court ruled that plaintiff's procedure, in which foreign purchases were first secured by the parent corporation and then resold to plaintiff in the Western Hemisphere, was not a sham because it was undertaken for the valid commercial purpose of shifting to the parent the risk of loss during transit. *Significance*—This decision clarifies the definition of "incidental purchases" within section 921 of the Internal Revenue Code, and exposes a procedural loophole that allows a WHTC to reduce its extra-hemispherical purchases by purchasing through a parent corporation located in the Western Hemisphere. *Otis Elevator Co. v. United States,* 618 F.2d 712 (Ct. Cl. 1980).

3. JURISDICTION AND PROCEDURE

IMPORTATION OR RECEIPT OF GOODS FROM THE UNITED STATES CONFIRMED BY TELEX TO PLAINTIFF IN UNITED STATES INSUFFICIENT CONTACTS TO ESTABLISH PERSONAL JURISDICTION UNDER FOREIGN SOVEREIGN IMMUNITIES ACT

Plaintiff, a New York corporation, sued defendants, a Syrian government agency and a Syrian shipping company, for demurrage on a cargo of rice delivered by plaintiff from California to Syria. Defendant agency had imported or otherwise received the foodstuffs or chemicals delivered by plaintiff from the United States; both it and the defendant shipping company had telexed plaintiff in the United States guaranteeing demurrage on the cargo. The District Court for the Southern District of New York granted defendant's motion to dismiss because there were insufficient contacts to support personal jurisdiction under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(2). After finding as a matter of fact that the negotiations for the cargo had occurred in Syria, and that the defendants were not parties to the transportation contract, the court concluded as a matter of law that there was no nexus between any activities of the defendants in the United States and the telex concerning payment of demurrage incurred in Syria. Relying on *Thomas P. González Corp. v. Consejo Nacional de Costa Rica,* 614 F.2d 1247 (9th Cir. 1980) and on *East Europe Domestic International Sales Corp. v. Terra,* 467 F. Supp. 383 (S.D.N.Y. 1979), the court rejected plaintiff's argument that the use of international communications constituted sufficient purposeful activity to invoke personal jurisdic-

tion, or that such use had a "direct effect" in New York simply because it may injure a New York domiciled corporation. Mindful that the second circuit in *Carey v. National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979), had already established that the minimum contacts doctrine applied to the FSIA, the instant court simply refined this analysis by providing that a United States court has personal jurisdiction over a foreign defendant under the FSIA only when there is (1) evidence of continuous and systematic activities in the United States; (2) evidence of corporate agents regularly doing business in the United States; or (3) evidence that the defendant has exercised the privilege of, or benefitted from the protection of, conducting business in the United States. Following *Verlinden B.V. v. Central Bank of Nigeria,* 488 F. Supp. 1284 (S.D.N.Y. 1980), which held that there must be a nexus between the forum and the facts giving rise to the cause of action in order to exercise personal jurisdiction, the instant court concluded that such a nexus was lacking in the facts of the instant case. *Significance*—This decision follows a line of cases finding no evidence of activity of a foreign defendant, or its agents, in the United States. *Gemini Shipping Inc. v. Foreign Trade Org.*, 496 F. Supp. 256 (S.D.N.Y. 1980).

Importer Has Standing to Sue Under the Anti-Dumping Act

Plaintiff, an importer of decorative foliage, charged that defendants violated the Anti-Dumping Act of 1916, 15 U.S.C. § 72, by importing and selling foliage in the United States at prices substantially less than market value. Defendants moved for summary judgment, asserting that only domestic manufacturers have standing to sue under the Act. The district court denied defendants' motion, noting that the broad language of the Act granted standing to "any person injured in his business or property by reason of any violation" of the Act. Although recognizing the Act was created to protect United States manufacturers from unfair competition due to cheaper European goods, the court found that allowing this importer to sue would promote the "genial policy" of fostering fair competition in United States markets. *Significance*—This decision provides that some domestic importers, in addition to domestic manufacturers, now have standing to sue under the Anti-Dumping Act. *Jewell Foliage Co. v. Uniform Overseas Florida,* 497 F. Supp. 513 (M.D. Fla. 1980).

OFFICERS OF A UNITED STATES GENERAL PARTNERSHIP WITH A MINORITY OWNERSHIP BY ITALIAN CITIZENS ARE NOT AGENTS OF A FOREIGN PRINCIPAL UNDER THE FOREIGN AGENTS REGISTRATION ACT

Plaintiffs, members of an Italian commercial fishing partnership, sought a declaratory judgment that certain agreements with defendant United States corporation and its officers were void and unenforceable. Both parties had entered into an agreement forming a general partnership in the United States for the construction and operation of fishing vessels. The agreement provided that plaintiffs would possess a twenty-five percent interest in the enterprise, and that defendant's officers would conduct political lobbying in an attempt to secure more favorable fishing rights for plaintiffs. Plaintiffs also sought a stay of arbitration pending the outcome of this action, while defendant cross-moved to stay this action pending arbitration. On cross-motions for summary judgment, the District Court for the Southern District of New York ruled in favor of defendant and held that the Foreign Agents Registration Act of 1938, which "proscribes the payment of fees that are contingent on the success of political lobbying," did not render the partnership agreements illegal or unenforceable. First, the court found that the corporation was not plaintiff's agent because plaintiff's minority owners did not "control" it. Second, the court determined that the agreement in question did not provide for any remuneration contingent upon successful lobbying. Third, the court stated that an agreement by a chief executive officer of a United States corporation to engage in advocacy of beneficial legislation did not violate public policy and was a valid exercise of first amendment rights. Last, the court held that the parties' agreement for arbitration of disputes was enforceable because a "private contract dispute" did not fall within the purview of the Fishery Act, which gives district courts exclusive jurisdiction over actions arising under it. *Significance*—This decision holds that a foreign principal must own more than a twenty-five percent interest in a United States corporation to exert enough "control" to qualify as an agent under the Foreign Agents Registration Act. *Michele Amoruso E. Figli v. Fisheries Development,* 499 F. Supp. 1074 (S.D.N.Y. 1980).