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The end to the challenge of jurisdiction clauses in bills of lading by French courts or do old habits die hard?

In this update we draw attention to an important legal issue arising in international maritime commerce where the English and French courts in the past have taken fundamentally different positions. Most English lawyers would not express any particular surprise that a standard clause featuring in a carrier's bill of lading terms providing for all disputes are to be referred to the court of the place where the carrier has his place of business is perfectly valid. But from the perspective of the other side of the Channel the general attitude of the French lawyer will be quite the reverse. Traditionally French law and doctrine have shown great hostility to the validity of jurisdiction clauses appearing in carrier's standard bill of lading terms especially when they require French cargo interests to sue a foreign carrier elsewhere than before their domestic courts. A recent case which brings to a close eight years of litigation between national carrier CMA CGM and Banque Paribas rendered in March 2013 by the French supreme court the Cour de Cassation may, it is hoped by some, put an end to debates on the validity of jurisdictions clauses in bills of lading but that could be wishful thinking.

In its decision in March last year (the second judgment rendered in relation to the same case) the French Cour de Cassation concluded quite succinctly that it is customary in bill of lading contracts, maritime law being a specific branch of international commerce, that the bill of lading contract will include a clause providing that disputes shall be referred to the courts of the place of business of the carrier. The clause in the bill of lading in question was therefore perfectly valid and binding on the bank to whose order the bill of lading had been issued.

The background to the decision is the well known principle set out in article 17 of the Brussels Convention of 1968 on jurisdiction and recognition of judgments in the European Union (now article 23 of the EU Regulation 44/2001) which essentially states that in international commerce an agreement on jurisdiction which is in conformity with the custom of the branch of trade in question will be valid without requiring evidence that the parties have specifically approved the clause in question. In its decision of the 9th November 2011 (Coreck Maritime GMBH v Handelsveem BV) the European Court of Justice held that a jurisdiction clause agreed in a bill of lading contract between a shipper and a carrier will be binding on a third party receiver if the latter succeeds to the rights and obligations of the shipper pursuant to the applicable national law. Logically, where a jurisdiction clause in a form customary for international trade is included in a bill of lading contract then it will be binding on the shipper and also the receiver if the latter succeeds to the rights and obligations of the shipper pursuant to national applicable law. The decision of the European Court of Justice in the Coreck Maritime case has been applied by the French supreme court notably in two important decisions in 2008 (16.12.2008 decision number 1284 CMA CGM v BNP PARIBAS and number 1375 of the same date Deutsche Afrika Linien Gmbh v Dole France). It would then be tempting to conclude that the result is that the French supreme

court considers that maritime commerce is a specific branch of international trade and the insertion of foreign jurisdiction clauses in bills of lading issued by carriers is a well recognized practice in such trade.

This position has not, however, met with universal approval in France and is far from welcome to the French cargo underwriters' community who would much prefer to commence proceedings before their home courts and contest the validity of international jurisdiction clauses in reliance on the traditional approach of its courts which subjects the validity of the clause to evidence that it has been accepted by the shipper or receiver.

There are two important factors which must be understood to comprehend the historic French hostility to the foreign jurisdiction clause. The legal background is the principle of French procedural law that a jurisdiction clause in a contract is essentially a derogation from the right of a French litigant to bring proceedings before his domestic court and therefore requires strict evidence that the party in question has approved and accepted the clause. The social policy background to the dispute is the commercial reality that with the exception of CMA CGM and a few other French shipowners, France is now predominantly a nation of shippers and cargo underwriters who all prefer to bring proceedings before their own courts rather than before the courts of foreign carriers. In the light of those comments it is perfectly understandable that in the past the French courts encouraged by certain legal commentators would normally battle against the enforceability of foreign jurisdiction clauses by insisting that the clause could not be binding on a shipper or receiver absent strict proof that the latter had accepted the clause. Such evidence would normally oblige the carrier to demonstrate the approval of the clause by the signature of the bill of lading by the shipper. This would be a difficult task as everyone knows shippers rarely sign bills of lading in modern times (a French decree of the 12 November 1987 confirmed that shippers are no longer obliged to sign bills of lading...).

From the perspective of any active participant in international maritime trade the suggestion that a shipper or receiver regularly exporting goods was unaware that bills of lading issued by carriers invariably contained jurisdiction clauses requiring proceedings be brought before the courts of the carriers would appear at least highly artificial if not completely at odds with commercial reality. But nonetheless many lawyers acting for French cargo interests persisted undaunted in pursuing proceedings in France in defiance of foreign jurisdiction clauses in bills of lading with the support of more than a few leading commentators and some decisions of the lower courts but increasingly less frequently the higher courts.

So what is the position today? Is it now accepted that following the latest decisions of the French Cour de Cassation a foreign jurisdiction clause in bill of lading which is in a form recognized by the relevant international trade will be binding? The answer is that it is yet far from clear that challenges to jurisdiction clauses appearing in standard bill of lading terms have ceased although the task of persuading the French courts that the jurisdiction clause should not be upheld is becoming increasingly difficult. Old habits die hard.

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