RECENT DECISIONS

EXTRATERRITORIAL SEARCH AND SEIZURE — COAST GUARD POLICE POWERS IN FOREIGN TERRITORIAL WATERS: WHAT PRICE EXPANSION? — UNITED STATES V. CONROY

A recent decision by the Fifth Circuit Court of Appeals[1] has greatly broadened the authority of the United States Coast Guard to apprehend domestic vessels suspected of drug smuggling and other illicit operations. The reasoning behind this expansion of extraterritorial jurisdiction was based on a tenuous precedent.

In *United States v. Conroy*, a United States Coast Guard cutter, pursuant to information supplied by a Drug Enforcement Agency (DEA) informant, attempted to apprehend the American sailboat *Nahoa* in international waters. The *Nahoa* chose to turn and run for sanctuary in nearby Haitian waters. To the surprise of her crew,[2] the *Nahoa* was pursued and subsequently subdued by the threat of cannon fire in waters within Haitian territorial limits. The Coast Guard successfully pursued the *Nahoa* into Haitian territorial waters after first obtaining permission by radio from the Haitian Chief-of-Staff. After consent to an inspection had been refused,[3] a boarding party combed the *Nahoa* and uncovered and seized 7,000 pounds of marijuana.[4] The defendants protested that without a warrant and without express statutory authority to conduct a search within foreign waters, the Coast Guard had exercised powers that

1. United States v. Conroy, 589 F.2d 1258 (5th Cir. 1979), *rehearing denied*, 594 F.2d 241 (5th Cir. 1979).

2. *Id.* at 1267. The court, citing P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 120 (1927), recalled the traditional law of the sea doctrine that foreign warships did not "enjoy an absolute legal right to pass through a state's territorial waters."

The *Nahoa* undoubtedly set course for Haitian waters in reliance on this doctrine without realizing that it had become outdated.

3. The Coast Guard may apprehend and board any vessel under the American flag; such authority is plenary and need not be founded on any particularized suspicion. Once on board, the Coast Guard may conduct documentation and safety inspections. If, during the course of such inspection, circumstances arise which generate probable cause to believe that a violation of United States law has occurred, the Coast Guard may search, seize, and make arrests. *See*, 14 U.S.C. § 89 (1976); Tariff Act of 1930 § 581(a), 19 U.S.C. § 1581(a) (1976); U.S. CONST. amend. 4.

4. The enforcement provisions of the Tariff Act of 1930 prescribed penalties and fines for the transportation of marijuana and other contraband. 19 U.S.C. § 1584 (1976) states, in part: "If any of such merchandise so found consists of smoking opium, opium prepared for smoking, or marijuana, the master of such vessel . . . shall be liable to a penalty of $25 for each ounce thereof so found."

neither Congress nor the Constitution had conferred upon it.[5]

The Court was unimpressed by this argument.[6] It conceded that under normal lie-in-wait situations a search warrant would have been the minimum requirement for such an invasion of the defendant's seacruise.[7] Nevertheless, the *Nahoa* did not follow normal hailing procedures, which would have been to identify herself and submit to an inspection of the captain's log and safety devices. Instead she fled in an obvious attempt to obtain sanctuary in foreign territorial waters, thereby evoking an exception to the Fourth Amendment prohibition of warrantless searches based on the exigency of the suspect's uncontrolled mobility.[8] The DEA informant's information having supplied the requisite antecedent probable cause, the Coast Guard had sufficient reason to pursue the *Nahoa* in order to secure and preserve instrumentalities of the suspected crime.[9]

The most remarkable element of *Conroy* is the judicial recognition of certain Coast Guard powers as viable and affirmative within the jurisdictional waters of another sovereignty.[10] Two Fifth Circuit

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5. 14 U.S.C. § 89(a) (1976); U.S. CONST. amend. 4. The language of the enforcement provision of the Coast Guard Act refers only to the "high seas," and does not expressly mention foreign territorial waters as being open to Coast Guard police activities.

6. 589 F.2d at 1268-1269.

7. *Id.* at 1269.

8. *Id. See,* Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1923).

9. United States v. Conroy, 589 F.2d 1258 (5th Cir. 1979), *rehearing denied,* 594 F.2d 241 (5th Cir. 1979); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1923).

10. Although the Supreme Court has held that the United States has legislative authority over its citizens on the high seas and in foreign territory, no decision has extended this power to territorial waters of a foreign sovereign. Steele v. Bulova Watch Co., 344 U.S. 280 (1952) (the United States possesses authority to regulate trademark infringements by an American citizen in Mexico); Foley Bros. v. Filardo, 336 U.S. 281 (1949) (Congress possesses the authority to control overtime pay of workers in the employ of American contractors in Iran and Iraq, but it did not intend to exercise its power).

In addition, the Tariff Act of 1930 allows examination of *foreign* vessels *without the customs waters* of the United States by customs officers pursuant to a "special arrangement" with the foreign government. 19 U.S.C. §§ 1581, 1587 (1976). Close examination of 14 U.S.C. § 89(a) (1976) indicates no such open-ended grant of authority to the Coast Guard in terms of domestic vessels. 14 U.S.C. § 89(a) (1976) provides in relevant part:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's

decisions decided a year earlier embodied the spirit of the expansive holding in *Conroy*. *United States v. Warren*[11] and *United States v. Cadena*[12] both interpreted the Coast Guard enforcement provisions found in section 89(a) of title 14 of the United States Code. Section 89(a) extends the Coast Guard's authority to detain, board, and search domestic vessels believed to have violated laws of the United States on the high seas.[13] Both cases held that the Coast Guard had authority to search on the high seas under section 89(a) by reason of its reliance on "the jurisdiction, or . . . operation of *any law* of the United States."[14] Neither the *Warren* nor the *Cadena* opinions, both concerning high seas searches and seizures of marijuana, so exceeded the scope of their respective circumstances as to suggest that suspected smugglers could be sought out in foreign waters.

In so enlarging the geographical boundaries of the Coast Guard's authority to conduct searches of domestic vessels, Judge Rubin, writing for the Fifth Circuit in *Conroy*, relied on implicit legislative history, not on express statutory language.[15] The opinion also relied on the United Nations-sponsored Convention on the Territorial Sea and Contiguous Zone (Convention),[16] to which the United States and Haiti are signatories.[17] The fact that the exercise of Coast Guard powers took place within the Haitian territorial sea seemingly placed no great burden on the court. By virtue of the doctrine of innocent passage, incorporated into Article 14 of the Convention to permit innocent passage of foreign warships not engaged in combat,[18] the Coast Guard was, according to the court,

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documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.

11. United States v. Warren, 578 F.2d 1058 (5th Cir. 1978).

12. United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978).

13. 14 U.S.C. § 89(a), *supra* note 10.

14. *Id.* (emphasis added). *See*, 578 F.2d at 1069; 585 F.2d at 1257.

15. In regards to 14 U.S.C. § 89(a) (1976), Judge Rubin said:

> Because neither mandate nor prohibition of search can be divined from Section 89(a), the Coast Guard's authority, if it exists, must be . . . an incident of its other powers . . . . The pattern of legislation from 1790 to 1927 traced by Mr. Justice Brandeis [concurring in Maul v. United States, 274 U.S. 501 (1927)] and the subsequent Congressional action . . . make it clear that, in the absence of objection by the sovereign power involved, Congress intended the Coast Guard to have authority to stop and search American vessels on foreign waters . . . even though it never said so with unequivocal didacticism. 589 F.2d at 1266-1267.

16. The Convention on the Territorial Sea and the Contiguous Zone, *done* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (effective Sept. 10, 1964) [hereinafter cited as the Convention].

17. *Id.*

18. *Id.* Article 14 of the Convention, *supra* note 16, provides in relevant part:

acting within the scope of its duties. Since Article 14 permits the unannounced entrance of all ships into territorial waters,[19] Judge Rubin concluded that the implicit authority of section 89(a) of title 14 of the United States Code[20] permitted the Coast Guard to conduct its duties as it would on the high seas.

The court's oblique interpretation of the Convention raises the question of whether there is a possible jurisdictional flaw in its decision to sanction police powers extraterritorially.[21] Regardless of whether or not the Convention permits foreign warships to innocently ply a nation's territorial sea,[22] it neither expressly nor impliedly expands jurisdiction of the foreign sovereign beyond limits currently in effect.[23] Although the Coast Guard had implied permis-

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1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.

2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

. . . .

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law. Convention, *supra* note 16, 15 U.S.T. at 1610.

The *Conroy* opinion claims that "[n]o distinction is made between warships and other vessels." 589 F.2d at 1267. Coast Guard vessels can therefore ply foreign territorial waters for the reasons set forth in Article 14(2) and (4) of the Convention. Contrary to the court's claim, the Convention does distinguish warships from civilian or other government vessels. Article 23 contemplates coastal state action against foreign warships if Article 14 is not upheld: "If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea." Convention, *supra* note 16, art. 23.

19. Convention, *supra* note 16, art. 14(1).

20. 589 F.2d at 1267-1268.

21. The Convention addresses the situation that occurred in *Conroy* in Article 19(5), which provides virtually unbridled freedom of passage through a coastal state's waters by a merchant ship:

> The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion (sic) with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters. Convention, *supra* note 16, art. 19(5).

Regardless of how the court weighed Mr. Justice Brandeis' influence on the legislation of 14 U.S.C. § 89(a) through his concurrence in Maul v. United States, *supra* note 15, Coast Guard authority thereunder appears geographically exhausted by the term "high seas." Had Congress anticipated extending the authority to conduct searches into foreign territorial waters, it could have indicted it in more explicit terms.

22. *Supra* note 18.

23. *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977), involved the reversal of a conviction of an American citizen for violating the Marine Mammal Protection Act of 1972

sion to pass through Haitian waters, section 89(a) of title 14 of the United States Code does not automatically apply. Rather, section 89(a) extends only so far with respect to the "high seas" as expressed in its terms.

A more concrete ground for extension of the authority to search extraterritorially is barely recognized by the court: the Haitian Chief-of-Staff's explicit, oral authorization of the pursuit of the *Nahoa* amounted to consent to a Coast Guard search in Haitian waters.[24] The court gave only nominal weight to this, which was possibly the most sound basis for authority available.[25]

Authority for the Coast Guard's mere presence in Haitian waters is secure under Article 14 of the Convention. However, authority for the Coast Guard's exercise of police activities, based solely on its presence and an "implicit recognition by the United States Government of the power of its warship to make the search,"[26] creates an unreliable precedent in the area of the law of the sea. In a similar situation, where express consent to an extraterritorial detention and search is withheld, courts will be hard-pressed to apply the *Conroy* decision and rationale. Rights of innocent passage are not

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by capturing dolphins within the three-mile limit of the Commonwealth of the Bahamas. That legislation was held to extend authority to control the behavior of American citizens to the high seas, but not to the territory of other nations. A presumption is raised against extraterritorial application of a statute, the nature of which does not mandate extraterritorial application. This presumption is overcome by a clear showing of congressional intent. *Id.* at 1002.

The *Conroy* court confidently relies on Justice Brandeis' closing to his concurrence in *United States v. Maul* as authority to search into foreign territorial waters. Examination of the *Maul* decision indicates that the Justice's opinion suggests authority to search "no matter what the place of seizure." Maul v. United States, 274 U.S. 501, 531 (1927). However, his concurrence *in toto* considers only the high seas, not expressly the territorial waters of a foreign sovereign. Consequently, the "high seas" terminology of 14 U.S.C. § 89(a) does not clearly indicate the broader congressional intent found in the *Conroy* court's holding, as required by the *Mitchell* standards.

24. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 44(1)(b) (1965).

25. The court found authority to conduct the extraterritorial search by essentially relying on one provision of the Convention: the "implicit authorization for its warships to do what the warships of other nations might do," derived from Article 14 of the Convention. 589 F.2d at 1268. No authority is given for this interpretation of warship operations under the Convention.

Yet stricter scrutiny is invited by the court's suggestion that, even without such implicit Coast Guard authority, the defendants had no case. Absent the implicit authority mentioned, the court "would still be compelled to conclude that the defendants cannot assail the legality of their seizure . . . . [R]edress for improper seizure in foreign waters is not due to the owner or crew of the vessel involved, but to the foreign government whose territoriality has been infringed by the action." The Richmond, 13 U.S. (9 Cranch) 102 (1815).

26. 589 F.2d at 1268.

readily reshaped to mandate an exercise of foreign police activity, the authority for which hangs by a thread of tenuous legislative guidance.

William Little

INTERNATIONAL BANKING — REPUDIATION OF CONTRACT AND ENFORCEMENT OF LETTER OF CREDIT AGREEMENTS — AMERICAN BELL INTERNATIONAL, INC. v. THE ISLAMIC REPUBLIC OF IRAN, BANK IRANSHAHR, AND MANUFACTURERS HANOVER TRUST COMPANY

The recent political upheaval in Iran has created multifarious problems between the Islamic Republic, the new governing force in Iran, and American multinational corporations holding contracts with the deposed Imperial Government. The results of these conflicts are beginning to reach our courts. The ensuing litigation will determine, within the context of banking agreements, important legal issues between the principles and their respective banks. Corresponding considerations involve the enforcement of contractual obligations in a modern world pervaded with the intractable political problems of individual states. These considerations are acquiring important legal precedential status in the international spectrum.

Recently, a federal district court[1] applied the *Caulfield* criteria[2] to deny a preliminary injunction to enjoin a bank from paying the amount demanded under a Letter of Credit. The importance of this decision is enhanced by the fact that the Iranian government was both the party demanding payment under the Letter of Credit and

1. American Bell International, Inc. v. The Islamic Republic of Iran, Bank Iranshahr and Manufacturers Hanover Trust Company, No. 79-3904 (S.D.N.Y. Aug. 4, 1979) [hereinafter cited as *Bell*].

2. Caulfield v. Board of Education, 583 F.2d 605 (2d Cir. 1978). In *Caulfield*, the United States Court of Appeals, Second Circuit, recently clarified the standard for issuance of a preliminary injunction. The *Caulfield* case concerned a federal district court's denial of a preliminary injunction to enjoin the mandatory answering of ethnic questionnaires. In denying the plaintiff's motion, the *Caulfield* court made no findings of fact or conclusions of law. *Id.* at 610.

The court in the *Bell* case made findings of fact and law concerning probable success on the merits and the seriousness of the litigation. *Bell, supra* note 1.

the party whose breach of contract made the demand callable. The case raises serious questions with respect to the future involvement of American companies in the more unstable nations of the world. The decision may have the impact of deterring involvement by American companies otherwise willing to invest substantial funds and effort to contract with foreign governments. The fear that American courts will apply nebulous balancing standards that may impair these companies' equitable and contractual rights may have a chilling effect on dealings with foreign states. The recent decision affecting American Bell International, Inc. demonstrates this problem.

On July 23, 1978, plaintiff American Bell International, Inc.,[3] entered into a contract with the Imperial Government of Iran to provide consulting services and advanced equipment to develop Iran's nationwide telecommunications system. The contract provided for a total payment of $280,000,000 to Bell, including a down payment of $38,800,000. The down payment was callable upon demand by the Imperial Government with a 20 percent deduction of the amounts invoiced by Bell. At the date of the subsequent breach, $30,200,000 of the down payment remained callable. Under the terms of the contract, Bell was required to secure an unconditional and irrevocable Letter of Guaranty[4] for $38,800,000, to be issued by the defendant Bank Iranshahr to the Imperial Government of Iran.[5] In return for issuing a Letter of Guaranty to Bell, Bank Iranshahr required Bell to obtain a standby Letter of Credit[6] in favor of Bank Iranshahr in the amount of $38,800,000. The Letter of Credit was issued by defendant Manufacturers Hanover Trust Company.[7]

3. Bell is a wholly owned subsidiary of American Telephone & Telegraph Company.

4. A Letter of Guaranty is generally defined as a collateral promise or undertaking by one person to answer for the payment of some debt or the performance of some duty (in case of default) of another person liable therefore in the first instance. Cargill, Inc. v. Buis, 543 F.2d 584 (7th Cir. 1976).

5. The parties agreed to submit to the jurisdiction of the Iranian courts to settle any disputes arising out of the contract.

6. A Letter of Credit primarily provides an assurance to the selling party of prompt payment against documents. It defines the terms of conditions upon which, and only upon which, the payment will be made, and which, within the strict limits of those terms and conditions, engages the full primary responsibility of the bank to make payment. Venizelos, S.A. v. Chase Manhattan Bank, 425 F.2d 461, 464 (2d Cir. 1970). For a good general discussion of how a Letter of Credit agreement operates in the sphere of international banking, American East India Corp. v. Ideal Shoe Co., 400 F. Supp. 141 (D.C. Pa. 1975). In *Bell*, the Letter of Credit was required to secure reimbursement to Bank Iranshahr if it was required to pay the Iranian Government under its Letter of Guaranty.

7. The standby Letter of Credit provided for payment by Manufacturers Hanover to Bank Iranshahr upon receipt of the following:

Bell commenced performance under the contract, providing services and equipment pursuant to its obligations.[8] In January 1979, the Islamic Republic overthrew the Imperial Government. This resulted in a repudiation of all contractual obligations by Iran and left Bell with substantial unpaid invoices for services rendered. Bell subsequently ceased performance and on February 16, 1979, brought an action[9] against Manufacturers Hanover in the Supreme Court, New York County, seeking a preliminary injunction prohibiting Manufacturers Hanover from honoring any demand for payment under the Letter of Credit. The motion was denied on March 26, 1979 and was unanimously affirmed by the Appellate Division, First Department.

On August 1, 1979, Manufacturers Hanover notified Bell that a conforming demand[10] had been received. The following text is an examination of the decision rendered by the United States District Court, Southern District of New York, denying Bell's new motion for a preliminary injunction.

The court decided this motion in light of the tests set forth in *Caulfield v. Board of Education.*[11] The court in *Caulfield* held that there must be "a showing of possible irreparable injury *and* either

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> Your [Bank Iranshahr's] dated statement purportedly signed by an officer indicating name and title or your Tested Telex Reading: (A) 'Referring Manufacturers Hanover Trust Co. Credit No. SC170027, the amount of our claim $ represents funds due us as we have received a written request from the Imperial Government of Iran Ministry of War to pay them the sum of under our Guarantee No. issued for the account of American Bell International, Inc. covering advance payment under Contract No. 138 dated July 23, 1978 and such payment has been made by us' . . . .

Bell, *supra* note 1, slip op. at 3.

In the application for the Letter of Credit, Bell agreed immediately to reimburse Manufacturers Hanover for all amounts paid by Manufacturers Hanover to Bank Iranshahr pursuant to the Letter of Credit. *Id.*

8. The evidence presented to the court indicated that Bell sent numerous invoices for services and equipment, but had received only partial payment at the time it ceased performance. *Id.*

9. Bell brought its action before a demand had been made by Bank Iranshahr for payment under the Letter of Credit. *Id.* at 4.

10. On July 25 and 29, 1978, Manufacturers Hanover received demands by Tested Telex from Bank Iranshahr for payments of $30,220,724 under the Letter of Credit, the remaining balance of the down payment. Asserting that the demand did not conform with the Letter of Credit, Manufacturers Hanover declined payment and so informed Bank Iranshahr. Informed of this, Bell responded by filing this action and an application, by way of order to show cause, for a temporary restraining order, engendering this motion for a preliminary injunction. Following argument, the court granted a temporary restraining order on July 29th enjoining Manufacturers Hanover from making any payment to Bank Iranshahr until forty-eight hours after Manufacturers Hanover notified Bell of the receipt of a conforming demand, and the order extended pending decision of this motion. *Id.*

11. 583 F.2d 605 (2d Cir. 1978).

(1) probable success on the merits *or* (2) sufficiently serious questions going to the merits to make it fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief."[12]

First, the court considered whether Bell would be suffering irreparable injury if no preliminary injunction was granted to enjoin Manufacturers Hanover from paying on the Letter of Credit.[13] The court considered two contentions[14] in rendering its decision and found for the defendants in both instances. Bell asserted that it had no effective remedy or legal recourse if payment was made because it must institute suit in Iran pursuant to the jurisdictional agreement by the contracting parties.[15] This, Bell claimed would result in a hopeless submission to Iranian law as interpreted by Iranian courts.[16] The court recognized the fact that Iranian authorities had reached a zenith of anti-American fanaticism and the likelihood[17] that an Iranian court would objectively uphold an American multinational corporation's contract rights against the state was incredibly remote.[18] The court held, however, that Bell failed to demonstrate that it was without adequate remedy under the Foreign Sovereign Immunity Act.[19] In so holding, the court did not discuss

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12. *Id.* at 610.

13. *See Bell, supra* note 1, slip op. at 5.

14. Bell only claimed that it would be precluded from suing in Iranian courts. It did not assert that it would be unable to sue Manufacturers Hanover in American courts. The court notes that Bell's failure to show why it would be prevented from suing Manufacturers Hanover, for violation of the Letter of Credit, in American courts constitutes insufficient grounds for a proper showing of irreparable injury. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *See* Stromberg-Carlson Corp. v. Bank Melli, No. 79-1167 (S.D.N.Y. Mar. 23, 1979) for a general appraisal of the current situation in Iran and the effect it is having on American companies' assertion of contract rights with Iranian entities.

19. 28 U.S.C. § 1605(a)(2) (Supp. 1979) provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

. . . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1610(b)(2) (Supp. 1979) provides:

(b) [A]ny property in the United States of an agency of instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment

the probable outcome if the decision had been rendered against the Iranian state. Ordering Iran to repay the funds received under the Letter of Credit, following a successful suit by Bell in the American courts, would arguably present problems similar to the admittedly futile act of bringing suit in the Iranian courts. Manufacturers Hanover, having lost to Bell in an American court, would be forced to sue Iran to recover its loss, thus encouraging the very kind of international problem that the district court was trying to avoid.[20]

The court, having concluded that Bell failed to demonstrate irreparable injury,[21] turned to the second[22] *Caulfield* test to determine if grounds existed for granting the preliminary injunction. Under that test, the plaintiff must have shown, by a preponderance of the evidence, that either a demand for payment on Manufacturers Hanover's Letter of Credit had not been made,[23] or that the demand, although in conformity, should not be honored because of fraud[24] in the transaction. The court effectively precluded granting

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entered by a court of the United States or of a State after the effective date of this Act if—

. . . .

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of § 1605(a)(2), (3), or (5), or § 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

20. *Bell, supra* note 1, slip op. at 5.

21. *Id.*

22. *Caulfield* requires a plaintiff, upon failing in his attempt to show irreparable injury, to demonstrate probable success on the merits. 583 F.2d at 610.

23. This requirement concerns whether the demand is in strict conformity with the Letter of Credit. For a general discussion of strict conformity, see 425 F.2d at 465.

See Bell, supra note 1, slip op. at 6, which sets forth the facts upon which the court dispenses with the discrepancy between the amount in the demand and in the Letter of Credit. The court found the dissimilarity between the named beneficiaries on the two documents to be irrelevant. *Id.* at 7.

The court dismissed any contention that the new Iranian Government had any right to demand payment under a Letter of Guaranty, payable only to its predecessor, by setting forth the long-held proposition that American courts traditionally view contract rights as vesting not in any particular government, but in the state for which that government is an agent. Furthermore, the United States Government has officially recognized the Peoples Islamic Republic as the legal successor to the Imperial Government of Iran, a recognition binding on American courts. *See* Guaranty Trust Co. v. United States, 304 U.S. 126, 137-38 (1938).

The court speculated that probable chaos would result if American courts commenced finding nonconformity in international financial agreements only because the incumbent government of a foreign state changed in makeup or ideology. *Bell, supra* note 1, slip op. at 7.

24. The court dismissed Bell's contention that the Iranian Government perpetrated a fraud by repudiating the contract and subsequently demanding enforcement of the Letter of Guaranty, thereby tainting the Letter of Credit called by Bank Iranshahr. The grounds for dismissal rested on the law of contract damages and the requirement of proof of fraudulent

of the preliminary injunction on the grounds of nonconformity or fraud, and left Bell with the third and final basis on which to seek injunctive relief.

Under the third alternative test of *Caulfield*, a plaintiff may seek a preliminary injunction on the grounds that (1) sufficiently serious questions going to the merits make them a fair ground for litigation,[25] and (2) the balance of hardship tip decidedly toward the plaintiff.[26] It is the court's analysis of this third basis which raises some interesting considerations concerning the potential effect on future economic involvement in politically volatile countries. Here, the court applied a balancing test before holding that the admittedly serious and complex hardships involved did not tip against the plaintiff Bell.[27] The court reasoned that Bell was a large and sophisticated multinational corporation aided by competent counsel. Bell, well aware of the intricacies of international business agreements, voluntarily signed a contract with the Iranian Government allowing Iran to recoup the down payment on demand without regard to cause. Iran merely had to call the Letter of Guaranty to effectuate the banking process which ultimately required Manufacturers Hanover to pay Bank Iranshahr the down payment upon receipt of the conforming documents[28] without regard to cause. The court extended its balancing test by listing the potential benefits[29] which would have accrued to Bell upon completion of the contract. The court did not consider the fact that, because of a breach of the contract by the Iranian Government, none of the potential benefits

intent. The court noted that absent proof that Iran would refuse to pay damages upon breach of contract, it would not presume fraudulent intent. The court observed that the law of contract damages presumes that one who repudiates has done so because of a calculation that such damages are cheaper than performance. This would constitute a nonfraudulent economic calculation by the Iranian Government to reclaim its down payment regardless of the reason or consequences. The court held that this was nonfraudulent conduct. *Bell, supra* note 1, slip op. at 10.

25. *Id.* at 11.

26. *Id.*

27. The court conceded that Bell would probably lose $30,200,000 guaranteed in the Letter of Credit, but countered it with the potential risks of Manufacturers Hanover. Those risks include the possibility of being sued by Bank Iranshahr and having $30,200,000 of its assets in Iran attached to guarantee payment, the possibility of consequential damages, the possibility that an irate Iranian Government may order its banks to attach all Manufacturers Hanover's assets within Iran far above the amount in suit, and a loss of credibility in the international money and banking community by failing to execute a valid Letter of Credit. *Id.*

28. *Id.* at 12.

29. The court stated that Bell stood to gain a large monetary profit from the contract itself and an economic benefit commensurate with the international goodwill elicited by designing and installing a nationwide telecommunications system. *Id.*

were actually realized by Bell. Bell's loss was described as an instance where "one who reaps the rewards of commercial arrangements must also accept the burdens."[30] One of the burdens was the risk that they would lose the down payment without cause. As a consequence of having found that all the equitable considerations weighed against Bell, the court refused to grant a preliminary injunction. The court reached their decision knowing that both Bell and Manufacturers Hanover were innocent victims[31] of international events beyond their control and that neither was guilty of any breach under the contract—a contract repudiated without cause by the new Iranian Government. The district court's decision and corresponding analysis merit careful consideration. Finally, in the legal context, the long-range effect of the holding on American companies' international business ventures in unstable countries warrants a watchful eye.

John D. Bouchard

30. *Id.*

31. The court readily admitted Bell's total noncomplicity in any wrongdoing or breach under the contract. *Id.*

BOOK REVIEW

MANUAL ON SPACE LAW, Compiled and Edited by Nandasiri Jasentuliyana and Roy S.K. Lee, Dobbs Ferry, New York: Oceana Publications, Inc., Alphen Aan Den Rijn: Sijthoff & Noordhoff, 1979. Vol. I: Pp. xv, 479; Vol. II: Pp. xii, 550.

Jasentuliyana's and Lee's MANUAL ON SPACE LAW consists of two volumes totaling over 1000 pages of texts and documents. Volume I is divided into two parts, dealing respectively with "principles of space law," i.e., the ten existing or emerging international space law agreements, and with "space agencies and institutions." Volume II contains the texts of existing or draft international agreements in the field of space law, accompanied, where applicable, by a list of ratifications, signatures, accessions, a list of references to *travaux préparatoires* and a selected bibliography.

Essentially Volume I is made up of contributions by individual authors, all with an excellent reputation in the field of space law or international law in general, and amongst whom many were closely involved in the actual drafting of the international agreements which they discuss.[1] As noted in the *Foreword* by Manfred Lachs, Judge in the International Court of Justice and an eminent authority in the field of space law,[2] the MANUAL ON SPACE LAW is an "achievement in itself."[3] With clarity and precision the authors discuss the existing status of what is now generally called the *"corpus juris spatialis,"* as it stands some ten years after the signing of the 1967 Outer Space Treaty,[4] the charter of international space law. On purpose the two editors have kept editorial changes in the individual contributions to a minimum.[5] With the high quality of the articles in question, this editorial policy does in no way diminish the value of the MANUAL ON SPACE LAW. What is regrettable, however, is that the editors have not seen it fit to write a more elaborate preface or an introductory chapter to volume I. The reader is, as it

1. *Contributors* to 1 MANUAL ON SPACE LAW xv. (N. Jasentuliyana & R. Lee eds. 1979) [hereinafter cited as MANUAL ON SPACE LAW].

2. Manfred Lachs is the author of THE LAW OF OUTER SPACE (1972) and is a former president of the International Court of Justice.

3. Lachs, *Forward* to 1 MANUAL ON SPACE LAW xi.

4. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *done* Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. 6347, 610 U.N.T.S. 205 (effective Oct. 10, 1967) (text reproduced at 2 MANUAL ON SPACE LAW 1) [hereinafter cited as Outer Space Treaty].

5. Jasentuliyana & Lee, *Preface* to 1 MANUAL ON SPACE LAW xiii.

were, plunged into the details of the individual subjects without an adequate overall introduction to the general development of international space law and its institutions.

Chapters I to IV of volume I contain largely descriptive studies of the four international space law agreements to date, which have been drawn up within the United Nations framework. All four instruments are based upon, and elaborate upon, the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space Resolution, adopted by the United Nations General Assembly in 1963.[6] The Outer Space Treaty, opened for signature in 1967, is discussed in chapter I[7] by Dembling. Readers can benefit from the author's intimate knowledge of the drafting history and the contents of the Outer Space Treaty, often called the cornerstone of international space law. No doubt the two most important principles enunciated by the treaty are:

a) that outer space, including the Moon and other celestial bodies shall be free from exploration and use by all States;[8] and
b) that no weapons of mass destruction shall be placed in earth orbit, in outer space and on celestial bodies.[9]

Amongst the other provisions of the treaty, many anticipate upon the three remaining United Nations space law agreements, which would be adopted subsequently.[9.1] As noted by Dembling in his conclusion, the basic weakness of the treaty is the generality of its terms leaving "much to interpretation by the parties."[10]

In chapter II,[11] Lee, one of the two editors of the MANUAL ON SPACE LAW, discusses the 1968 Agreement on Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched Into Outer Space.[12] After an analysis of this largely technical instrument,

6. G.A. Resolution 1962, 18 U.N. GAOR Supp. (No. 15) 15, U.N. Doc. A/5515 (1963) (text reproduced at 2 MANUAL ON SPACE LAW 373).

7. Dembling, *Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, in 1 MANUAL ON SPACE LAW 1.

8. *Id.* at 9-12.

9. *Id.* at 12-15.

9.1. Since the publication of the *Manual on Space Law* and the writing of this comment the U.N. Committee on the Peaceful Uses of Outer Space (COPUOS) has finalized a draft Moon Treaty.

10. *Id.* at 35.

11. Lee, *Assistance to and Return of Astronauts and Space Objects*, in 1 MANUAL ON SPACE LAW 53.

12. Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of

the author concludes, amongst other things, that the agreement ought to be amended so as to require "launching authorities to make notification of spacecraft which is about to return to earth prematurely."[13] Such an amendment could be useful in a case such as that of Cosmos 954, which reentered the earth's atmosphere and crashed in the Canadian Northwest Territories in January 1978.[14]

The third United Nations space law treaty, the Liability Convention of 1972,[15] is dealt with at great length by Cheng in chapter III.[16] The main feature of this agreement is the principle of absolute liability of states for damage caused on earth by space objects. With his usual lucidity, Cheng, an outstanding specialist in both the fields of air and space law,[17] gives an excellent appraisal of the convention. As a postscript and as alluded to by Cheng,[18] the abovementioned crash of Cosmos 954 in Canada will be the first practical test to which the Liability Convention is put.[19] The fourth and last United Nations agreement,[19.1] the Registration Treaty of 1975,[20] a largely technical instrument, is rather briefly discussed in chapter IV[21] by Cocca of Argentina, who for many years has been associated with the works of the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS).

Chapters V and VI of volume I deal with a number of international instruments in the field of space telecommunications, which have been agreed upon outside the United Nations framework. In chapter V editor Jasentuliyana describes the detailed regulatory

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Objects launched into Outer Space, *done* April 22, 1968, 19 U.S.T. 7570, T.I.A.S. 6599, 672 U.N.T.S. 119 (effective Dec. 3, 1968) (text reproduced at 2 MANUAL ON SPACE LAW 9).

13. Lee, 1 MANUAL ON SPACE LAW 73.

14. *Id.; see* Haanappel, *Some Observations on the Crash of Cosmos 954*, 6 J. SPACE L. 147 (1978).

15. Convention on International Liability for Damage Caused by Space Objects, *done* March 29, 1972, 24 U.S.T. 2389, T.I.A.S. 7762 (effective Oct. 9, 1973) (text reproduced at 2 MANUAL ON SPACE LAW 13) [hereinafter cited as the Liability Convention].

16. Cheng, *International Liability for Damage Caused by Space Objects*, in 1 MANUAL ON SPACE LAW 83.

17. Bin Cheng is the author of THE LAW OF INTERNATIONAL AIR TRANSPORT (1962) and is the Professor of Air and Space Law at London University and the Chairman of the Air Law Committee on the International Law Association.

18. Cheng, 1 MANUAL ON SPACE LAW 84.

19. *See* Dept. of External Affairs, *Canadian Statement of Claim*, Communiqué 8, Doc. FLA-268, Jan. 23, 1979.

19.1. See, *supra*, footnote 9.1.

20. Registration of Objects Launched into Outer Space, *opened for signature* Jan. 14, 1975, 28 U.S.T. 695, T.I.A.S. 8480 (effective Sept. 15, 1976) (text reproduced at 2 MANUAL ON SPACE LAW 23) [hereinafter cited as the Registration Treaty].

21. Cocca, *Registration of Space Objects*, in 1 MANUAL ON SPACE LAW 173.

work of the International Telecommunications Union (I.T.U.) and its World Administrative Radio Conferences (WARC) in the field of the "judicious control of the radio spectrum and the international standardization of frequency allocation."[22] In the following chapter Schulze discusses the 1974 Brussels Convention on the Distribution of Programme-Carrying Signals Transmitted by Satellite,[23] reached within the framework of the World Intellectual Property Organization (WIPO).[24] This convention is essentially aimed at copyright protection but, unfortunately, does not cover broadcasts by so-called direct broadcast satellites.[25]

Chapters VII to IX of volume I are individual studies of three subjects which have been on the working program of the United Nations COPUOS for many years, but on which the international communty has, as yet, not been able to reach agreement with a view to drafting conventions. These subjects are: legal principles relating to the moon,[26] to direct satellite broadcasting,[27] and to romote sensing of the earth by satellites.[28] Perhaps a coincidence, the contributions to the MANUAL ON SPACE LAW on these three subjects are all Canadian ones. Matte,[29] director of McGill University's Institute of Air and Space Law, and Vlasic,[30] former director of that institute, write on, respectively, the Draft Moon Treaty[31] and principles relating to remote sensing of the earth by satellites. Dalfen, Vice-Chairman of the Canadian Radio-Television and Telecommunications Commission (CRTC), writes on direct broadcast satellites. All three authors refer to the present stalemate within COPUOS regarding these important subjects. With respect to the Draft Moon

22. Jasentuliyana, *Regulations Governing Space Telecommunication*, in 1 MANUAL ON SPACE LAW 195, 195.

23. Convention Relating to the Distribution of Programme-Carrying Signal Transmitted by Satellite, *done* May 21, 1974 (text reproduced at 2 MANUAL ON SPACE LAW 87).

24. Schulze, *The Distribution of Progamme-Carrying Signals Transmitted by Satellite*, in 1 MANUAL ON SPACE LAW 239.

25. *Id.* at 245-46.

26. Matte, *Legal Principles Relating to the Moon*, in 1 MANUAL ON SPACE LAW 253.

27. Dalfen, *Direct Satellite Broadcasting*, in 1 MANUAL ON SPACE LAW 283.

28. Vlasic, *Remote Sensing of the Earth by Satellites*, in 1 MANUAL ON SPACE LAW 303.

29. Nicholas M. Matte is the author of AEROSPACE LAW (1969) and AEROSPACE LAW FROM SCIENTIFIC EXPLORATION TO COMMERCIAL UTILIZATION (1977), and is Director of the Centre of Research of Air and Space Law of McGill University.

30. Vlasic is a co-author of M. McDougal, H. Lasswell, and I. Vlasic, LAW AND PUBLIC ORDER IN SPACE (1963), and is a Professor of Law at McGill University.

31. Draft Treaty Relating to the Moon, U.N. Doc. A/AC.105/196 Annex I (April 11, 1977) (text reproduced at 2 MANUAL ON SPACE LAW 93) [hereinafter cited as the Draft Moon Treaty].

Treaty the question of the utilization of the moon's natural resources is the stumbling block;[32] for direct satellite broadcasting, it is the conflict between the principle of freedom of information and State sovereignty over radio and television broadcasts;[33] and for remote sensing of the earth by satellites, it is the problem of national sovereignty over information relating to natural resources.[34]

The last chapter of part one of volume I, chapter X, gives a survey of the numerous bilateral cooperation agreements between States in the field of space activities.[35] Most of these agreements were concluded between the United States[36] and the Soviet Union[37] on the one hand and third countries on the other. The chapter was written by Hosenball, General Counsel of the National Aeronautics and Space Administration (NASA).

Reviewing part one of volume I as a unity, one misses separate chapters on at least three topics which have recently attracted a great deal of attention in the world community: the status of the equatorial geostationary orbit, used by most communication satellites and over which eight equatorial countries now claim sovereignty.[38] Also missing are chapters on the boundary between air space and outer space, and on the advent of solar energy satellites. The latter subject is quite new. The former is old and had become almost forgotten until, in 1978, the Soviet Union proposed an international agreement fixing the lower limit of outer space at 100 kilometers above sea level.

Part two of volume I deals with "space agencies and institutions." Chapters XI,[39] XII,[40] XV,[41] and XVI,[42] written by Colino,[43]

32. Matte, 1 MANUAL ON SPACE LAW 264-70. See, also *supra* footnote 11.1.

33. Dalfen, 1 MANUAL ON SPACE LAW 296.

34. Vlasic, 1 MANUAL ON SPACE LAW 319-24.

35. Hosenball, *Bilateral Agreements*, in 1 MANUAL ON SPACE LAW 347.

36. *Id.* at 347-51.

37. *Id.* at 351-54.

38. For the declaration of these eight countries, the so-called Bogota Declaration, see *Declaration of the First Meeting of Equatorial Countries*, in 2 MANUAL ON SPACE LAW 383. For a discussion of the geostationary orbit within the framework of the I.T.U., see Jasentuliyana, 1 MANUAL ON SPACE LAW 220-23.

39. Colino, *International Telecommunications Satellite Organization (INTELSAT)*, in 1 MANUAL ON SPACE LAW 363.

40. Kolossov, *International Organization of Space Communications (INTERSPUTNIK)*, in 1 MANUAL ON SPACE LAW 401.

41. Jasentuliyana, *The International Maritime Satellite System (INMARSAT)*, in 1 MANUAL ON SPACE LAW 401.

42. Gorove, *The Arab Corporation for Space Communications (ARABSAT)*, in 1 MANUAL ON SPACE LAW 467.

43. Richard R. Colino is Vice-President and Manager of INTELSAT.

Kolossov,[44] Jasentuliyana,[45] and Gorove,[46] respectively, describe four international organizations in the field of space telecommunications: INTELSAT, the space telecommunications organization of the western world; INTERSPUTNIK, its eastern counterpart; INMARSAT, a specialized organization for maritime space telecommunications; and ARABSAT, an emerging regional telecommunication satellite organization amongst the member nations of the Arab League. Of these four organizations, the Washington-based INTELSAT is definitely the most important and largest one. Chapters XIII[47] and XIV,[48] written by Vereshchetin[49] and Kaltenecker,[50] discusses two regional organizations for space activities in general, the East European INTERCOSMOS and the western European Space Agency (ESA). Strangely lacking in part two of volume I is a separate chapter on the United Nations COPUOS, which after all is the forum through which most international space law agreements have arisen. A study of COPUOS could have been particularly useful and enlightening at a time when the committee, which so far has worked with a rule of unanimous consent, is unable to reach agreement on such important matters as the Moon Treaty,[50.1] direct satellite broadcasting and remote sensing.

As mentioned earlier, volume II contains the texts of existing or draft international agreements in the field of space law, accompanied, where applicable, by a list of ratifications, signatures, accessions, a list of references to *travaux préparatoires* and a selected bibliography. The list of references to the *travaux préparatories* is especially invaluable.[51] The selected bibliography[52] is thorough, but is in no way a replacement for Li's bibliography.[53] The very recent

44. Yuri M. Kolossov is Legal Adviser to the Ministry of Foreign Affairs of the Soviet Union.

45. Nandasiri Jasentuliyana is Political Affairs Officer of the Outer Space Affairs Division of the U.N. Secretariat and Deputy Secretary of the U.N. Committee on the Peaceful Uses of Outer Space.

46. Stephen Gorove is Professor of Law at the University of Mississippi and Editor-in-Chief of the JOURNAL OF SPACE LAW.

47. Vereshchetin, *Cooperation in the Exploration and Use of Outer Space for Peaceful Purposes (INTERCOSMOS)*, in 1 MANUAL ON SPACE LAW 415.

48. Kaltenecker, *The European Space Agency (ESA)*, in 1 MANUAL ON SPACE LAW 427.

49. Vladlen S. Vereshchetin is Vice-Chairman of INTERCOSMOS.

50. Hans Kaltenecker is the former director of the legal bureau of the European Space Agency.

50.1. See *supra* footnote 9.1.

51. *Travaux Préparatoires*, in 2 MANUAL ON SPACE LAW 455.

52. *Selected Bibliography*, in 2 MANUAL ON SPACE LAW 527.

53. K.W. Li, WORLD WIDE SPACE LAW BIBLIOGRAPHY (1978).

Convention on the Transfer and Use of Data of the Remote Sensing of the Earth From Outer Space[54] stands somewhat alone in the MANUAL ON SPACE LAW, since, because of its very recent date, it is not discussed in volume I.

Overall, the MANUAL ON SPACE LAW is a reflection of existing international space law, and forms with its articles and texts an excellent study book and reference work.

P.P.C. HAANAPPEL*

54. Convention on the Transfer and Use of Data of the Remote Sensing of the Earth From Outer Space, U.N. Doc. A/33/162 (June 29, 1978) (text reproduced at 2 MANUAL ON SPACE LAW 367.

This convention was signed between the Soviet Union and a number of East European countries.

* Associate Professor of Law, McGill University.

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