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Circular for P & I Clubs

DATE: 1st OCTOBER 2000

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Venezuelan Court rejects Foreign Jurisdiction Clause within Liner Bill of Lading

In the *SABATINO PIZZOLANTE Circular for P&I Clubs* dated 20-5-1999, the decision taken by the Supreme Court in the 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, was discussed; in the light of such decision it was held that a foreign jurisdiction clause inserted in the bill of lading was not enforceable in Venezuela if there are connecting factors between the relevant claim and the domestic jurisdiction, unless there is an express Venezuelan jurisdiction waiver in the wording of the bill of lading. As a matter of fact, this law firm in the light of the “Jans” case suggested 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”.

Nevertheless, after the decision from the Supreme Court of Justice —held pursuant to Law for International Private Law and the Constitution of the Bolivarian Republic of Venezuela— in the case *El Gran Blanco C.A vs. Nedlloyd Lijnen BV Rotterdam and Nedlloyd Maritime de Venezuela C.A.*, this exclusion or waiver of jurisdiction must be the result of a common agreement between contracting parties, something that rarely occurs with a liner bill of lading given its adhesion nature. For this reason is worth to consider this court decision in detail.

In this case, consignees filed a lawsuit against the carrier and its agent for damages occurred as a consequence of the loss of a refrigerated shipment that arrived in poor condition to Venezuelan port. The carrier's agent, once more, alleged lack of jurisdiction of Venezuelan courts to hear and decide on present action, citing as basis for this allegation, a clause in the bill of lading establishing that all derived action from it "should be presented before Rotterdam Courts, and no other Court would have jurisdiction with respect to such action, unless the carrier appeals to other jurisdiction or submits voluntarily to it". The Supreme Court of Justice, in sentence dated 30th May 2000, decided that Venezuelan courts did have jurisdiction to hear and decide on demand in dispute.

In the analysis of the jurisdiction clause contained in the bill of lading which remitted all actions to the Courts of Rotterdam excluding any other jurisdiction unless carrier appealed to some other jurisdiction or submitted voluntarily to it, the Political-Administrative Division of the Supreme Court stated: *"From simple reading of above clause it is inferred that the election of competent jurisdiction for the hearing of actions related to this Bill of Lading, specifies not only the chosen courts but also, excludes any other jurisdiction that could be competent simultaneously with Courts from Holland, with the reservation that the carrier may appeal to other jurisdiction and submit voluntarily to it; none of the above evidenced in files recorded. Our Law for International Private Law admits as a rule the possibility of conventional derogation of the Venezuelan Jurisdiction in favour of foreign Courts or arbitration that may act and resolve abroad, as provided in article 47 of said legal instrument, establishing three exceptions clearly described: "Article 47.- Jurisdiction corresponding to Venezuelan Courts, as of above provisions, may not be conventionally derogated in favour of Foreign Courts or arbitration that may act and resolve abroad, in those cases when the subject is referred to is related to real rights on real state located inside the territory of the Republic, or when the subject in dispute does not admit transaction or, when essential principles of Venezuelan public order are affected". The issue under examination does not refer to real property located inside the territory of the Republic, nor is it circumscribed to subjects that do not admit transaction, nor does it affect local public order; this could take us to the logic conclusion of declaring the validity of derogation of Venezuelan jurisdiction in favour of Dutch Courts. But, it is a consideration of this Division, that legislator admits the rule for derogation of jurisdiction in the conventional manner, i.e. when the parties, by a common and previous agreement and after a process of discussion and determination of the terms that are to rule the contractual relationship, decide such derogation. The Bill of Lading, even though it is a type of contractual instrument, it is not less true that the same may be defined as an adhesion contract from where all possibilities of debate or dispute between the parties are excluded. In an adhesion contract, as it is marked*

by doctrine and jurisprudence, the clauses are previously determined by only one of the parties, in a way that the other party is only limited to accept all that has been determined by the first. Moreover, considering that the consequence of a contractual clause on election and derogation of jurisdiction establishes the competence of courts from one State on one part, but on the other part, it also prevents that the jurisdictional institutions from some other sovereign state may be called upon to decide controversies for which they are also competent, the interpretation of the legal formula that allows for this must be done strictly attached to the sense of its wording. Even though derogation of Venezuelan jurisdiction may be admitted through the contractual figure, it cannot be accepted that in adhesion contracts, where both parties do not participate in the establishment of clauses, jurisdiction might be a subject under discussion. The above is strengthened by the principles on access to Justice which are now found in the New Constitution of the Bolivarian Republic of Venezuela, which are referred to, among others, in Article 26 of this Fundamental Text. To consent that clauses admitting exclusion of Venezuelan jurisdiction may be part of adhesion contracts like bills of lading, preventing their nationals from satisfying their legitimate pretensions and obtaining justice because of contractual demands from issuer of contract, would detract from such constitutional postulates and would misarticulate the whole judicial system that depends on these principles...()... For this Court, even when the international legislator does not especially mention the conventional derogation of jurisdiction for adhesion contracts, this is only admissible through an agreement of wills that may be express independently from the whole of the norms pre-written, but it must evidence that it is the product of such will from all parties, and not only from one of them”.

CONCLUSION

From above case it may be observed that there is a trend on the part of our highest Court, to claim jurisdiction in the cases of claims derived from transport contracts, even when these may contain attributive clauses of foreign jurisdiction. Nevertheless, the reasoning of the Political-Administrative Division of the Supreme Court in the case of Corporation El Gran Blanco, C.A. versus Nedlloyd, sets forth one interrogation, i.e., what would have been the Court's decision in the event of a contractual relationship stipulated in a charterparty (of typical usage in tramp traffic), where the bill of lading would be in the possession of the charterer, that is, the initial holder of the bill of lading?. Undoubtedly, in this hypothesis the will of the parties is contained in the charter agreement, the bill of lading been only a receipt for the merchandise and a negotiable title, and therefore, any clause on foreign jurisdiction that might exist in the charter agreement would have to be acknowledged by our courts as valid.

However, carriers should be aware that at least in case of liner bills of lading, the contract of adhesion argument used in the reasoning of the case referred to, would make ineffective any express Venezuelan jurisdiction waiver.

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

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