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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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1. ADMIRALTY

AN OWNER MUST ARBITRATE A CLAIM THAT A PARENT COMPANY ASSIGNED TO ITS SUBSIDIARY WHEN THE OWNER CONTEMPLATED SUCH ARBITRATION IN A CONTRACT WITH THE SUBSIDIARY

A parent company's insurer covered cargo that was lost due to the sinking of a vessel chartered by a subsidiary company. The insurance company filed a petition in the parent company's name to compel arbitration of the loss by the shipowner based on an arbitration clause in the charter contract. The district court refused to compel arbitration because the parent company's claim was not a dispute between the shipowner and the charter party. The insurance company then assigned its rights to the subsidiary company in order to impose an obligation on the subsidiary to assert the claim for the lost cargo against the shipowner. The subsidiary company filed a petition to compel the shipowner to arbitrate the loss. The district court granted the petition and the shipowner appealed. The court of appeals affirmed the lower court's ruling and held that a "dispute" within the meaning of the arbitration clause existed due to the unusual circumstances. According to the court, the case was similar to an indemnity claim and the shipowner would be liable for the amount of loss that arbitrators determined to be caused by the shipowner's fault, because the shipowner had bargained for the arbitration clause. *Significance*—This decision enforces the intention manifested in an arbitration clause to a contract between a subsidiary company and a shipowner, despite the rule that a non-arbitrable claim does

not become arbitrable through assignment. *Caribbean Steamship Co. v. Sonmez Denizcilik Ve Ticaret A.S.*, 598 F.2d 1264 (2d Cir. 1979).

WRIT OF ATTACHMENT WILL WITHSTAND VACATUR MOTION EVEN WHEN OBTAINED AFTER ARBITRATION HAS COMMENCED

Plaintiff shipowner obtained attachment under Rule B(1) of the Supplemental Rules to secure its claim for demurrage, then pending in London arbitration called for by the charter party. Defendant charterer moved for vacatur. First, defendant contended that the subject of the dispute, charterer's guarantee to pay demurrage due from the cargo receiver upon the latter's failure, was not a maritime contract because it was expressed in a side letter executed one day after the charter party. Second, defendant argued that Rule B(1) was used by plaintiff merely to obtain security during arbitration, whereas the Rule's primary purpose was acquisition of *in personam* jurisdiction. Third, the defendant charterer urged vacatur on the ground that the United States Convention on the Recognition and Enforcement of Arbitral Awards, 9 U.S.C. §§ 201-208, does not authorize attachment in conjunction with arbitration. The district court denied the motion for vacatur. Concerning the side letter, the court noted a provision in the charter party itself that appeared to make the charterer liable for all demurrage, and held that such an ambiguity must be resolved in favor of the dispute's characterization as arising from a maritime contract. Second, the court found no abuse of Rule B(1), holding that the Federal Arbitration Act, 9 U.S.C. § 8, expressly provided for initiation of arbitration by seizure, with the court retaining jurisdiction to enter a decree after the arbitral award. In *The Anaconda v. American Sugar Refining Co.*, 322 U.S. 42 (1944), the Supreme Court noted a congressional intent in this provision to afford a statutory security mechanism during arbitration. In the instant case, however, the district court extended the meaning of § 8 of the Act to allow attachment after foreign arbitration had already begun. Third, the court followed *Andros Compania Maritima, S.A. v. Andre & Cie., S.A.*, 430 F. Supp. 88 (S.D.N.Y. 1977), holding that the Convention's silence on attachment in conjunction with arbitration was not inconsistent with the Act's seizure provision. *Significance*—This is the first case to consider whether attachment may be obtained under the Act purely for security after the initiation of arbitration. *Paramount Carriers Corp. v. Cook Industries, Inc.*, 465 F. Supp. 599 (S.D.N.Y. 1979).

2. DIPLOMATIC IMMUNITY

UNITED NATIONS EMPLOYEES NOT ACCORDED DIPLOMATIC IMMUNITY IN CASES OF ESPIONAGE; RECAPTURE OF STOLEN CLASSIFIED INFORMATION FROM DIPLOMAT DOES NOT VIOLATE DIPLOMATIC IMMUNITY

Two Soviet citizens, employees of the United Nations Secretariat, were indicted for espionage against the United States and moved for dismissal on the ground that they were entitled to diplomatic immunity under 22 U.S.C. § 252, 18 U.S.C. § 288, and the Vienna Convention on Diplomatic Relations. The trial court held that no immunity existed and ruled that defendants were not "public ministers" protected by 22 U.S.C. § 252 and that employees of international organizations were insulated from prosecution by 18 U.S.C. § 288 only for acts falling within their official functions. Additionally, the court ruled that such employees were not "diplomatic agents" immunized by Article 29 of the Vienna Convention. Defendants also moved to suppress evidence that had been seized from the person of a third Soviet citizen whom the United States conceded to be entitled to diplomatic immunity, and who was therefore not a defendant in the case. Although originally granted, upon a Government motion for reconsideration, the court denied defendants' motion to suppress. The court concluded that the congressional intent expressed in 22 U.S.C. § 252 was not meant to preclude the recapture of national defense information stolen by a diplomat. The court then considered a possible inconsistency between such a conclusion and its earlier ruling that the diplomat's detention violated the express exemption of Article 29 of the Vienna Convention. The court found that the law of nations would not contemplate rendering a receiving State helpless to prevent the transportation of highly classified information across its borders. The Convention was therefore viewed as consistent with the statute with regard to such information. Conversely, the court ruled that seizure of the incriminating container surrounding the classified information, did occasion a detention in violation of Article 29. The court, however, declined to apply the exclusionary rule to what on reconsideration it characterized as a diplomatic problem for the executive and legislative branches. *Significance*—This decision is the first to consider inconsistency between United States statutory diplomatic immunity and the more recent Vienna Convention on Diplomatic Relations. *United States v. Enger*, 472 F. Supp. 490 (D.N.J. 1978).

3. EXTRADITION

UNITED STATES EXTRADITION TREATY APPLICABLE TO ALL ENUMERATED CRIMES REGARDLESS OF THE SENTENCE IMPOSED

Canada sought to extradite respondent, a United States citizen, under the provisions of the Treaty of Extradition Between the United States and Canada, 27 U.S.T. 983 (1976) (Treaty). The Treaty provides for extradition of individuals convicted of certain crimes punishable in both the United States and Canada by a term of at least one year. Respondent argued that the Treaty could not be applied to his offense because: (1) he was sentenced to a term of less than one year; (2) the formal extradition documents, while received by the Department of Justice within the forty-five day period required by the Treaty, were not filed with the court until after the forty-five day period had elasped; and (3) the Canadian government had breached a plea bargain arrangement. Rejecting respondent's contentions, the court limited the scope of the extradition hearing to an ascertainment of whether the Treaty applied and whether the evidence of criminal conduct was sufficient to warrant extradition. Finding that these requirements had been met, the court directed the issuance of a warrant for respondent's extradition. The court, reasoned that the Treaty included all offenses punishable by a term of imprisonment of at least one year, regardless of the sentence imposed. Respondent's offense thus fell within the scope of the Treaty. The court further stated that the Treaty only required that the court of the asylum country receive the extradition documents within forty-five days of the extradition request. The purpose of the Treaty, according to the court, was to protect the asylum country and individuals from unnecessary delays by the requesting country. The court also stated that a court should refrain from interfering with the judicial processes of another country in order to avoid violating the comity underlying international extradition. *Significance*—This decision interprets the Treaty of Extradition Between the United States and Canada to include all offenses for which a sentence greater than one year may be imposed, regardless of the actual sentence. *United States v. Clark*, 470 F. Supp. 976 (D. Vt. 1979).

4. INTERNATIONAL PATENT REGULATION

MOTION REQUESTING BENEFIT OF FOREIGN PATENT IN PATENT INTERFERENCE ACTION IS PROPER WITHOUT SUPPORTING STATEMENT OF REASONS WHEN OPPONENT CAN FAIRLY RESPOND

In a patent interference action, the party declared to be junior

based on a later United States filing date sought to shift the burden of proof by a motion under 37 CFR 1.231(a)(4) for the benefit of the date of an earlier Czechoslovakian application. The interference examiner granted the senior party's motion to strike, finding that the junior party failed to comply in a timely manner with 37 CFR 1.231(b), which required "reasoning" in support of the motion. Since the motion was not transmissible to the primary examiner for consideration, the Patent and Trademark Office (PTO) Board of Patent Interferences refused the junior party's request for a final hearing pursuant to 37 CFR 1.225. The Court of Customs and Patent Appeals reversed, holding that a final hearing pursuant to 37 CFR 1.225 required only a "proper" motion under 37 CFR 1.231. The junior party motion was "proper" because it stated that the foreign application described the same invention contained in the United States application, thereby notifying the opposing party and satisfying 37 CFR 1.231(b) without further "reasoning." On petition for rehearing, the court revoked the determination that the specific error was refusal to set the case down for final hearing, recognizing the PTO interest in continuing with prescribed internal procedures. The court rejected any PTO interest in consistent interpretation of a "proper" motion as a motion which has been filed, transmitted by the interference examiner to the primary examiner, and decided by the primary examiner. Such interpretation would be inconsistent with 37 CFR 1.231(d), which makes "proper" motions transmissible, and 37 CFR 1.244, which allows the primary examiner to decide "proper" motions that have not been transmitted. The instant junior party was not required to file a petition under 37 CFR 1.244 because its effort to have the case set down for final hearing under 37 CFR 1.225 denied "acquiescence" in the interference examiner's error. *Significance*—The PTO interference practice will not be accommodated when PTO interpretation of its own regulations jeopardizes the junior party's due process rights. *Peska v. Satomura,* 602 F.2d 969 (C.C.P.A. 1979).

5. JURISDICTION AND PROCEDURE

DISMISSAL VIA FORUM NON CONVENIENS PROPER IN SUIT BY FOREIGN NATIONALS WHEN PRIVATE AND PUBLIC INTERESTS STRONGLY FAVOR THE DEFENDANT

Plaintiff's decedents, four Norwegian residents, were killed in a crash off the Norwegian coast in a helicopter manufactured by the defendant, a Delaware corporation. Plaintiffs brought a products

liability action in Delaware under 28 U.S.C. § 1338. Defendant moved to dismiss on the basis that Norway was clearly the more convenient and logical forum for the suit. Defendant maintained that the wreckage, investigations, operational and maintenance records, and witnesses for the measure of potential damages were located in Norway. Additionally, defendant argued that potential defense witnesses could not be compelled to testify in Delaware. Defendant asserted that an action could be maintained in Norway and that the defendant would assent to such suit and would produce all its records relevant to the litigation at its own expense. The court granted defendant's motion, finding that Norway was a suitable forum and that a balance of the private interest of convenience and of the public interest strongly favored this situs. In addition to the obvious greater number of evidentiary connections with Norway (private interests), the court reasoned that applying the Delaware choice of law principles for the negligence theory of liability would lead to the application of Norwegian substantive law (public interest). *Significance*—This decision delineates the application of private and public interest analysis for determining if dismissal on a motion for transfer to a more convenient forum is proper. *Dahl v. United Technologies Corp.*, 472 F. Supp. 696 (D. Del. 1979).

NATURALIZED UNITED STATES CITIZEN IS BARRED FROM USING THEORY OF "DUAL NATIONALITY" TO INVOKE DIVERSITY JURISDICTION

Plaintiff, a naturalized citizen of the United States residing in California, who is considered a citizen of the United Kingdom under British law, brought suit in federal district court for breach of contract and tort violations against defendants, United States citizens residing in California, asserting diversity of citizenship jurisdiction based upon plaintiff's alleged "dual nationality." Defendants moved to dismiss for lack of subject matter jurisdiction. The district court granted dismissal holding that plaintiff is only a citizen of the United States, regardless of his status under British law, because naturalized citizens take an oath renouncing their foreign allegiance. Alternatively, accepting plaintiff's argument of "dual nationality," diversity jurisdiction is inappropriate because the parties are both United States citizens and residents of the same state. Considering the policies underlying diversity jurisdiction, the court found no reason to expect bias in state courts when all parties are residents of the forum state. Furthermore, as long as the party asserting jurisdiction is a United States citizen, it is unlikely that a foreign government will be affronted by a decision

adverse to that citizen. Acceptance of the rule proposed by plaintiff would grant naturalized citizens nearly unlimited access to the federal courts while native-born citizens are denied such general access. The court found *Aguirre v. Nagel,* 270 F. Supp. 535 (E.D. Mich. 1967), unpersuasive, which held that a minor plaintiff born in the United States of foreign parents was a citizen of the foreign state as well as the United States and could properly assert diversity jurisdiction. *Significance*—This decision denies favored treatment to naturalized citizens as compared to native-born citizens in diversity jurisdiction claims by refusing to consider allegations of dual citizenship. *Raphael v. Hertzberg,* 470 F. Supp. 984 (C.D. Cal. 1979).