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How to Enforce a Choice of Court Agreement or Arbitration Clause in a Bill of Lading in the United States

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Introduction

The purpose of this article is to give a general overview of the development of what constitutes a valid choice of court agreement, or an arbitration clause in a bill of lading (or charter partly), and how it will be enforced.

The laws of The United States, pertaining to recognition of foreign judgments, have evolved from federal common law to the application of the relevant state law in both federal and state courts. This evolution has resulted in a non-unified legal system [1].

General Principles of Contract of Carriage

Absent any choice of law agreement in a bill of lading (or charter partly), the applicable law, to the bill of lading will be maritime law of the United Sates and general contract formation law. As a result, maritime law recognizes choice of law and court principles. However, if bills of ladings are issued relating to cargo shipment to, or from the U.S., the Carriage of Goods by Sea Act applies thru operation of law.

General principles of arbitration clauses

Generally, there is a strong public policy to enforce arbitration clauses in United States. Under the Federal Arbitration Act, an arbitration clause in bill of lading, or a bill of lading, that incorporates a charter party by reference, which contains arbitration clause, will be enforced.

However, in order for an arbitration clause contained in a charter party, which is incorporated in a bill of lading by reference to be enforceable. The bill of lading need to reference to the charter party with sufficient clarity, in order to give notice to the parties [2].

On the other hand, courts are divided on the reach of the enforceability of a bill of lading, which incorporates a charter party, which contains an arbitration clause. Some courts have limited the enforceability of the arbitration clause to the immediate parties, to the underlying document [3]. Therefore, the arbitration clause may not be enforceable towards non-party bill holders.

Under the Federal Arbitration Act, arbitration must be in writing, this does not mean it has to be signed, similar to general contract principles. However, under maritime law an oral contract is enforceable.

General principles of choice of court agreement

Generally, as with arbitration agreements there is a strong public policy to enforce a choice of court agreement in the United States. A choice of court agreement is govern by contract formation principles and law. A choice of court agreement is either exclusive, or non-exclusive. An "exclusive" agreement only permits litigation in one specific forum. Non-exclusivity allows litigation too in a particular forum, but does not prevent litigation elsewhere. There is no uniformity in the United States as to when a contact is deemed exclusive or non-exclusive it depends on the interpretation of the language of the contract [4].

What constitutes a valid choice of court agreement, or an arbitration clause in the United States?

The vast majority of the courts in United States will enforce a choice of court agreement, or an arbitration agreement in a bill of lading contract (or charter partly), unless the opposing party shows that the enforcement would be unreasonable and unjust [5], invalid based on contract formation principles, or the doctrine of forum non convenience applies. These principles have been codified in various regulations, including the Federal Arbitration act under section 10. As a result, some states consider choice of court agreements less favourably [6]. Four cases need to be explored in order to determine, what constitutes a valid choice of court agreement, or arbitration agreement in the United States: Bremen, Carnival Cruise Lines v. Shute, The Sky Reefer, and Figueiredo Ferraz E Engenharia de Projeto Ltda. V. Republic of Peru [7].

Bremen

M/S Bremen v. Zapata Off-Shore Company [8], concerns a towage contract between the German company Bremen and the U.S. company Zapata. According to the towage contract, Bremen contracted to tow an oilrig owned by Zapata from a U.S. port to Italy. The contract contained a choice of forum clause, which designated the court of England as the proper forum. During a storm, the goods were damage and Zapata ordered the ship to take refuge in the port of Tampa, Florida. Zapata initiated proceedings in the U.S. Federal District Court against the German company for negligent towage. Bremen objected to the jurisdiction by relying on the choice of court agreement. The trial court refused to give the choice of court agreement effect by using a forum non-convenience analysis, on appeal, the order was upheld. Later, The US Supreme Court heard the case. The US Supreme Court explained; "Plainly, the courts of England meet the standards of neutrality and long experience in admiralty litigation". And "The choice of that forum was made in an arm's length negotiation by experienced and sophisticated businessmen, and, absent some compelling and countervailing reason, it should be honoured by the parties and enforced by the courts [7]". The Supreme Court reversed the Appellant Court´s decision.

The key principles laid out by the Supreme Court is; 1) if professional businessmen concludes a choice of forum agreement, 2) the agreement is concluded and negotiated in an "arm´s length", 3) and unaffected by fraud, duress, and capacity, then the agreement is valid. The Supreme Court´s opinion also laid out three exceptions to the enforcement of a

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choice of court agreement, which is applicable to arbitration clauses as well. The first exception is the forum non convenience doctrine. The second exception is fraud, overreaching, or unconscionable conduct in contract relations [8]. The third exception is when a transaction is misaligned against public policy, or the transaction is otherwise unfair, unreasonable or unjust [7].

Carnival Cruise Lines v. Shute

The case of Carnival Cruise Lines v. Shute concerned a ticket purchase by a consumer [5]. Notice the important difference in the facts from the Bremen case, which emphasize the notion of a freely negotiated agreement between two corporations. The ticket purchased by Shute contained a unilateral choice of court agreement on the face of the ticket, which designated the courts of Florida, the domicile of Carnival Cruise Lines headquarters. Mrs Shute fell and injured herself. The couple sued the cruise line in the state of Washington, where the tickets was purchase. The Supreme Court of United States analysed the principle laid down in the Bremen case. Specifically the principle of "negotiated". The U.S. Supreme Court found, that it would be unreasonable to expect "that a cruise passenger would or could negotiate the terms of a forum clause in a routine commercial cruise ticket form". As a result the U.S. Supreme Court expanded the ruling and principles laid down in Bremen.

The Sky Reefer

Vimar Seguros v. M/V Sky Reefer [9], concerns a shipping contract. The bills of lading contained an arbitration clause designating Japan as the proper forum. The proceedings were brought in United States, where the goods had been delivered. The respondent highlighted the difficulty in enforcing the rights of a person's interest in the cargo in Japan and that the arbitration clause may violate the original Carriage of Goods by Sea Act 1936 (COGSA). The US Supreme Court rejected the argument. Stating the mere fact, that a foreign arbitration clause lessons COGSA liability by increasing transaction cost of obtaining relief, does not trigger the Limitation of liability for negligence under COGSA §3 (8). The U.S. Supreme Court went on to state, that the respondents argument was "contrary reading of § 3(8) is undermined by Carnival Cruise [10]".

Figueiredo Ferraz E Engenharia de Projeto Ltda. V. Republic of Peru

The Figueiredo case concern, the enforcement of an arbitral award. The underlying dispute arose from an engineering consulting agreement between the parties. One of the parties was the government of Peru. Under the law of Peru, the maximum liability the government of Peru can be liable for is 3% of their annual income. The United States District Court for the Southern Discrete of New York denied the motion to dismiss on the ground of forum non convenience.

The Appellant Court disagreed with the District Courts decision and took a surprising view, arguing that the forum non convenience is applicable, because, otherwise "every suit having the ultimate objective of executing upon assets located in this country could never be dismissed because of [forum non convenience]". The Appellant Court explicitly stated that it disagreed with the ruling of TMR Energy [11]. In TMR Energy the Appellant Court took the opposite view of the Appellant Court in Figueiredo. Specifically, the court in TMR Energy considered a foreign forum inadequate, because, a judgment can only be attach to the foreign defendant´s asset in United States, by a court in United States.

Enforceability of choice of court agreements and arbitration clauses

As mentioned, a choice of court agreement or arbitration agreement will be enforced. Unless, forum non convenience, fraud, overreaching, or unconscionable conduct in contract relations, public policy applies, or Title V grounds of refusals under the New York Convention applies. Obviously, United States contract formation and invalidity law will only be applicable under Title V of the New York Convention if the "[arbitration] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".

In order to dismiss an action on the basis of forum non convenience, the party invoking the defence must establish, that (1) an adequate alternative forum for the dispute is available, and (2) a balancing of private and public interest factors must strongly favours dismissal. The Supreme Court elaborated on the conditions stating; the first requirement would ordinarily be satisfied "when the defendant is 'amenable to process' in the other jurisdiction," however, the other forum may not be an adequate alternative if, for example, "the alternative forum does not permit litigation of the subject matter of the dispute".

As of now, forum non convenience is a defence applicable to both choice of court agreements, and arbitral awards in the United States due to the recent development in the enforceability of arbitral awards. However, the courts are divided, on the issue of the application, of the forum non convenience doctrine as a defence to challenge the enforcement of foreign arbitral awards in the United States. Unfortunately, on January 9, 2017, The U.S. Supreme Court decline to resolve the issue.

Conclusion

Contract principles along with applicable law/convention will govern both choice of court agreements and arbitration agreements in a bill of lading (or charter partly). The dismissal grounds may vary, depending on whether or not; it's an arbitration clause, or choice of court agreement.

The biggest question is the legal uncertainty surrounding forum non convenience use as a defence under the New York Convention. Therefore, parties ought to be careful and choose their decision regarding the jurisdiction in which to bring an enforcement action wisely.

The Appellate Court in Figueiredo arguably reached the wrong decision. Under the New York Convention the enumerated grounds are found in Article V of The New York Convention. Notably, the committee report of the initial draft of the treaty emphasized that the inclusion of the word "only" in Article V was intended to "make it clear", that as soon as the procedural requirements for enforcement are met "no other grounds except those included in this article may be invoked as a defence [12]". Additionally to emphasis this point, the Federal Arbitration Act provides, that a court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention".

It's correct, that the U.S. Supreme court has categorized forum non convenience a "doctrine… of procedure [13]". However, it is highly doubtful the drafters of the convention imagined, that the technicality use of forum non convenience by United States would undermine the treaty and its purpose.

As Justice Gerard E Lynch wrote in his dissenting in Figueiredo; "there is little reason to think that the drafters of the treaties, who were drawn from a variety of legal traditions, considered what impact this rather technical and distinctly American use of the term might have on the enforceability of international arbitration awards [6].

Lastly, forum non convenience is a neutral procedural rule, that selects a forum based on convenience, it is not a device ought to be used for piloting parties to the forum that is possible to apply the substantive law, which one, or the other favours (or judges in the applicable forum think is desirable).

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