Vanderbilt Journal of Transnational Law

Volume 7
Issue 2 *Spring 1974*

Article 9

1974

Case Digest

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Case Digest

The purpose of the Case Digest is to identify and summarize for the reader those recent and interesting cases that have less significance than those that merit an in-depth analysis. Included in the digest are cases that apply established legal principles without necessarily introducing new ones.

This digest includes cases reported mainly from October 1973 through January 1974. The cases are grouped into 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 aspects of transnational law.

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1. ACT OF STATE

ACT OF STATE DOCTRINE PRECLUDES PAYMENT OF INSURANCE POLICY'S CASH SURRENDER VALUE IN CONTRAVENTION OF THE LAW OF THE NATION GOVERNING THE CONTRACT

Plaintiff, an expatriated Cuban national, brought suit against defendant, a United States life insurance company, to recover the cash surrender value of his 1949 insurance policy that was executed in Cuba, and which required payment of the policy in Cuba in Cuban currency. In 1959, the Cuban Government promulgated a law prohibiting all United States legal entities from making any payments to Cuban nationals anywhere except in Cuba. Shortly thereafter, in 1960, Cuba nationalized all United States-owned property and businesses, expropriated defendant's Cuban assets and assumed defendant's obligations to its Cuban policy holders. The trial court in this subsequent action awarded judgment for plaintiff, ordering defendant to pay the cash surrender value of the policy in United States currency. On appeal, the Louisiana Court

of Appeal, *held,* reversed. The primary issue before the court was whether it must apply Cuban law to the insurance contract and thereby absolve defendant of its contractual obligation to plaintiff. The court observed that it is an almost universal rule that a contract of insurance must be governed by the law of the place where the contract is finally consummated. Because this policy had been issued in Cuba and required payment there in Cuban currency, and because the parties clearly intended that enforcement of the contract should occur in Cuba, the court reasoned that the policy was a Cuban contract governed by Cuban law. Citing *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964), the court ruled that the act of state doctrine bound the Louisiana courts to recognize the validity of applicable Cuban laws. Therefore, the Cuban Government had replaced defendant as the insurer and obligor under plaintiff's policy, and it was the entity to which plaintiff must look for recovery. *Fernandez v. Pan-American Life Ins. Co.,* 281 So. 2d 779 (La. App. 1973).

2. ADMINISTRATIVE LAW

Secretary of the Interior May Suspend Gas and Oil Leases to Conserve Maritime Natural Resources

Plaintiff was the holder of eleven oil and gas leases in California's Santa Barbara Channel. After the 1969 Santa Barbara oil spill, defendant, the Secretary of the Interior, exercised his authority under the Outer Continental Shelf Lands Act, 42 U.S.C. §§ 1331-43 (1970) (OCS Act), to suspend operations on plaintiff's Channel leases "in the interest of conservation" and for the purpose of permitting Congress to consider proposed legislation to terminate the leases. In its suit to overturn the suspension, plaintiff contended that the Secretary's power to suspend the leases adhered only for the purpose of conserving oil and gas, and not natural resources in general, as the Secretary argued. In addition, since the leases fully conformed to the OCS Act, one of the purposes of which is to develop the oil and gas resources of the outer continental shelf, plaintiff argued that it could, and indeed must, drill. Therefore, defendant could not suspend the leases in order to give Congress time to pass legislation declaring them invalid. The district court upheld plaintiff's claim, but on appeal the Court of Appeals for the Ninth Circuit reversed. Relying on a broad construction of the OCS Act and the environmental safeguards mandated in the National Environmental Policy Act of 1969, 42 U.S.C.

§§ 4321-47 (1970), the court determined that the Secretary acted within his delegated authority to suspend, and thereby conserve, the broad range of natural resources in the outer continental shelf. Since drilling had not yet begun and it might have to be abandoned on passage of pending legislation, the court concluded that the Secretary's evaluation of the environmental risks to the natural resources of the area was not arbitrary, capricious or an abuse of discretion. *Gulf Oil Corp. v. Morton,* No. 72-2449 (C.D. Cal., Nov. 27, 1973).

3. ADMIRALTY

LIBEL IN REM AGAINST VESSEL DEMISE CHARTERED TO THE UNITED STATES IS NOT WITHIN COURT'S JURISDICTION UNDER SUITS IN ADMIRALTY ACT WHEN SHIP IS OUTSIDE UNITED STATES TERRITORIAL WATERS

Plaintiff, a Panamanian corporation, advanced some 20,000 dollars in repairs, supplies and wages while acting as husbanding agent for its vessel under time charter to defendant, the United States. Claiming a maritime lien against the vessel for that amount, plaintiff filed an in rem action while the vessel, on a subsequent demise charter to the Government, was outside the territorial waters of the United States. Plaintiff noted that because the United States as demise charterer was the vessel's owner *pro hac vice* under 46 U.S.C. § 186 (1970), it was unable to libel the vessel in rem because the Suits in Admiralty Act, 46 U.S.C. §§ 741-52 (1970), prohibits such actions against vessels owned or operated by the United States. Plaintiff argued, however, that the lien was enforceable against the Government because 46 U.S.C. § 742 gave the court jurisdiction to transform a libel in rem into an enforceable in personam action. On re-entering territorial waters five weeks after the original suit was filed, the vessel was seized in a separate in rem action brought by other lienors, declared off-hire by the Government, and sold to pay these liens. Plaintiff intervened in this suit, but recovered only 1,935 dollars because other liens had higher priority. After the district court dismissed the original complaint, plaintiff filed an amended complaint claiming damages against the Government for the loss of its lien's priority because 46 U.S.C. § 741 allegedly prevented it from libeling the vessel in rem. The court granted the Government's motion for summary judgment, holding plaintiff unable to libel the vessel because of the vessel's absence from the court's jurisdiction

when plaintiff made its complaint, and not because of section 741 immunity. In affirming this decision, the Court of Appeals determined also that plaintiff's in rem action was not made in personam by 46 U.S.C. § 742 for the purposes of jurisdiction, that the Government was not responsible for the loss in value of plaintiff's lien caused by its own delay in pursuing the allowable remedies when the vessel had earlier been within the court's jurisdiction, and that, contrary to the majority in *Hudson Trading Company v. United States,* 28 F.2d 744 (3d Cir. 1928), 46 U.S.C. §§ 741, 746 allow the Government to permit judicial seizure of merchant vessels chartered by it when necessary to limit its liability according to law. *Everett S.S. Corp. v. Liberty Navigation & Trading Co., Inc.,* 486 F.2d 462 (9th Cir. 1973).

Status as Crew Member of and a Relatively Permanent Connection with a Floating Structure Required for Recovery Under the Jones Act

Plaintiff, a marine construction worker, suffered injuries while helping to build a boathouse on a barge owned by defendant, his employer, and moored at a shipyard. Seeking to invoke admiralty jurisdiction in his action to recover damages for personal injuries from defendant, plaintiff contended first, that as a seaman under the Jones Act he could recover damages for defendant's negligence, and secondly, that he was permitted to recover for injuries caused by the barge's alleged unseaworthiness. The court reasoned that to qualify as a Jones Act "seaman," plaintiff must demonstrate, *inter alia,* that he was a member of the crew of and had a more or less permanent connection with a floating structure. Finding that work aboard barges constituted only ten per cent of plaintiff's total employment as a general shore-side construction worker, the court concluded that plaintiff had failed to prove the requisite maritime connection to qualify as a seaman entitled to sue in admiralty under the Jones Act. Addressing the question of recovery for unseaworthiness, the court reasoned that, under *McCown v. Humble Oil Refining Co.,* 405 F.2d 596 (4th Cir.), *cert. denied,* 395 U.S. 934 (1969), plaintiff must establish that at the time of injury he was doing a seaman's work. Since his duties as a shore construction worker only occasionally took him aboard floating structures, the court determined that plaintiff was not entitled to the warranty of seaworthiness. *Lewis v. Trego & Sons,* 359 F. Supp. 1130 (D. Md. 1973).

EMPLOYER MAY NOT SET OFF CONTRACTUALLY CREATED DISABILITY PENSION BENEFITS AGAINST JURY VERDICT FOR ITS NEGLIGENCE UNDER THE JONES ACT

Plaintiff, a seaman employed by defendant, sued under the Jones Act, 46 U.S.C. § 688 (1970), and general maritime law for injuries received aboard defendant's vessel and recovered a 40,000 dollar judgment. The sole issue on appeal was whether the district court had correctly refused to allow defendant to set off against the judgment disability pension benefits partially paid by defendant to plaintiff. Defendant argued that set off of pension benefits is proper for two reasons. First, section 5 of the Federal Employers Liability Act, as incorporated into the Jones Act, provides that a common carrier sued by an employee may set off "any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee . . . *on account of the injury* . . . for which said action was brought" (emphasis added). Secondly, defendant contended that a tortfeasor need not pay twice for the same wrong. Finding the question of set off to be one of law for the court's determination and not for the jury, the court rejected defendant's contentions. Citing as authority *Haughton v. Blackships, Inc.*, 462 F.2d 788 (5th Cir. 1972) and *Hall v. Minnesota Transfer Railway Co.*, 322 F. Supp. 92 (D. Minn. 1971), the court reasoned that pension benefits paid pursuant to a collective bargaining agreement were not contingent on defendant's negligence but constituted a "fringe benefit" and a "form of compensation" for plaintiff's employment. The pension plan agreement was held, therefore, to be "collateral" to defendant's obligation to pay for its wrongdoing, and not within the set off provision of the Jones Act. Similarly, because the judgment was the sole burden imposed on defendant for its negligence, the court found no double payment for the same tort. *Russo v. Matson Navigation Co.*, 486 F.2d 1018 (9th Cir. 1973).

4. AVIATION

CAB REGULATION REQUIRING NOTICE ON TICKETS OF CARRIERS' LIMITED LIABILITY FOR BAGGAGE IS CONSISTENT WITH WARSAW CONVENTION AND WITHIN FEDERAL AVIATION ACT

Plaintiff, a German airline engaged in international operations, appealed an order of the Civil Aeronautics Board (CAB) requiring all air carriers operating in the United States to note on their

passenger tickets their limitation of liability for baggage loss or damage. Plaintiff argued that the regulation violated the provision of the Warsaw Convention that plaintiff alleged governed exclusively the information required on passenger tickets, and that by issuing the regulation the CAB had exceeded its authority under the Federal Aviation Act (FAA), 49 U.S.C. §§ 1301-1542 (1970). The Court of Appeals for the District of Columbia reasoned that the Convention provisions are not exclusive, nor meant as a protective shelter to shield air carriers in any way from public responsibility. The CAB regulations, the court concluded, assist in affording the public the necessary ample opportunity to comprehend the limitation on baggage liability imposed by carriers. The court also found the regulation permissible under the broad authority conferred on the CAB by the FAA to regulate and control the public's notice of liability limitations that carriers may impose. *Deutsche Lufthansa Aktiengesellschaft v. Civil Aeronautics Board,* 479 F.2d 912 (D.C. Cir. 1973).

5. BORDER SEARCHES

EVIDENCE FROM SEARCH OF ALIEN PAROLED INTO UNITED STATES AND HELD IN CONTINUOUS PHYSICAL CUSTODY BY ENTRY OFFICIALS IS ADMISSIBLE AS DERIVED FROM A BORDER SEARCH

Appellant, an alien admitted into the United States on a "deferred inspection parole" status and held in continuous physical custody thereafter, was tried for illegally importing and possessing cocaine with the intent to distribute. Arguing that the evidence, discovered a week after his detention on other grounds, was obtained without a warrant in violation of the fourth amendment, appellant filed a motion to suppress the introduction of the cocaine as evidence. In denying the motion, the federal district court relied on the government's contention that the search fell within one of the exceptions to fourth amendment warrant requirements, and, in affirming, the Court of Appeals for the Fifth Circuit determined that the case involved a border search. In reaching this conclusion, the court specifically relied on 8 U.S.C. § 1182(d)(5) (1970), which declares that an alien's entry on a deferred inspection parole basis is not an admission to the United States. Therefore, the court reasoned, although appellant was physically within the boundaries of the United States on temporary parole, he was considered to be "standing at the border" because he had not been fully admitted. The court carefully limited, however, its characterization of one

standing at the border in a deferred inspection parole status, and thereby susceptible to a border search, to those aliens who have been held in continuous physical custody by entry officials, provided the alien is not detained for an unreasonable length of time. *United States v. Christancho-Puerto,* 475 F.2d 1025 (5th Cir. 1973).

CUSTOMS AGENTS CANNOT LAWFULLY OPEN A LETTER-SIZED ENVELOPE ABSENT REASONABLE SUSPICION THAT IT CONTAINS SOMETHING OTHER THAN A LETTER

The United States Government, pursuant to section 305 of the Tariff Act of 1930, 19 U.S.C. § 1305 (1970), sought to confiscate and destroy the contents of four envelopes mailed to the United States from abroad on the ground that each contained obscene material and, therefore, was unlawfully imported. After finding that these imported materials were unquestionably obscene as required by section 305, the District Court for the Southern District of New York addressed the issue whether the envelopes were opened legally by customs officials. Noting that customs agents need have only a mere reasonable suspicion of illegal activity to justify a search at a border crossing or area, the court reasoned that a mailroom could be characterized as a "border area" for applying this mere suspicion standard in evaluating the customs agent's search of this mail. The court then held that three of the four envelopes on their face raised reasonable suspicions that clearly justified intrusions by customs agents. As to the fourth envelope, however, the court found that neither on its face nor based on the expertise or experience of the customs officials did it offer such a suspicion of obscene contents and, therefore, was opened improperly. *United States v. Various Articles of Obscene Merchandise,* 363 F. Supp. 165 (S.D.N.Y. 1973).

6. EXTRADITION

JUDICIAL FAILURE TO DETERMINE COMPETENCY OF INDIVIDUAL CHARGES FOR WHICH EXTRADITION IS SOUGHT IS CURABLE ON WRIT OF HABEAS CORPUS IF SUFFICIENT EVIDENCE PROVIDED TO WARRANT EXTRADITION FOR ONE OF THE CHARGES

Appellant, an Israeli citizen, was sought by Israel from the United States pursuant to the extradition treaty between these nations following an Israeli court's issuance of a nineteen-count

indictment charging appellant with the operation of an allegedly fraudulent investment enterprise. Appellant was apprehended and subjected to an extradition hearing before the District Court for the Southern District of New York, which then certified to the Secretary of State that the evidence presented warranted extradition. Petitioning on a writ of habeas corpus for discharge from custody, appellant contended, *inter alia,* that all of the charges were not extraditable under the terms of the extradition treaty. The district court denied the petition, and on appeal the Court of Appeals for the Second Circuit affirmed. Relying on the principle of specialty recognized by the Supreme Court in *United States v. Rauscher,* 119 U.S. 407 (1886), the court determined that the judge hearing the application for extradition must decide the competency of each of the individual charges for which extradition is sought. The lower court's failure to follow this procedure, the court concluded, nonetheless was curable following a petition for a writ of habeas corpus if sufficient evidence existed to warrant extradition for one of the charges. Lacking a clear precedent, the court reasoned that such a determination is consistent with the judiciary's role in extradition proceedings and would not infringe on the powers of the executive branch of government. *Shapiro v. Ferrandina,* 478 F.2d 894 (2d Cir. 1973).

7. INSURANCE

GUERRILLA HIJACKING AND DESTRUCTION OF AIRPLANE IS COVERED BY AIRLINE'S ALL-RISK INSURANCE POLICY CLAUSE EXCLUDING FROM COVERAGE LOSSES RESULTING FROM WAR RISKS

Plaintiff's airliner was hijacked by members of the Popular Front for the Liberation of Palestine (PFLP) and ultimately taken to Cairo where it was destroyed. Defendant denied liability under the "all-risk" insurance policy issued by it to plaintiff by relying on the clause excluding payment for losses from "any taking of the property insured or damage to or destruction thereof . . . by any military . . . or usurped power, . . ." or resulting from "war, . . . civil war, . . . insurrection or warlike operations . . . ." The district court noted the general rule that doubts and ambiguities in an insurance policy should be resolved against the insurer, especially when the doubt relates to exceptions from the coverage of "all risks." The court observed that this standard "war risk" exclusion clause was not precisely applicable to the circumstances of the disputed loss, and determined that the loss was not attributable

to "war, . . . insurrection or warlike operations," nor to the actions of a "military or usurped power," since the PFLP was a nongoverning and entirely self-serving political group whose intentional infliction of violence on nonbelligerent civilians occurred far from the locale of any warfare. In addition, since hijacking was a risk well known to defendant, and described by it with clarity and precision in its other policies, the court reasoned that the ambiguity of defendant's phraseology here should result in an interpretation favoring coverage rather than exclusion. *Pan American World Airways, Inc. v. The Aetna Casualty & Surety Co.*, 42 U.S.L.W. 2185 (S.D.N.Y. Sept. 17, 1973).

8. JURISDICTION

FINALITY AND ENFORCEABILITY OF FOREIGN ARBITRATION AWARD ABROAD IS NOT DETERMINATIVE OF RECOVERY ON AWARD IN UNITED STATES

Plaintiff, a United States citizen, and defendant, a German bank, entered into an investment agreement that contained a complex arbitration clause providing that disputes would be arbitrated in Germany before a board of arbitration whose award would be final. In 1965, a dispute arose and an appropriate panel issued an award in favor of plaintiff which was upheld by a lower German court. Pursuant to article VI(2) of the Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, Oct. 29, 1954, [1956] 2 U.S.T. 1839, 1845-46, T.I.A.S. No. 3593, plaintiff sought enforcement of the award in a New York federal district court. Defendant moved to stay this action pending final appeal in Germany of the arbitration award in the belief that, under the Treaty, the finality and enforceability of the arbitration award under German law was determinative in this New York suit. The court construed the Treaty as including, but not limiting, those awards that would be enforced in the United States to awards that are final and enforceable in Germany. Under *von Engelbrechten v. Galvanoni & Nevy Bros., Inc.*, 59 Misc. 2d 791, 300 N.Y.S.2d 239 (1969), the court found that the award was enforceable in New York prior to final appeal, and the court determined that the foreign judgment in the lower court eliminated any genuine issue of material fact. Furthermore, since plaintiff was entitled to pursue simultaneously two separate actions to enforce his award, the court denied defendant's motion to stay. *Landegger v. Bayerische Hypotheken und Wechsel Bank*, 537 F.Supp. 692 (S.D.N.Y. 1972).

COURT MAY CONDITION GRANT OF STAY PENDING RESOLUTION OF PRIOR FOREIGN ACTION ON COMPLIANCE WITH CERTAIN STIPULATIONS

Plaintiff, a Pennsylvania insurance company, engaged defendant, a Delaware corporation headquartered in London, England, as its exclusive overseas sales representative. Defendant corporation later sued plaintiff in England for breach of contract. While this action was still pending, plaintiff sued defendant and its principal owners in Delaware alleging fraud in the inducement of their contract and seeking restitution and an accounting. Defendants then moved alternatively for a dismissal of the Delaware suit on the ground of *forum non conveniens* or a stay pending the outcome of the English action. In addressing this plea, the Delaware Chancery Court recognized that most of the witnesses and much of the evidence were in England. Nevertheless, it refused to dismiss the suit because of its concern about the slow progress of the English action, the alleged disadvantage to plaintiff under English discovery procedures, and the lack of a complete identity of issues in the two suits. Instead, the court decided that efficiency, judicial economy and respect for defendant's initial choice of forum justified granting a stay pending resolution of the English suit provided that the parties complied with two conditions: first, plaintiff must amend its English counterclaim to include all issues in the instant case, and secondly, all parties must voluntarily ensure that the English action offers discovery procedures comparable to those available in Delaware courts. *Life Assurance Co. v. Associated Investors International Corp.*, 312 A.2d 337 (Del. Ch. 1973).

DIVERSITY OF CITIZENSHIP REQUIRED BY 28 U.S.C. § 1332(c) FOR FEDERAL COURT JURISDICTION IS LACKING WHEN ALIEN CORPORATION'S PRINCIPAL PLACE OF BUSINESS IN UNITED STATES IS WITHIN STATE OF ADVERSARY'S PRINCIPAL PLACE OF BUSINESS OR INCORPORATION

Plaintiff, a Bahamian corporation, brought suit in federal court against defendants, plaintiff's brokerage firm, seeking the return of allegedly stolen bonds, or indemnification for the money it had paid for these securities. Challenging the court's subject matter jurisdiction, defendants sought to dismiss the action pursuant to 28 U.S.C. § 1332(c) (1970) on the ground of an absence of the requisite complete diversity between the parties. Defendants asserted that for jurisdictional purposes some of them were citizens of Illinois, the site of the suit, because they were incorporated in Illinois or maintained their principal places of business there,

while plaintiff allegedly also was an Illinois citizen under section 1332(c), although chartered in the Bahamas, because Illinois was its principal place of business. Plaintiff responded by arguing first, that its Illinois office engaged solely in manipulating its stock account and so was not its principal place of business, and secondly, that section 1332(c) was inapplicable because alien corporations are citizens only of the foreign states of their charter. The District Court for the Northern District of Illinois dismissed plaintiff's suit, and determined that section 1332(c) applies to alien corporations whose principal place of business is in the United States. Rejecting the interpretation of section 1332(c) advocated by the District Court for the Southern District of New York in *Eisenberg v. Commercial Union Assurance Co.*, 189 F. Supp. 500 (S.D.N.Y. 1960), and subsequent decisions, the court determined that Congress intended in that section to limit federal court diversity jurisdiction. The protection of federal courts was unnecessary in cases like this one, the court concluded, in which an alien corporation maintained its principal place of business in the state where its legal adversary resided, because the foreign entity in effect was no longer an outsider. *Southeast Guaranty Trust Co. v. Rodman & Renshaw, Inc.*, 358 F. Supp. 1001 (N.D. Ill. 1973).

9. TAXATION

PURCHASE OF FOREIGN HOLDING COMPANY STOCK AS MEANS TO ACQUIRE INDIRECTLY LESS THAN TEN PER CENT OF ANOTHER FOREIGN COMPANY DOES NOT QUALIFY FOR DIRECT INVESTMENT EXCLUSION TO INTEREST EQUALIZATION TAX

Appellants purchased 23 per cent of the stock of Westsales Corporation, a Luxembourg corporation whose only assets on the date of purchase were less then one per cent of the stock of Western Sales, Ltd., a Bahamian entity. The appellants paid under protest the interest equalization tax required on the purchase by §§ 4911-31 of the Internal Revenue Code of 1954, and argued that the acquisition qualified for the "direct investment" exemption in section 4915(a)(1) for purchases of more than ten per cent of the stock of foreign corporations. Section 4515(c)(1), however, provides that this exemption does not apply when a foreign entity is "availed of" for the principal purpose of acquiring stock whose direct acquisition would be subject to the tax. Appellants denied the applicability of that exception because they alleged that it adhered only to holding companies with continuing securities oper-

ations, and because appellants arguably had not "availed of" Westsales to avoid a tax that would have been assessed had the purchase of Western Sales stock been made directly. The Commissioner disallowed appellants' claim to the section 4915(a)(1) exemption, reasoning that appellants did so "avail of" Westsales to avoid tax, and, alternately, that appellants had not made a "direct investment" since they were not actively engaged in the corporation's management. The district court ruled for the Commissioner, and on appeal to the Court of Appeals for the Fifth Circuit, *held,* affirmed. The court did not reach the argument concerning appellants' involvement in Westsales' management. Instead, the court found that the tax applies to the purchase of stock in all such holding companies, whether or not engaged in continuing securities operations, the practical consequence of which is the avoidance of the interest equalization tax. *Garrett v. United States,* 479 F.2d 598 (5th Cir. 1973).