Recent Developments

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JURISDICTION: *Novid Co., Ltd. v. United States*, 535 F.2d 5 (Ct. Cl. 1976).

Title 28 U.S.C. § 2517 (1964) provides that every final judgment rendered by the Court of Claims against the United States Government is to be paid out of appropriated funds only. This section has been applied to deny the Court of Claims subject matter jurisdiction over certain contract claims. This case is a recent example.

Plaintiff Novid had entered into a contract with the United States Government, the defendant, to construct housing in Iran at the stipulated price of $900,000. The contract was authorized by two "country-to-country" agreements between the United States and Iran. These agreements provided that payments under the contract were to be strictly limited to funds loaned to Iran by the defendant. These funds, the proceeds from the sale of American commodities in Iran, were placed in a special account in the Foreign Trade Bank of Iran.

The plaintiff, upon completion of the project, asserted several claims against the contracting officer for an increase in the contract price, but was granted only a fraction of its request. In accordance with the "disputes" clause of the contract, Novid appealed the decision to the "Head of Plan Organization, Government of Iran," who permitted a slightly larger increase. The plaintiff thereupon filed this action in the Court of Claims for the total requested amount.

The defendant Government attacked Novid's suit on the ground that the Court of Claims lacked subject matter jurisdiction to hear the contract claim. The Government relied on *Kyer v. United States*, 369 F.2d 714 (Ct. Cl. 1966). In *Kyer* the Court of Claims, relying on its interpretation of 28 U.S.C. § 2517, held that it was without jurisdiction over a cause of action based on a contract funded by nonappropriated funds. In other words, to be actionable in the Court of Claims, a contract must be one which could obligate public funds. The Government asserted that the funds involved here were loans to the Iranian Government and not property of the United States, and thus could not be "appropriated funds." Thus, the defendant concluded, the Court of Claims had no jurisdiction.

Plaintiff Novid, on the other hand, argued that since the loans to Iran were derived from the sale of government-owned commodities acquired with appropriated funds, the requirements of *Kyer* had been sufficiently met. In addition, the plaintiff asserted that the defendant's use of the Army Corps of Engineers and other "appropriated funds" instrumentalities in negotiating and carrying out the contract, also demonstrated a sufficient incidence of involvement of appropriated funds.

The Court of Claims rejected the plaintiff's arguments, stating that the real question, in determining the court's jurisdiction, was whether the contract was one which could have been *satisfied* out of appropriated funds. Since the "country-to-country" agreements limited the contract payments to the special loan fund, the court determined that appropriated funds were wholly insulated from liability in this matter. Therefore, this claim was not one which the Court of Claims had jurisdiction to hear.

JURISDICTION: *McShan v. Omega Louis Brandt Et Frere, S.A.*, 536 F.2d 516 (2d Cir. 1976).

Is a Swiss corporation, which sells its products in the United States through a totally independent distributor located in New York City, subject to suit in New York for nonpayment of patent royalties? The Second Circuit Court of Appeals affirmed the dismissal of a suit against such a foreign corporation, citing a lack of personal jurisdiction.

McShan, the owner of United States and foreign patents relating to watch movements, brought suit against the defendant Omega, a watch manufacturer, for failure to pay royalties. The defendant, a Swiss corporation, had obtained the rights to manufacture, use and sell inventions covered by the McShan patents by way of a sublease agreement with the American Railroad Curvelining Corporation [ARC], the original lessee of those rights. This agreement had been signed in New York by ARC and sent to Switzerland for execution by Omega. Omega distributed its watches in the United States through the Norman M. Morris Corporation [Morris], a New York corporation. Morris was a wholly independent legal entity, and purchased watches from the defendant f.o.b. Switzerland. McShan obtained the right to sue Omega through an assignment by ARC of its rights under the sublease agreement.

Plaintiff McShan commenced the action in the New York Supreme Court, and served process on the defendant at its principal office in Switzerland. The defendant thereupon removed the action to the federal District Court for the Eastern District of New York. That court dismissed the case for lack of personal jurisdiction over the foreign corporation. The Second Circuit Court of Appeals affirmed. It noted that under New York law a foreign corporation comes within the state's jurisdiction if it is "doing business" there with a "fair measure of permanence and continuity." However, the court felt that the defendant did not come under this statute since it had neither an office nor a place of business in New York. The plaintiff had asserted that the location of the defendant's American distributor (Morris) and the advertisement of its products in New York were sufficient to constitute "doing business" under the test. The court rejected this on the basis of

a prior New York case which had held that sales of a foreign corporation's products in New York through an independent agency did not make it amenable to suit, even though the products were locally advertised.

The Court of Appeals also examined the plaintiff's claim of personal jurisdiction under New York's long-arm statute, which provides for personal jurisdiction over a foreign corporation where a cause of action arises from the transaction of business in New York by the nondomiciliary or its agents. The plaintiff had alleged that the signing of the subleasing agreement by ARC had been a transaction of business in New York, out of which his cause of action (the breach of the subleasing agreement by the nonpayment of royalties) had arisen. However, the court held that the long-arm statute required some meaningful activity *by the defendant* in New York. Since Omega had signed the subleasing agreement in Switzerland, this requirement of the statute was not met.

Plaintiff McShan argued further for the application of the long-arm statute. He maintained that the defendant, through the business transactions of his distributor Morris, had indeed performed some meaningful activity in New York. The appellate court also dismissed this argument, saying that the cause of action for the royalties did not arise out of any of Morris' transactions in New York, and thus the statute could not be applied. Morris was a complete stranger to the subleasing agreement, which was the basis of McShan's claim, and the payment of royalties by Omega was of no concern to Morris.

JURISDICTION: *Koupetoris v. Konkar Intrepid Corp.*, 535 F.2d 1392 (2d Cir. 1976).

Does an alien seaman, injured while aboard an alien defendant's ship, have a cause of action under the Jones Act[1] or under general maritime (admiralty) law, where the defendant shipowner's only contact with the United States is the occurrence of the accident in United States waters? The Second Circuit Court of Appeals recently held such contact insufficient to support jurisdiction, and affirmed the dismissal of the seaman's claim.

Plaintiff Koupetoris, a Greek citizen and resident, brought suit under the Jones Act and the general maritime law of the United States to recover damages for personal injuries. These injuries were allegedly sustained in 1974 off the coast of Maryland, during the course of the

[1] 46 U.S.C. § 688 (1970). The pertinent parts are: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . ."

plaintiff's employment as a seaman aboard the *Konkar Intrepid.* This was the only vessel owned by the defendant Konkar Intrepid Corp., a Liberian corporation whose office and principal place of business was in Athens, Greece. The defendant corporation was completely owned by Greek citizens. Although not licensed to do business in New York State, the defendant did maintain substantial financial ties there, including two mortgages, at least one bank account, and an outstanding letter of credit. Furthermore, the defendant employed agents in New York who were authorized to carry out banking activities and to appoint husbanding agents.

The district court found that the activity of the defendant's New York agents and its financial ties to that state were sufficient to meet the requirements of minimum contacts, and thus, to render the defendant amenable to suit in New York. Furthermore, the activity of the New York agents was held to be substantial enough to allow service of process on them as the general or managing agents for the shipowner, under Federal Rule of Civil Procedure 4(d)(3). However, the court found that there was no subject matter jurisdiction and dismissed the case. In making that decision, the district court held that there was no diversity jurisdiction where both the plaintiff and defendant were aliens. The court also declined, in its discretion, to use the admiralty jurisdiction of the federal courts because an alternative forum (in Greece) was available to the plaintiff. Finally, the court rejected the federal question argument for subject matter jurisdiction by finding that the Jones Act was inapplicable on these facts.

The district court noted that suits under the Jones Act have been limited to cases where the defendant had some substantial contact with the United States. The following factors were considered in determining whether the contacts in this case were substantial: (1) the place of the wrongful act; (2) the law of the flag; (3) the place where the employment contract was made; (4) the inaccessibility of a foreign forum; (5) the allegiance or domicile of the injured party; (6) the allegiance or base of operations of the shipowner; and (7) the law of the forum which has perfected personal jurisdiction. The court felt that the first four criteria were insignificant and relied mainly on factors (5) and (6). Since the plaintiff was not an American and since the shipowner was not based in the United States, the court held their contacts to be insufficient to invoke the Jones Act.

In affirming the district court's opinion, the court of appeals reiterated the limited applicability of the Jones Act and reviewed the factors determining the substantiality of the defendant's contact with the United States. It said that the occurrence of "the Plaintiff's injuries . . . off the coast of the United States is purely fortuitous, and a factor of minimal importance in supporting application of the Act." The appellate court also approved the refusal of the lower court to use its admiralty jurisdiction in this case.

FISHERIES: *United States v. Ayo-Gonzalez,* 536 F.2d 652 (5th Cir. 1976).

Is *mens rea* required to establish liability for foreign fishing within the twelve mile limit in violation of 16 U.S.C. §§ 1081-94? The Fifth Circuit Court of Appeals recently held that it is not, and also decided that failure to give the master of a foreign vessel a *Miranda* warning before asking him to identify himself does not require a reversal of his conviction.

The Cuban vessel of which defendant Ayo was master was fourteen miles off the United States mainland when it was hailed by a United States Coast Guard cutter and ordered to drop anchor. After the fishing vessel had pulled in its gear and anchored, a boarding attempt was made during which Ayo requested that the United States fisheries agent on board the cutter contact the fishing flotilla commander. The fisheries agent asked Ayo if he was the captain, and Ayo answered in the affirmative. After a later successful boarding attempt, the United States agent assembled the crew and asked for the captain. Ayo responded and was read his *Miranda* rights. Ayo waived his rights and cooperated in trying to reconcile the situation. It was then determined that Ayo, depending on radar information received from a mother ship, believed he was outside of the United States fishery zone, when in fact his position was eight miles from St. Joseph Island off the Texas coast. The defendant opted for a bench trial in federal district court and upon conviction appealed to the Fifth Circuit.

Ayo contended that evidence of his identity should have been suppressed. One of the elements of the offense of which he was convicted was that he was the "master or other person in charge," and he maintained that this element was proved only by means of statements obtained in violation of his *Miranda* rights. Ayo further contended that the district court's refusal to require even a showing of negligence constituted error because (1) Congress did not intend to punish innocent encroachments, or (2) if the statute does not require at least negligence in order to be violated, it denies due process.

The court disposed of the *Miranda* question by concluding that the identification of a foreign vessel's master was probably not covered by the *Miranda* decision, but assuming *arguendo* that it was, that in this case the admission of the challenged testimony was harmless error. The facts of Ayo's identification to the fisheries agent prior to the boarding, his immediate waiver of his rights once they were read, and the relaxed rules of admissibility in a bench trial all contributed to the court's holding.

On the *mens rea* issue the court found "persuasive evidence" that Congress intended to impose strict liability, and found "no persuasive indications . . . of an intent to require some form of *mens rea.*" Because of the strong policy considerations involved, the lack of stigma associated with conviction, the reasonableness of the statute under the

circumstances, and the fact that the statutory crime is not taken from the common law, the elimination of a criminal intent element was held not violative of the due process clause.

ADMIRALTY: *Matter of S/S Helena,* 529 F.2d 744 (5th Cir. 1976).

In December 1968, the freighter *Helena,* owned by the Sincere Navigation Corporation, collided with the United States Coast Guard vessel, *White Alder,* on the Mississippi River in Louisiana territorial waters. Seventeen of the twenty crewmen of the *White Alder* perished. The three survivors, joined by relatives of most of the decedents, filed complaints in a Louisiana state court seeking damages against Sincere Navigation and its insurer. Sincere removed the case to the federal district court on the basis of diversity.

It was not until April, 1972 that the district court decided in favor of the survivors and decedents' relatives. Damages were awarded according to the Louisiana wrongful death statute, which included compensation for the surviving relatives' grief and mental anguish. Sincere Navigation immediately appealed.

Sincere based its appellate argument on two Supreme Court cases decided subsequent to the 1968 collision of the *Helena* and the *White Alder.* The Court held in *Moragne v. States Marines Lines, Inc.,* 398 U.S. 375 (1970), that a cause of action existed in general maritime law for wrongful death. In *Sea-Land Services v. Gaudet,* 414 U.S. 573 (1974), the Court held that loss of society (e.g., love, affection, care, attention, companionship, comfort, and protection) was compensable under the *Moragne* cause of action, but that grief or mental anguish of the decedents' surviving relatives was not. Sincere argued that *Moragne* supplanted state wrongful death statutes for deaths occurring within a state's territorial waters, and that *Moragne* and *Gaudet* should be applied retroactively to the present case.

The Fifth Circuit Court of Appeals agreed with Sincere Navigation. In holding that *Moragne* precluded recognition of state wrongful death statutes, the court reviewed the history of wrongful death claims. There were two reasons generally given for the recognition and enforcement of state wrongful death statutes in admiralty courts: there was no cause of action in general maritime law, and there was federal recognition of a special solicitude for a state's sovereignty within its territorial borders. *Moragne* did away with the rationale for the first reason, and with respect to the second, *Moragne* was "not as solicitous" in that it "significantly interfered with the state schemes for wrongful death recoveries." 529 F.2d 744 at 752. Thus, the court concluded, there is no longer a need for recognition of state wrongful death statutes in admiralty courts.

The Fifth Circuit also held that *Moragne* and *Gaudet* were to be applied retroactively. Were they not retroactive, argued the court, the maritime law of negligence and unseaworthiness would have to be enforced through state law, which is precisely what *Moragne* was designed to prevent. The claimants, however, argued that state law should apply since the Louisiana statute would allow them recovery for mental anguish whereas *Moragne* and *Gaudet* would not. They contended that they should not be denied this recovery after having spent considerable time and money in the state proceedings, with a view toward recovering damages to which they were legally entitled at the time of the deaths. The court was not totally unsympathetic to their plight, but nevertheless concluded that the new law should be given greater weight than the extent to which the parties relied on the old law.

The court also gave retroactive effect to *United States v. Reliable Transfer*, 421 U.S. 397 (1975); *See* 1 N.C.J. INT'L L. & COMM. REG. 92 (1976). In that case, the Supreme Court held that liability for property damages in maritime collisions was to be allocated among the parties according to their relative degree of fault. The goal of *Reliable Transfer* was to insure just and equitable allocation of damages, and the Court concluded that its retrospective application would promote that goal in this case.

ACT OF STATE DOCTRINE: *United Bank Limited v. Cosmic International Inc.*, 542 F.2d 868 (2d Cir. 1976).

The act of state doctrine has territorial limitations: the principle under which United States courts refuse to examine the legality of an act done by a foreign government applies only to an act done by that foreign sovereign within its own territory. This restriction was applied in *United Bank v. Cosmic International* to deny the government of Bangladesh a recovery in a dispute between that country and several Pakistani plaintiffs concerning the right to receive payment for jute products exported from East Pakistan before it became the nation of Bangladesh.

On April 10, 1971 a proclamation was issued in India which declared that East Pakistan had become the sovereign state of Bangladesh on March 26, 1971. However, it was not until December 16, 1971 that the ensuing revolution was quelled and the last Pakistani troops surrendered, thus guaranteeing the sovereign status of the new nation. In early 1972, the new government expropriated all property owned by Pakistani citizens and also took over the ownership of all banks. In neither case was any compensation provided to those deprived of their property.

The defendant Cosmic International [Cosmic], a New York corporation, had purchased, in two separate transactions, jute products from the Nishat Jute Mills [Nishat] and Amin Jute Mills [Amin]. Both Nishat and Amin were Pakistani corporations whose East Pakistani interests (although incorporated in Pakistan, each had its mill located in East Pakistan) were taken in the expropriations by the new Bangladesh government.

The plaintiffs National Bank of Pakistan [National] and United Bank Limited [United] financed the operations of Nishat and Amin respectively. These banks were also incorporated in Pakistan and had branch offices in East Pakistan through which the accounts of the two jute mills were handled. As mentioned before, these branch banks were expropriated, without any compensation to United or National. Both mills were heavily indebted to their respective banks, and any amounts they expected to collect from Cosmic would have been paid, according to the financing agreements, to the banks to reduce the debts.

Because of the confusing events taking place in Bangladesh, Cosmic did not make payment for the jute products, although it did readily admit the debt. Cosmic held two funds which represented the proceeds from the sale of the jute products from each of the two mills. Subsequently, Cosmic was sued in the District Court for the Southern District of New York by several plaintiffs. The cases were consolidated for a single trial. National and United each claimed the proceeds owed to the mill which it financed. These claims were based on the indebtedness of the mills and on the financing arrangements. The funds were also claimed by Bangladesh which argued that, by virtue of the expropriation orders, it was the successor in interest to all property (including the debts owned by Cosmic) formerly owned by the Pakistani corporations. Although Bangladesh acknowledged that no compensation was paid for any of the Pakistani property purportedly seized, it maintained that the act of state doctrine precluded American courts from examining the propriety of any taking effected by Bangladesh law.

The district court found that at the time of Bangladesh's attempted seizure of the debts in question their situs was in New York. Since Bangladesh was trying to take control of property not within its own national boundaries, the territorial limitations precluded the application of the act of state doctrine to this case. With this doctrinal obstacle removed, the court next looked at the propriety of the expropriations, and, having done so, refused to give effect to the purported confiscations because no compensation had been paid. The district court said that this was contrary to the public policy of the United States. Judgment was entered in favor of the Pakistani plaintiffs.

On appeal to the Second Circuit, Bangladesh maintained that the situs of the debts was actually in Bangladesh (making the act of state

doctrine applicable) and that the confiscations were consistent with United States practice in the context of a wartime situation. Three arguments were made to support the contention that these debts had their situs within Bangladesh: (1) Cosmic's creditors were said to be located there; (2) Bangladesh courts were alleged to have jurisdiction over the debtor; and (3) the Cosmic debt secured the indebtedness of the jute mills to the banks, and since these latter debts were located in Bangladesh at the time of the seizure, Cosmic's obligation passed as an incident to that taking. The appellate court found all of these arguments lacking in merit.

In response to the first "situs" argument, the court felt compelled to follow an earlier decision, *Menendez v. Saks and Co.*, 485 F.2d 1355 (2d Cir. 1973). In *Menendez* the court held that a debt is not located within a foreign state for purposes of the act of state doctrine, unless that state has the power to enforce and collect it. In light of Cosmic's location in New York, the *Cosmic* court felt that Bangladesh had no such power. The court also ruled that Bangladesh's claim to jurisdiction over the debtor was purely speculative. The third argument was rebutted by saying that since territorial constraints and United States policy against expropriations without compensation would have prevented Bangladesh from seizing directly the Cosmic debts located in New York, that country should not now be allowed to accomplish the same result indirectly by first confiscating the corporate owners of the debts.

Having laid to rest the claims of a Bangladesh situs for the debts, the court next answered the contention that the wartime practice of the United States would allow these confiscatory takings. Although noting that United States legislation and case law did allow confiscation of enemy property, the court found that such seizures had been limited to property within the United States. Therefore, confiscatory seizures of an *extraterritorial* nature (such as Bangladesh sought here) were inconsistent with American policy. Based on these findings, the Second Circuit affirmed the district court.

INTERNATIONAL LAW: *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir. 1976).

Traditionally, legal scholars and the courts have maintained that rights expressed in treaties and in the doctrines of international law can be enforced only by nations and not by individual plaintiffs. This notion was reaffirmed in *Dreyfus v. Von Finck* to deny the claimant a cause of action for the wrongful confiscation of his property.

The plaintiff, Willy Dreyfus, was a Swiss citizen and resident. In 1938 he was living in Germany and held an interest in the banking firm of J. Dreyfus and Co. In that year Dreyfus was forced to emigrate, because of his Jewish faith, to Switzerland. Before leaving Germany he

sold his interest in the banking firm to the defendants, August Von Finck and Merck, Fink & Co., allegedly under duress and at a price which was $1.5 million below its actual value. After the war, Dreyfus sought additional compensation, and a settlement was reached in 1948. However, the settlement was never satisfied, allegedly due to a wrongful repudiation by the defendants. A second settlement was reached in 1951 and the additional consideration was paid to Dreyfus.

The plaintiff brought the present action in 1973, basing the cause of action upon the original taking of his property and the alleged wrongful repudiation of the 1948 settlement. He argued that both of these incidents violated four treaties or pacts to which the United States was a party — The Hague Convention, The Kellogg-Briand Pact, The Versailles Treaty, and The Four Power Occupation Agreement. The suit was commenced in the District Court for the Southern District of New York by attaching certain of the defendants' assets in New York City. The defendants were, at all times relevant to this action, citizens and residents of West Germany.

Because the plaintiff had made a colorable claim under the above mentioned treaties, the district court held that it had subject matter jurisdiction, under 23 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1350 (jurisdiction in any civil action by an alien for a tort in violation of the law of nations or a treaty of the United States), to determine whether the complaint stated a cause of action on which relief could be granted. After a review of the treaties, the district court dismissed the complaint because it concluded that the treaties provided no private right of recovery for the defendants' allegedly tortious conduct.

The Second Circuit Court of Appeals again gave serious consideration as to whether the plaintiff had a cause of action under the treaties. It also heard a new argument by the plaintiff that the seizure of his property and the 1948 repudiation were torts which violated international law or the law of nations. With regard to the first contention, the court stated that treaties may contain provisions conferring rights upon citizens which are capable of enforcement like other private rights, but that this was certainly not the general rule. After examining the purposes of the four treaties relied on by the plaintiff, the appeals court affirmed the earlier decision that no private right of action could be based on these international agreements.

The court also rejected the plaintiff's claim of rights under international law, stating that international law dealt primarily with the relationships among nations rather than among individuals. Furthermore, like a general treaty, the law of nations was not self-executing so as to vest a plaintiff with individual legal rights. The Second Circuit noted finally that, regardless of the status of the individual under the law of nations, no violation of international law had occurred in this case because the parties involved were nationals of the same state at the time of the alleged tortious conduct.

SHIPPING: *Kraft Foods v. Federal Maritime Commission,* 538 F.2d 445 (D.C. Cir. 1976).

Is an ocean carrier's tariff provision, requiring that any claim for adjustment of freight charges based on alleged errors in weight or measurement be presented to the carrier in writing before the shipment involved leaves the custody of the carrier, invalid as being in violation of the statute allowing a person to file a claim for reparation with the Federal Maritime Commission [FMC] within two years after the cause of action accrues? The District of Columbia Court of Appeals held that such a tariff rule is not enforceable.

Plaintiff Kraft Foods sent a shipment of noodle dinners and marshmallows to Supermarket, Ltd., the consignee, in Mombasa, Kenya. The shipment was carried by Moore-McCormack Inc. The transportation charges were prepaid and were based on a measurement of 284 cubic feet as shown on the bill of lading. Two days after receiving the shipment, Supermarket notified Kraft that there was an apparent overcharge, in that the true measurement of the shipment was 145.01 cubic feet. Kraft then notified Moore-McCormack of the error and asked for reparation. Moore-McCormack responded that the original measurements were correct and that in any event the claim was barred by its tariff rule. The Moore-McCormack tariff rule (referred to as the South and East Africa Conference South Bound Freight Tariff No. 1, Rule 16) said in effect, that claims for adjustment of freight charges will not be considered unless presented to the carrier in writing before the shipment leaves the custody of the carrier.

A hearing was held before an administrative law judge who denied reparation on the ground that Kraft had failed to sustain its burden of proof on the merits of the claim. On review, the FMC did not reach the merits, but held that the tariff rule barred the bringing of the claim. Kraft then made this appeal, contending that the tariff rule in question conflicted with the provisions of 46 U.S.C. § 821. That statute allows anyone to obtain relief from a carrier by commencing an administrative proceeding before the FMC within two years of the incident giving rise to the cause of action.

The appellate court agreed with Kraft and allowed it to reinstate its claim for decision on the merits. It found that the tariff rule set up as a period of limitation the time during which the shipment remained in the custody of the carrier, and that such a limitation infringed on the rights granted by 46 U.S.C. § 821. The court therefore held the tariff rule invalid.

SHIPPING: *Swedish East Asia Co., Ltd. v. Topp Electronics, Inc.*, 334 So. 2d 653 (3d Dist. Ct. App. Fla. 1976).

Which carrier is liable, in a multi-carrier shipment, for loss of goods where there is no evidence as to which of the carriers caused the loss? An appellate court in Florida recently held that all of the carriers were liable.

The plaintiff in the action, Topp Electronics, Inc. [Topp], a distributing company located in Miami, had contracted with defendant Blue Sea Lines [Blue Sea] for the transport of fifty-eight shipments of electronic equipment from the Far East to the Port of Miami. The defendant acknowledged receipt of the merchandise in good order by issuing a clean bill of lading for each of the fifty-eight shipments. Upon arrival in Miami, the goods were unloaded by defendant Harrington & Company [Harrington] and transported by defendant Land Trucking Company [Land] to the plaintiff's warehouses, where it was discovered that shortages existed in fifty-six of the shipments.

Topp filed suit against the three carriers for failure to deliver. The lower court held for the plaintiff against Blue Sea, apparently applying the rule that a prima facie case is established by a shipper against an ocean carrier and its agents by showing a clean bill of lading and proof that the consignee did not receive the merchandise. The court rendered judgments in favor of the other two defendants, Harrington and Land. Blue Sea appealed its judgment and Topp cross-appealed, assigning as error the judgments for Harrington and Land.

The decision was reversed by the appellate court on the grounds that the lower court had applied an incorrect principle of law. The correct principle, according to the court, was that a carrier is solely liable for a shortage of goods only where it can be shown that the carrier delivered fewer goods than it actually received from the shipper. Although the clean bills of lading were proof that Blue Sea had received all of the shipments, it could not be proven that Blue Sea alone was responsible for the shortages since the plaintiff discovered the discrepancies only after the shipments had been handled by all three of the carriers. The court of appeals, therefore, in holding against all of the carriers, stated that all carriers in a multi-carrier shipment are liable for a shortage of goods unless any one carrier can prove that the shortage already existed when it received the goods. The case was remanded so that the lower court might hear further testimony in light of the principle announced by the appellate court.

INTERNATIONAL TRADE LAW: Draft Convention on the Uniform Law on the International Sale of Goods, U.N. Doc. A/CN.9/116, Annexes I & II (1976).

When the United Nations Commission on International Trade Law [UNCITRAL] set up the Working Group on the International Sale of Goods in 1969, the major purpose was to simplify the text of the Uniform Law on the International Sale of Goods [ULIS], which had been annexed to the 1964 Hague Convention on Private International Law. The old Uniform Law had met with severe criticism from several developing nations which claimed that the law, drafted by twenty-eight developed nations, put the developed nations in a more favorable position. The law was also criticized as being bloated with artificial and complex concepts. Consequently, the old version of ULIS, which came into force in 1972, had been ratified by only a few nations.

The Working Group completed a Draft Convention for a reform of ULIS on January 16, 1976, and approved it by consensus with a few minor reservations. The Group, representing a balance of developing and developed countries, expressed the hope that the new ULIS would help facilitate trade across national boundaries, reduce the impediments arising from conflicts between different nations' laws, and better inform both vendor and buyer of their rights and obligations in an international contract for the sale of goods. The Group also emphasized the need to structure the revised law in the form of a draft convention rather than a uniform law annexed to a convention, so as to minimize the number of reservations taken upon ratification of ULIS.

The Draft Convention defines in Article 1 the contracts to which it will apply: contracts for the sale of goods between parties whose places of business are in different States, but only if those States have adopted ULIS. The Commentary on the Draft Convention lists the major goals of Article 1: (1) to reduce forum shopping; (2) to reduce recourse to private international law (*i.e.*, what common law lawyers call conflicts of law); and (3) to provide a modern law of sales "appropriate for transactions of an international character." Article 1, interpreted in light of the goals expressed in the Commentary, could bring an enormous number of sale of goods contracts under the Draft Convention. However, specifically excluded from its application are contracts for the sale of goods bought for personal use, by auction, or by execution of law. Also excluded are contracts for the sale of stocks, investment securities, negotiable instruments, money, ships, vessels, aircraft or electricity. Article 4 permits both parties to a contract to designate this Convention as the law governing their agreement. This allows a business dealing with businesses in both adopting and non-adopting States, still to obtain the benefit of a uniform law. Article 5 permits the parties to preclude application of any or all of the

Convention, and it thus provides the flexibility needed for individual contracts.

The scope of the revised law is limited, in that it applies only to the rights and obligations of the parties under an existing contract, and not to the formation and validity of the contract. The only provision touching on formation and validity is Article 11, which states that the contract need not be evidenced by writing and is not subject to form requirements. Additional issues concerning the formation and validity of contracts are currently being considered by the Working Group.

One obstacle to the wide-spread acceptance of ULIS is the likelihood of conflicting interpretations of the Law in different national courts. Article 13 emphasizes the need for uniformity in interpretation and declares that "regard is to be had to its international character." An exception to this call for uniformity is in Article 12. This Article allows national courts to grant the specific performance remedies, provided for in Articles 27 and 43, according to the dictates of their own domestic law. The remainder of the Convention concerns the rights and obligations of both the buyer and the seller, the measurement of damages, the duty to mitigate damages, and the passing of risks.

Once the Draft Convention was approved by the Working Group, it was sent to UNCITRAL-member governments and interested international organizations for review and comments. These comments will be considered along with the Draft Convention at UNCITRAL's tenth session to be held in Vienna from May 23 to June 17, 1977. During that session UNCITRAL will prepare the final form of the Draft for ratification.

INTERNATIONAL TRADE LAW: Draft Convention on the Carriage of Goods by Sea, U.N. Doc. A/31/17 (1976), 15 INT'L LEGAL MATERIALS 901 (1976).

The United Nations Commission on International Trade Law [UNCITRAL] has approved the Draft Convention on the Carriage of Goods by Sea, which deals primarily with the liabilities of carriers to shippers for damages caused by the loss, damage or delay of goods in carriage at sea. Currently, such damages are governed by the 1924 International Convention of Certain Rules of Law Relating to Bills of Lading, otherwise known as the Hague Rules.

The Draft Convention defines the period of the carrier's responsibility to include the time he has taken over the goods until the goods are handed over to the consignee, or placed at his disposal. The Draft Convention also extends carrier responsibility to include live animals and cargo carried on deck.

The basis for the carrier's liability is set forth in Article 5, which also enumerates the affirmative defenses available to the carrier. The plaintiff need only show loss, damage or delay of goods which occurred while the carrier was in charge of the goods, to set up a prima facie case against the carrier. The one exception is damage caused by fire, in which case the plaintiff must prove that the fire arose from the carrier's negligence. If the carrier can prove that he and his agents "took all measures that could reasonably be required to avoid the occurrence and its consequences," then the carrier is free from liability. The carrier is also absolved if any loss, damage or delay resulted from measures taken to save life (human, most likely), or from reasonable measures taken to save property. If the negligence of the carrier is combined with other causes to produce loss, damage or delay, the burden is on the carrier to prove the amount of damage which is not attributable to its negligence.

The Draft Convention provides two methods for calculating a carrier's limit of liability. The first method is based, in cases of loss or damage, on a set figure per package or per kilograms of gross weight, whichever is higher; and in cases of delay, on the freight payable for the goods actually delayed. The second method sets a straight limit based on the gross weight of the goods which are lost, damaged or delayed. There is also a provision allowing the carrier and shipper to agree on liability limits exceeding those provided in the Convention. Neither the Convention limitations nor the specifically agreed limits are applicable, however, where the carrier is shown to have caused the damage intentionally or recklessly.

Articles 12 and 13, dealing with the liability of the shipper, require the shipper to inform the carrier of any dangerous qualities of the goods to be carried and to label the goods as such. The shipper is held strictly liable for any damage resulting from the carriage of such goods, if the shipper fails to inform the carrier and if the carrier does not otherwise have knowledge of their dangerous nature. Moreover, if these circumstances arise, the carrier has the right to unload, destroy or render innocuous the dangerous goods if necessary.

Articles 14-16 codify the requirements concerning bills of lading. Rules are laid down as to time of issuance, proper signatories, contents, reservations and evidentiary effect.

The final part of the Draft Convention concerns the procedure for claims arising from loss, damage or delay of goods. The consignee is required to give written notice to the carrier of any loss or damage no later than the day after the day that the goods were handed over to the consignee, or within fifteen days if the loss or damage is not apparent. Otherwise, the handing over of the goods is prima facie evidence of proper carriage. A two-year statute of limitations is imposed on any suit, the period of limitation commencing on the day on which the goods were delivered or should have been delivered.

Article 21 designates the proper jurisdiction for actions arising from the Draft Convention. Suits may be brought in a jurisdiction encompassing any of the following places: (1) the defendant's principal place of business; (2) the place where the contract was completed, if the defendant has a place of business there; (3) the ports of loading or discharge; or (4) any place designated as the proper forum in the contract. Any forum selection clause in the contract of carriage will be binding on the parties. The parties may also expressly provide for referral of claims to arbitration. If this avenue is chosen, the rules of the Draft Convention are to be applied by the arbitrator, even if the parties expressly agree otherwise, unless the agreement relating to arbitration was made after the claim arose.

INTERNATIONAL BUSINESS PRACTICES: The United Nations Commission on Transnational Corporations: Intergovernmental Working Group on Corrupt Practices.

During the past two years evidence of corrupt or questionable business transactions has arisen on every continent. The scandals have involved high public officials and respected multinational corporations and have caused serious consequences in many countries. The United Nations is now seeking to prevent the further use of corrupt practices in international trade.

In December of 1974 a Commission on Transnational Corporations was established by the United Nations Economic and Social Council [ECOSOC]. This Commission began, in March of 1976, to promulgate a code of conduct for the activities of transnational corporations. Klaus Sahlgren, the Executive Director of the United Nations Centre on Transnational Corporations, has said that the code is designed to "maximize the contributions that these corporations can offer to development and to minimize their negative effects."

At the same time that this code of conduct is being prepared, a special working group has been set up specifically to study corrupt practices of global corporations. This working group is also under the authority of the Economic and Social Council. Its first meeting was held in November of 1976, and its report of concrete recommendations to the ECOSOC is due in July or August, 1977.

Several classes of improper payments are the subject of the study by the Intergovernmental Working Group on Corrupt Practices. These include: (1) bribery of public officials by businesses seeking to gain favorable treatment or to match the bribes paid by competitors; (2) extortion by public officials who require businesses subject to their regulation to pay them directly or to make political or even charitable contributions; (3) inflated agent's fees, especially where such fees are

insulated from scrutiny by questionable accounting practices; (4) slush funds; (5) the practice of petty payments to administrative officials in order to "expedite" routine action; and (6) kickback schemes.

The United States has already presented one approach to these problems. It has urged a treaty-regulated system of public disclosures of a defined class of payments. The theory is that public access to records of payments will deter corrupt practices.