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WHAT DID YOU EXPECT ? The French Supreme Court upholds its position dating back to 2008

The question whether a jurisdiction clause in a bill of lading can be invoked against a third party receiver was for many years a hot issue, gave rise to heated debates among scholars, opened battlefields for lawyers who challenged jurisdiction of foreign courts and occupied already overloaded French courts.

In recent years it has become a rather colder issue, as the French Supreme Court's position became stable and predictable following a change of vision inspired by EU law.

To recall, three major evolutions led to the current decision.

Before 1992, the French Supreme Court ruled constantly that a jurisdiction clause in a bill of lading accepted by the shipper, was considered having automatically been accepted also by the consignee. The consignee was bound by the shipper's acceptance of such a clause (Cass.com, 10.3.1987, DMF 1987, 713). In such times, the discussion was limited to establish the shipper's acceptance of the jurisdiction clause.

Then, in May 1992, the commercial chamber of the French Supreme Court rendered a revolutionary decision which overruled its former position. From then, the carrier who wished to invoke a jurisdiction clause against the consignee or third party holder of a bill of lading had to prove that the consignee knew about the existence of the clause and effectively accepted it (Cass.com, 16.5.1992, n° 90-17352). In practice, such proof was almost impossible to establish.

Under the influence of the famous decision rendered by the European Court of Justice CORECK MARITIME on November 9th 2000, the 1st civil chamber and the commercial chamber of the Supreme Court rendered a decision in December 2008 stating that:

"*a jurisdiction clause agreed between the carrier and the shipper in a bill of lading, can be opposed to the third party holder of the bill of lading under the condition that the latter succeeded to the rights of the shipper by virtue of the applicable law to the contract of carriage. If this is not the case, one must verify if he validly consented to its application under the standards of article 17 of the Convention*" (which became article 23 of the EU Regulation 44/2001).

As far as contentment is concerned, the French Supreme Court ruled, following its 2008 milestone decision that in maritime law, which is considered a specific branch of international commercial law, it is customary in bills of ladings to provide a jurisdiction clause that refers to jurisdiction of the place of business of the carrier or to the High Court of London (Cass.com, 12.3.2013, n° 10-24465).

This being recalled, the decision rendered on February 17th 2015 by the French Supreme Court, allowed to confirm its position adopted since 2008 and to reject some criticism regularly brought forward by scholars.

The facts were the following and more than current:

A German carrier loaded 2 refrigerated containers on board of its vessel, with a voyage from LE HAVRE to POINTE A PITRE. The cargo arrived damaged. A survey clearly attributed the damages to the cargo to the maritime voyage. The liability of the carrier was difficult to deny. Cargo interest insurers introduced, after subrogation in the rights of the consignee, legal proceedings against the German carrier before the Commercial Court of POINTE A PITRE.

The German carrier challenged jurisdiction of the French court, invoking the jurisdiction clause of its bill of lading giving jurisdiction to the High Court of London, with application of English law.

The Commercial Court in first instance rejected the German carrier's motion and confirmed jurisdiction of the French Court where the damaged goods arrived.

Before the Court of Appeals of BASSE TERRE, the insurers argued that:

- The consignee was not remitted a full copy of the bill of lading upon arrival of the goods, thus denying having had knowledge of the jurisdiction clause printed overleaf.
- The jurisdiction clause was printed in small characters and not made particularly apparent and was in fact unreadable.

The Court of Appeals rejected these arguments and denied jurisdiction of the French Court.

The insurers brought the case before the French Supreme Court.

They basically argued that:

- A jurisdiction clause should only be invoked against a third party if the latter had knowledge and accepted the jurisdiction clause at the time of formation of the contract. Therefore, the burden of proof of the remittance of a full original copy of the bill of lading to the third party lied upon the carrier. By arguing so, the insurers tried to step back in time and convince the Supreme Court to readopt its former position of 1992.
- The proof of remittance of the bill of lading to the consignee was not established as the cargo was destroyed upon arrival and never formally delivered.
- Article 23-1 c of the EU Regulation 44/2011 does not allow to determine a particular customary law in maritime law with respect to jurisdiction clauses. Such jurisdiction clauses vary and may give jurisdiction to courts without any particular link to an international contract of carriage by sea.

Six years after the facts, the Supreme Court ruled in its decision from February 17th 2005 that:

- It is not necessary to establish the existence of a consent to accept a jurisdiction clause under article 23 first paragraph of the EU Regulation 44/2001 if the third party to the bill of lading succeeds into the rights and obligations of the shipper under the applicable national law.

- In the matter submitted to the Court, the applicable national law was English law which, according to an affidavit, provides that the consignee succeeds into the rights of the shipper.

The position adopted by the Supreme Court – which was predictable - is however regularly challenged by lower courts trying to resist to the Supreme Court's and European Court of Justice's case law as well as by scholars.

The reasons are quite evident.

France has an important underwriters' community who prefers to commence proceedings before national French courts rather than being forced to battle abroad.

Historically, article 14 of the French Code Civil allows any French national to bring a case against a foreigner before French courts. This provision is still applicable in matters of international litigation in which no international convention or EU Regulation sets mandatory derogatory rules of jurisdiction.

Politics try to make France more attractive for international litigation and arbitration. The Brexit will possibly play some role and make the London High Court less attractive as place of litigation and trigger change of some jurisdiction clauses of carriers.

Last but not least, the French legal community among which French lawyers have clear interest to challenge jurisdiction clauses appearing in standard bill of lading terms, keeping litigation in France…