

2-1-1976

## Recent Cases

Follow this and additional works at: <http://repository.law.miami.edu/umialr>

---

### Recommended Citation

*Recent Cases*, 8 U. Miami Inter-Am. L. Rev. 261 (1976)

Available at: <http://repository.law.miami.edu/umialr/vol8/iss1/15>

This Special Feature is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

## RECENT CASES

GREGORY G. COSTAS)\*  
OLIVER A. PARKER)

### HIERARCHY OF FOREIGN LAWS

*Lineas Aereas Paraguayas v. Fairchild Hiller Corporation*, 400 F.Supp. 116 (1975).

Lineas Aereas Paraguayas (LAP) and several individual plaintiffs brought an action in federal court against the Fairchild Hiller Corporation (Fairchild), owner of a single-engine airplane, to recover for property damage, injury and death resulting from the collision of Fairchild's airplane with parked airplanes belonging to LAP during a takeoff attempt at a Paraguayan airport.

The issue to be determined by the court was which Paraguayan law was to be applied to determine liability. The burden of proof would differ greatly depending on which Code was applicable. Under the Civil Code the defendant had the burden of proving that there was no fault on his part. Under the Aeronautical Code the plaintiff had to prove that the defendant acted with the intent to cause damage or with recklessness and with knowledge that it probably would cause damage. Not unexpectedly, LAP urged that the general Paraguayan Civil Code be applied, while Fairchild insisted that the Paraguayan Aeronautical Code determine all issues of liability.

The court took note that Paraguay is a "code" state and has therefore enacted a system of "positive" law, the hierarchy of which includes a constitution, treaties, codes and rules. It was observed that the codes (providing for general and also for more specific situations) and not the cases constituted the basic body of jurisprudence which governed the issue presented to the court.

In determining which of the two codes should be applied, the court employed two guiding principles: First, a special law should apply over

---

\*J.D. Candidates, University of Miami School of Law.

a general law, if possible (the Aeronautical Code of Paraguay is such a special law); second, the Aeronautical Code is intended to provide comprehensive coverage of all aspects of aviation, and every reasonable effort should be made to fit the present case within the terms of that code.

The court concluded that Paraguays' Aeronautical Code and not its Civil Code controled the claims arising from the accident.

#### FOREIGN LAW ENFORCEMENT

*United States v. Lira*, 515 F.2d 68 (2d Cir. 1975).

Rafael Lira, defendant below, brought this appeal from a narcotics conviction in the Southern District of New York for the purpose of attacking a denial of a motion to dismiss the indictment against him. In that motion the defendant alleged that he had been illegally abducted from Chile and tortured by agents of the U.S. government—such action necessitating dismissal on the basis of *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

On appeal, in addition to constitutional issues, Lira contended that Chilean law was violated when that government issued an expulsion decree directing that he be sent to the United States.

The court found this argument totally devoid of merit since the Chilean government was aware of the alleged violations on the part of its own officials and did not object or take remedial action. Moreover, the court stated that in dealing with a foreign government the U.S. Drug Enforcement Agents were entitled to rely on Chile's interpretation and enforcement of its own laws. Thus the U.S. government did not owe Lira any obligation to enforce his asserted right under Chilean law.

The decision below was affirmed.

#### CONTIGUOUS ZONE AND HOT PURSUIT

*United States v. F/V Taiyo Maru, Number 28*, 395 F.Supp. 413 (1975).

The United States filed a civil complaint for condemnation and forfeiture of the Japanese fishing vessel *Taiyo Maru 28* for violation of

United States fisheries law, and a criminal information was filed against the master. The vessel was seized on the high seas after it had been sighted within the contiguous fisheries zone of the United States and after continuous hot pursuit by the Coast Guard.

The defendant moved to dismiss both actions alleging that the court lacked jurisdiction over the *Taiyo Maru 28* and her master, because the vessel was seized on the high seas in violation of the 1958 Geneva Convention on the High Seas (opened for signature April 29, 1958, 13 U.S.T. 2312, entered into force September 20, 1962), a multilateral treaty agreement to which both Japan and the United States are parties signatory.

The defendant argued that since Article 24 of the Convention on the Territorial Sea and the Contiguous Zone (opened for signature April 29, 1958, 15 U.S.T. 1607, entered into force September 10, 1964) only authorizes the establishment of a contiguous zone for the purposes of enforcing the coastal State's customs, fiscal, immigration or sanitary regulations, and since Article 23 of the Convention on the High Seas permits hot pursuit of a foreign ship from such a contiguous zone only for the four purposes listed in Article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the United States was without authority to commence hot pursuit of the *Taiyo Maru 28* from within the contiguous fisheries zone for the purpose of enforcing its fisheries regulations.

While the defendant recognized that the general rule of law is that the power of the government to enforce a forfeiture or to prosecute a defendant is not impaired by the illegality of the method by which it has acquired control over the defendant, the defendant relied upon the exception to this general rule established in *Cook v. United States*, 288 U.S. 102 (1933). In *Cook*, the United States Coast Guard seized a British vessel, the *Mazel Tov*, caught in rum-running, on the high seas outside the American jurisdictional limits set by a British-American treaty covering the apprehension of prohibition law violators. The Supreme Court held that the United States, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. It was the defendant's contention that the *Cook* exception destroyed the jurisdiction of the court because under Article 23 of the Convention on the High Seas, read together with Article 24 of the Convention of the Territorial Sea and the Contiguous zone, the United States had undertaken a specific obligation not to institute hot pursuit of a foreign ship from the contiguous fisheries zone for violation of its fisheries law.

In rejecting the defendant's arguments the court noted that Article 23 does not specifically deny a coastal state the right to commence hot pursuit from a contiguous zone established for a purpose other than one of the purposes listed in Article 24. Nor does Article 24 specifically prohibit the establishment of a contiguous zone for purposes other than those listed in the Article—in particular the enforcement of domestic fishing law. Thus unlike the British-American treaty in *Cook*, the Conventions cited by the defendant contain no specific undertaking by the United States not to conduct hot pursuit from a contiguous fisheries zone.

In conclusion, the court found the *Cook* exception to be inapplicable because the United States had not by treaty imposed a territorial limitation upon its own authority. Consequently, the court denied the defendant's motion to dismiss.

#### ACT OF STATE

*Dahlgren Manufacturing Company v. Harris Corporation*, 399 F.Supp. 1253 (1974).

Dahlgren Manufacturing Company (Dahlgren), an American corporation, brought an action in a Texas state court against the Harris Corporation (Harris), also an American corporation, alleging an appropriation of Dahlgren's trade secrets by Harris. The defendant removed the case to federal court on the basis of diversity of citizenship. Harris then counterclaimed seeking an injunction against Dahlgren to restrain the assertion of rights under certain foreign patents against the defendant. The basis for the injunction was an alleged breach by Dahlgren of a cross-licensing agreement between the parties.

Dahlgren moved to dismiss the counterclaim arguing that on the basis of comity and the Act of State doctrine the court lacked jurisdiction over the subject matter [citing *Packard Instrument Co. v. Beckman Instrument, Inc.*, 346 F.Supp. 408 (1972), *Velsicol Chemical Corp. v. Hooker Chemical Corp.*, 230 F.Supp. 998 (1964) and *Vanity Fair Mills, Inc. v. T. Eaton Co., Ltd.*, 234 F.2d 633 (2d Cir. 1956), cert. denied, 352 U.S. 871 (1965)].

The court agreed with Dahlgren that if the counterclaim required a decision on the invalidity of the patents issued by foreign nations, such a decision would be an unwarranted intrusion into the sovereignty of foreign states under *Packard Instrument* and *Velsicol Chemical*. The court

further agreed that under *Vanity Fair Mills* it lacked the power to enjoin the use of a foreign patent that infringes an American patent. However, the court held that the counterclaim was not a patent action seeking to either void a foreign patent or to declare an infringement by a foreign patent on an American patent. Rather, the action was in contract alleging a breach of the underlying agreement, with jurisdiction founded on diversity of citizenship.

In denying the plaintiffs motion to dismiss, the court concluded that the issuance of the injunction would neither affect the validity of the foreign patents held by Dahlgren, nor intimate that they infringed United States patents. The injunction would relate only to the in personam jurisdiction of the United States courts over American nationals [citing *Bulova Watch Co., Inc. v. Steele*, 194 F.2d 567 (5th Cir. 1952), aff'd *Steele v. Bulova Watch Co., Inc.* 344 U.S. 280 (1952)].

#### ACT OF STATE AND CONFLICT OF LAWS

*J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 333 N.E. 2d 168 (1975).

This appeal stems from a partial summary judgment rendered in favor of the plaintiff, an Israeli partnership, with respect to two causes of action brought when the defendant, a Ugandan bank, ordered its New York agent bank not to reimburse checks drawn on letters of credit issued by the defendant for the benefit of the plaintiff.

The defendant contended that the complaint should have been dismissed because the court lacked subject matter jurisdiction, that Ugandan law applied which would compel dismissal of the complaint, that the decision under review was contrary to the Act of State doctrine, and that the decision violated the Bretton Woods Agreement.

Citing *Gonzalez v. Industrial Bank of Cuba*, 186 N.E.2d 410 (1962), the court, on the facts of this case, determined the New York law relating to subject matter jurisdiction to be that "a cause of action arises where that is done which should not be done." Since New York was the locus of the repudiation where it should have been the situs of payment (a factor going to the heart of the transaction) the court found an adequate ground for the exercise of subject matter jurisdiction.

The court then resolved the choice of law problem by holding that New York law should apply because New York had the greatest interest

in, and was most intimately concerned with, the outcome of the litigation. This high degree of interest and concern was found to exist due to the functions served by New York as a financial capital which acted as a clearinghouse and market place for a multitude of international transactions.

Additionally, the court noted that at the time the letters of credit were issued they were valid under existing Ugandan law. But a radical change in policy toward the State of Israel on the part of the Ugandan government rendered the letters unenforceable in Uganda. The court characterized the laws promulgated under that policy as confiscatory and discriminatory in nature. With this in mind the court went on to state that laws of foreign governments have extraterritorial jurisdiction only by way of comity, and that when there is a conflict between our public policy and the application of comity, our own sense of justice and equity as embodied in that public policy must prevail. As a result, it concluded that since the U.S. government espoused no policy requiring acquiescence in the confiscatory acts of the Ugandan government, the state policy against such acquiescence would be operative.

The court also found that the Act of State doctrine was inapplicable because Uganda's action in voiding the debt was not an act within its territory as it was powerless to enforce or collect the debt (the situs of enforcement or collection being New York as provided by the contract).

Lastly, the court held that there was no violation of the Bretton Woods Agreement since even in its broadest reading, the Agreement does not encompass letters of credit as such letters are clearly not exchange contracts.

The lower court was affirmed.

## IMMIGRATION

*Paul v. United States Immigration and Naturalization Service*, 521 F.2d 194 (5th Cir. 1975).

The petitioners, nine Haitian nationals, entered the U.S. by boat, landing near Boca Raton, Florida. They subsequently failed to present themselves to INS officials for inspection. Such facts alone served to render them deportable.

Shortly after the apprehension of the petitioners the District Director considered their claim that they would be subject to political persecution if returned to Haiti. After consulting the State Department the Director denied relief.

The Haitians then went before an Immigration Judge who held that they had failed to meet their burden of proving "beyond a troubling doubt" that they had a valid fear of persecution if returned to Haiti, thereby precluding the granting of political asylum available under 8 U.S.C. Sec. 1253(h). The Board of Immigration Appeals found that although the burden placed upon the petitioners was impermissibly strenuous, they had nonetheless failed to prove their case by a preponderance of the evidence.

In this petition the issues raised consisted of a challenge to the discretionary denial of asylum under 8 U.S.C. Sec. 1253(h), and allegations to the effect that they were denied their right to a fair hearing and reasonable opportunity to develop their case.

With respect to the first point the court stated that in order to qualify for discretionary withholding of deportation, the applicants must prove that their departure from Haiti was politically motivated and that on returning they would face persecution for reasons political in nature (citing *Matter of Janus and Janek*, Int. Dec. No. 1900, decided July 25, 1968). The court proceeded to review the decision below under the following standard:

Judicial review of discretionary administrative action is limited to the questions of whether the applicant has been accorded procedural due process and whether the decision has been reached in accordance with the applicable rules of law. Furthermore, the inquiry goes to the question whether or not there has been an exercise of administrative discretion and, if so, whether or not the manner of exercise has been arbitrary or capricious. [*Jarecha v. INS*, 417 F.2d 220, 224 (5th Cir. 1969)].

In light of the above standard and on the basis of the proofs presented, the court found that the petitioners had indeed failed to make their case and that the denial of discretionary relief was not arbitrary or capricious.

Concerning the second issue, the court held that the petitioners received the benefit of the statutory right to counsel (noting that such representation was not required to be at government expense). Secondly, the court found that their generalized allegations were insufficient to

support a claim of denial of due process because of inefficient counsel. Lastly, a fair hearing was not denied merely because the Immigration Judge refused to take judicial notice of alleged political conditions in Haiti as such a requirement served to confer "blanket asylum status" upon those who were not in fact political refugees.

Thus, the petition was denied.

## JURISDICTION AND SOVEREIGN IMMUNITY

*Vicente v. State of Trinidad*, 372 N.Y.S.2d 369 (1975).

The plaintiff brought suit on the basis of receipt of allegedly negligent medical treatment in the Port of Spain General Hospital located in, and owned, operated, and controlled by the defendant State of Trinidad and Tobago.

The following issues came from a pre-trial hearing for the purpose of determining whether the court had in personam jurisdiction over the defendant.

Trinidad contended that the court lacked in personam jurisdiction over it on the grounds that process or its service was insufficient, and that the defendant was immune from suit because of the doctrine of sovereign immunity. Defendant moved to dismiss.

Concerning the first point above, the defendant had been served in the following manner: 1) by registered mail upon its Attorney General who was authorized under Trinidad's laws to receive such service of process; and 2) by personal delivery to the Trinidad and Tobago Mission to the U.N., to the Trinidad and Tobago Industrial Development Corp., to the Trinidad and Tobago Tourist Board, and to British West Indies Airlines. The court found that the plaintiff's methods for service of process were reasonably calculated to provide adequate notice in view of the fact that in addition to proper service upon the Attorney General, the defendant should have received notice when its diplomatic agent to the U.N. was personally served. Also, the plaintiff served three corporate agents who were either wholly or substantially owned and operated by the defendant, and should therefore reasonably be expected to notify it. As a result, the court held that service of process was properly effected and could not serve as a ground for the motion to dismiss.

In resolving the sovereign immunity issue the court presented an analysis of the history and policy behind the doctrine citing several cases whose names have become household words in this area of the law. The court then went on to state that in the case at bar the defendant's request for a suggestion of immunity had been denied by the State Department. Such denial operated conclusively upon the court because it presented a political rather than a judicial question and it was the court's proper function to enforce the political decisions of the State Department in such matters [citing *New York and Cuba Mail S.S. Co. v. Republic of Korea*, 132 F.Supp. 684 (1955)].

The defendant's motion to dismiss was denied on both grounds.

## RIGHT TO SUE

*Banco Frances e Brasileiro S.A. v. Doe*, 370 N.Y.S.2d 534 (1975).

The plaintiff, a private Brazilian bank, brought an action for fraud and deceit, and conspiracy to defraud and deceive against twenty unidentified "John Doe" defendants. It was alleged that the defendants participated, in violation of Brazilian currency regulations, in the submission of false applications to the bank, upon which it relied, resulting in the improper exchange by plaintiff of Brazilian currency into travelers checks in U.S. dollars.

Defendants' motion to dismiss was granted in the lower court on the ground that the New York courts were not open to an action arising from a tortious violation of foreign currency regulations.

The question resolved on appeal was whether a private foreign bank may avail itself of the New York courts in an action for damages for tortious fraud and deceit and for rescission of currency exchange contracts arising from alleged violation of foreign currency exchange regulations.

At the outset the court cast doubt on the validity of applying the rule that one State does not enforce the revenue laws of another to cases in the international sphere involving foreign currency exchange regulations. This was based on the assumption that a currency exchange regulation is normally not designed for revenue purposes as such. However, the court stated that even assuming the validity of the revenue law rule with respect to currency exchange regulations, U.S. membership in the International Monetary Fund would make it inappropriate to refuse to entertain

the claim. Furthermore, it was added that nothing in the Bretton Woods Agreement prevents an IMF member from aiding a fellow member in making its exchange regulations effective.

Next, in terms of policy, the court found that U.S. membership in the IMF made it impossible to conclude that the currency control laws of other States were offensive to New York's public policy so as to bar suit in tort by a private party, and that conduct reasonably necessary to protect the foreign exchange resources of a country did not offend international law. It was therefore concluded that where a true governmental interest of a friendly nation was involved (relating to foreign currency reserves), the national policy of co-operation with Bretton Woods signatories would be furthered by providing a state forum for suit.

Lastly, the court found the "jealous sovereign" rationale to be inappropriate where private parties were the litigants.

The decision of the lower court was reversed and the case remanded for further proceedings.