

SABATINO PIZZOLANTE

Circular for P & I Clubs

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Correspondents for:

British Marine Mutual P&I Insurance Association Limited, Through Transport Club, The Charterers Mutual Assurance Association Limited, Dragon P&I and Assuranceforeningen SKULD.

Court Decision held that Foreign Jurisdiction Clause in a Bill of Lading is not enforceable in Venezuela

Contrary to what has been the view held by the Venezuelan Supreme Court of Justice (SCJ) in the last years, a recent decision by this body has ruled that Venezuelan courts have jurisdiction to deal with claims against foreign carriers, this despite the existence of a foreign jurisdiction clause inserted in the bill of lading. It is important to point out that in the past the SCJ in cases of cargo claims, held foreign jurisdiction clauses inserted in bills of lading sufficient as to protect foreign carriers against claims locally brought.

The decision was taken in an action by Seguros Avila as subrogated cargo insurer against CGM, Harrison Line and Royal Mail Line, in connection with the sinking of m.v. "Jans" at the port of la Guaira.

The three carriers, among others defences, contended that the Venezuelan courts lacked jurisdiction based on the existence of a Foreign Jurisdiction Clause in each of the bills of lading, providing that claims under the contract of carriage had to be brought in France and the U.K. The Supreme Court departing from former decisions then argued that in those circumstances where there are connecting factors involving Venezuela, for instance, a Venezuelan receiver or an agent acting on behalf of a carrier, the so-called gravity center theory should apply. Therefore, the Court ruled that unless there has been an express

Venezuelan jurisdiction waiver in the bill of lading, claims against the carrier can be brought before the Venezuelan courts, no matter the existence of a foreign jurisdiction clause.

The implications of this decision are rather worrying for foreign carriers, taking into consideration the lack of experience of local courts insofar as maritime affairs is concerned, as well as time consuming judicial proceedings. It might be expected, on the other hand, that this decision could encourage local cargo receivers and insurers to bring legal actions before domestic courts.

Taking into consideration the importance of this decision for Shipowners/Charterers and others vessel operators, a transcription of the final ruling by the Supreme Court of Justice seems to be appropriate:

FINAL RULING
SEGUROS AVILA, C.A. vs.
THOS & JASHARRISON LTD., AND OTHERS.
(Court File No. 12,379. Ruling No. 815)

“Transport companies sued have demanded submission to foreign jurisdiction, based on competence attribution clauses in each one of the bills of loading held in writs.- Compagnie Generale Maritima (Clause 25), Thos Jas Harrison LTD (Clause 25-2) and Royal Mail Lines LTD (Clause 1-5).

On this matter, it is internationally accepted that bills of loading establish the conditions under which transport of merchandise to port of destiny is to be performed, been such clauses valid "prima facie" and of obligatory performance for the parties in contract. Bill of loading asserts all obligations undertaken by each of the parties and the terms under which these obligations should be fulfilled. Bills of loading, according to international practices (which is the base of maritime law), are written by carrier and signed only by captain or agent, been accepted practice that they are not signed by stevedores, least to say of consignees or the party which holds the right to the shipment. Thereof, such practice, acceptance of terms and conditions of bills of loading on the part of the latter party is perfected, from that same moment when cargo is accepted at side of ship.

Nevertheless, jurisdiction within these terms, should be object of detailed study as this is inherent to territorial sovereignty of each State. In consequence, the Venezuelan State (as it has been admitted by law and doctrine) is enabled to determine, absolutely and unilaterally — disregarding any similar, foreign judicial dispositions or body of laws— and to establish, the limits of its own jurisdiction; and only when the special

case in consideration can be subject to foreign codes of law or regulations without prejudice to said sovereignty may the State decline.

By virtue of above, each dispute should be analysed in respect of all elements involved and each connecting factor such as domicile, place, place of execution, nationality, should not be assessed independently but as a whole, or as a group of particular circumstances by judges, in order to decide accordingly and to the best interest of justice. If, at completion of study, it is determined that jurisdiction corresponds to a different State of that specified in contract-bill of lading, the clause of selection of forum is irrelevant and unacceptable; which in legal doctrine is known as "Gravity Center" theory, a theory specially enforced by courts deciding on maritime cases.

These are the reasons why this Court when, deciding on the validity of this clause of attribution of jurisdiction, must analyse each one of the factors involved in the dispute.

In the present case, there is a marked connection with Venezuelan territory, namely by:

- A) Obligations derived from contract of carriage should have been performed in Venezuela —Puerto Guamache— as this circumstance is vinculating to Venezuelan jurisdiction to judge on filed sue, according to that established in Ordinal 2^{nd.}, Article 53 of Code for Civil Procedure.
- B) Location where loss occurred was the Port of La Guaira, Venezuela, which also vinculates the action to territory, as regards the faculty to produce proof and witnesses necessary to determine damage and responsibilities, and the subsequent indemnification (compensation).
- C) To the effect of procedure, the company H.L. BOULTON is acting as ship agent, that is, as a representative of carrier companies —and this only in virtue of having performed necessary arrangements arising from voyage of vessel— this representation, originally at administrative level, may be projected to judicial grounds where ship agent is enabled to represent them as plaintiff or defendant. Being this ship agent domiciled in Venezuela, we would be in the presence of both parties to the suit—plaintiff and defendant— domiciled in Venezuela, a fact which leads us to conclude that to guarantee access of parties to court and due development of process, Venezuelan jurisdiction would be the competent one to try the present claim, dismissing the possibility that a case, totally connected to Venezuelan territory, may be judged by a foreign jurisdiction on the sole ground that the companies in charge of

carriage are domiciled abroad or that, in virtue of prerogative of carriers in drafting bills of lading —adhesion case if any— this fact may commit judges at the time of assigning jurisdiction.

- D) Finally, in the present case, each one of the bills of lading establishes attribution norms for jurisdiction as in each one of same, competence for legal actions on claims or controversies which might arise from such bills of lading would be taken according to the following rules: 1) At the Commercial Courts in Paris when carrier is the Compagnie Generale Maritime, 2) at Courts of the city of Redhill, Great Britain (domicile of carrier), when transport company be the Royal Mail Line and 3) at the High Court in London, when the transport company be Thos Jas Harrison.

In relation to the clauses attributing jurisdiction, it is the judgement of this Court that even though Article 47 of the Code for Civil Procedure, as well as Articles 321 and 322 of the Bustamante Code authorise the parties to choose a "special Domicile", this selection is concurrent but not exclusive, unless parties decide in contrary. Therefore, in order that this special domicile is to be considered exclusive, clause must be written in such a form that the parties expressly wave to any other domicile that, by connection, might result qualified to hear of dispute.

In the present case, even though it is true that the parties selected the figure known, as "law of the autonomy" in the sense that they do not choose the contract law but located the contract in a chosen country thus inferring applicable law; it is not less true that in said clauses appears no waver to Venezuelan jurisdiction; therefore, considering the connecting factors that this case maintains with Venezuelan territory, this present case shall be tried and decided upon by the Venezuelan Courts and so it is declared".

CONCLUSION

Therefore, a significant conclusion to be drawn from the above decision, is that for Carriers to be able to avoid local jurisdiction by virtue of this ruling, they are advised to include in their bills of lading, if possible, an express Venezuelan jurisdiction waiver.

Should you need any assistance or further information regarding the topic stated above, please feel free to contact:

SABATINO PIZZOLANTE ATTORNEYS´ OFFICE

Centro Comercial Inversiones Pareca, Piso 2, Ofic. 2-08/2-09,

Av. Salom, Urb. Cumboto Sur, Puerto Cabello, VENEZUELA.

Phones: +58-42-641801/641026/641798

Fax: +58-42-640998

Mobiles: +58-16-6420036/6420555

E-mail: mail@sabatinop.com

Webpage: www.sabatinop.com

AOH: +58-42-612286

Contact: Mr. José Alfredo Sabatino Pizzolante.