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Recent Developments

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RECENT DEVELOPMENTS

ADMIRALTY — Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co., 565 F.2d 1129 (9th Cir. 1977).

In *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.* the court grappled with two questions: First, is the principle of strict products liability applicable to suits in admiralty? Second, may the doctrine of comparative negligence (comparative fault) apply as partial defense to a claim based on strict products liability? The court's answer to both questions was in the affirmative.

In 1969, Pan-Alaska Fisheries hired Marine Construction & Design Co. (Marco) to rebuild the vessel *Enterprise,* which work included installation of a new marine engine. Marco purchased the engine from Northern Commercial Marine (NCM), a dealer for Caterpillar Tractor Company (Caterpillar). Caterpillar had been receiving complaints that the fuel filters it mounted on this type of engine had been rupturing and causing fires; therefore it developed a modified replacement filter. Nine days before NCM delivered the Caterpillar engine to Marco, Caterpillar sent to its dealers, including NCM, a products letter, telling them to discontinue use of the old filters and to furnish owners with the new filters. NCM failed to change the filters on the *Enterprise's* engine, to notify either Marco or Pan-Alaska to change the filters, or to warn them of the hazards of the old filters. Caterpillar failed to determine whether NCM had done as instructed and did not contact Pan-Alaska or Marco regarding the hazardous filters.

When Marco finished work on the *Enterprise,* she sailed. The next morning the engineer discovered a crack in one of the fuel filters, replaced it with a spare modified filter, and watched the engine operate at idle speed, but he failed to watch how the engine and filter operated at full speed. A fuel oil fire subsequently broke out in the engine room, and the ship sank.

The trial court found only NCM liable to Pan-Alaska on a negligence theory and found Pan-Alaska contributorily negligent. As a result, Pan-Alaska was awarded only half the cost of the *Enterprise.* The court of appeals vacated the holding and remanded to the trial court, instructing it to determine liability and apportion damages based on the principles of strict products liability and comparative negligence (rather than on the rules of negligence and contributory negligence).

The court held that the principle of strict products liability should be applicable to a suit in admiralty. The court reasoned that "strict products liability actions have become sufficiently well-established to justify its being incorporated into the law of admiralty."[1] The rule of strict products liability to be applied in admiralty law is that stated in the Restatement (Second) of Torts:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer, or to his property, is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if (a) the seller is engaged in the business of selling such a product and (b) it is expected and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[2]

Under this rule of strict products liability manufacturers, dealers, and retailers may all be liable to the injured user because they are all "an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products."[3] Under this theory, Caterpillar, the manufacturer of the engine, is not excused from liability simply because it warned its dealers of the danger of the old filters. It is the manufacturer's duty to ensure that his products are delivered to the consumer in a non-defective condition. The purpose of the rule of strict products liability is to protect the consumer and make those responsible for the injury liable regardless of fault.

In addition, the court held that the doctrine of comparative fault may be a partial defense to strict products liability claims. "[T]he public policy reasons for strict products liability do not seem to be incompatible with comparative negligence. The manufacturer is still accountable for all the harm from a defective product, except that part caused by the consumer's own conduct."[4] The court pointed out that the doctrine of comparative negligence has been applied in other areas of admiralty law, such as claims involving maritime collisions and strandings, unseaworthiness (a type of strict liability), and maritime personal injury actions.

In using the concept of comparative fault the court stated that "[*a*]*ll* of the plaintiff's conduct contributing to the cause of his loss or injury can be compared to defendant's liability, regardless of the labels attached to that conduct."[5] The court, however, departed from the rule of

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[1] 565 F.2d 1129, 1135 (9th Cir. 1977).

[2] RESTATEMENT (SECOND) OF TORTS, § 402-A (1965).

[3] 565 F.2d at 1135.

[4] Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 46 (Alaska 1976).

[5] 565 F.2d at 1139. (emphasis added).

strict products liability by rejecting the distinction made in section 402-A, Comment n of the Restatement, whereby the contributory negligence of the plaintiff is a defense for the defendant when it takes the form of assumption of risk but *not* when its form is that of a mere failure to discover a defect in the product. The court argued that such all-or-nothing defenses do not distribute liability according to fault and are thus inconsistent with comparative fault principles.

—S.V.G.

ASSET CONTROLS — Richardson v. Simon, 560 F.2d 500 (2d Cir. 1977).

The Second Circuit decided in *Richardson v. Simon* that federal regulations promulgated under the Trading with the Enemy Act[1] do not violate due process when they permit a continued freeze on assets once owned by Cubans and now substantially or completely owned by United States citizens.

On July 8, 1963, under the authority of the Cuban Assets Control Regulations,[2] all assets in the United States owned by the Cuban government or by Cuban nationals were frozen. Included were cash and stock previously placed in a New York City bank by Mr. and Mrs. Stuetzel, who were citizens and residents of Cuba. Mr. Stuetzel died in 1965, leaving Mrs. Stuetzel as his sole heir. Mrs. Stuetzel entered the United States as a permanent resident in 1969, and applied to the Secretary of the Treasury for a license releasing the blocked assets. The Secretary granted a release of half the assets as a transfer of dower.[3] Mrs. Stuetzel died in 1971, leaving her residuary estate to her niece, Mrs. Richardson, a U.S. citizen.

The executors of Mrs. Stuetzel's will applied for a license releasing the remaining blocked assets. The Secretary refused to grant such a license, basing his refusal on the finding that a Cuban national still held an interest in the blocked property. Under section 5(b)(1)(B) of the Trading with the Enemy Act, in a time of national emergency the President may prohibit any use, transfer or withdrawal of property in which a foreign country or a foreign national has an interest.[4] Section 525(b) was promulgated pursuant to this section of the Act and provides that "no transfer to any person by intestate succession ... shall be deemed to terminate the interest of the decedent in the property transferred, if the decedent was a designated [Cuban] national." Thus Mr. Stuetzel, after his death, supposedly still owned half of the property originally frozen. Since Mr. Stuetzel remained a Cuban national until his

[1] 50 U.S.C. App. 1 *et seq.* (1971).
[2] 31 C.F.R. 515.201 (1976).
[3] *Id.* at 515.525(a)(1).
[4] 31 C.F.R. § 515.

death, he still had an interest in the property and there was justification for keeping the assets frozen.

The executors claimed that the Cuban Assets Control Regulations were not authorized by the Act and that, even if they were, as applied they were a violation of due process. The court rejected both claims and held for the defendant Secretary. The regulations were authorized by the Act because "Congress ... intended to give the President broad discretion in administering the Act...."[5] There was found to be no denial of due process in permitting Mrs. Richardson to inherit only the unblocked half of the assets, which came into Mrs. Stuetzel's possession after she became a permanent resident of the United States. The court postulated a reasonable congressional purpose, not specifically articulated by Congress, which would justify this result:

> Congress could reasonably believe that a Cuban living in Cuba, under pressures from the Cuban government, might use his power to affect the disposition of blocked assets on the Cuban's death to a United States citizen ... to affect the United States citizen's stand on certain policies toward Cuba. To frustrate such possible attempts by the Cuban government, the Secretary could issue regulations which declare that a Cuban's interest in blocked assets continues after his death.[6]

The court's holding seems questionable in light of a 1965 congressional report[7] expressing concern over the Treasury Department's practice of continuing to block Cuban assets now substantially owned by U.S. citizens. The report said such assets should be unblocked because they could be used as a fund to pay claims of U.S. citizens against Cuba, and this would be using the property of one U.S. citizen to pay the claim of another. The court remained uninfluenced by this report.

The court also admitted that the continued freeze on Mr. Stuetzel's assets served none of the express purposes of the Trading with the Enemy Act as it applies to Cuba.[8] The dissent suggests that there seems no need to create an imaginary purpose to support a questionable regulation: "The Treasury thus, in effect, by agency fiat, has rewritten the laws of succession to read that no American citizen ... is entitled to receive any inheritance from the estate of a Cuban national. This ... is beyond the power of the agency and [is] a deprivation of property without due process."[9]

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[5] Richardson v. Simon, 560 F.2d 500, 503 (2d Cir. 1977).

[6] *Id.* at 505.

[7] S. REP. No. 710, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 3581, 3585.

[8] The major purposes of the Act are, first, to prevent the Cuban government from acquiring dollars, second, to provide a pool of assets from which United States citizens can be compensated for wrongs done to them by the Cuban government, and, third, to use blocked funds for negotiation with Cuba.

[9] 560 F.2d at 507.

Another case, involving an almost identical fact situation, was recently decided by the fifth circuit.[10] In *Real v. Simon* the court held that there *was* a denial of due process and that the plaintiff was entitled to possession of the assets. A dead person could not be a foreign national in possession of property within the meaning of the Trading with the Enemy Act. The Government argued that the freeze served the purpose of maintaining a fund to compensate Americans whose property had been confiscated by Cuba. The court found there could be no justification for denying one U.S. citizen a right to his property in order to benefit the property right of another U.S. citizen.

Thus, there is a definite conflict among the circuit courts, and a decision by the United States Supreme Court may ultimately be required as to the constitutionality of the Cuban Assets Control Regulations as applied to fact situations like that of *Richardson v. Simon*.

—S.V.G.

INTERNATIONAL LAW — Judah v. Delaware Trust Co., ___Del.___, 378 A.2d 624 (1977).

Are the rights of shareholders in a dispute over valuation of the preferred stock of a Delaware corporate utility doing business in China governed by the laws of that foreign jurisdiction? In a unanimous decision, the Supreme Court of Delaware ruled that the laws of China did have extraterritorial effect in the dispute. Even more important, while acknowledging the rule that "matters of foreign law are determined as questions of law,"[1] the supreme court stated that it is entirely appropriate for the trial court to consider relevant evidence concerning the political, social and economic climate of China[2] in determining whether to give effect to a 1935 decree of the Chinese Nationalist Government or to a 1949 provisional constitution of the People's Republic.

The Shanghai Power Company [SPC] had operated a utilities system in Shanghai, China prior to expropriation of its facilities by the communists. Dividends on preferred shares and proceeds in the event of liquidation were to be paid in Chinese silver dollars or a substitute currency. In 1935, the Kuomintang Government proscribed the use of silver for currency purposes and substituted a new currency, the Chinese dollar, for the old. Devaluations and further substitutions of this currency over the past forty years rendered it essentially valueless.[3]

SPC therefore sought judgment declaring that the preferred stock was without value. The successor trustee and owner of the preferred

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[10] *Real v. Simon*, 510 F.2d 557 (5th Cir. 1975).

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[1] ___Del. at___, 378 A.2d at 625.

[2] *Id.*

[3] *Id.* at 628.

stock filed counterclaims, asking declaratory judgments determining that the securities were not without value. The Delaware Court of Chancery granted SPC's motions for summary judgment, and the successor trustee and owner appealed. The Delaware Supreme Court reversed and ruled that summary judgment was "precluded by factual issues" of international law, specifically, whether the 1935 decree had been rendered null and void by the 1949 provisional constitution of the new People's Republic of China, which abolished all Chinese Nationalist statutes.[4]

In reversing and remanding on this issue, the court stated that it would be proper for the trial court, in deciding which law to give extraterritorial effect, to *consider relevant evidence*, which would include evidence of the "political, social and economic climates of Shanghai and China"[5] bearing on sale of the preferred securities.

—F.B.

SOVEREIGN IMMUNITY — *Edlow International Co. v. Nuklearna Krsko*, 441 F. Supp. 827 (D.D.C. 1977).

In *Edlow International Co. v. Nuklearna Elektrarna Krsko*,[1] the District Court for the District of Columbia held that a Yugoslavian enterprise known as a "workers organization" was not an agency or instrumentality of a foreign state under section 1603 of the Foreign Sovereign Immunities Act [FSIA].[2] The court therefore declined to exercise its jurisdiction under section 1330(a) of the FSIA.[3]

The plaintiff was a Bermuda corporation[4] whose activities included acting as broker in connection with sales of nuclear fuels. In December 1975, a Paris representative of a French nuclear concern contacted the plaintiff and informed it that the defendant, a Yugoslavian utilities company, desired to purchase about two hundred thousand pounds of uranium for use as a nuclear fuel. After determining that the desired amount could be provided, the plaintiff notified the French representative, adding that the transaction was subject to a brokerage fee of fifteen cents per pound. This information was in turn relayed to the defendant. Further communications were held with the American supplier, United

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[4] *Id.* at 625.

[5] *Id.*

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[1] 441 F. Supp. 827 (D.D.C. 1977).

[2] 28 U.S.C.A. § 1603 (West Supp. 1977).

[3] 28 U.S.C.A. § 1330(a) (West Supp. 1977).

[4] The actual plaintiff, Edlow International Co., was a corporation organized under the laws of Washington, D.C. However, the company involved in the transactions that gave rise to the suit was Edlow Resources, a Bermuda corporation. Both were owned and managed by the same family, but the court held that the Bermuda corporation was the real party in interest.

Nuclear, and the defendant eventually signed a contract arranging for the sale of the fuel. In March 1976, one hundred sixty thousand pounds of uranium oxide were delivered to defendant. Shortly thereafter, the plaintiff submitted to the defendant an invoice for $24,000, representing the fifteen cents per pound brokerage fee. By November, the plaintiff, frustrated in its efforts to obtain payment, brought this suit. The defendant moved for a motion to dismiss on the grounds that the district court did not have subject matter jurisdiction.

Section 1330 of the FSIA provides that district courts shall have original jurisdiction "without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title...." Section 1603(a) defines a foreign state as including an "agency or instrumentality of a foreign state...." To qualify as an agency or instrumentality of a foreign state, an entity must meet the three criteria set forth in section 1603(b): (1) it must be "a separate legal person, corporate or otherwise;" (2) it must be an "organ of a foreign state or political subdivision thereof;" and (3) it must not be a citizen of the United States or organized under the laws of any nation except the foreign state in question. The court found that the defendant clearly satisfied the first and third criteria listed above. The crucial issue, therefore, was whether a workers organization in Yugoslavia is an "organ" of the Yugoslavian state or is owned by the state or a subdivision thereof.

Plaintiff argued that since Yugoslavia is a socialist country, all property under its jurisdiction is ultimately owned by the state. On the basis of this premise, plaintiff argued that defendant and all Yugoslavian workers organizations are owned by the state and therefore come within section 1603(b)(2). The Yugoslavian constitution defines a workers organization as "an independent self-managing organization of workers linked in labour by common interests and organized in basic organization of associated labour. ..."[5] Defendant argued that the property it owned was "social property" which was neither state-owned nor privately owned, but rather "held and used 'in trust' by the work organization for the general social good of all the Yugoslav people."[6]

While recognizing that Congress intended that section 1603(b) be read broadly to include a variety of forms, the court rejected plaintiff's contentions, by saying that "to accept plaintiff's argument on this point would be to characterize virtually every enterprise operated under a socialist system as an instrumentality of the state...."[7] The court noted also that the Yugoslavian government did not subsidize defendant, that defendant's daily operations were virtually free of direct government control, and that the government held no seats on defendant's board of directors.

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[5] 441 F. Supp. at 831.

[6] *Id.*

[7] *Id.*

The court's ruling was based largely on the Yugoslavian definition of a workers organization. Yugoslavia is unique and an argument can be made that it, more than any other socialist nation, allows individual enterprise to exist. Nevertheless, socialism implies total government control, and though this workers organization may have had a great deal of autonomy, it is difficult to imagine that it existed without direct approval of the Yugoslavian government.

—D.M.

SHIPPING — *Pan American World Airways, Inc. v. California Stevedore & Ballast Co.*, 559 F.2d 1173 (9th Cir. 1977).

The Carriage of Goods by Sea Act [COGSA][1] limits the liability of ocean carriers to five hundred dollars for loss or damage in connection with transportation *unless* the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. The dispute at issue in *Pan American World Airways, Inc. v. California Stevedore & Ballast Co.* arose when a carrier attempted to limit its liability in all cases to five hundred dollars through the use of a bill of lading which contained "no space for an excess valuation declaration" and therefore *on its face* provided "no opportunity for the shipper to declare a higher value."[2]

The U.S. Court of Appeals for the Ninth Circuit held that such a practice could not limit liability because it does not allow the shipper a *fair opportunity* to declare a higher value for the cargo and to pay a correspondingly higher charge.[3] The court held that California Stevedore's bill of lading did not allow this fair opportunity to declare a higher value. It was therefore inconsistent with the purpose of COGSA and could not take effect. The court rejected the carrier's assertions that Pan Am could have avoided the limitation through insertion of a higher valuation, even though such opportunity did not present itself on the face of the bill of lading. The court emphasized that a bill of lading is a boilerplate form drafted by the carrier, and is "presented for acceptance as a matter of routine business practice to a relatively low-level shipper employee."[4] It is commercially unrealistic to impute knowledge of COGSA liability limitations to such an employee. The court therefore placed on the carrier the burden of proving that an opportunity did in fact exist for the shipper to avoid the limitation. Since California Stevedore did not carry this burden, the limitation of liability was disallowed.

[1] Carriage of Goods by Sea Act, § 1 *et seq.*, 46 U.S.C. § 1300 *et seq.* (1970).
[2] 559 F.2d 1173, 1176 (1977).
[3] *Id.*
[4] *Id.* at 1177.

Judicial recognition of the legislative history of COGSA buttressed the decision. Congress passed the Act in 1939 precisely to counteract the persistent attempts of carriers who sought to escape liability through all-embracing exceptions in their ocean bills of lading.[5]

—F.B.

IMPORTS —*Japan Line, Ltd. v. County of Los Angeles*, 20 Cal. 3d 180, 571 P.2d 254, 141 Cal. Rptr. 905 (1977).

The California Supreme Court recently held that the City and County of Los Angeles could impose on a foreign carrier an *ad valorem* personal property tax on cargo shipping containers used exclusively in foreign commerce. The court upheld the levy even though the same containers were also taxed in Japan. None of the containers were ever continuously present in the state, because each container was constantly in transit.

The plaintiffs were six foreign shipping lines which had their domiciles and principal places of business in Japan. Each container remained within the jurisdiction of the city and county for a period averaging less than three weeks, although a certain number of different ones were always present. The containers were taxed according to the number continuously present, ostensibly in payment for the plaintiffs' use of county services.

In upholding the defendants' right to tax the cargo containers, the court relied upon a recent California case involving similar facts, *Sea-Land Service, Inc. v. County of Almeda.*[1] In *Sea-Land* the California Supreme Court upheld the county's right to tax a domestic corporation's cargo shipping containers which were used in both interstate and foreign commerce. Those containers were within the local jurisdiction on the same transitory basis as the ones in *Japan Line.*[2] The shipping lines in the present case attempted to distinguish *Sea-Land* on the basis that those containers were owned by a domestic corporation concededly subject to local taxation in the United States, while here the owners were foreign-based. The court, however, rejected this distinction and applied the reasoning of *Sea-Land* to the present facts.

The home-port doctrine, as first applied in the *Sea-Land* decision, states that foreign airplanes and oceangoing ships engaged in foreign commerce may not be taxed by any jurisdiction except that of their home port.[3] This doctrine had been extended to foreign commerce by the

[5] *Id.* at 1174.

[1] 12 Cal. 3d 772, 528 P.2d 56, 117 Cal. Rptr. 448 (1974).
[2] *Id.* at 776, 528 P.2d at 58-59, 117 Cal. Rptr. at 450-51.
[3] *Id.* at 782, 528 P.2d at 63, 117 Cal. Rptr. at 455.

California Supreme Court in *Scandanavian Airlines System, Inc. v. County of Los Angeles.*[4] The plaintiffs in *Japan Line* argued that this doctrine precluded taxation of the containers by any other jurisdiction other than Japan. The court in *Japan Line*, however, adopted a highly restrictive view of the home-port doctrine.

The court in *S.A.S.* distinguished situations involving foreign commerce from those involving interstate commerce. With respect to foreign trade it held that local governments "must confine themselves to a levy on an apportioned basis, related to time or use within that jurisdiction, ... in order that the total taxes so assessed shall not amount to more than one single *ad valorem* basis."[5] However, the court in *Japan Line* limited the *S.A.S.* decision to situations in which foreign airplanes and ships have insufficient contacts with the local jurisdiction. As support for its decision the court noted the series of U.S. Supreme Court cases which adopt the apportionment doctrine for taxing instrumentalities of *interstate* commerce. The court's extension of the *Sea-Land* rule and its restriction of *S.A.S.* were further demonstrated by its adoption of Justice Traynor's dissent in *S.A.S.*, which stated that "the threat of double taxation from foreign taxing authorities has no role in commerce clause considerations of multiple burdens ...."[6]

The court similarly dispensed with the plaintiff's other contentions and found that taxation by the defendant municipalities did not violate the prohibition against the states imposing tonnage duties found in Article I of the U.S. Constitution. Supporting this conclusion is the U.S. Supreme Court's opinion in *Michelin Tire Corp. v. Wages,*[7] which held that a nondiscriminatory *ad valorem* property tax imposed by a state on imported as well as domestic tires is not an "impost" or "duty" on imports within the purpose of the constitutional prohibition.[8] Moreover, the Court also authorized the imposition of personal property taxes on such instrumentalities of interstate commerce as railroad cars, so long as the taxes are apportioned according to the length of time the instrumentalities are found within the state's jurisdiction.[9]

The court in *Japan Line* did not consider the most favored nation provision in the 1953 treaty between the United States and Japan to be controlling. In the *S.A.S.* case, the court held that a similar most favored nation provision in a 1939 convention between the United States and Sweden prevented Los Angeles County from taxing Swedish-owned property, including airplanes. In *Japan Line*, however, the court refused to extend the *S.A.S.* holding to cover cargo containers.

—W.H.

[4] 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25 (1961) [hereinafter referred to as *S.A.S.*]
[5] *Id.* at 31, 363 P.2d at 37, 14 Cal. Rptr. at 37.
[6] 20 Cal. 3d at 185, 571 P.2d at 257, 141 Cal. Rptr. at 908.
[7] 423 U.S. 276 (1976).
[8] *Id.* at 283-94.
[9] Pullman's Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

INTERNATIONAL AIR TRANSPORT — *Chandler v. Jet Air Freight, Inc.*, 54 Ill. App.3d 1005, 370 N.E.2d 95 (1977).

Parties shipping freight by international air transport may be denied recovery for the carrier's loss of their goods in transit either by the two year period of limitations in the Warsaw Convention[1] or by the claim procedures in the the Civil Aeronautics Board's International Airfreight Rates Tariff. So held the Illinois Court of Appeals in *Chandler v. Jet Air Freight, Inc.*,[2] which involved a customer's suit against an air carrier for loss of cargo to be shipped to Jamaica, West Indies. The court held that the suit was barred by both regulations; the Warsaw Convention controls since the transportation was between two contracting parties to the convention, and the C.A.B. tariff provisions apply since the carrier had filed the tariff with the C.A.B.

Here the plaintiffs had contracted with defendant Jet Air Freight, Inc. in September 1970 to have certain cargo transported from Chicago to Jamaica. While the carrier held the goods in Miami pending receipt of plaintiff's payment, the cargo was lost or misplaced. The plaintiffs did not file suit until June 1974, although they had become aware that the freight never reached Jamaica shortly after the goods were sent.

In applying the Warsaw Convention to the present facts, the court was relying on solid precedent. Although the cargo never actually left the country, Article 1 of the Convention states that the document's provisions "apply and exclusively govern the rights and liabilities of the parties" as long as the contract provides for transportation between Convention signatories.[3] Article 29 provides that the two-year statute of limitations runs from the date that either the aircraft ought to have arrived at its destination or the transportation stopped. The case of *Molitch v. Irish International Airlines*[4] supports the proposition that this limitation is absolute and is not subject to any requirement that the customer be expressly warned of any rules limiting liability under the Convention.[5]

The holding in *Chandler* would appear to be entirely consistent with the two stated purposes of the original Convention. The short statute of limitations was an important part of the attempt to achieve uniformity in the procedures for dealing with claims arising in international air traffic

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1 A Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Oct. 12, 1929; entered into force for the U.S. Oct. 29, 1934, subject to a reservation, 49 Stat. 3000, T.S. No. 876, *codified at* 49 U.S.C. § 1502 (1970).

2 54 Ill. App. 3d 1005, 370 N.E.2d 95 (1977).

3 Butz v. British Airways, 421 F. Supp. 127, 129 (E.D. Pa. 1976).

4 436 F.2d 42 (2d Cir. 1970).

5 *Id.* at 44. Although *Molitch* involved passenger tickets and the requirements of Article 3(1)(e), it is easily extended to encompass the cargo in the present facts by Article 8(q).

and in the substantive law applicable to these claims.[6] Similarly, the court's decision conforms with the Convention's principal goal of limiting the carrier's potential liability from such claims.[7]

Apart from the terms of the Convention, the court held that other grounds for barring plaintiffs' relief existed in the C.A.B. tariff provisions. Under the Federal Aviation Act of 1958,[8] all air carriers are required to file with the C.A.B. tariffs stating fares, rules and regulations concerning their operation.[9] A long line of authority has held that such a tariff, once filed, "becomes an integral part of the contract between the carrier and the shipper," and "if valid, are conclusive and exclusive" in governing the rights and liabilities of the parties.[10] Since the defendant carrier in the present case had filed International Airfreight Rates Tariff No. 3 with the C.A.B., the claim procedure of this tariff controlled. Under this procedure, plaintiffs had failed to make their claim in writing within 120 days of the carrier's acceptance of the shipment, and thus their claim was denied.

The federal courts have also considered the problem of limitations on liability contained in the tariffs. A ceiling on the value of claims was upheld in *Blair v. Delta Air Lines, Inc.*, in which the court stated that the Federal Aviation Act does not prohibit exculpatory clauses contained in the tariffs, if valid and accepted by the C.A.B.[11] Another court has similarly held that such limitations on liability are binding on the shipping customers regardless of whether the restrictions are stated in the transportation documents.[12]

— W.H.

INTERNATIONAL AGREEMENTS — Agreement Between the United States and Canada on Principles Applicable to a Northern Natural Gas Pipeline, printed in DECISION AND REPORT TO CONGRESS ON THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM, Executive Office of the President, September 1977.

On September 20, 1977 the United States and Canada signed the Agreement on Principles Applicable to a Northern Natural Gas Pipeline, initiating a project which promises to be one of the largest privately financed international business ventures of all time. The Agreement provides certain assurances on the questions of routes, taxation levels,

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[6] Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-99 (1967).

[7] *Id.* at 499.

[8] 49 U.S.C. § 1373 (1970).

[9] *Id.* at § 1373(a).

[10] Randall v. Frontier Airlines, Inc., 397 F. Supp. 840, 845 (W.D. Ark. 1975).

[11] Blair v. Delta Air Lines, Inc., 344 F. Supp. 360, 365 (S.D. Fla. 1972).

[12] Randall v. Frontier Airlines, Inc., *supra* note 10.

project delays and other matters, and, with the Transit Pipeline Treaty, protects the project from charges that would threaten the intended savings to U.S. consumers.

Under the Trans-Alaska Pipeline Act, Congress authorized the President to determine whether Canada would permit construction of a natural gas pipeline across Canada and to negotiate intergovernmental agreements to that end. Accordingly, the President's Decision and Report to Congress on the Alaska Natural Gas Transportation System[1] was submitted to Congress and was approved by joint resolution on October 12, 1977.[2] The system finally approved had been proposed by the Alcan Pipeline Company, a wholly owned subsidiary of Northwest Pipeline Corporation. The route will parallel existing utility corridors southward from Prudhoe Bay through the Yukon Territory, British Columbia, Alberta and Saskatchewan, and then to the U.S. markets.

As construction will be privately financed, the companies owning the pipeline will have to demonstrate to the government having jurisdiction that adequate protections against the risk of non-completion and interruption have been taken before construction is allowed to begin. Both governments will use a variable rate of return on each company's equity investment as an incentive for minimizing costs. Thus the burden of cost increases will be carried by the companies' stockholders, not passed on in increased user fees to the owners of the gas shipped through the pipeline. This will insulate the consumer to some degree from the effects of cost overruns in project construction.[3]

The Agreement also includes provisions to ensure non-discriminatory taxation by the affected Canadian provinces. British Columbia, Alberta and Saskatchewan annexed endorsements to the Agreement, assuring the federal governments that no more taxes or fees will be charged against the Alcan pipeline than those levied on any other within their boundaries. As there are currently no similar pipelines in the Yukon Territory, *ad valorem* property taxation was negotiated as a part of the Agreement. The agreed rate of taxation in the Yukon is comparable to that levied on the part of the pipeline within Alaska. It will remain unchanged for twenty-five years unless another similar pipeline is built or unless Alaska alters its present rates. If another pipeline is constructed in the Yukon, the non-discriminatory arrangement now applying in the provinces will replace the Alaska-based rate.[4]

The provisions also cover any future payments due for either impact assistance or native claims. The Canadian government has assured

[1] EXECUTIVE OFFICE OF THE PRESIDENT, DECISION AND REPORT TO CONGRESS ON THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM (1977) [hereinafter cited as REPORT].

[2] H.R.J. Res. 621, 95th Cong. 1st Sess., (1977).

[3] Agreement Between the United States of America and Canada on Principles Applicable to a Northern National Gas Pipeline, ¶ 5 [hereinafter cited as Agreement] *reprinted in* REPORT, *supra* note 1, at 50-51 with explanation at 248-49.

[4] Agreement, ¶ 5 *reprinted in* REPORT, *supra* note 1, at 51-56.

the United States that no charges for native claims will be levied against the pipeline. It regards native claims settlements as a purely domestic matter, and will not follow the precedent set by the assessment of native claims against the Alaskan segment of the pipeline. To compensate for the pipeline's socioeconomic impact, the Canadian National Energy Board (NEB) had recommended a $200 million impact assistance payment to the Yukon. However, a plan has been arranged so that advance payment by the company will be treated as a loan to the government, to be paid back through reduction of future property tax liabilities. This arrangement will not affect the cost of service to U.S. consumers.[5]

A further concern of the parties was the possible effect on the "Canadian content" regulations issued by the NEB. Intended to ensure that Canadian firms and workers receive maximum economic benefit from pipeline projects in Canada, the regulations could have increased costs. The Agreement, however, commits each government to the principle that the supply of goods and services will be on a competitive basis. If either party concludes that this principle is not being followed, it may consult with the other government to consider remedies, including the renegotiation of contracts or reopening of bids.[6]

—W.H.

INTERNATIONAL BUSINESS PRACTICES — International Chamber of Commerce, Commission on Ethical Practices, Draft Report on Ethical Practices in Commercial Transactions, ICC Doc. 192/36 (1977), 16 INT'L LEGAL MATERIALS 686 (1977).

Recent disclosures of corruption in international transactions have prompted both governments and the international business community to consider methods of combatting corrupt practices. One such effort is that undertaken by the International Chamber of Commerce. In December 1975, it set up an ad hoc commission to investigate the extent of corrupt business practices and to suggest a solution to the problem. In March 1977, the commission produced a Draft Report on Ethical Practices. The Drafting Committee concluded that "complementary and mutually reinforcing efforts at the national and international levels by both government and business" are required to combat the problem.[1] The committee therefore proposed stringent laws in all countries prohibiting commercial corruption and providing administrative machinery necessary for enforcement.

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[5] Agreement, ¶ 5(b)(ix) *reprinted in* REPORT at 56-57 with explanation at 241-42.

[6] Agreement, ¶ 7 *reprinted in* REPORT at 60-61 with explanation at 242-43.

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[1] Foreword to the Commission on Ethical Practices Draft Report on Ethical Practices in Commercial Transactions, 16 INT'L LEGAL MATERIALS 686, 687 (1977).

The Draft is divided into two sections. Part I consists of recommendations to individual governments, and Part II sets forth the International Code on Ethical Practices. Part I proposes that national governments set up strict procedures to monitor financial transactions between government officials and corporate enterprises, and between corporations themselves. It suggests that this could be accomplished through the use of surveillance and investigation by law enforcement agencies. An independent audit of all companies enjoying limited liability would complement these enforcement measures. On the international level, the Draft proposes that states should adopt an international treaty providing for international cooperation and judicial assistance in dealing with corrupt practices. Specific proposals focus upon cooperation in the investigation and prosecution of offenders.

Part II is the actual Code on Ethical Practices, which promulgates standards and rules of good behavior for business. The Code relies upon voluntary compliance to promote integrity in commercial transactions.[2] The fourteen Articles proscribe the making, solicitation or acceptance of corrupt payments and kickbacks. Several rules cover the conduct of corporate and government agents. The Articles recommend semi-public disclosure of financial accounts, and couple the recommendation with a suggestion that an independent audit verify the accuracy of the accounts. Additional provisions provide for the public disclosure of any conflict of interest or related information.

The Committee also recommends that a model contract clause covering ethical practices be included in contracts between enterprises, as well as in contracts between enterprises and public bodies. The clause requires strict observance of the Code, and specifies that violations thereof enable the innocent party to terminate the contract or to recover the full value of the offer plus any consequential damages that may arise.

The Draft lastly provides for an implementing "Council" composed of geographically diverse members with legal and business backgrounds. In applying the Code, the Council would be entitled to investigate any violation of the Code and recommend to national authorities the appropriate civil or criminal proceedings. The Council also could give advisory opinions on the interpretation of the Code to courts of law or any other public authorities.

—F.B.

INTERNATIONAL INVESTMENT — Recent Developments at the International Centre for Settlement of Investment Disputes.

The International Centre for Settlement of Investment Disputes was created in 1966 as a permanent impartial facility to resolve investment

[2] *Id.* at 693.

disputes between host countries and foreign investors through conciliation and arbitration proceedings. The Convention which established the Centre was formulated by World Bank officials in order to encourage private foreign investment in less developed countries by reducing the risk and uncertainty of such investments.[1] Both the host country and the country of which the investor is a national must have signed the Convention in order for the Centre to have jurisdiction over the dispute. As of January 3, 1978, seventy-three states had signed the Convention and sixty-nine had deposited instruments of ratification.[2]

Despite certain advantages which the Centre offers the private investor, its effectiveness has been limited. The primary advantage of the Centre is that it "affords private persons and corporations the only institutionalized international forum for litigating with States."[3] However, during the Centre's twelve year existence only eight cases have been submitted to its facilities for arbitration. The explanation for the Centre's lack of effectiveness seems to be twofold. First, no Central or South American states have signed the Convention. The Latin American opposition to the convention is based on the strongly held concepts of sovereignty embodied in the Calvo Doctrine and peculiar to that part of the world.[4] This eliminates a particularly volatile and important area of the Third World from the Centre's jurisdiction. Second, a 1973 study of *Fortune 1,000* firms revealed that managements of the responding firms were wary of utilizing the services of a new organization which had no track record.[5] Many respondents also expressed unfamiliarity with the Centre and its procedures.

On January 1, 1977, none of the first five arbitration cases brought before the Centre had been disposed of. The oldest had been registered on December 24, 1971, and the newest on June 21, 1974. During early 1977, however, three cases filed in 1974 and relating to the Jamaican expropriation of bauxite properties were settled by the parties. The ICSID proceedings were discontinued.[6] On August 29, 1977, an award was rendered in the case of *Adriano-Gardella SpA v. Government of Ivory Coast.*[7] Proceedings continue in the oldest case, *Holiday Inns/*

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[1] Ryans & Baker, *The International Centre for Settlement of Investment Disputes,* 10 J. WORLD TRADE L. 65 (1976).

[2] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, LIST OF CONTRACTING STATES AND OTHER SIGNATORIES OF THE CONVENTION (As of January 3, 1978), ICSID/3/Rev. 23.

[3] Amerasinghe, *Dispute Settlement Machinery in Relations Between States and Multinational Enterprises – With Particular Reference to the International Centre for Settlement of Investment Disputes,* 11 INT'L LAW. 45, 48 (1977).

[4] Amerasinghe, *The International Centre for Settlement of Investment Disputes and Development Through the Multinational Corporation,* 9 VAND. J. TRANSNAT'L L. 793, 798 (1976).

[5] Ryans & Baker, *supra* note 1.

[6] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ELEVENTH ANNUAL REPORT 4 (1977); ICSID Press Release, January 3, 1978.

[7] Press Release, *supra* note 6.

Occidental Petroleum v. Government of Morocco. Registered on December 27, 1971, the case has been delayed by the death of one arbitrator and the resignation of another.[8]

Current developments suggest that the Centre may be achieving wider acceptability. During the last eighteen months, three new cases have been registered with the Centre, including the first case brought by a government against a private party. On October 5, 1976, the Government of Gabon instituted arbitration proceedings against Societe SERETE, S.A., a French corporation. The parties reached an amicable agreement and the case was discontinued in 1977. The other two new cases were filed in November and December 1977 by private investors against the Government of the People's Republic of Congo. Both are still pending.[9]

During the fiscal year ending June 30, 1977, the Centre made further progress in gaining visibility and acceptance of its programs. Three bilateral treaties for the protection and promotion of foreign investments were signed which provided for acceptance of the jurisdiction of the Centre as a means of settling disputes.[10] Six such treaties entered into force during the year. The Centre prepared two new volumes for the loose-leaf service INVESTMENT LAWS OF THE WORLD-DEVELOPING COUNTRIES; the laws of forty-three countries have been published.[11]

While the Centre has made some progress in gaining the acceptance of its facilities, it has been unable to induce any Latin American nations to sign the Convention. The frequency of *ex parte* settlement should not detract from the achievement of the Centre. Voluntary settlement is always preferable to the making of an award. The Centre's purpose is the settlement of investment disputes, and the limited results now available indicate success in that goal.

—R.K.

LAW OF THE SEA — Proposed Federal Investment Guarantee of Deep Seabed Mining Legislation, S. 2053, 95th Cong., 1st Sess. (1977); H.R. 3350, 95th Cong., 1st Sess. (1977).

Debate in the U.S. Congress and in the Third Law of the Sea Conference (in its seventh session) will continue on the subject of the control and use of the resources of the sea. As developing and industrialized countries argue without resolution over allocation of the sea's resources, frustration may hasten national action in Washington

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[8] ANNUAL REPORT, *supra* note 6, at 4.

[9] ANNUAL REPORT, *supra* note 6, at 5; Press Release, *supra* note 6.

[10] ANNUAL REPORT, *supra* note 6, at 5.

[11] *Id.* at 20.

on deep seabed mining legislation. Bills that would license and regulate U.S. nationals in the mining of hard minerals on the ocean floor are before both Houses of Congress.[1] Unilateral action by the U.S. through such legislation now has the support of the Carter administration largely because the administration disapproves of the current trend in the Law of the Sea Conference. However, the Carter administration objects to, and the current debate in Congress centers on, investment guarantee by the federal government to the companies participating in deep seabed mining against the adverse effect any Law of the Sea treaty might have on their operations.

The proposed legislation is currently moving through various committees of both houses.[2] As the bills emerge from committee, their common characteristics will be as follows: (1) the legislation is to be interim in nature pending a Law of the Sea treaty; (2) the environment must be protected through regulation and violation fines; (3) an investment fund must be set aside from the profits for the future benefit of the international community; and (4) the concept of freedom of the high seas is accepted, that is, the legislation is merely a licensing statute which is in no way a claim of sovereignty by the United States over any part of the high seas.

The bills vary in their provisions for investment insurance. Title II of the version of the bill in the Senate Commerce Committee and Title II of the version reported by the Merchant Marine and Fisheries Committee of the House contain a provision providing investment insurance or investment guarantee for deep sea mining adversely affected by any international agreement into which the United States subsequently enters.[3] Losses *not* compensated by the bills are those covered by customary insurance, as well as acts of sabotage or terrorism, failure of mining technology, variation in market value or claims with remedy in admiralty law.[4] What is sought is "political" insurance against the United States' changing by multi-lateral treaty the legal and political environment under which the companies operate. The government will guarantee a loss by a mining concern up to the lesser of 90% of actual loss or $350,000,000. If a company has held a permit or license to mine for ten years, no compensation will be allowed. A company wishing to insure itself in this manner must pay a premium to the federal treasury of between one quarter and three quarters of one percent of its investment in the preceding calendar year.[5]

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[1] S. 2053, 95th Cong., 1st SESS. (1977); H.R. 3350, 95th Cong., 1st SESS. (1977) [hereinafter cited by bill number and section]. (Similar or identical bills introduced in the House are H.R. 3652, 4582, 4922, 5624, 6784, 6846).

[2] Energy and Natural Resource, and Commerce Committees of the Senate; Merchant Marine, Interior and International Relations Committees of the House.

[3] S. 2053 § 202, H.R. 3350 § 13(a) as amended § 202.

[4] *See, e.g.*, H.R. 3350 § 202(a).

[5] S. 2053 §§ 202(c)(2), (b)(2); H.R. 3350 § 202(e).

The investment guarantee would benefit four international consortia involving Lockheed, Kennecott Copper, U.S. Steel and International Nickel (a Canadian-based corporation).[6] These companies assert they cannot obtain the capital with which to begin and continue deep sea mining.[7] Testimony before congressional hearings on the legislation by banking and insurance executives supports their contentions. It is impossible to insure commercially against a treaty,[8] and, in order for a financial institution to consider financing a venture such as deep seabed mining, the venture would have to withstand an evaluation of risk factors. One necessary risk factor would be guaranteed tenure of the mining company to the mining site or insurance in the event such tenure were lost.[9]

The failings of the Law of the Sea Conference are at the heart of the problem. The need for investment guarantee arises from the unstable nature of the Conference. The varied proposals emanating from the factions in the Conference will doubtless involve some type of international production control over U.S. companies. Control could mean anything from royalty payment or revenue sharing to absolute discretion wielded by an international body made up largely of those whose interests would be contrary to those of the United States and its mining companies. It is this threat which undercuts the ability of the mining companies to obtain the needed capital. The mining company solution is a compensation guarantee from the federal government which would prevent an uncertain political situation from developing in a way adverse to mining interests. The mining companies seek to obtain the needed capital through insurance from the United States government.[10]

Opposition to the investment guarantee comes on several fronts. In a close vote,[11] the Interior and Insular Affairs Committee of the House deleted the investment guarantee section from the bill. Among the reasons given by the majority for rejecting the investment guarantee

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[6] H.R. REP. No. 95-588 (Part II), 95th Cong., 1st SESS. 67 (1977).

[7] *See, e.g.*, Proposed Deep Seabed Mining Legislation: Hearings of H.R. 3350 Before the Subcomm. on Oceanography and the House Comm. on Merchant Marine and Fisheries, 95th Cong., 1st SESS. 228 (1977) [hereinafter cited as Hearing Report].

[8] H.R. REP. No. 95-588 (Part I), 95th Cong., 1st SESS. 20 (1977), Hearing Report, *supra* note 7, at 223.

[9] *Id.* at 20; Hearing Report, *supra* note 6, at 169.

[10] The initial investment of each American company before any profit is about $850,000,000 over ten years. *See:* H.R. REP. NO. 95-588 (Part I), *supra* note 8, at 16.

[11] 22 to 18 on deletion and 21 to 20 on a proposed amendment raising the premium paid by the mining companies. H.R. REP. NO. 95-588 (Part I), *supra* note 8, at 17.

were lack of proof of need for the minerals,[12] possible expense to the U.S. taxpayer due to the high liability in the first years and lack of precedent for such compensation.[13] The major opposition in the Interior Committee, however, focused on the fact that investment guarantee might harm or discourage a successful Law of the Sea treaty. With such a provision, United States negotiators would be caught in the middle, not wanting to occasion a loss to individual citizens or to the government of the United States. The committee also noted that the bill's guarantee provision would add fuel to the fire already started by the act's implication that the United States was claiming sovereignty over the oceans and engaging in twentieth century colonialism.[14]

In a reverse of its prior stance, the Carter administration decided to support the deep seabed mining legislation, but *without* the investment guarantee. The administration position is that unilateral United States action through licensing and environmental regulation may be impetus to compromise and action at the upcoming seventh session of the Law of the Sea Conference. But the investment guarantees would hamstring U.S. negotiators.[15] The administration wants a bargaining wedge but at the same time does not want to split the Conference any more than is possible.

The GAO report is generally critical of the legislation. It says the bill turns on the heavily debated investment guarantee section without properly addressing the environmental problems, the form of Federal management and the foreign policy issues:

> If U.S. private interests willingly undertake, under Federal license, exploration and commercial recovery with knowledge that the U.S. is currently negotiating an international agreement, we do not believe it necessary for the U.S. government to be responsible for compensating the private interests for the financial consequences of implementing the international agreement known to have been under development.[16]

The administration and the minority report of the House Merchant Marine and Fisheries Committee support the view that all parties — the

[12] The minerals sought on the ocean floor are "manganese nodules" found in large quantities beyond the national jurisdiction of any nation at a depth of about 2000 meters. In composition, they are 24.2% maganese, 1% nickle, .35% cobalt and .5% copper. The United States is dependent upon imports for 98% of its manganese, 7% of its nickle, 98% of its cobalt, and 15% of its copper. In terms of national defense, manganese is 2, cobalt is 11 and nickle is 15 in supply vulnerability in the event of war. Hearing Report, *supra* note 7 at 410, 421; H.R. REP. 95-588 (Part II), *supra* note 6, at 14; H.R. REP. 95-588 (Part I), *supra* note 8, at 13.

[13] H.R. REP. 95-588 (Part I), *supra* note 8, at 17.

[14] *Id.; See also* Hearings, *supra* note 7, at 181.

[15] Deep Seabed Mining and the Law of the Sea: Hearings Before the Subcomm. on International Organizations of the Comm. on International Relations, 95th Cong., 1st SESS. 2 (1977).

[16] General Accounting Office Report to the Chairman of the House Subcommittee on Mines and Mining, 9-15-77 *reprinted in* H.R. REP. 95-588 (Part I), *supra* note 8, at 33.

mining industry, the United States, other industrial nations and the developing countries — would be best served if the United States did not go to the bargaining table at the Law of the Sea Conference with the investment guarantees hanging over its head. A better position would be for the United States to insist on "grandfather rights" or tenure at deep sea mine sites existing at the ratification of any treaty.[17] Such a position would protect mining interests and should be enough assurance to investment concerns to supply the needed capital.

Miners need capital. Investors need a situation of acceptable risks. The Law of the Sea Conferences negotiations give no assurances that could provide the needed economic stability to permit investment. But for the United States government to guarantee against the adverse effects of a multilateral Law of the Sea treaty detrimental to mining companies will further divide the factions at the Law of the Sea Conference.

—K.K.

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[17] H.R. REP. 95-588 (Part II), *supra* note 6, at 64.