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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

#### SPOUSE OF INJURED SEAMAN MAY RECOVER DAMAGES FOR LOSS OF SOCIETY UNDER MARITIME COMMON LAW

In an action filed under the Jones Act and general maritime law, the wife of Jose Tito Cruz filed for loss of consortium, loss of society, and loss of services after Cruz was injured on a vessel found to have been unseaworthy. The United States Supreme Court decision in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980), that a wife could recover damages for loss of society in similar circumstances, prompted this rehearing *en banc* of an earlier decision by the Fifth Circuit that recovery for loss of consortium is not available to the wife of a nonfatally injured seaman. The court of appeals reversed and held that “the spouse of a seaman whose nonfatal injuries are attributable to the unseaworthiness of a vessel has general maritime law cause of action for loss of his society.” The court distinguished between loss of consortium and loss of society and explained that there could be no recovery for loss of society under the Jones Act, but that such recovery is allowed under “judicially crafted general maritime law.” This cause of action would extend not only to wives of seamen, but to wives of harbor workers. *Significance*—This case explicitly overrules the Fifth Circuit’s decision in *Christofferson v. Halliburton Co.*, 534 F.2d 1174 (5th Cir. 1976), which did not allow

recovery for loss of society by the wife of an injured seaman. *Cruz v. Hendy International Company*, 638 F.2d 719 (5th Cir. 1981).

## II. JURISDICTION

### FEDERAL DISTRICT COURT LACKS JURISDICTION UNDER 28 U.S.C. § 1350 OVER FRAUD ACTION BROUGHT BY ALIEN WHEN CLAIM FAILS TO IMPLICATE A TREATY OR BODY OF RULES GOVERNING RELATIONS BETWEEN FOREIGN STATES

Plaintiff, a Luxembourg corporation, brought suit against defendant, a Michigan bank, for fraudulently inducing plaintiff to make deposits with defendant. Plaintiff contended, *inter alia*, that the district court had subject matter jurisdiction over the action under 28 U.S.C. section 1350 which grants original jurisdiction to district courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Plaintiff argued that fraud is a universally recognized tort, and that its claim was for "a tort only" within the meaning of the statute. The district court found plaintiff's contention unpersuasive, and dismissed the claim for lack of subject matter jurisdiction. Recognizing that courts have had few occasions to interpret section 1350, the district court held that a tort controversy under section 1350 must implicate a treaty or the body of rules and custom governing relations between states *inter se* or between a state and foreign citizens or subjects. Plaintiff's claim that "fraud is a universally recognized tort," without more, was not enough to establish fraud as part of "the law of nations" for the purpose of determining subject matter jurisdiction under section 1350. *Significance*—Jurisdiction for a purely private tort claim will not be granted under 28 U.S.C. section 1350 if the claim does not implicate a treaty or the body of rules and custom governing relations between states *inter se* or between a state and foreign citizens or subjects. *Trans-Continental Investment Corporation v. Bank of the Commonwealth*, 500 F. Supp. 565 (C.D. Cal. 1980).

### JURISDICTION UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT REQUIRES AT LEAST A FINDING OF INTERNATIONAL SHOE "MINIMUM CONTACTS"

Texas Trading & Milling Corporation brought an action under the Foreign Sovereign Immunities Act of 1976 (FSIA) against the Federal Republic of Nigeria for anticipatory breach of contract

for the purchase of cement and on a documentary letter of credit established pursuant to that contract. Nigeria filed a motion to dismiss, contending that the court lacked jurisdiction because the acts of Nigeria did not have a direct effect in the United States as required by the FSIA. The district court granted the motion and dismissed the complaint. The court analogized the FSIA to the District of Columbia long-arm statute and said that the "direct effect" requirement of FSIA section 1605(a)(2) is fulfilled only when there are significant contacts between the transaction underlying the cause of action and the United States. The letter of credit payable through a New York bank was merely an accommodation to Texas Trading and thus the purported injury caused by the breach of the contract took place in the United States only because the plaintiff was domiciled or doing business in the United States.

According to the court, this limited commercial activity was not sufficient to fulfill the "minimum contacts" requirements constitutionally afforded by courts under traditional concepts of fairness and due process, nor did it meet the lesser personal jurisdiction requirement of "direct effect" under the FSIA. *Significance*—The instant case establishes that the "direct effect" requirement of the Foreign Sovereign Immunities Act requires fewer contacts than would be required to establish minimum contacts, but that it does require more than a plaintiff merely being domiciled or doing business within the United States. *Texas Trading and Milling Corp. v. Federal Republic of Nigeria*, 500 F. Supp. 320 (S.D.N.Y. 1980).

### III. PROCEDURE

#### APPELLATE COURT WILL NOT REVIEW THE POST-SETTLEMENT APPEAL OF A PRE-SETTLEMENT PROVISIONAL REMEDY WITHOUT DISTRICT COURT CONSIDERATION OF THE INTERVENING EVENTS

Ninety-six commercial entities brought suit against Iran under the Foreign Sovereign Immunities Act of 1976 to regain assets held by Iran after the seizure of the United States embassy. The district court held that the presidential freeze of Iranian assets successfully "suspended" Iran's immunity from pre-judgment attachment and denied plaintiff's claims. During the appeal executive action was taken to secure the release of the United States hostages. Confronted by the new issue of whether constitutional or statutory authority existed for the issuance of the Executive

Orders freezing the assets, the court of appeals remanded the case to the district court but refused to give an advisory opinion on such a delicate issue which had been neither briefed nor argued before the district court. *Significance*—This case continues a trend towards the exercise of judicial restraint during discretionary review of cases in which a dramatic change has occurred in the facts surrounding the case between the time of the district court decision and the appeal. *New England Merchants National Bank v. Iran Power Generation and Transmission Company, et al.*, 646 F.2d 779 (2d Cir. 1981).

#### IV. SOVEREIGN IMMUNITY

##### FOREIGN STATES ARE SUBJECT TO LIABILITY FOR NON-COMMERCIAL TORTS ARISING FROM THE COMMERCIAL ACTIVITIES OF THE FOREIGN STATE UNDER THE FSIA

A collision caused by the negligence of defendant, the Chilean Government Merchant Marine, damaged cargo owned by plaintiff. Plaintiff brought suit to enforce its maritime lien against defendant under the Foreign Sovereign Immunities Act of 1976 (FSIA). Defendant, a foreign state agency, asserted its foreign sovereign immunity in its motion to dismiss the case. The district court denied defendant's claim of sovereign immunity and held that section 1605(b)(ii) of the FSIA denied defendant immunity since plaintiff's maritime lien was "based upon a commercial activity of the foreign state." The court rejected defendant's argument that the language in section 1605(b), which requires that plaintiff's lien be "based upon" the commercial activity of the foreign state, excludes tort liens. Explaining that the legislative history of the FSIA indicated that section 1605(b) was designed to include collision claims, the court added that the words "based upon" did not limit that design. Since non-commercial liens were not explicitly excluded, the court found, the absence of reference in the legislative history to non-commercial liens was insignificant. *Significance*—This decision is the first to indicate that tort liens are the type of liens which can be enforced under FSIA section 1605(b) against foreign sovereigns engaged in commercial activities. *China National Chemical Import and Export Corporation v. M/V Lago Haulaihue*, 504 F. Supp. 684 (D. Md. 1981).