Forum Selection Clauses in Maritime Contracts

By Marilyn Raia

The parties to a maritime contract have various options when trying to resolve a dispute. [See "Resolving Maritime Disputes", Pacific Maritime Magazine, January 2010] They also have the option of agreeing on the geographic location for dispute resolution even if that location has no relationship to the dispute. The clause in a maritime contract designating the place for dispute resolution is called a "forum selection clause." A forum selection clause might designate a particular country, state or court as the forum. It might also refer to the designated forum in more general terms such as the origin port or the destination port.

The parties to a maritime contract are not required to specify a forum for dispute resolution. If they do not specify a place, a court will consider alternatives including the place where the contract was made, or where the breaching party is located, or where the contract was to be performed. This article focuses on forum selection clauses in different types of maritime contracts.

Towage Contracts

The US Supreme Court first addressed forum selection clauses in international towage contracts in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). That case involved a towage contract between an American corporation, Zapata, and a German towing company, Unterweser. The towage contract provided: "any dispute arising must be treated before the London Court of Justice". The towed vessel, Zapata's drilling rig, suffered damage during the tow. Despite the forum selection clause in the towage contract, Zapata sued Unterweser in federal court in Florida. The district court held the forum selection clause to be unenforceable as against public policy, reasoning parties to a contract could not agree ahead of time to "oust the jurisdiction of the courts". The court of appeals agreed with the district court. The US Supreme Court disagreed with both. It held the forum selection clause to be prima facie valid because it was freely bargained for. The US Supreme Court also recognized the party objecting to the forum selection clause had the burden of proving it unreasonable under the circumstances. That meant the objecting party had to show that trial in the contracted forum would be so "gravely difficult and inconvenient" as to deprive that party of its "day in court". Even though the selected forum might be inconvenient for the parties, the inconvenience did not make the forum selection clause unenforceable because the possibility of inconvenience was known and contemplated at the time the parties agreed to it.

Since Bremen, forum selection clauses in other types of maritime contracts have been held enforceable.

Passenger Tickets

Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) involved a ticket purchased in Washington for a California-Mexico cruise. The ticket provided that all disputes "shall be litigated, if at all, in and before a Court located in the State of Florida, USA to the exclusion of the Courts of any other state or country."

Shute was injured during the cruise and sued Carnival in the federal court in Washington for negligence. The district court held the forum selection clause enforceable. The court of appeals disagreed, relying on the criteria in the Bremen decision and holding the clause was not freely bargained for. The US Supreme Court held the forum selection clause in the printed ticket enforceable. It reasoned the ticket was a routine form contract and the provision requiring litigation in Florida was reasonable under the circumstances. The circumstances included 1) Carnival's interest in limiting the places it could be sued; 2) the minimization of confusion over
the proper place for litigation; and 3) the reduction in fare reflecting the savings incurred by Carnival when limiting the places it could be sued. The US Supreme Court rejected the notion Carnival selected Florida as the forum for litigation to discourage passengers from pursuing their claims.

**Bills of Lading**
Bills of lading serve three purposes: a receipt for cargo; a document of title; and a contract of carriage. When serving as a contract of carriage to or from the United States in foreign trade, they are mandatorily subject to the United States Carriage of Goods by Sea Act, 46 U.S.C. 30701 et seq., [COGSA] which prohibits provisions in bills of lading that lessen the carrier's liability below the standards set forth in COGSA.

Carriers routinely place forum selection clauses in the fine print on the reverse side of their bills of lading. Commonly selected forums include the United States District Court for the Southern District of New York and the High Courts of Japan or Korea. Until the US Supreme Court decided *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), forum selection clauses in bills of lading were routinely held void on the ground they lessened the carrier's liability below COGSA's standards. The courts reasoned cargo owners would be discouraged from suing if required to sue in a distant forum, resulting in lower settlements for cargo claims to the carrier's advantage.

*Sky Reefer* involved a bill of lading clause requiring cargo owners to arbitrate cargo damage disputes in Japan. The US Supreme Court held the clause enforceable finding it did not necessarily impermissibly lessen the carrier's liability under COGSA. The court also noted the clause required only arbitration, which allowed the district court to retain jurisdiction to make sure the parties' substantive interests were protected. Since *Sky Reefer*, courts have often extended its reasoning to uphold bill of lading clauses requiring litigation in a foreign country over which the district court would not be able to retain jurisdiction.

**Employment Contracts**
Forum selection clauses in maritime employment contracts also have been held enforceable. In *Calix-Chacon v. Global International Marine, Inc.*, 493 F.3d 507 (5th Cir. 2007), a US company hired a Honduran seaman to work aboard its vessel. The employment contract provided that any claims would be brought exclusively in a court in Honduras. The seaman sued his employer in a federal court in Louisiana for personal injuries. The district court denied the employer's motion to dismiss the case holding the forum selection clause unenforceable. The court of appeals held a foreign forum selection clause in a US maritime employment contract is not per se unreasonable and that the party objecting to it bears the burden of proving it unreasonable under the circumstances.

**Dockage Agreements**
Forum selection clauses may also be found in dockage agreements. In *Ruble Heck-Dance v. Inversiones Isleta Marina, Inc.*, 381 F.Supp.2d 50 (D. P.R. 2005), the dockage agreement required all legal matters to proceed before a local state court. The marina sued its tenant in state court for unpaid charges and obtained a judgment. To satisfy the judgment, the marina attached the tenant's vessel. Three years later, the tenant sued the marina in federal court alleging the marina had not followed proper procedures in the state court action. The marina moved to dismiss the action based on the forum selection clause in the dockage agreement requiring suits to be brought in state court, not federal court. The federal court dismissed the case, finding the forum selection clause in the dockage agreement applied to the facts of the
case, that is, the allegations arose from the dockage agreement. It also found the forum selection clause "obvious and understandable" and within the tenant's knowledge because it participated in the state court proceedings and did not object at that time.

Insurance Policies
A marine insurance policy is also a maritime contract in which a forum selection clause may be found and enforced. In *Marco Forwarding Co. v. Continental Casualty Company*, 2005 AMC 2669 (S.D. Fla. 2005), Marco was sued for negligence in stowing and securing a shipment. In turn, Marco sued its insurer, Continental, for denying coverage for its liability. Continental successfully moved to dismiss the case based on a clause in the policy requiring litigation of disputes in Canada. The district court held the inconvenience and economic hardship to Marco, who was located in Florida where the underlying cargo damage claim had been litigated, were insufficient to avoid the forum selection clause.

Forum selection clauses have been held enforceable in a wide variety of maritime contracts. They have been upheld in negotiated as well as non-negotiated contracts. Before negotiating a forum selection clause in a maritime contract, due consideration should be given to various factors including the convenience of the chosen forum to the parties and the availability there of necessary witnesses and evidence. A court's subpoena power does not extend across state or country borders. Accordingly, the ability to prosecute or defend a claim can be severely compromised when witnesses and evidence cannot be compelled into the chosen forum.

The party facing an undesirable forum selection clause in a non-negotiated contract may have little choice. It can accept the potential need to litigate in an undesirable or inconvenient place as a condition of doing business with a company or not do business with that company because the forum selection clause is likely to be enforced.

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