Vanderbilt Journal of Transnational Law

Volume 10
Issue 1 *Winter 1977*

Article 8

1977

Case Digest

Journal Staff

CASE DIGEST

This *Case Digest* provides brief analysis 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

ILA COLLECTIVE BARGAINING AGREEMENTS AFFECTING CONTAINERIZED CARGO HELD INVALID AS "WORK ACQUISITION" MEASURES

Plaintiff, the Regional Director of the National Labor Relations Board, requested a temporary injunction pending the resolution of charges by motor common carriers that the defendant, the International Longshoremen's Association, had engaged in unfair labor practices. The motor common carriers had protested the cancellation of their Equipment Interchange Agreements for noncompliance with ILA collective bargaining agreements. These agreements required the employ of longshoremen when unpacking containerized cargo within fifty miles of a port. Such provisions had been defended as protecting the traditional labor of longshoremen. The NLRB contended these provisions were invalid as "work acquisition" measures and that their enforcement constituted a boycott of noncomplying motor carriers. The court, after examining the history of containerized cargo, found the Director had "reasonable cause" for his characterization and remanded for the appropriate injunctive relief. *Significance*—This is a case of first impression holding that the labor of longshoremen has not traditionally included unpacking containerized cargo; hence, collective bargaining agreements reserving this task for longshoremen will be invalidated. *Humphrey v. International Longshoremen's Association,* 548 F.2d 494 (9th Cir. 1977).

DAMAGES FROM SUCCESSIVE, INDEPENDENT INJURIES MAY NOT BE CUMULATED TO DETERMINE "CONSTRUCTIVE TOTAL LOSS" WHERE VESSEL HAS BEEN RESTORED TO SEAWORTHY CONDITION BETWEEN INJURIES

Plaintiffs, time-charterers of the *Panocean,* purchased marine insurance which provided that, should the vessel incur damage estimated at more than half its insured value, the ship and its contents would be considered a "constructive total loss" and plaintiffs would be entitled to recover for lost profits. The ship was damaged, repaired, and damaged a second time by a different source. Plaintiffs argued that damages from the two casualties should be aggregated to determine constructive total loss. The court refused to allow constructive total loss, holding that damages from successive, independent injuries may not be cumulated where the ship was repaired and deemed "seaworthy" prior to the second injury. The court held that the estimation of damages in a marine insurance case must be made with sufficient specificity to allow the appellate court to determine from the record whether the expenses alleged were for "salvage, pilotage, and superintendence." *Significance*—In its first application of the doctrine of "constructive total loss" to a marine insurance contract benefiting non-owners of a vessel, the court construed the term strictly in accord with established principles of admiralty. *Lenfest v. Coldwell,* 525 F.2d 717 (2d Cir. 1975).

SHIPOWNER IS ENTITLED TO LOST PROFITS MEASURED BY THE PREVAILING MARKET RATE DURING OFF-HIRE EXTENSION PERIOD

Plaintiff's ship was heavily damaged when defendant's pilot caused the propeller to become entangled in a buoy while maneuvering into a seaberth. The time-charterer extended its agreement with plaintiff by the off-hire extension period or the time spent in dryclock making repairs. Plaintiff sought to recover the lost profits due to the off-hire extension at the lower charter rate. The court of appeals found that the damages were within the scope of the risk created by defendant's negligent act, and were foreseeable because the off-hire extension would be exercised by the charterer only if it were commercially advantageous to do so. The court held that the measure of damages should be the reasonable current market value of the loss of the use of the boat. *Significance*—By measuring the damages according to the prevailing market rate the court departs from the old measure based on the charter rate less costs and expenses avoided while the vessel was not in service. *Compania Pelineon de Navegacion v. Texas Petroleum Co.,* 540 F.2d 53 (2d Cir. 1976).

2. CUSTOMS

TRADING WITH THE ENEMY ACT AUTHORIZES TREASURY REGULATIONS PROHIBITING IMPORT OF CUBAN ASSETS WHEN THE UNITED STATES INTEREST ARISES AFTER THE EFFECTIVE DATE OF THE REGULATIONS

Plaintiffs, United States citizens, brought suit as heirs to invalidate the Cuban Asset Control Regulations under the Trading with the Enemy Act by which assets of deceased, a Cuban national, had been blocked from import into the United States. Plaintiffs, relying on *Real v. Simon,* 510 F.2d 557 (5th Cir. 1975), contend that because no Cuban interest remains in the assets the regulations as applied are invalid to bar import. The court held that the regulations are within the authority granted by the Act and denied summary judgment. The court distinguished the holding in *Real* as applying to import of assets beneficially owned by Americans on or before July 8, 1963, the date the regulations became effective. The court reasoned that this distinction reflected the intent of Congress as expressed in the Senate Committee Report cited in *Real.* The court further reasoned that to hold otherwise would permit circumvention of the Act by parties creating a present United States interest in order to qualify for an import license under *Real. Significance*—This case confirms previous judicial support for the Cuban Asset Control Regulations by limiting the application of the *Real* decision to interests which arose prior to July 8, 1963. *Richardson v. Simon,* 420 F. Supp. 916 (E.D.N.Y. 1976).

STANDING TO PROTEST IMPOSITION OF DUMPING DUTIES DENIED WHERE PLAINTIFF UNABLE TO PROVE BY SUBSTANTIAL AND CONVINCING EVIDENCE THAT IT WAS AN IMPORTER, CONSIGNEE, OR AGENT

DuPont had contracted to take title in Mexico to shipments of sulphur it was importing from that country. A Supplemental Agreement was executed for the purpose of relieving DuPont of its contingent liability for dumping duties as an importer under the Antidumping Act of 1921, 19 U.S.C. § 160(a) (1970). Under the terms of the Agreement, plaintiff, a wholly-owned subsidiary of the Mexican exporter, would take title to the sulphur from its parent in Mexico, import it into the United States, and there resell it to DuPont. Plaintiff subsequently brought an action to protest imposition of import duties on three shipments. Defendant moved to dismiss, arguing that plaintiff had failed to prove that it was the importer, consignee, or agent with respect to the contested shipments, and therefore, lacked standing to protest under 19 U.S.C.

§ 1514 (1970). The Customs Court granted defendant's motion to dismiss. The court looked behind plaintiff's documentary evidence and found its role was that of a phantom conduit through which illusory transactions were funnelled to relieve DuPont of liability for dumping duties. *Significance*—The courts will scrutinize importation transactions, and invoices alone, without corroborative evidence, will be insufficient to establish status as an importer for the purpose of determining standing to protest imposition of import duties. *Pasco Terminals, Inc. v. United States,* 416 F. Supp. 1242 (Customs Ct. 1976).

3. JURISDICTION AND PROCEDURE

SUBSTANTIVE LAW OF A FOREIGN STATE MAY BE UNENFORCEABLE BECAUSE ITS DIFFERENCES FROM THE LAW OF THE FORUM STATE CONTRAVENE SOUND PUBLIC POLICY

An Illinois resident brought a diversity action in Illinois against a Mozambique corporation, as organizer of a hunting safari, to recover for injuries which plaintiff sustained in Mozambique when she was struck by a swamp buggy operated by defendant's employee. Defendant moved to apply the law of Mozambique to the substantive issues of the case and for a determination of the relevant Mozambique law. The district court held that Mozambique law should apply to the issue of liability but that Illinois law should apply to the measure of damages if liability were established. Since Illinois courts, following the RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 145 (1971), have preferred to apply the law of the place of injury unless the majority of contacts were in Illinois and the occurrence of the tort in the foreign state was fortuitous, the district court determined that Mozambique liability law should be applied. On the issue of damages, however, the court applied Illinois law over Mozambique law as a matter of public policy since Mozzambique law limits liability for travel accidents to approximately $6,600 in United States dollars and fails to provide recovery for pain and suffering, disfigurement, or loss of enjoyment of life. Relying on the New York case of *Rosenthal v. Warren,* 475 F.2d 438 (2d Cir. 1973), the court reasoned that in the absence of any justification for a policy which contravenes the sound public policy of the forum, and provided the defendant is not unfairly surprised, the Illinois courts should decline to apply the foreign rule. *Significance*—This decision extends application of the current trend in conflicts law to cases involving foreign states. *Pancotto v. Sociedade de Safaris de Mozambique, S.A.R.L.*, 422 F. Supp. 405 (N.D. Ill. 1976).

A FOREIGN CORPORATION IS SUBJECT TO PERSONAL JURISDICTION IN THE STATE OF WASHINGTON WHEN IT DERIVES INCOME FROM THE LOCAL MARKET THROUGH AN INTEGRATED CHAIN OF WORLDWIDE DISTRIBUTION

Respondent, a Washington resident, was injured in an accident in a Volkswagen microbus in California, and brought suit in Washington for damages in a products liability action against the New Jersey importer, the German manufacturer, and a regional distributor of Volkswagen vehicles. The petitioners moved to quash service of process and dismiss for lack of jurisdiction on the grounds that they were not "doing business" in the state since they made no direct sales there, and that the distributor's representative was not an adequate agent for substituted service of process. The Washington Supreme Court affirmed the lower court, holding that the integrated worldwide distribution scheme for Volkswagen products, which generates income for the corporations through a network including competitive sales in the state, provides sufficient contacts for in personam jurisdiction. In addition, the court held that the close contractual relationship and extensive control which the foreign corporations maintained over the regional distributor rendered its appointed agent adequate for due process purposes. *Significance*—Contrary to previous decisions by other courts in similar fact situations, this holding extends personal jurisdiction to foreign corporations which indirectly sell products in the state through a controlled distribution chain. *Crose v. Volkswagenwerk Aktiengesellschaft*, 88 Wash. 2d 50, 558 P.2d 764 (1977).

JURISDICTION UNDER THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS MAY EXTEND TO FEDERAL COURTS IN CASES INVOLVING CONTRACTS BETWEEN UNITED STATES CITIZENS

Plaintiff Fuller Company filed a petition for a declaratory judgment against defendant Compagnie des Bauxites de Guinee (CBG) to determine the effect of an alleged settlement of a dispute arising out of a contract under which plaintiff was to manufacture and sell equipment to defendant for use in defendant's plant in Guinea. When CBG removed the action to federal district court, invoking jurisdiction under section 202 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Fuller Company moved to remand for lack of jurisdiction. Fuller Company argued that since both parties to the action were American citizens and were allegedly without reasonable relationship with a foreign state

as required by statute, the court was unable to assert jurisdiction. The court denied the motion to remand and upheld jurisdiction under 9 U.S.C. § 202 stating that the "reasonable relationship" criterion constitutes a flexible standard to be applied on a case-by-case basis. The court reasoned that since plaintiff's employees had provided extensive services to defendant's plant in Guinea, and since the original contract contemplated on-going responsibilities of the parties in Guinea, a reasonable relation with Guinea had been established. The court further reasoned that since the contract contemplated arbitration in Switzerland and since a Belgian corporation had been retained to draft the contract acceptance certificates, other foreign contacts existed as well. *Significance*—This is a first impression case as to the application of the Convention to contracts executed between United States citizens. *Fuller Co. v. Compagnie des Bauxites de Guinee,* 421 F. Supp. 938 (W.D. Pa. 1976).

FOREIGN ARBITRATION AWARD IS ENFORCED IN FEDERAL COURT DESPITE THE ABSENCE OF PARTIES' EXPLICIT CONSENT TO THE ENTRY OF JUDGMENT

A West German automobile exporter brought an action against a United States importer for enforcement of a Swiss arbitration award under the Convention on the Recognition of Foreign Arbitral Awards. The importer filed a motion to dismiss, arguing that since the contract did not explicitly set out the parties' consent to the entry of judgment on arbitration awards, the court was prohibited by section 9 of the Federal Arbitration Act from taking jurisdiction. The court denied the motion and held that the requisite consent to the entry of judgment was implied by the contract language in regard to "finality" of arbitration and by the conduct of both parties in invoking the jurisdiction of the court. The court noted that *I/S Stavborg v. National Metal Converters, Inc.,* 500 F.2d 424 (2d Cir. 1974), established the proposition that consent for purposes of 9 U.S.C. § 9 could be implied from less than explicit contract language provided there was sufficient emphasis on "finality" of awards coupled with conduct of the parties tending to show consent. *Significance*—This decision is the first to cite the *Stavborg* rationale that the jurisdictional requirements of section 9 of the Federal Arbitration Act may be satisfied by implied consent even when there is no reference in the contract to the entry of judgment on arbitration awards. *Audi NSU A.U. Aktiengesellschaft v. Overseas Motors, Inc.,* 418 F. Supp. 982 (E.D. Mich. 1976).

DOCTRINE OF SOVEREIGN IMMUNITY DOES NOT APPLY TO IN REM ACTION AGAINST GOVERNMENT-OWNED VESSEL USED FOR COMMERCIAL PURPOSES

The vessel *Philippine Admiral* was under a conditional contract of sale from the Philippine Reparations Commission to a private company, who in turn engaged the ship in private party charter contracts and contracts for repair. Under the contract, the Commission was to retain ownership until all purchase installments were made, and at the time of suit the private company's payments were in arrears. Unpaid creditors of the company brought in rem actions for breached contracts of charter and repair. The Commission, as legal owner, obtained an order setting aside the writs, claiming sovereign immunity. On appeal, the Hong Kong Supreme Court reversed the action setting aside the writs, holding that immunity would not be granted in respect to vessels not destined for public use. The Judicial Committee of the Privy Council rejected the Commission's appeal from the Hong Kong Supreme Court decision, stating that the trend of world judicial opinion was moving away from application of sovereign immunity to ordinary trading transactions. The Council further decided that the *Philippine Admiral* had been used solely for ordinary commercial purposes, and no evidence indicated that the Commission intended to convert it to public use upon repossession from the defaulting party. The Court declined to decide whether sovereign immunity applied to in rem actions against government-owned vessels used for public purposes, and noted without comment the "rule" that no in personam action can be brought against a foreign government on a commercial contract. *Significance*—This decision explicitly departs from prior case law in denying the applicability of sovereign immunity to in rem actions against government-owned vessels involved in ordinary commercial trade. *Wallen Shipping Co. v. Philippine Admiral,* 1 Lloyd's List L.R. 234 (1976).

4. PATENTS

RESORT TO SPECIFICATIONS OF FOREIGN PATENT IS PROPER TO SHOW SECTION 103 OBVIOUSNESS

CITC Industries sued for patent infringement, and defendant counterclaimed for a declaration of invalidity. Citing a German *Gebrauchmuster* (utility model) as evidence that the patent was anticipated, defendant sought a ruling in advance of trial as to the admissibility under 35 U.S.C. § 102 of the specifications and drawings of the *Gebrauchmuster.* The court expressed its preference for

the rationale of *Bendix Corp. v. Balax,* 421 F.2d 809 (7th Cir. 1970), which permits reference to the specifications to obtain clarification of the patent claims for section 102 purposes, over that of *Reeves Brothers v. United States Laminating Corp.,* 282 F. Supp. 118 (E.D.N.Y. 1967), which limits anticipation strictly to the words of the patent claims. The court, however, was unwilling to determine such an important question of substantive patent law on a pre-trial motion when it felt that the matter could be determined on evidentiary grounds. It held that specifications and drawings are admissible as relevant evidence of the level of skill of the art under 35 U.S.C. § 103. The court felt this to be an appropriate rule in the case of both foreign and United States patents, and ruled the *Gebrauchmuster* specifications and drawings to be admissible. *Significance*—This decision extends the applicability of the evidentiary rule for admission of patent specifications for section 103 purposes to cases involving foreign patents. *CITC Industries, Inc. v. Manow International Corp.,* ___ F. Supp. ___, 300 P.T.C.J. A-12 (S.D.N.Y. 1976).

5. POSTAL REGULATIONS

WARRANTLESS MAIL COVER BASED ON LAW ENFORCEMENT AGENCY'S "FEELING" OF POSSIBLE CRIME VIOLATES POSTAL REGULATIONS AND THE FOURTH AMENDMENT

Defendant, charged with attempted tax evasion, moved to supress all evidence obtained through a Drug Enforcement Administration-instigated warrantless mail cover, under which the United States Post Office had recorded the return addresses on all first and fourth class mail defendant received. The DEA had requested the mail cover because it "felt" that defendant was smuggling narcotics into the United States from a South American source and communicating with the source by mail. The DEA instead discovered a bank account with assets unreported on defendant's income tax return. The court granted defendant's motion to suppress on two grounds. First, the Post Office violated its own regulations, which allow a mail cover only after the requesting agency stipulates and specifies the reasonable grounds that exist for believing a mail cover would aid in obtaining information about the commission of a crime. The court ruled that the DEA's "feeling" was not a reasonable ground for the cover. Second, the court ruled that the cover violated the Fourth Amendment guaranty against unreasonable searches. It applied the "reasonable expectation of privacy" test of *Katz v. United States,* 389 U.S. 347 (1967), and found that although the expectation of privacy con-

cerning return addresses on mail is a limited one, the government had shown no interest that would justify this incursion into that limited expectation. *Significance*—This case interprets the minimum standards for satisfying Post Office regulations and Fourth Amendment standards on warrantless mail covers. *United States v. Choate,* 422 F. Supp. 261 (C.D. Cal. 1976).