10-1-1983

Case Digest

CASE DIGEST

I. ARBITRATION

Bergeson v. Joseph Muller Corp.
548 F. Supp. 650 (S.D.N.Y. 1982)

A Norwegian owner of cargo vessels (Bergeson) brought an action against a Swiss charterer of vessels (Muller) to confirm and enter judgment upon an arbitration award rendered in New York in favor of Bergeson. Bergeson invoked the jurisdiction of the district court pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[1] Muller argued however that the arbitration award does not come within the terms of the Convention and, that the arbitration award, by its own terms, excludes enforcement of an award in the United States from its scope. The district court held that the enforcement of an arbitration award, rendered in New York, on disputes arising out of charter parties between foreign corporations, falls within the Convention.

The court determined that the Convention applies to awards which are not considered to be "domestic" in the state of enforcement. Originally, the concept of a foreign award was limited to awards rendered in a country other than the one where enforcement was sought. The delegates to the conference found this criteria to be inadequate and augmented the necessary considerations to include the nationality of the parties, the object of the dispute, and the rules of arbitral procedure. Under these expanded criteria, article I(1) of the Convention looks to the law of the enforcing state to determine whether the dispute was domestic. 9 U.S.C. § 202 excludes an agreement or award arising out of a commercial relationship which is entirely between citizens of the U.S. as domestic, unless significant foreign contacts are involved. Since Congress did not define arbitral awards between foreign commercial parties as "domestic" within the context of article I(1) of the Convention, the district court had jurisdiction over this matter.

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1. 9 U.S.C. §§ 201-08 (1970).

II. EXPROPRIATION

Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.
686 F.2d 322 (5th Cir. 1982)

Compania de Gas de Nuevo Laredo (CGNL), a Mexican natural gas purchaser, brought a diversity action against Entex, Inc., an American natural gas exporter, for conspiring with Mexican government officials to expropriate its assets. CGNL had become delinquent in its account with Entex as a result of a price increase in 1974. By 1976, the amount owed had become significant and Entex sent a letter to CGNL and various Mexican government officials stating that if the account was not cleared immediately, Entex would suspend deliveries according to the terms of the contract. The Mexican government appointed an "interventor" and took immediate, total, and temporary possession of CGNL's assets and rights in Mexico.

CGNL then brought a tort claim in the district court for the Southern District of Texas alleging that Entex had conspired unlawfully with Mexican officials to obtain control of CGNL's assets. The district court granted Entex's motion to dismiss the tort claim, holding that the act of state doctrine barred all inquiries into the alleged conspiracy. The court noted that application of the doctrine is determined by balancing the degree of involvement of the foreign state, whether the validity of its law or regulation was an issue, whether the foreign state was a named defendant, and whether there was a showing of harm to American commerce. The Court of Appeals for the Fifth Circuit upheld the district court's decision by applying the act of state doctrine as established in *Industrial Development Corp. v. Mitsui Co., Ltd.*[2]

Although the Mexican government was not a named defendant, the court found the remaining factors to be sufficient to justify the dismissal of the conspiracy claim. Resolution of the charges made by CGNL would require a determination as to the legality of the Mexican government's actions and the validity of such actions under Mexican law. In addition, CGNL did not demonstrate that the alleged conspiracy affected U.S. commerce. Further, the court felt that its analysis, if undertaken, might have an adverse affect on relations between the United States and Mexico.

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2. 594 F.2d 48 (5th Cir. 1979).

The court of appeals also dismissed the contractual issue raised by CGNL on the basis of collateral estoppel. The court noted that CGNL had a full and fair opportunity to litigate its claim as to the federal preemption over regulating the price of gas in a previous case involving the Federal Energy Regulatory Commission,[3] and thus was barred from relitigating the same issue.

III. IMMIGRATION

United States v. Pierre
No. 81-5800 (11th Cir. Oct. 4, 1982)

The defendant was convicted of smuggling illegal aliens into the United States in violation of 8 U.S.C. § 1324(a) and 18 U.S.C. § 2. The word "entry" as used in section 1324 (a)(1), is defined in 8 U.S.C. § 1101(a)(13) as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession. . . ." In his requested jury instruction, the defendant sought to define "entry" as used in section 1324(a)(1) to exclude the entry of an illegal alien which was followed by a grant of parole. The district court denied the requested jury instruction.

The Court of Appeals for the Eleventh Circuit affirmed, holding that a subsequent grant of parole to aliens whom a defendant is charged with transporting illegally into the country does not erase the original unlawful "entry." The Fifth Circuit held identically in *United States v. Hanna*,[4] a similar case cited by the court of appeals.[5] The court also noted that under 8 U.S.C. § 1182(d)(5), parole of an alien "shall not be regarded as an admission of the alien. . . ." Finally, the court could find no logical reason to alter the definition of "entry" as used in 8 U.S.C. § 1324(a)(1).

IV. JOINDER

CTI - Container Leasing Corp. v. Viterwyk Corp.
685 F.2d 1284 (11th Cir. 1982)

CTI - Container Leasing Corp (CTI), a lessor of ocean carrier cargo containers, sued Viterwyk Corp. (Viterwyk) for breaching leases of ocean cargo containers and other related equipment.

3. Compania de Gas v. Federal Energy Regulatory Commission, 606 F.2d 1024, 1028-29 (D.C. Cir. 1979).

4. 639 F.2d 194, 196 (5th Cir. 1981), *on rehearing from* 639 F.2d 192 (5th Cir. 1980).

5. *United States v. Hanna*, however, involved a conviction under section 1324(a)(4).

Viterwyk moved to implead Iran and an alleged instrumentality of Iran as third party defendants, claiming that they had entered into the leases as an agent for the parties. The district court stayed the entire action in response to statements of interest filed by the United States requesting a stay pending the determination, by the U.S. - Iran Claims Tribunal, of the district court's jurisdiction to hear the claims.

The court of appeals held that the stay order regarding the third party actions was proper but that it was an abuse of discretion for the lower court to stay the principal action. The court reasoned that the stay, as it affected third party claims against Iran, was *mandatory* since those claims were clearly within the Tribunal's jurisdiction. Although the joinder of Iran and an instrumentality of the Iranian government was clearly feasible, this type of action had been severed under an executive order granting jurisdiction to a special tribunal to hear such claims. However, the stay of the principal action was only *discretionary* since the Tribunal did not have jurisdiction over that claim. In following the judicial trend to review collateral issues which had little to do with claims against Iran, the court felt that the danger of denying justice to CTI by delay outweighed Viterwyk's potential inconvenience as well as the potential expense of piecemeal review.

V. Search and Seizure

United States v. Stuart-Caballero
686 F.2d 890 (11th Cir. 1982)

On the night of October 8, 1980, a Coast Guard cutter, in international waters south of Florida, moved to intercept a ship spotted with the letters "THOMAS E NORFOLD VA" on its stern. When the cutter's captain attempted to board the ship, the crewmen attempted to evade them, and a high seas chase ensued. When the cutter finally disabled the vessel, there was a strong odor of marijuana coming from the ship and a general search uncovered over 21,600 pounds of marijuana. After a jury trial, the defendant, a crewman was convicted of possession of mairjuana on an American vessel with intent to distribute.

On appeal, the defendant contested the validity of the stop, search, and seizure of the vessel arguing that the government failed to show there was probable cause to believe a crime was being committed. The Court of Appeals for the Eleventh Circuit deemed

the search and seizure proper, holding that the Coast Guard has plenary authority to stop and board American vessels on the high seas. The search may be for the purposes of ascertaining compliance with safety, documentation, customs, or narcotics laws and the Coast Guard needs neither probable cause nor reasonable suspicion to board.

The defendant further argued that the prosecutor failed to prove that the THOMAS E was a United States vessel on the date in question, which is required to establish guilt under the statute.[6] Eligible ships that engage in trade with foreign lands are registered under a documentation procedure established in the Act of December 31, 1792.[7] The name and home port of every documented vessel must be marked on its stern. Since evidence showed that the vessel had been registered only five months prior to defendant's arrest, the court found that the registration created a sufficiently high probability of continued registration to prove the vessel to be of the United States.

VI. TAXATION - ALIENS

Di Portanova v. United States
690 F.2d 169 (Ct. Cl. 1982)

In 1980, the Internal Revenue Service assessed a deficiency against a nonresident alien on the ground that the trust income from fractional oil and gas interests was taxable under I.R.C. § 871(b). This statute applies ordinary graduated rates to income effectively connected to the conduct of a trade or business. The plaintiff argued that he was not engaged in a trade or business during the year for which the deficiency was assessed and that therefore he was entitld to pay the flat-rate tax of thirty percent under I.R.C. § 871(c).

The government contended that the principal purpose for the plaintiff's renunciation of his U.S. citizenship was the avoidance of taxation. This contention, if confirmed, would bar the plaintiff from obtaining the thirty percent tax rate and would subject his trust income to the regular graduated rates under I.R.C. § 877. The plaintiff also contended that, as a matter of law, section 877 of the

6. 21 U.S.C.A. § 955a; 18 U.S.C.A. § 2; Ship Mortgage Act, 1920, § 30, §§ B; 46 U.S.C. § 46 (1976).

7. 1 Stat. 287 (codified as 46 U.S.C. ch.2).

I.R.C. does not apply to him since the income is exempt from taxation by the U.S. under the Convention on Double Taxation, March 30, 1955, United States - Italy, Art. III, para. 1, 7 U.S.T. 2999, 3004, T.I.A.S. No. 3679.

The United States Court of Claims held that the nonresident alien's trusts were *not* engaged in the oil and gas business. Although the trusts had the option to participate in the operation of the business, the court refused to characterize their interest as "active participation" and instead labeled it as an investment. The court also found that the double taxation treaty with Italy did *not* bar the application of I.R.C. § 877 to the plaintiff since the situs of the property being taxed was within the U.S. Finally, the court remanded the case to determine whether the principal reason for the plaintiff's renunciation of citizenship was tax avoidance.