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Case Concerning a Collision on the High Seas, Belgium v. United States, 1963.

Best Brief

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IN THE INTERNATIONAL COURT OF JUSTICE

BELGIUM v. UNITED STATES

MEMORIAL FOR THE GOVERNMENT OF BELGIUM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treaties and Statutes

Periodicals

Texts and Treatises

JURISDICTION

The plaintiff Belgium and the respondent the United States of America have agreed to refer this dispute to the International Court of Justice under Article 36-1 of the Statute of the Court for decision in accordance with the function of the Court set out in Article 38-1 of the Statute. Article 38-1 directs the Court to decide disputes in accordance with international law, applying (a) "international conventions," (b) "international custom, as evidence of a general practice accepted as law," and (c) "the general principles of law recognized by civilized nations."

STATEMENT OF FACTS

S.S. Alpha of British flag, registry, and ownership and M/S Beta of Belgian flag, registry, and ownership collided in fog twenty nautical miles off the East Coast of the United States. Alpha was worth $30,000,000 and was a total loss. Beta had a fair value of $15,000,000 and was damaged $1,000,000. Beta was towed to a United States port and thereafter libelled in rem in a United States District Court sitting in Admiralty by the owners of cargo carried on Alpha for the value of their cargo, $15,000,000, lost with that vessel. The cargo owners are Canadian nationals. Beta's motion to dismiss on the ground of forum non conveniens was denied. At the trial before the Federal Court in Admiralty, Beta contended that the court should apply the Maritime (Brussels Collision) Convention of 1910. Instead the American court, although finding that Beta was only 1/5th at fault for the collision, applied the United States' "equal division" rule of damages and its rule of joint and several liability, which, in combination, had the effect of compelling Beta to pay the cargo claimants $15,000,000 plus costs,

though Beta's owners would have had to pay but $3,000,000 if the Brussels Convention proportional damages rule had been applied. The Brussels Convention has been accepted by Canada, Belgium, Britain and all the major seafaring nations of the world with the sole exception of the United States.

After review of the United States precedents, American counsel for Beta decided not to appeal, and time for appeal has now expired. Beta's owners paid the cargo claimants the full sum of the judgment and then attempted to recover 4/5ths of the total paid out by means of proceedings in the United Kingdom against Alpha's owners, but lost.

The Belgian Government protested the American decision to the Department of State, but the protest was rejected on the grounds (i) that internally the matter was entirely within the competence of the national judiciary under the Constitution of the United States, and (ii) that no violation of international law was involved.

The Belgian Government replied proposing that the second contention in the United States note be referred to the International Court of Justice. The United States agreed to this course, accepting jurisdiction under Articles 36 and 38 of the Statute of the Court.

QUESTIONS PRESENTED

I. Whether the Belgian shipowners' decision not to appeal the judgment of the United States District Court bars -- on the ground that local remedies were not exhausted -- the Belgian government from prosecuting this action?

II. Whether the action of the United States District Court in applying its own law to the determination of liability in a collision on the high seas between ships of different flags, where all the parties adhere to

an international convention imposing upon them a rule different from that of the forum is contrary to:

(a) international custom, as evidence of a general practice accepted as law, or

(b) the general principles of law recognized by civilized nations,

and is therefore a violation of international law?

ARGUMENT

I

IT IS NOT APPROPRIATE THAT THE DOCTRINE OF EXHAUSTION OF LOCAL REMEDIES BE EMPLOYED IN THIS CASE TO BAR THE ACTION.

A. If the substantive contentions of the Government of Belgium are accepted, then it will have been established that the United States did not have a sufficient interest in the original transaction to have any basis for applying its own law, and perhaps should not have accepted jurisdiction at all. It would follow that America did not have sufficient interest in any right to require that the action be continued in the United States courts and decided according to United States law. As Doctor Meron, Legal Advisor to the Israeli Foreign Office, has put it, the requirement of exhaustion of local remedies comes into play only when the forum state has a "genuine link" with the transaction, Meron, "The Incidence of the Rule of Exhaustion of Local Remedies," 35 Brit. Y.B. Int'l L. 83, 96 (1959). The argument that there was no "genuine link" is ultimately an issue of international law, not American law, and therefore should be settled here, not on appeal in the United States.

B. The purposes of the requirement of exhaustion are to protect the interests of a sovereign state and to prevent it from being prematurely labeled unjust. But the United States really has little more than an academic interest in this case. None of its nationals are involved. No reparations are asked of it. Belgium seeks only a declaratory judgment that because the U.S. admiralty court should have dismissed the action or applied the law common to the parties, its decision is contrary to international law and therefore should not have a res judicata effect barring an action by the owners of Beta to recover their money and compel a new trial at which the

proper rule of law would be applied. As Professor Fawcett has said:

> Where the act complained of is a breach both of local law and of an international agreement or customary international law, the rule of the exhaustion of local remedies operates as a procedural bar to an international claim for damages but is not a bar to a claim for a declaratory judgment by an international tribunal that there has been a breach of international law. Fawcett, "The Exhaustion of Local Remedies: Substance or Procedure," 31 Brit. Y.B. Int'l L. 452, 458 (1954). [Emphasis supplied.]

C. Even if the non-exhaustion of local remedies might have been an appropriate issue in this case, it clearly has been waived by the United States Department of State. When the Government of Belgium dispatched a note to the United States protesting the action of the District Court, the State Department replied not by demanding that an appeal be taken but by contending that there had been no violation of international law and agreeing to submit that issue to the International Court of Justice. This case is here upon the voluntary submission of both parties, not upon application of Belgium for exercise of compulsory jurisdiction over the United States as a signatory to the ICJ Treaty. See Article 36 of the Statute of the International Court of Justice. If the United States had wished to assert the failure to exhaust as a procedural or jurisdictional bar, it should have -- as in the Interhandel Case -- refused to appear voluntarily before this Court, thus compelling the Government of Belgium to make application for the exercise of compulsory jurisdiction. Then the United States might have raised its objection, which "must be regarded as directed against the application," Interhandel Case, [1959] I.C.J. Rep. 26.

II

BECAUSE IT IS THE CUSTOMARY PRACTICE OF NATIONS TO APPLY THE LAW COMMON TO THE VESSELS WHERE A COLLISION OCCURS ON THE HIGH SEAS BETWEEN TWO VESSELS OF THE SAME FLAG, OR HAVING THE SAME LAW, APPLICATION OF LOCAL LAW IN THIS CASE IS A VIOLATION OF INTERNATIONAL CUSTOM.

Under Article 38-1(b) of the Statute of the International Court of Justice this Court, in deciding disputes submitted to it, is to apply "international custom, as evidence of a general practice accepted as law."

The Government of Belgium recognizes that in most maritime collision cases, municipal courts taking jurisdiction are free to decide the question of what law should be applied under the municipal law of the forum. Serbian Loans, P.C.I.J. Series A, Nos. 20/21, p. 41 (1935). However, as this Court recognized in that case, the rules of private international law or conflicts of laws "may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States." Ibid.

A. Where two ships colliding on the high seas fly the same flag, it is customary to apply the law of the flag.

Such an international custom having the force of law is found in the practice of nations in applying the law of the flag where the two colliding vessels fly the same flag. Restatement of Conflicts, § 410(a). Bulgaria: C. Marit., art. 189. France: Ripert, 3 Droit Marit. (4th ed.) 19 § 2076; 6 Lyon-Caen et Renault § 1050. Germany: RG. (Nov. 18, 1901) 49 RGZ. 182; RG. (Nov. 12, 1932) 138 RGZ. 243 at 245. Italy: Codice della Navigazione (1942) art. 12. Portugal: C. Comm. art. 674 No. 2. Treaty of Montevideo on Commercial Law (1889) art. 12, sent. 1; Codigo Bustamente, art. 292. This principle has long been recognized by the United States' courts. Dictum from.

The Scotland, 105 U.S. 24, 31 (1881), was applied in The Eagle Point, 142 Fed. 453 (3d Cir. 1906), involving a collision between two British vessels on the high seas. The Court found both vessels at fault in a suit by a cargo owner, and held that the British law of damages would apply rather than the American rule, approving the following statement of the District Court:

> It may often be the case that an act done, or fault committed, upon a vessel upon the high seas, may give rise to a right which has its source only in the law of the flag; and when this is the case, such a right will ordinarily be enforced in the tribunals of another sovereignty, even if the law of the forum differs in this respect. [142 Fed. at 453-4.]

The lower court had held, however, that the British law of damages dealt only with a remedy, which was governed by the law of the forum. In rejecting this rule, the Court of Appeals said:

> The law of Great Britain, in limiting the recovery which may be awarded against either one of two vessels, seems to us plainly to respect a matter of liability or obligation, for it determines the extent of the obligation of each of them. The Belgenland, 114 U.S. 355, 370. [142 Fed. at 454.]

The Court further stated:

> To that [British] law these cargo owners subjected themselves when they placed their goods under the British flag, and though their right to damages as against either vessel was thereby curtailed, their apportioned claim against each of them was still capable of enforcement by methods of procedure which our own laws authorize. [142 Fed. at 454.]

B. Where two ships colliding on the high seas fly different flags, but adhere to the same legal principles, it is customary to apply the law common to the vessels.

Where a collision occurs on the high seas between two vessels of different nations having different laws, an acceptable international rule of choice of law would be difficult to propound and it is clear that there is no generally accepted rule. See 2 Rabel, The Conflict of Laws (2d Ed. 1960) 349. Where, however, the laws of the flags are the same in respect to the

legal rule in question, none of the attendant difficulties of conflicting laws is present and, since no other law is in competition, the application of the law common to the parties is the best possible rule. The acceptance of such a rule by municipal courts can be shown in the cases which have discussed this problem.

The German Reichsgericht, in a case involving a collision on the high seas between a Danish schooner and a Norwegian steamer, considered the question whether the rule of damages common to the laws of Denmark and Norway or the German rule should be applied. 49 RGZ. 182 (1901). After finding both vessels at fault, the Court held that the common Danish-Norwegian rule of damages in both-to-blame collisions should apply, approving the position of the lower court [our translation]:

> . . . the application of the law of the flag is much less the cause for difficulty because of the fact that both of the home laws of the ships, the Norwegian and Danish sea law, are fully identical in respect to damage claims for collisions, so that as a result, neither of the two parties can complain about the application of this law. [49 RGZ. at 184.]

The Reichsgericht further said [our translation]:

> If the ships colliding on the high seas have the same nationality, or disparate nationality, are subject to the same law, then this external reason, which results from the differentness of the laws of the two flags, for the application of the law of the forum is done away with. [49 RGZ. at 186.]

The United States has long recognized that the same policy reasons underlying the application of the law of the flag where both vessels fly the same flag are also applicable where the flags differ but the laws are the same. In The Scotland, supra, the Supreme Court said:

> Perhaps a like claim might be made where the parties belong to different nations having the same system of law. [105 U.S. at 32.]

In The Belgenland, 114 U.S. 355 (1885), the Supreme Court stated the above exception to the application of the general maritime law as understood in

American courts in even stronger language:

> Another qualification is, that if the maritime law, as administered by both nations to which the respective ships belong, be the same in both in respect to any matter of liability or obligation, such law, if shown to the court, should be followed in that matter in respect to which they so agree, though it differ from the maritime law as understood in the country of the forum; for, as respects the parties concerned, it is the maritime law which they mutually acknowledge. The Scotland, 105 U.S. 24, 31. [114 U.S. at 370.]

The obligation of the American courts to apply the foreign law in a case similar to the one at bar was recognized in The Mandu, 15 F. Supp. 627 (E.D. N.Y. 1936), in which the Brussels Convention of 1910 was applied in an action involving a collision between Brazilian and Belgian ships in Brazilian waters. The Court said, ". . . it does not follow that this court is at liberty to refuse to enforce the foreign law here relied upon merely because it differs from the domestic law. . . ." 15 F. Supp. at 629-30.

C. The adherents to the Brussels Convention expected that its provisions would govern this action.

The countries of which all of the parties interested in this collision are citizens, Belgium, Great Britain and Canada, are all signatories or adherents to the Brussels Collisions Convention of 1910. Not only is it just to apply the law common to the parties, but it also fulfills their expectations; for the adherents of the Brussels Convention expressly agreed that in a case such as this the Convention would be applied. Article 12 of the Convention states:

> The provision of this convention shall be applied as regards all persons interested when all the vessels concerned in any action belong to States of the high contracting parties. . . . [Emphasis supplied.]

Under the language of this Article, it would be proper to apply the law common to the vessels regardless of the law of the nationality of the cargo owners, but the fact that Canada has also adhered to the Convention lends

even more compelling force to the application of the Convention rules. Moreover, under Article 1 of the Convention, the damages rule of Article 4 is to apply "in whatever waters the collision takes place." [Emphasis supplied.]

III

BECAUSE THIS CASE FALLS OUTSIDE ANY OF THE JUSTIFICATIONS RECOGNIZED IN THE CONFLICT OF LAWS PRINCIPLES OF CIVILIZED NATIONS FOR THE APPLICATION OF LEX FORI, THE APPLICATION OF LOCAL LAW WAS VIOLATIVE OF A PRINCIPLE OF LAW UNIVERSALLY RECOGNIZED BY CIVILIZED NATIONS: THAT THERE MUST BE SOME REASONABLE JUSTIFICATION FOR THE IMPOSITION OF LOCAL LAW ON FOREIGNERS IN REGARD TO A TRANSACTION THAT OCCURRED OUTSIDE THE JURISDICTION OF THE FORUM STATE.

Under Article 38-1(c) of the Statute of the International Court of Justice this Court is to apply "the general principles of law recognized by civilized nations."

The learned Professor Stowell has said that the duty to "apply the rule identical with that of the foreign jurisdiction is. . .an international obligation which rests upon the state." Stowell, International Law, 299-300 (1931). Even American writers, taking a less extreme view of the extent to which public international law limits national choice of law rules, have said that there is a standard of "reasonableness, comparable to that imposed by the Federal Constitution upon the conflicts of laws rules of the states." Stevenson, "The Relationship of Private International Law to Public International Law," 52 Colum. L. Rev. 561, 579 (1952). Professor Baty has written that choice of law must at least not be "arbitrary or outrageous." Baty, "The Private International Law of Japan," 2 Monumenta Nipponica 54 (1939).

Not only do the needs of the international system of law require that the foreigner "not be the subject of discrimination," but they also call for "fair evaluation of the respective claims of foreign and local law to govern a particular dispute. To this end, choice of law rules are usually

cast in a form that requires the application of any law which has the enumerated connections with the case without regard to whether it be that of the forum or of another state." Cheatham and Reese, "Choice of the Applicable Law," 52 Colum. L. Rev. 959, 963 (1952). The dangers of arbitrary application of forum law were clearly recognized by the United States Supreme Court in Lauritzen v. Larsen, 342 U.S. 571 (1953), where it was said:

> If, to serve some immediate interest, the courts of each [country] were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea. Hence, courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality. It has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations. [345 U.S. at 581.]

In this case the American court exploited a contact -- the fortuitous circumstance that the Belgian ship in distress happened to be towed into an American port because of its proximity to the scene of the collision -- so limited that it is questionable whether as a matter of international law it even gave the American court jurisdiction to entertain the action, see Jessup, The Law of Territorial Waters and Maritime Jurisdiction, 194 (1927) and authorities cited therein, much less to apply American law. Furthermore, it is submitted that an examination of all the justifications that municipal courts have advanced for applying forum law will reveal that the American decision in this case was so arbitrary as to fall short of meeting standards of international law -- no matter how limited those are thought to be.

Only in the following situations can it be said that a justification for the application of lex fori exists:

A. Where local law is assumed to be declaratory of the general rule.

English and American courts have often applied local law to foreign transactions on the ground that the local law either is declaratory of a general rule of law accepted by all nations or is presumed so because of the court's inability to discover what other law to apply. This is clearly not the case here. Counsel at trial argued the applicability of the Brussels Convention. Moreover, American courts have for years recognized the aberrant nature of the United States equal division rule, severely criticizing their country's divergence from the better rule followed by the overwhelming majority of seafaring nations. As it was said in The Hygrade, 250 F. 2d 485, at 488 (3d Cir. 1957), in referring to the effect of the major-minor fault rule on the equal damages rule,

> But to ameliorate the unjust effect of one arbitrary rule by applying another which is equally arbitrary seems hardly the way to promote justice and reach an equitable result. How much better it would be to apply, in cases where it was feasible to do so, a rule of comparative fault analogous to that now applied in the admiralty in cases of personal injuries.
>
> We need to recall in this connection that the United States today stands virtually alone among the great maritime nations in retaining this archaic rule in full vigor.

See also, Tidewater Associated Oil Co. v. The Syosset, 203 F. 2d 264, 268-69 (3d Cir. 1953); Ulster Oil Transp. Co. v. The Matton, No. 20, 210 F. 2d 106, 110 (2d Cir. 1954) (L. Hand, J., dissenting).

B. Where the laws of the parties differ.

A second justification for the application of local law has been that where the laws of the parties differ, it is considered unjust to apply the law of either to the prejudice of the other. See The Scotland, supra, at 30. This is not the case here, as the Brussels Convention proportional damages rule is accepted by the states to which all three parties in interest belong.

C. Where local public policy is paramount.

Local law has often been applied in the furtherance of the public policy of the forum, either because a citizen of the forum is involved or because the forum regards the foreign rule as unjust or immoral. Here no party of the forum is involved. Moreover, in applying the rule of the Brussels Convention to a case between two foreign ships where the collision occurred in Brazilian territorial waters, the American court expressly rejected the argument that the difference between the Brussels and the American rules was "sufficient to warrant the court of the forum to reject the foreign law on the ground that it is violative of a fundamental principle of justice or prevalent conception of morals." The Mandu, supra, at 629-30. This case falls more logically within the language of The Lottawanna, 88 U.S. [21 Wall.] 558, 571 (1874):

> Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with local or municipal law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed -- as, in justice, it should be. [Emphasis supplied.]

D. Where a matter is essentially procedural.

Local law has often been applied in regard to matters that are essentially procedural and that it would be difficult for the forum court to apply effectively. In the Mandu opinion, however, the American judge pointed out, "it is manifest that . . . the measure of damages . . . pertains to the substance of the right, not to the remedy." The Mandu, supra, at 630. That the Brussels Convention is not unduly difficult of administration is evident from The Eagle Point, supra. In this case the American court

actually did determine proportional liability, as do American courts in all cases involving personal injuries at sea, thus illustrating the absence of difficulties in enforcement.

Justice Jackson of the American Supreme Court has said wisely that:

> The purpose of a conflict of laws doctrine is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum. Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable. Lauritzen v. Larsen, supra, at 581.

CONCLUSION

WHEREFORE, the Government of Belgium respectfully submits that the action of the American Court, acting as an instrumentality of the Government of the United States, constitutes a violation of international law.

APPENDIX

Charter of the United Nations. Chapter XIV: The International Court of Justice

Art. 93. 1. All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice.

. . .

Art. 94. 1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

. . .

Statute of the International Court of Justice

Art. 36. 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation.

. . .

Art. 38. 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

. . .

The Brussels Collisions Convention, 1910

Art. 1. Where a collision occurs between sea-going vessels or between sea-going vessels and vessels of inland navigation, the compensation due for damages caused to the vessels, or to any things or persons on board thereof, shall be settled in accordance with the following provisions, in whatever waters the collision takes place.

. . .

Art. 4. If two or more vessels are in fault the liability of each vessel is in proportion to the degree of the faults respectively committed. . . .

The damages caused, either to the vessels or to their cargoes or to the effects or other property of the crews, passengers, or other persons on board, are borne by the vessels in fault in the above proportions, and even to third parties a vessel is not liable for more than such proportion of such damages.

. . .

Art. 12. The provision of this convention shall be applied as regards all persons interested when all the vessels concerned in any action belong to States of the high contracting parties, and in any other cases for which the national laws provide.

. . .

Art. 15. States which have not signed this convention are allowed to adhere to it on request. . . .