



THE MISCHEVIOUS FORUM SELECTION CLAUSE

Legal Corner By David Street, TOYSA Legal Counsel

A recent case in New York illustrates the fact that hiring an NVOCC or freight forwarder to transport cargo may sometimes have unintended consequences for the shipper. The case involved the purchase of industrial printing machinery in Milwaukee, Wisconsin intended for shipment to Guatemala by way of New Orleans. The purchaser of the equipment was a Guatemalan company named Quality Print. Quality Print contracted a freight forwarder to arrange for the transportation and the freight forwarder booked the shipment with an NVOCC. The NVOCC then booked the shipment with Maersk.

The printing machinery was packed in four Maersk containers. Three of the containers were trucked from Milwaukee to Chicago and then carried by rail to New Orleans where they were loaded on board a Maersk vessel and transported to Guatemala. The fourth container, however, was delayed by the railroad and was not delivered to New Orleans until after the Maersk vessel had sailed. Before the fourth container could be put on another vessel, Hurricane Katrina hit New Orleans, resulting in severe flooding and damage to the Maersk Sea Terminal. Ultimately, the fourth container was never delivered to Guatemala.

Quality Print sued Maersk twice in Panama, seeking to arrest two separate Maersk vessels that were passing through the Panama Canal. Quality Print claimed damages of \$8,415,000 from Maersk. The Panama court ordered both Maersk vessels to be arrested. Ultimately, Maersk obtained release of these vessels by posting a \$10 million cash bond with the Panama court as security. Quality Print then filed an action in Guatemala seeking to hold Maersk responsible for these same damages.

In response to these actions by Quality Print, Maersk filed motions in the Panama and Guatemalan courts seeking an order forcing the purchaser to dismiss its claims and proceed against Maersk in the United States District Court for the Southern District of New York. Maersk based its motions on the forum selection clause in its bill of lading, which required that all actions involving carriage in the trades to and from the United States be brought exclusively in the New York court. The foreign courts, however, ruled against Maersk. Maersk then filed an action in the New York court seeking to attach money belonging to Quality Print as damages for having to defend the lawsuits and post the bond in Panama. The court granted Maersk's request and attached \$650,000. Maersk then amended its complaint in New York to, among other things, add a request for an order forcing Quality Print to litigate its claims against Maersk in the New York court. Quality Print then filed a motion with the New York court seeking to vacate the attachment of its \$650,000 and to dismiss Maersk's amended complaint.

It initially appeared that Maersk would have a difficult time convincing the court to issue this order. In the first place, the Maersk bill of lading was never actually issued for these shipments. Instead, Maersk issued *The contents of this article do not constitute legal advice. You should always consult an experienced attorney about legal issues that arise from particular situations as the individual facts may warrant different legal conclusions in a given case. Mr. Street is a partner at the law firm of GKG Law, P.C and has served as Toysa's legal counsel since 1991.*

a Booking Note to the NVOCC expressly incorporating the terms and conditions of its bill of lading into the booking confirmation. Second, Quality Print was not a party to the Maersk Booking Note. Quality Print, quite reasonably, asked how it could be governed by bill of lading terms from a bill of lading that had never been issued that were incorporated in a Booking Note to which it was not a party. Ultimately, the court enforced the bill of lading terms and conditions notwithstanding that the bill of lading was never issued. It may be surprising, but this is not an unusual decision. Courts frequently enforce bills of lading terms and conditions even when damages have occurred prior to issuance of the bill of lading or in cases where the bill of lading was never issued. So long as the shipper had some opportunity to have notice of the bill of lading and its terms and conditions, courts tend to apply the bill of lading to the transaction.

Quality Print also argued that, even if the bill of lading applies generally, it was not bound by the Maersk bill of lading because it was not a party to that contract document. As is typical with NVOCC shipments, the NVOCC was the shipper on the Maersk bill of lading.

Maersk asserted that Quality Print was bound by its bill of lading terms and conditions because the NVOCC which directly dealt with Maersk was acting as an agent for Quality Print and had authority to bind that company to Maersk's contract of carriage. In light of the facts of this case, this appears to be a pretty tenuous argument. Quality Print did not actually hire the NVOCC that dealt with Maersk. It only hired a freight forwarder that, in turn, hired the NVOCC. Thus, Maersk argued in essence that Quality Print of the goods was bound by terms and conditions of a bill of lading that was never issued through the actions of a company that Quality Print never dealt with and may not have even known was a participant in the transaction.

Moreover, Maersk based its argument on the Supreme Court's decision in the *Norfolk Settlement Railway v. James N. Kirby* case which had concluded that an NVOCC could bind the cargo owner to the limitations of liability in the vessel operator's bill of lading. The Supreme Court, however, had strictly limited the NVOCC's Ability to bind the cargo owner in the following language:

The intermediary is certainly not automatically empowered to be the cargo owner's agent in every sense. That would be unsustainable. But when it comes to liability limitations for negligence resulting in damage, an intermediary can negotiate reliable and enforceable agreements with the carriers it engages.

Clearly, a forum selection clause such as the one Maersk sought to enforce in this case is totally different from a limitation of liability clause which was the subject of the Supreme Court's decision.

The court, however, did not rely on the Supreme Court's decision in upholding Maersk's argument. Rather, in a bit of legal judo, the court used Quality Print's own actions in Panama and Guatemala to find that it had agreed to the terms and conditions of the Maersk bill of lading. The court stated that, since Quality Print "had brought multiple suits against Maersk in Panama and Guatemala, each relying upon the Booking Note incorporating the terms and conditions in the standard Maersk Sea-Land Bill of Lading" it had accepted the terms and conditions of the Maersk bill of lading and was, therefore, bound by it.

While reaching a decision based on that premise, the court also stated that it believed the rationale of the Supreme Court's decision in the *Kirby* case should also be extended to enforcement of a forum selection clause. While the court cloaked its reasoning on this point in a discussion of legal precedent, its conclusion rested on very practical grounds; the same practical grounds the Supreme Court's conclusion in the *Kirby* case ultimately rested upon. That is, in the business of international ocean transportation, cargo owners frequently use intermediaries to make their transportation arrangements with the vessel operating carries. If the vessel

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operators cannot be assured that the terms and conditions of their bill of lading contracts will be binding on the cargo owners, they will refuse to do business with the intermediaries or charge the intermediaries higher rates for their shipments to compensate the vessel operator for the increased risk of not having its bill of lading contract enforced. (Why would the vessel operators not be willing to simply rely on the fact that their bill of lading terms and conditions are clearly binding on the intermediaries? Again, a practical reason. Intermediaries are frequently thinly financed and may go out of business when faced with burdensome legal obligations arising from enforcement of the carrier's bill of lading terms and conditions. Cargo owners are usually better financial prospects.) In effect, the courts are telling businesses that operate internationally that one of the prices they pay for doing so is that they will sometimes be bound by bill of lading contracts to which they are not parties.

Interestingly, the new Rotterdam Rules governing international ocean transportation, which the United States has signed but which have not taken effect, seek to draw a balance between the interests of carriers and shippers with regard to forum selection clauses in a different manner. Recognizing that carriers have a legitimate interest in having their bill of lading terms and conditions enforced, the Rotterdam Rules permit a carrier to enforce its forum selection clause against a shipper that uses an intermediary that actually dealt with the carrier, but only if the forum selection clause specifies one of the following places:

- a. the domicile of the carrier;
- b. the place of receipt agreed in the bill of lading;
- c. the place of delivery agreed in the bill of lading; or
- d. the port where the goods were initially loaded on a ship or the port where the goods were finally discharged from the ship.

These restrictions serve to protect the interests of the shipper against having to file suit against the carrier in foreign courts that have no connection with the shipment. The restrictions in the Rotterdam Rules favor the shipper to the extent that all of the possible forums are at least reasonably linked to the carriage of the goods. By including the domicile of the carrier, however, the Rotterdam rules leave open the possibility that shippers may have to go to the countries where the carrier is located to sue them, which could be inconvenient. The simple answer to a complaint about this, however, is to use a different carrier.

The result of this suit was that the court agreed that Maersk could obtain an injunction preventing Quality Print from pursuing its lawsuits in Panama and Guatemala. While a court's injunction order may be binding on the parties subject to the court's jurisdiction, such orders are not binding on foreign courts. We really don't know how this case ended, but we can speculate that different problems would arise if Quality Print had ignored the New York court's injunction and obtained verdicts against Maersk in the courts of Panama and Guatemala where Maersk does business. These are interesting problems with which litigants and courts have not infrequently wrestled. But that is another story, perhaps one for a future newsletter.

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