

Vanderbilt Journal of Transnational Law

Volume 13
Issue 3 Issue 4 - Fall 1980

Article 7

1980

Case Digest

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Recommended Citation

Journal Staff, Case Digest, 13 *Vanderbilt Law Review* 895 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol13/iss3/7>

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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

PROVISIONS OF CARRIAGE OF GOODS BY SEA ACT INCORPORATED BY REFERENCE IN BILL OF LADING ARE TO BE GIVEN EFFECT CONSISTENT WITH OTHER BILL OF LADING AND TARIFF PROVISIONS

In a suit to recover for damages to pharmaceuticals shipped from Puerto Rico to New York, the bill of lading contained a typed provision limiting the declared value of the drugs to fifty cents per pound. On the reverse side of shipper's Short Form Bill of Lading, the bill's provisions were made subject to the Carriage of Goods by Sea Act. The Act, at 46 U.S.C. § 1303(8), voids any agreement in a contract for carriage limiting the carrier's liability for damages due to the carrier's negligence or fault. Title 46 U.S.C. § 1312 excludes application of the Act to shipments between any two ports of the United States or its possessions, unless the contract for carriage incorporated the Act by reference. Defendant carrier argued that since the Act did not apply of its own force and effect, but was incorporated by reference in the bill of lading, the provisions of the Act should be given effect consistent with the other bill of lading provisions. The district court agreed, holding that the carrier's liability was limited to fifty cents per pound. The court found persuasive precedent for its decision in *Pannell v. United States Lines Company*, 263 F.2d 497 (2d Cir. 1959), which held that a specific definition of "package" in the bill of lading was controlling even though it differed from

the definition in the Carriage of Goods by Sea Act, since the Act was incorporated only by reference and did not apply of its own force. The court also pointed out that the fifty cent per pound valuation was not chosen by the carrier to limit his liability, but by the shipper to obtain a lower freight charge. *Significance*—Valuation provisions can limit the liability of a carrier below the strict amount in the Carriage of Goods by Sea Act so long as the Act is incorporated only by reference and does not apply of its own force. *Norwich Pharmacal Co. v. S.S. Bayamon*, 474 F. Supp. 240 (S.D.N.Y. 1979).

VOYAGE CHARTER EXTENDED TO COVER CONTRACT SETTING TERMINATION DATE IN ORDER TO AVOID "SECRET" MARITIME LIENS

Defendant Good Hope Refineries (Good Hope) chartered a vessel for the transportation of petroleum products from plaintiff Atlantic Richfield Company (ARCO). The charter agreement included a clause limiting the duration of the contract to twelve consecutive months with an option to renew for an additional twelve. The contract provided that a demurrage lien would continue "after delivery of the cargo into possession of any Charterer, or of the holder of any Bills of Lading covering the same or of any storageman." ARCO attached 30,000 tons of oil cargo, claiming accumulated demurrage charges, none of which pertained to the voyage on which the particular cargo was carried. Good Hope posted a security bond for the amount claimed and obtained release of the vessel. In a subsequent Chapter 11 bankruptcy proceeding, the federal district court in Massachusetts enjoined prosecution of all actions against Good Hope. The federal district court in Florida stayed the in personam action against Good Hope but allowed in rem proceedings to continue as to insurer's liability on the security bond. The Florida court concluded that under the charter, ARCO had a lien for all demurrage charges incurred regardless of the voyage on which they arose, and entered judgment for the amount of the bond. The Fifth Circuit reversed in part, holding that although the Florida court had jurisdiction to continue proceedings in spite of the bankruptcy stay, ARCO did not have a lien for all demurrage charges accumulated over the course of the charter because it was in the form of a voyage charter. The Fifth Circuit reasoned that the district court had jurisdiction over the case because a bankruptcy stay does not divest an admiralty court of jurisdiction in an in rem proceeding when such jurisdiction attaches prior to the commencement of

the bankruptcy action. The Circuit court reversed the trial court's impression of a lien for all demurrage charges incurred, by finding that the modifications in the contract did not render it ambiguous or similar to a time charter, under which a lien arises for all charges incurred over the term of the contract. The appellate court concluded that the evidence supported characterization of the contract as a voyage charter for four reasons. First, minor modifications in the agreement did not alter its essential nature. Second, since voyage charters for the transportation of liquid cargoes are frequently extended for a number of consecutive voyages, a voyage charter could be expanded to include the situation in which the parties fix a specific termination date. Third, the parties could have altered the lien clause to permit attachment of cargoes without regard to the voyage on which demurrage was incurred. Fourth, the parties treated each cargo separately for demurrage billing. Relying on *Osaka Shosen Kaisha v. Pacific Export Lumber*, 260 U.S. 490 (1923), the Fifth Circuit also relied on the policy against increasing the scope of "secret" maritime liens in reaching its decision. *Significance*—Absent a clear intent to create a time charter with far-reaching lien provisions, a voyage charter will be extended to include the situation in which the charter sets a definite termination date. *Atlantic Richfield Company v. Good Hope Refineries, Inc.*, 604 F.2d 865 (5th Cir. 1979).

2. INTERNATIONAL PATENT REGULATION

IN A PATENTEE'S DEALING WITH LICENSEES, THE POLICIES UNDERLYING THE PATENT SYSTEM DO NOT OVERRIDE THOSE OF THE SHERMAN ACT

Plaintiff corporation sued defendant corporation seeking to compel the continuation of a foreign license agreement, under which the plaintiff was a most favored licensee, and for license rights in foreign countries which had been granted by the defendant to a third corporation. The district court held for the defendant on all of plaintiff's license claims, and granted defendant's motion for summary judgment on both of plaintiff's antitrust claims. On appeal, the Third Circuit upheld the district court's judgment on the license claims and the summary judgment granted on the antitrust claim in which the plaintiff argued that an arbitrary refusal to deal by a lawful patent monopolist should be actionable under Section 2 of the Sherman Act. The appellate court held that the summary judgment record demonstrated that

defendant's refusal to license know-how to the plaintiff was not arbitrary, thus eliminating the need to decide the legal issue of whether a cause of action existed for an arbitrary refusal to deal. The Third Circuit, however, reversed and remanded for further proceedings the lower court's summary judgment on plaintiff's antitrust conspiracy cause of action which alleged that defendant conspired with one or more of its foreign licensees to cancel plaintiff's foreign sales licenses. Rejecting the lower court's reasoning that the policy of deference to a patentee's licensing decisions should be extended to protect the termination of a licensee undertaken at the request of a competing licensee, the appellate court reasoned that application of antitrust principles to this conduct would materially encourage competition without posing any serious threat to the policies underlying the patent system. *Significance*—This case is the first to determine that where a patentee's alleged anticompetitive conduct is begun after a number of non-exclusive licenses have been granted, the policies underlying the patent system do not override those of the Sherman Act to give an antitrust exemption to the patentee. *Mannington Mills, Inc. v. Congoleum Industries, Inc.*, 610 F.2d 1059 (3d Cir. 1979).

3. JURISDICTION AND PROCEDURE

FOREIGN SOVEREIGN IMMUNITIES ACT § 1611 OPERATES WHEN TREATY WAIVER DOES NOT SPECIFICALLY INCLUDE A CERTAIN TYPE OF PROPERTY

Defendant Islamic Republic Iranian Air Force failed to approve invoices for goods shipped by plaintiff to Iran and failed to pick up cargo ready for shipment. Plaintiff, an international freight forwarder, applied for a writ of attachment against defendant's property pursuant to Fed. R. Civ. P. 64 and the New Jersey Attachment Statute. Defendant claimed, *inter alia*, that its property was immune from attachment under the Foreign Sovereign Immunities Act of 1976 because it was intended for use in connection with a military activity. In granting the writ, the district court first considered the effect of the Foreign Sovereign Immunities Act on the 1957 United States-Iran Treaty of Amity, Economic Relations and Consular Rights. The court found that although the treaty was saved from repeal by § 1609 of the Act, the treaty did not specifically include military property within its scope. Citing legislative history, the court held that where a treaty is silent with respect to the attachment of certain types of prop-

erty, the Act governs. The court then rejected defendant's military-property claim of immunity under § 1611(b)(2) because defendant had not sustained its burden of showing that the property was within the scope of § 1611(b)(2). *Significance*—This decision holds that when a waiver provision in a treaty does not specifically include a certain type of property, the court must look to the Foreign Sovereign Immunities Act to find immunity regardless of the treaty provision. *Behring International, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 396 (D.N.J. 1979).

TRANSACTIONS INVOLVING OPTIONS IN A FOREIGN CURRENCY ARE COMMODITIES SUBJECT TO REGULATION UNDER THE COMMODITY EXCHANGE ACT

The Commodity Futures Trading Commission instituted a suit seeking various forms of relief against defendants for alleged violations of the Commodity Exchange Act, 7 U.S.C. § 1 *et seq* (1976). Defendants, sellers of foreign currency options, argued that these activities were not within the scope of the Act for the following reasons: (1) the Act only applies to commodity futures options and (2) the Act does not apply to options in foreign currency. Rejecting both arguments, the district court first noted that the definition of "commodity" under the Act was broad enough to include options involving foreign currency. The Act was not limited to transactions in commodities for future delivery, and, as such, defendant's spot and cash market transactions fall under the Act. The court then stated that while the Act was not applicable to transactions in foreign currency, foreign currency is a commodity under the Act, and transactions involving that commodity were subject to regulation under the Act. The court reasoned that an option was not equivalent to a transaction in the commodity involved, and until the holder exercises the option he remains subject to the Act. *Significance*—The holder of a currency futures option is subject to regulation by the Commodity Exchange Act. *Commodity Futures Trading Commission v. American Board of Trade*, 473 F. Supp. 1177 (S.D.N.Y. 1979).

