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Case Digest

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CASE DIGEST

The purpose of the Case Digest is to identify and summarize for the reader recent cases in which established principles of law are applied to new factual situations. The cases are grouped in topical categories, and references are given for further research. It is hoped that attorneys, judges, teachers, and students will find that this digest facilitates research in problems involving current aspects of transnational law.

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1. ADMIRALTY

"CONTACTS" TEST BASED ON 99 PERCENT AMERICAN OWNERSHIP OF A FOREIGN CORPORATION WILL NOT BE APPLIED TO CIRCUMVENT THE RECIPROCITY PROVISION OF THE PUBLIC VESSELS ACT

A shipowner, a Philippine corporation 99 percent American owned, brought an action against the United States under the Public Vessels Act, 46 U.S.C. §§ 781-90, for damage to its vessel in a collision with a U.S. destroyer. The shipowner failed to satisfy the reciprocity provision, 46 U.S.C. § 785, which is required for federal jurisdiction in actions by foreign nationals under the Act. The action was dismissed. On appeal, the shipowner argued that its American ownership gave it sufficient "contact" with the United States to be treated as an American citizen. The shipowner cited *Hellenic Lines v. Rhoditis,* 398 U.S. 306 (1970), a Jones Act case in which a foreign corporation, 95 percent American owned, was held to have sufficient U.S. contacts to be an "employer" under the Jones Act. The Court held that the shipowner was required to satisfy the reciprocity provision, reasoning that the shipowner should not be able to choose to do business as a corporation in the Philippines, yet escape the disadvantages of that choice when it saw fit. The court distinguished *Rhoditis* by holding that the use of the "contacts" test would not further the purpose of the Public Vessels Act, which was to remove the defense of sovereign immunity in actions against the government. The court further

held that the Act's discrimination between U.S. and foreign nationals or between foreign nationals whose courts do or do not accord reciprocal treatment to U.S. nationals, was not violative of equal protection. *Significance*—This decision is another stage of litigation in which the reciprocity provision of the Public Vessels Act has been considered in its relation to other admiralty statutes and is the first decision to hold the reciprocity provision of the Act constitutional. *United Continental Tuna Corp. v. U.S.*, 550 F.2d 569 (9th Cir. 1977).

SEARCH OF A U.S. VESSEL ON THE HIGH SEAS PURSUANT TO STATUTE AUTHORIZING SAFETY INSPECTIONS BY THE U.S. COAST GUARD MAY NOT BE ASSISTED BY AGENTS OF OTHER FEDERAL AGENCIES

Four defendants were convicted in district court of conspiracy to import marijuana and illegal international transport of U.S. currency in excess of $5,000. Defendants' arrests followed a search of their vessel by the U.S. Coast Guard, accompanied by Drug Enforcement Administration (DEA) and Customs agents. The search was made pursuant to 14 U.S.C. § 89(a), authorizing safety inspections by the U.S. Coast Guard. The court of appeals reversed the convictions, holding that the authority granted to the U.S. Coast Guard under 14 U.S.C. § 89(a) could not be delegated to other federal agencies, and in any event, the search had gone beyond the scope of a "routine safety inspection," as prescribed by 14 U.S.C. § 89(a). The court reasoned that the boarding and search of the vessel for reasons other than those prescribed by 14 U.S.C. § 89(a) violated defendants' fourth amendment protections against unreasonable search and seizure. *Significance*—This decision represents not only a blanket prohibition on other federal agencies' participation in U.S. Coast Guard inspections under 14 U.S.C. § 89(a), but also a serious limitation on the scope of the inspections themselves. *U.S. v. Warren*, 550 F.2d 219 (5th Cir. 1977).

LAND-BASED TORT PRINCIPLES OF NEGLIGENCE APPLY TO LIABILITY OF VESSELS FOR INJURIES TO LONGSHOREMEN RATHER THAN PRINCIPLES OF UNSEAWORTHINESS OR VIOLATION OF NONDELEGABLE DUTY

Two longshoremen employed by stevedores sued the owners of vessels upon which they had been working under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 (Supp. II 1972). The district courts found that the vessel owners had not been negligent, and gave judgment for the vessels. The two cases were consolidated on appeal, and the court of appeals affirmed the judgments. The court, examining the legis-

lative history for the 1972 amendments to the Act, held that § 905(b) of the Act made negligence, rather than "unseaworthiness" or violation of a "nondelegable duty," the source of liability of vessels for injuries to longshoremen. The court also held that the principles of the RESTATEMENT (SECOND) OF TORTS were to be applied, furthering congressional intent that land-based principles of negligence be applied in cases under the Act. The Courts of Appeal for the Second and Fourth Circuits had so held in *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976), and in *Anuzewski v. Dynamic Mariners Corp.*, 540 F.2d 757 (4th Cir. 1976). The court further noted that its holding did not affect the LHWCA rule of comparative negligence, and that a vessel might therefore have a duty to a stevedore's employees even where a danger was obvious. *Significance*—The Fifth Circuit joins the Second and Fourth Circuits in applying the land-based tort principles of the RESTATEMENT (SECOND) to suits against the vessels under the LHWCA. The court applies consistently the 1972 amendments permitting suit under the Act against vessels only on the theory of negligence. *Guerra v. Bulk Transport Co.*, 546 F.2d 1233 (5th Cir. 1977).

2. ALIEN'S RIGHTS

INTERRUPTION OF AN ALIEN'S PRESENCE IN THE UNITED STATES AND INVESTOR STATUS OF AN ALIEN ARE DEPENDENT UPON INDIVIDUAL CIRCUMSTANCES

An alien couple petitioned for review of a Board of Immigration order of deportation made in accordance with a Board decision denying applications for adjustment of immigration status from non-immigrants admitted as temporary visitors to aliens lawfully admitted for permanent residence. Additionally, aliens petitioned for relief from denial by the Board of an application for suspension of deportation at the discretion of the Attorney General of the United States, pursuant to 8 U.S.C. § 1245(a), the Immigration and Nationality Act. The aliens were initially admitted to the United States as non-immigrant visitors for a period of not more than six months. The couple unlawfully remained for a period of more than seven years, except for a six-week trip to West Germany. Since the time of initial entry, the alien husband invested $953.97 cash and bank loans of $4772.70 in a self-employed truck delivery service. The Immigration Board initially reversed an Immigration judge's finding of eligibility for change in immigration status, pursuant to 8 C.F.R. § 212.8(b)(4), where aliens engaged in an enterprise substantially capitalized by self-investment

are exempt from the requirement of obtaining a labor certificate. Upon remand, the Immigration judge denied the aliens' reapplication for change in immigration status and their application for discretionary suspension of deportation. The Board subsequently denied aliens' petition for relief, and the court of appeals affirmed the Board's denial of aliens' petition. The court held that the refusal to change immigration status was justified in that the husband's investment was not "substantial" in accordance with promulgated regulations. The court's reasoning was strongly influenced by the purpose of the substantial investment requirement to protect native workers from loss of employment, particularly where the capital investment did not promote an expansive economic effect, but only helped secure an existing job opportunity. The court also held that the couple's trip to West Germany was a meaningful interruption of the seven-year continuity requirement necessary to invoke discretionary review of the deportation order. *Significance*—This decision affirms the principle that interruption of an alien's continuous presence in the United States is a factor uniquely dependent upon the facts and circumstances of the case, and that "investor status" must be determined with regard to the invested operation's capability to create new employment situations. *Heitland v. Immigration and Naturalization Service,* 551 F.2d 495 (2d Cir. 1977).

3. ARBITRATION

PLAINTIFF DID NOT WAIVE RIGHTS TO ARBITRATION AFTER IMPROPER USE OF COMPULSORY FEDERAL DISCOVERY PROCEDURE BECAUSE DEFENDANT WITHHELD TIMELY OBJECTION TO SUCH DEPOSITIONS SO AS TO LATER CIRCUMVENT ARBITRATION

Plaintiff, a Japanese corporation, brought an action against an Oregon corporation to enforce arbitration over a disputed freight charge. Plaintiff took depositions dealing with the merits of the controversy after the dispute had already been committed to arbitration in Japan. Defendant then brought a motion for a temporary restraining order and preliminary injunction to forestall the arbitration proceedings. The district court reasoned that although a waiver of arbitration is normally deemed to have occurred when a party has brought suit in a federal court and utilized compulsory discovery, the plaintiff would not be precluded from invoking arbitration where the defendant was not misled as to plaintiff's intent to use depositions in arbitration and where defendant made a calculated decision to withold any objections so as to later circumvent arbitration by raising the defense of waiver. The court explained

that since the plaintiff brought this suit to enforce arbitration, not to litigate its grievances, the defendant cannot forthrightly claim surprise or unavoidable prejudice. Further, the defendant's participation and complicity in the improper use of a federal forum were knowing and conspicuous. Lastly, the court found that the defendant had the immediate and sufficient remedy of either moving for a protective order under FED. R. CIV. P. 26(c) or terminating or limiting examination under FED. R. CIV. P. 30(d), but chose rather to lodge the instant motion after the fact. *Significance*—The waiver of arbitration rule following suit in a federal court has never been applied to the fact situation found in this case. In all other cases either the defendant immediately objected to the proposed discovery proceedings or arbitration was not yet underway. *Shinto Shipping Co. Ltd. v. Fibrex & Shipping Co.*, 425 F. Supp. 1088 (N.D. Cal. 1976).

4. COMMERCE

EXPORT VALUE OF GOODS IMPORTED INTO THE UNITED STATES IS TO BE DETERMINED BY CONSIDERING ONLY THE EXPORTING COUNTRY'S MARKET FOR EXPORTATION TO THE UNITED STATES FOR PURPOSES OF ASSESSING CUSTOMS DUTIES

Glass stones and beads were sold at published list prices less 15 percent by their Austrian manufacturer to a Liechtenstein exclusive distributor for export to the United States. Upon arrival in New York, these goods were valued at the manufacturer's list prices for the purpose of assessing customs duties. In determining export value, the appraising officer considered sales in the domestic market of Austria as the exporting country and sales to third countries for exportation to the United States. The importer brought suit against the United States and contended that under section 402(b) of the 1930 Tariff Act, as amended by the Customs Simplification Act of 1956, export value was to be based solely on sales in the exporting country's market for exportation to the United States. The customs court held for the United States in line with *United States v. Acme Steel Co.*, 51 CCPA 81, C.A.D. 841 (1964). On appeal, the United States Court of Customs and Patent Appeals remanded for a hearing *de novo* in light of its decision overturning *Acme* in *J.L. Wood v. United States,* C.A.D. 1139, 505 F.2d 1400, 62 CCPA 25 (1974), rendered while review of the instant case was pending. The customs court on reconsideration reversed and found for the importer. The court relied totally on *Wood,* following its conclusion that Congress had clearly intended that export value be determined by considering only the exporting

country's market for exportation to the United States. The court ruled that on the evidence the Austrian manufacturer's sales to its selected purchaser, the Liechtenstein distributor, were at arms length and fairly reflected the market value of the goods. *Significance*—This decision represents application of the new *Wood* doctrine in a different factual context. *Ernest Lowenstein, Inc. v. United States,* 425 F. Supp. 856 (Cust. Ct. 1977).

FOREIGN COUNTRY NEEDS CLEAR DECLARATION OF NATIONAL OWNERSHIP OVER ARTICLE BEFORE EXPORTATION OF ARTICLE MAKES IT "STOLEN" WITHIN MEANING OF NATIONAL STOLEN PROPERTY ACT

Five defendants were arrested for transactions involving alleged illegally exported pre-Columbian artifacts from Mexico. The defendants were accused of conspiracy to violate and violation of the National Stolen Property Act (NSPA), 18 USC §§ 2314, 2315, which prohibits the transportation and receipt of stolen goods in foreign commerce. The district court found the defendants guilty. The district court relied on testimony that a Mexican law had declared all pre-Columbian artifacts property of the Republic of Mexico since 1897. The court of appeals reversed and remanded, holding the trial court's instruction that Mexico had ownership since 1897 to be erroneous. The court examined Mexican municipal law and found that Mexico had ownership only since 1972. The court reasoned that the recent date of ownership raises the issue of whether the artifacts were in fact illegally exported, and this issue must be determined to decide whether the National Stolen Property Act (NSPA) was applicable. *Significance*—This is the first decision to hold that the NSPA requires a clear declaration of national ownership before exportation of an article can be considered illegal and the article considered stolen, within the meaning of the NSPA, and to interpret Mexican law as to Mexico's property rights over pre-Columbian artifacts, as applicable in United States federal courts. *U.S. v. McClain,* 545 F.2d 988 (5th Cir. 1977); rehearing denied and case remanded, 551 F.2d 52 (5th Cir. 1977).

ITEM 807.00 TARIFF SCHEDULES OF THE UNITED STATES DOES NOT CHANGE THE BASIS FOR MAKING CUSTOMS DUTY ALLOWANCES ESTABLISHED UNDER SECTION 1615(A), TARIFF ACT OF 1930, AS AMENDED

Plaintiff challenged the district customs director's refusal to make an allowance for the cost of steel Z-beams of American origin used in the center sill sections of boxcars classified under item

690.15 Tariff Schedule of the United States (TSUS) and appraised under item 807.00 (TSUS). Plaintiff contended that the Z-beams met every requirement of item 807.00 TSUS. Defendant argued that because holes were burned into the Z-beams in Mexico, they were fabricated components rather than ready for assembly abroad under clause (a) of 807.00 TSUS. Defendant also argued that the modifications to the Z-beams caused them to be changed in form and shape and disqualified under clause (b) of 807.00 TSUS. Finally, defendant argued that the Z-beams were advanced in value or improved in condition while abroad, thus the beams failed to qualify under clause (c) of 807.00 TSUS. Holding that the allowance should not be applied, the court focused on the relationship of the Z-beams to the completed boxcars in its analysis under clause (a) of 807.00 TSUS, on the physical appearance of the goods in its analysis under clause (b), and on the magnitude of the operations performed on the Z-beams in its analysis under clause (c) of 807.00 TSUS. The court made full use of precedent decided under item 807.00 TSUS's predecessor, paragraph 1615(a), Tariff Act of 1930, as amended. *Significance*—Item 807.00 TSUS will not be interpreted as modifying the aproach to duty allowance decisions established prior to the enactment of item 807.00. *Rudolph Miles v. United States,* No. 73-11-03042 (Ct. Cl., filed Feb. 15, 1977).

5. JURISDICTION AND PROCEDURE

EMPLOYEE COVERED BY THE PUERTO RICO STATE INSURANCE FUND CANNOT INVOKE PUERTO RICO DIRECT ACTION STATUTE AGAINST AN INSURER OF A STATE INSURANCE FUND-INSURED EMPLOYER

Plaintiff longshoremen injured aboard a vessel bareboat chartered to their employer recovered damages under the Puerto Rican Workmen's Compensation Act. Plaintiffs then sought to invoke the Puerto Rican Direct Action Statute to bring an action against the vessel owners and their insurers. The defendants asserted that recovery under the Workmen's Compensation Act barred an action against the owner and insurer. Plaintiffs maintained that such a claim would not be derivative, but rather a separate and independent action. The district court granted defendants' motion for summary judgment, ruling that the insurers could not be held liable under the Puerto Rican direct action statute absent any cause of action against the vessel owners. The insurance policy provided indemnity for damages for which the owners were liable and there was no showing of neglect or unseaworthiness prior to the accident, thus no loss within the meaning of the direct action statute. Furthermore, the court, emphasizing that the

Federal Longshoremen's and Harbor Workers' Compensation Act (LHWCA) does not apply to Puerto Rico, indicated that the LHWCA reveals a public policy similar to that of Puerto Rican legislation in the workmen's compensation field. This policy indicates that the exclusive liability provisions of the LHWCA bar a direct action against the employer's insurer as well as a suit against the employer. *Significance*—This decision is the first to be handed down by the District Court of Puerto Rico which analogizes the Puerto Rico statutes in the workmen's compensation field to the federal statutes relating to direct action suits against an insurer absent a showing of negligence or unseaworthiness. *Ruiz Rodriguez v. Litton Industries Leasing Corp.*, 428 F. Supp. 1232 (D.P.R. 1977).

GUAM LEGISLATURE LACKS AUTHORITY UNDER 1950 ORGANIC ACT OF GUAM TO DIVEST U.S. DISTRICT COURT FOR GUAM OF ITS APPELLATE JURISDICTION

Respondent appealed his criminal conviction in the Superior Court of Guam to the U.S. District Court of Guam which dismissed the appeal. The dismissal was based on *Agana Bay Development Co. Ltd. v. Sup. Ct. of Guam,* 529 F.2d 952 (9th Cir. 1976), which held that the 1974 Court Reorganization Act enacted by the Guam legislature validly divested the U.S. District Court of its appellate jurisdiction and transferred that jurisdiction to the newly created Supreme Court of Guam. Respondent appealed the dismissal by the district court. The Ninth Circuit overruled en banc the divided panel decision in *Agana Bay,* and reversed the dismissal of respondent's appeal. *Territory of Guam v. Olsen,* 540 F.2d 1011 (9th Cir. 1976). The United States Supreme Court affirmed, holding that the Guam legislature lacked the authority under the 1950 Organic Act of Guam, § 22(a), as amended, 48 U.S.C. § 1424(a), to divest the district court of its appellate jurisdiction. The Organic Act, which organized the Guam judicial system, granted the district court all original jurisdiction in the territory except that "transferred by the legislature to other court or courts established by it" and "such appellate jurisdiction as the legislature may determine." The Court held that the Act granted the legislature the power to "determine" appellate jurisdiction only in the sense of the selection of what should constitute appealable causes rather than the power to actually transfer jurisdiction to other courts as was explicitly granted in the case of original jurisdiction. The Court felt that without a "clear signal from Congress" it could not conclude that the Organic Act was designed to

allow the Guam legislature to foreclose appellate review by Art. III courts of decisions of territorial courts in cases that may turn on questions of federal law. *Significance*—This protection of the appellate link between territorial courts and Art. III courts may make it difficult for the United States territories to pursue a more self-determinative course in governing themselves. *Territory of Guam v. Olsen,* 97 S. Ct. 1774 (1977).

OHIO CORPORATION RECEIVING SIGNIFICANT BENEFITS FROM FREQUENT VOLUNTARY TRANSACTIONS HAS SUFFICIENT CONTACTS TO ESTABLISH IN PERSONAM JURISDICTION UNDER PUERTO RICO'S LONG-ARM STATUTE

A Puerto Rican firm appealed an order of the district court granting the motion of the defendant Ohio corporation to dismiss a contract action for lack of personal jurisdiction. The court of appeals reversed. The court held that since the Ohio corporation sent catalogues to Puerto Rican firms, accepted mail orders from them, and regularly shipped products to Puerto Rico, it maintained sufficient contacts under the standard of *Hanson v. Denckla,* 357 U.S. 235 (1958), for the exercise of in personam jurisdiction under the Puerto Rican long-arm statute, even though Puerto Rican sales represented only a small part of the corporation's sales volume. By extending credit to Puerto Rican customers, the court noted, the corporation relied on the benefits of Puerto Rican law to enforce contracts made with the commonwealth's residents. The court added that the minimum contacts standard should be the same for both tort and contract actions. *Significance*—The holding indicates that the solicitation of customers and regular shipment of goods into a forum meets the "voluntary contacts" standard for the exercise of personal jurisdiction. *Vencedor Manufacturing Co., Inc. v. Gougler Industries,* 557 F.2d 886 (1st Cir. 1977).

SWORN AFFIDAVITS OF A FOREIGN LEGAL EXPERT CAN BE RELIED UPON TO INTERPRET FOREIGN LAW EVEN WHERE THE STATUTE, ON ITS FACE, INDICATES AN OPPOSITE INTERPRETATION

Defendants in a third party cross-claim action by an Iranian corporation moved for summary judgment on the grounds that, under Iranian law, a former director of a dissolved corporation lacks status to institute a suit in the name of the corporation. The district court was faced with two separate provisions of the Iranian Commercial Code of 1932, under which the plaintiff corporation was incorporated, which on their face appeared to support plain-

tiff's claim of status to sue. Defendants introduced two sworn affidavits of a recognized Iranian legal expert who interpreted the law as denying the director status in this case because the dissolution of the corporation had occurred by act of law rather than voluntarily as assumed in the code provisions relied upon by the plaintiff. The court granted defendants' motion for summary judgment based on the interpretation of Iranian law presented in the affidavits. In so doing, the court relied upon Rule 44.1, Federal Rules of Civil Procedure, which provides that the court may rely on any relevant source, including testimony, in determining foreign law. The court reasoned that under such a provision the interpretation of an unchallenged foreign expert must be conclusive even though the court might reach a different conclusion from simply reading the statutory provisions. *Significance*—Under the ruling in this case, testimony as to the meaning of foreign legislation can be introduced even where there is no ambiguity on the face of the statute, and even when a plain reading of the statute indicates the opposite result. *Alosio v. Iranian Shipping Lines,* 426 F. Supp. 687 (S.D.N.Y. 1976).