International Transportation Is Fundamental To International Relations, Trade And Travel

The International Transportation Committee (ITC) discusses a wide range of issues that relate to the international transportation of goods and people, whether by air, ship, road or multiple modes of transport. The ITC’s focus is on legal issues involving international transportation law from both the private commercial and public government perspectives. Both areas of law form an integral part of the international and national systems of laws, regulations, and agreements which govern international transportation and the movement of goods and people across borders.

Note from the Co-Chairs

We are pleased to announce the re-introduction of the International Transportation Committee’s Newsletter. Our thanks to Murali Menon for volunteering to be this year’s Editor.

We encourage all Committee and Section members to contribute articles to the Committee’s Newsletter. The ITC has members in a number of jurisdictions. Our members are involved with international transportation through a variety of interests, industries, governments, and subject areas. As this issue of the Newsletter demonstrates, we welcome summaries of legal developments, committee events, developments from jurisdictions worldwide, and all other news of interest.

We also encourage ABA International Section members to become active in our Committee. As discussed elsewhere in this Newsletter, we are actively engaged in developing Committee programs and presentations involving cutting-edge issues of international trade and transportation.

To become involved – or just learn more – please contact us or join us on our monthly Committee telephone conferences, which are held on the second Tuesday of each month. You can also visit our Committee’s ABA website at ABA SIL International Transportation Committee.
Enforcement Of Forum Selection Clauses In China: Observation On Some Recent Chinese Court Decisions

Philip Peng
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It is generally an established practice in modern civil and commercial laws of the world that the contracting parties are free to determine the contract terms governing their relations, including the choice of court clause for purpose of dispute resolution.

However, as was debated during the 2005 Hague Choice of Court Convention, not all countries agree that a choice of court forum selection clause should be enforced if there is no connection with the chosen forum. Instead, it is the position of some countries that the court contractually chosen by the parties must have an actual connection with the dispute and that courts should not host lawsuits from any parties where there is no objective link to the forum.

China adopts a relatively strict requirement regarding choice of court clauses in international commercial transactions. Basically, China requires that the chosen forum shall have an actual connection with the dispute. Otherwise, a Chinese court will treat the choice of court clause as invalid. In this context, Article 244 of the Civil Procedure Law of the Peoples Republic of China (PRC)(1991) provides that: “Parties to a dispute over a contract concluded with foreign element or over property rights and interests involving foreign element may, through written agreement, choose the court of the place which has actual connections with the dispute to exercise jurisdiction.” This law was amended on October 28, 2007, by the Tenth National People's Congress of China and again in 2012.

The current version of the applicable law, Article 34 of Civil Procedure Law of the PRC (2012), provides that: A party to the contract or other property dispute may choose by written agreement to be under the jurisdiction of the people's court in the location of the defendant's domicile, where the contract is performed or signed, in the location of the plaintiff’s domicile, in the location of the subject matter or in other locations which have actual connections with the dispute, provided that the provisions on hierarchical jurisdiction and exclusive jurisdiction are not violated.

As a practical matter, Chinese courts have repeatedly refused to enforce (Continued on page 3)

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choice of court clauses when the chosen forum has no actual connection with the dispute. For example:

1. On December 22, 2009, the Chinese Supreme Court held invalid a choice of court clause in an Exclusive Online Game Distribution and License Agreement between a Chinese company and a Korean company, stating “Any dispute arising from or in connection with this Agreement shall be resolved in Singapore and be subject to the jurisdiction of Singapore Courts.” The Chinese Supreme Court invalidated the clause on the grounds that neither the contracting parties nor the place of performance of the contract (in China) had an actual connection with Singapore.

2. In an Oct. 28, 2011 ruling, the Chinese Supreme Court invalidated a bill of lading (B/L) forum selection clause that provided that all disputes must be brought and heard solely in the U.S. District Court for the Southern District of New York. The Court stated that the clause should not be enforced because the plaintiff shipper was a Chinese company; the defendant carrier was a Taiwan company (Evergreen Marine Corp. (Taiwan) Ltd.); the load port was in China and the discharge port was in Baltimore. The Court held that none of these factors had any connection with the New York court.

3. On Dec. 16, 2011, the Chinese Supreme Court refused to enforce a choice of court clause in a bunker sales contract between a Chinese company and a Singapore company. Although the clause provided that “this contract shall be governed by English law and each party expressly submits to the jurisdiction of London High Court”, the Chinese Supreme Court invalidated it because neither company was an English company and the loading port was in Russia and the unloading port was in China. As such, the Court ruled that there was no connection with London and the said choice of court clause was invalid.

4. In a Dec. 13, 2013 decision, the Chinese Supreme Court invalidated a bill of lading clause that provided that “all disputes shall be under the exclusive jurisdiction of HK court” on the grounds that both the plaintiff and defendant were both Chinese companies, the involved carriage was from Dalian to Rotterdam, and these was no connecting factor with Hong Kong.

The difficulties that can be experienced in seeking to enforce forum selection clauses in China is illustrated by the recent December 2, 2014 decision of the Shandong High People’s Court in a case involving UPS SCS (ASIA) LIMITED. In this case, UPS SCS (ASIA) LIMITED was sued in the Qingdao Maritime Court. The plaintiff held a B/L issued by UPS SCS for a shipment from Qingdao to Mexico and was demanding that UPS either deliver the shipment or pay USD $77,855 as compensation for cargo loss. (Continued on page 8)
The Tax on Circulation of Goods and Services (ICMS) is one State value-added tax in Brazil and is due on operations involving circulation of goods on imports and interstate and inter-municipal transport (as well as the manufacturing, marketing and communications services) The Federal Supreme Court of Brazil renders an appellate decision that denies the levy of ICMS on imported goods that are the object of a lease agreement. On November 18, 2014, the decision rendered by the Federal Supreme Court on the Appeal No. 540.829/SP regarding the levy of the Tax on Distribution of Goods and Services (ICMS) on the entry of imported goods object of international lease was published on the official gazette.

In the case at issue, Hayes Wheels do Brasil (a company in the steel industry) sought the acknowledgment of the non-assessment of the ICMS on the import of industrial equipment under a lease agreement entered into with a foreign company, which provided for the return of the equipment to the lessor upon termination of the agreement (i.e., with no purchase option).

In its ruling, the Federal Supreme Court stated that “lease transactions, on their own, do not result in the transfer of ownership of the good that is the subject matter thereof, therefore lacking the required economic circulation that shall occur for the assessment of the ICMS”.

In due course, such understanding shall be applied by the lower courts in identical cases, i.e., in lawsuits that discuss the levy of ICMS in import transactions under lease agreements with no purchase option.

Although this particular case law refers to a lease with no purchase option, it should be noted that Justice Cármen Lúcia has indicated in her opinion that no “ICMS is levied on lease transactions whenever the good is subject to return to the owner and as long as the option to purchase is not implemented”. Therefore, the levy of the tax would be conditional upon the actual exercise of the purchase option by the lessee, and not merely by the provision of such option in the agreement.

Nevertheless, the argument presented by Justice Cármen Lúcia has not been subject to analysis by the other justices at this time, (Continued on page 8)
FACTS
The defendant, a German freight forwarder, was instructed with a multi-modal transport from Hong Kong via Hamburg to Eichenzell, Germany. The ocean carrier subcontracted by the defendant loaded the shipment aboard the MOL Comfort. On June 17 2013 the MOL Comfort sustained damage in the Arabian Sea, broke into two and finally sank. The shipment of bouncy castles was lost.

The MOL Comfort had been built in 2008 and was classified by Nippon Kaiji Kyokaj immediately before the journey in May 2013. Based on a special survey, the classification society awarded the vessel with a classification certificate without any complaints. According to the defendant, the MOL Comfort should have been considered unseaworthy despite the classification, due to cracks in its hull which had gone undetected during the survey. The cracks led to the water break-in during the voyage and eventually caused the sinking – a fact that was undisputed by the parties.

The plaintiff claimed compensation for the loss of its shipment up to the value of the lost goods. According to the bill of lading, the shipment had been packed into 732 cartons and stored in one container by the shipper. The bill of lading included a said-to-contain clause. The plaintiff argued that the claim amount was within the limitation of liability of 666.67 special drawing rights (SDR) per package, while the defendant rejected liability due to the vessel having been unseaworthy. The latter condition could not have been detected by the defendant, leading to an exemption of liability under Section 498 of the Commercial Code. The limitation of liability could not exceed 666.67 SDR for the container only, as it would have to have been taken into account when calculating the package limitation.

(Continued on page 9)
Shanghai China:
The Institutionalization of International Aviation Arbitration
By Luis Valdez Jimenez, ABA Law Student JD/ MBA

The world’s first arbitration court focusing on international aviation disputes has been established in Shanghai, China. One of the reasons why arbitration has become so popular is the ability of parties to select arbitrators who are experts in the dispute subject matter. There are currently numerous arbitration courts and centers have been established that specialize in specific areas of law.

The Shanghai International Aviation Court of Arbitration (“SIACA”) was established through a strategic cooperative agreement between the China Air Transport Association (“CATA”), the International Air Transport Association (“IATA”), and the Shanghai International Arbitration Center (“SHIAC”). Specifically, SIACA seeks to provide a list of “experienced, trusted, and neutral” aviation industry experts to serve as arbitrators who can provide assistance to parties in settling their disputes quickly and affordably. In addition, Experts Committee on Shanghai International Aviation Arbitration was also established, which held its first meeting on the day the SIACA was founded and discussed the future of SIACA, recommendations on arbitrators, and how to cater to the needs of the industry.

“"The establishment of the SIACA is part of an extensive effort by Shanghai to become a leader in the global economy""

The city has pledged to become an international center of international economics, finance, trading, and shipping. It has developed a free trade zone and China now has the second highest amount of civil aviation (Continued on page 10)

USA TRANSPORTATION CASES

U.S. Antitrust Violations: Criminal Complaints And Guilty Pleas: Price Fixing on Ocean Shipping Services for Cars and Trucks
By Andrew M. Danas, Chair of ABA International Transportation Committee and Partner at Grove, Jaskiewicz and Cobert, LLP in Washington DC.

The United States Department of Justice announced on December 29, 2014 that Nippon Yusen Kabushiki Kaisha (NYK), a Japanese ocean carrier, had agreed to plead guilty and pay a U.S. $59.4 million criminal fine for its involvement in a conspiracy to fix prices, allocate customers, and rig bids on international ocean shipping services for roll-on, roll-off cargo to and from the United States and elsewhere.

“"The Port of Baltimore is one of the U.S. ports that the Department of Justice has alleged was impacted by the conspiracy""

Roll-on, roll-off cargo is non-containerized cargo that can be both rolled onto and rolled off of an ocean-going vessel. Examples of this cargo include new and used cars and trucks and construction and agricultural equipment.

The NYK plea is the third guilty plea that the Antitrust Division of the U.S. Department of Justice has secured against international ocean carriers for a conspiracy which is alleged to have commenced from as early as February 1997 until at least September 2012. Prior guilty pleas in the investigation have also been obtained by the US DOJ from another Japanese carrier, Kawasaki Kisen Kaisha, Ltd. (K-Line), and a Chilean carrier, Compañía Sud Americana de Vapores S.A. (CSAV). The K-Line guilty plea, in which the carrier agreed to pay a U.S. $67.7 million criminal fine, was announced in September, 2014. The agreement by (Continued on page 10)
On January 9, 2015, the U.S. Department of Transportation (DOT) announced that Mexican motor carriers will soon be able to apply for authority to conduct long-haul, cross-border trucking services between Mexico and the United States. The announcement followed a three-year pilot program conducted by DOT that tested and validated the safety of Mexican trucking companies to conduct such operations.

The U.S. DOT announcement, and an accompanying report submitted to the U.S. Congress on the results of the pilot project, is part of a two-decade saga over implementation of the cross-border trucking provisions of the 1992 North American Free Trade Agreement, or NAFTA. Under NAFTA the United States and Mexico agreed to liberalize access for cross-border truck services, with the U.S. agreeing to allow Mexican trucking firms to operate first in the U.S. border states and then throughout the United States by January 1, 2000.

The saga commenced in late 1995 when, citing safety concerns with Mexican trucks, the U.S. announced that it would delay implementation of the NAFTA U.S.-Mexico cross-border trucking liberalization provisions. Mexico contested this action before an international arbitration panel, which ruled in February 2001 that NAFTA prohibited the imposition of a blanket U.S. ban on the operation of Mexican trucks beyond U.S.-Mexico border commercial zones. The arbitration panel also ruled, however, that the U.S. could for safety reasons prevent particular Mexican carriers or trucks from operating in the U.S. long-haul market. The panel also found that the U.S. could treat Mexican motor carriers differently from Canadian and U.S. carriers when processing applications for operating authority if legitimate safety concerns existed for the different treatment.

In 2009 Mexico exercised its option to take retaliatory measures for the arbitration panel’s finding that the U.S. was not in compliance with the cross-border trucking provisions. It imposed more than $2 billion in annual tariffs on exports of U.S. agriculture, personal care products, and manufacturing goods. Mexico took this action after the U.S. Congress halted a demonstration project that the U.S. DOT had implemented to test and validate the safety of Mexican trucking companies. Mexico suspended the retaliatory tariffs after a new pilot project was implemented in 2011.

In its most recent three-year pilot project DOT reported that companies from Mexico had violation, driver, and vehicle out-of-service rates that met the level of safety of American and Canadian-domiciled motor carriers. As a result, DOT has announced new conditions under which Mexican carriers can apply to operate in the United States.

Under the new DOT policy, Mexican motor carriers seeking to apply for long-haul operating authority will be required to pass a Pre-Authorization Safety Audit to confirm that they have adequate safety management programs in place. Such programs will include systems for monitoring hours-of-service and to conduct drug testing using a U.S. Health and Human Services (HHS) certified lab. In addition, all drivers will be required to possess a valid U.S. Commercial Driver’s License or a Mexican Licencia Federal de Conductor. Drivers will also be required to meet the U.S. DOT’s English language proficiency requirements.

(Continued on page 8)
CHINA...................(Continued from page 3)
UPS SCS objected to jurisdiction citing a choice of
court clause on the back of the B/L that provided
that all disputes should be subject to the exclusive
jurisdiction of the California courts, but the
Qingdao Maritime Court refused to enforce the
clause. On appeal, the Shandong High People’s
Court affirmed the invalidation of the clause on
the grounds that UPS SCS was a HK company
and the involved cargo carriage was from China
to Mexico, with no connection to the USA.

The decisions of the Chinese courts to refuse to
enforce forum selection clauses stand in contrast
to the law of the United States, where in the
decision of the Bremen v. Zapata Off-Shore Co
the United States Supreme Court held that such
clauses may be enforced, at least in a maritime
context. In many ways, the approach of Chinese
courts to forum selection clauses is similar to the
U.S. appellate courts prior to the Bremen decision.
In the Bremen case the United States Court of
Appeals for the Fifth Circuit refused to enforce a
contractual clause stipulating jurisdiction in the
courts of London unless the selected jurisdiction
would provide a more convenient forum than
the state in which suit was brought. In refusing
to enforce the clause, the Fifth Circuit held that
England had no interest in or contact with the
controversy other than the forum selection clause.
In reversing and vacating that decision, the US
Supreme Court held that contracting parties
can choose a neutral forum to resolve disputes
and that such choice of court clauses are valid.

In conclusion, counsel advising foreign clients
doing business in China should be aware that
Chinese courts will be disinclined to enforce
contractual choice of court clauses in commercial
disputes unless there is a connection between the
forum, the parties, and the disputed transaction.

2 Case no.: Chinese Supreme Court [2009]MSZZ No. 4.
3 Case no.: Chinese Supreme Court [2011] MTZ No. 301.
4 Case no.: Chinese Supreme Court [2011] MTZ No. 312.
5 Case no.: Chinese Supreme Court [2013] MTZ No. 243
6 Case no.: Shandong Province Case e High People’s Court [201 4]LMXZZ No.445.

BRAZIL .....................(Continued from page 4)
which means that the discussion of the non-assessment
of the ICMS on international lease agreements with
purchase option shall be subject of a specific lawsuit.

Finally, please note that the decision above is still subject
to appeal by the State Treasury, after which it shall be final.

US-MEXICO ..............(continued from page 7)
Once approved, the vehicles of Mexican motor carriers
operating in the United States will be required to
undergo a 37-point North American Standard Level
1 inspection every 90 days for at least four years.
Carriers and drivers from Mexico will also be required
to comply with all U.S. laws and regulations, including
regular border and random roadside inspections.
Canadian companies that are granted U.S. operating
authority are subject to this same requirement.

The history of the U.S.-Mexico NAFTA cross-
border trucking provisions can be generously
characterized as being one of fits and starts. The
current DOT action signifies forward movement in
implementing these provisions. However, as noted
by the FMCSA in announcing its actions expanding
trade opportunities in this sector, “American
trucking companies have been able to apply and
operate long-haul in Mexico through NAFTA
since 2007. Currently, five U.S. companies use this
authority to transport international goods into
Mexico.” Only fifteen Mexican trucking companies
participated in the DOT’s three-year pilot project,
with data collected from the operations of another
952 Mexican-owned trucking companies that were
operating under pre-existing authority. It will
thus take time to see whether the recent regulatory
action significantly opens up the U.S.-Mexican
cross-border trucking border in both directions.
GERMANY............(Continued from page 5)

Decision

The Hamburg District Court disallowed the claim.

The court ruled that any claim for compensation was precluded, as the defendant could rely on Section 498(II) (2) of the code. According to this stipulation, in the event of a vessel being unseaworthy, the carrier's liability is precluded if it can prove that the loss resulted from circumstances which it could not have prevented, exercising due diligence. The court took for granted that there had been no mistakes regarding the stowage or stability of the vessel and denied other circumstances leading to the sinking. Thus, the sinking was considered to have been caused by the cracks in the hull as a consequence of a construction error, leading to the vessel's unseaworthiness. The court held that the defendant was not responsible for errors in the vessel's construction. Undisputedly, the defendant had no knowledge of the vessel's unseaworthiness. The defendant could not be considered responsible for this lack of knowledge, as there was no indication which would have required it to check. This also applied to the ocean carrier as the defendant's subcontractor and the ocean carrier was therefore right to rely on the findings of the classification society ahead of the final journey.

Any possible misconduct by the shipyard or classification society could not be attributed to the defendant, as neither was considered its subcontractor.

Comment

The judgment is one of the first dealing with the new German maritime law. The decision is remarkable, as the experienced Hamburg District Court accepted no evidence regarding the MOL Comfort's unseaworthiness, but made its decision based on the available facts. The court also made clear that the German freight forwarder was not obliged, as the carrier, to check the vessel's construction unless there had been an indication that something might be wrong.

The decision might be surprising, but it is also fair and reasonable. From the plaintiff’s perspective, being unable to recover damage is hard to accept, especially given that the risk of cargo suffering damage while in the carrier’s custody is on the latter. However, in a situation where classification has recently been confirmed and there are no signs of the vessel being unseaworthy at the beginning of the voyage, it would overstretch the responsibility of the carrier to check what has recently been confirmed. A carrier must be able to rely on classification certificates from a legal and practical viewpoint.

The judgment is in line with a 10-year-old ruling of the Hamburg Court of Appeal, which confirmed that a tenant, as warehouseman of a storage facility, need not check the construction of the building, but can rely on permits made by the public authorities.

The decision is not yet legally binding. It is expected that the Hamburg Court of Appeal will take evidence on the (un)seaworthiness of the MOL Comfort before dealing with the question of what a German freight forwarder must do when transporting goods on a foreign vessel from Asia to Europe as regards the extent of due diligence. The Hamburg Court of Appeal is expected to confirm the judgment.
transportation by volume in the world.

However, China currently does not allow ad hoc arbitration, thus the SIACA was established to give parties in aviation disputes access to a legal, institutional arbitration center.

Local and international governmental officials, industry representatives, and legal experts were present at the signing ceremony of SIACA on August 28th, 2014. Over 70 representatives of major airlines, aircraft manufacturers, aviation companies, and various chambers of commerce attended the ceremony including Boeing, Airbus, Lufthansa, Aviation Industry Corporation of China, Air China, China Southern Airlines, China Eastern Airlines, China National Aviation Fuel Group, Capital Airports Holding Company, the European Union Chamber of Commerce in China, American Chamber of Commerce in Shanghai and others.

Could this lead to the creation of more arbitration courts focusing on aviation? Shanghai’s active participation in SIACA may influence other cities to also help develop aviation arbitration courts to establish the city as a global or regional center of aviation.

In addition, there are several transportation-focused organizations that have developed arbitration rules and help arrange arbitration services. For example, the National Motor Carrier Freight Traffic Association has developed its own arbitration rules and works with a private firm to manage its arbitration. The creation of SIACA may influence other aviation focused organizations to develop a similar model for aviation transportation disputes.

USA ........................................ (continued from page 6)

CASV to plead guilty and pay a U.S. $8.9 million criminal fine was announced in February, 2014.

The criminal complaints filed against the ocean carriers in the international price fixing conspiracy are the result of an ongoing antitrust investigation involving the U.S. Department of Justice and the Federal Bureau of Investigation. Individual felony charges have been filed against each of the carriers in the U.S. District Court for the District of Maryland in Baltimore.

Among various allegations set forth in the separate DOJ charges are claims that that the ocean carriers and their co-conspirators carried out the conspiracy by exchanging customer pricing information; agreeing to refrain from bidding against each other; agreeing on prices; and allocating customers and routes. The criminal complaints allege that these actions occurred as a result of meetings, communications, and by other means. The Department of Justice says that the companies then charged fees in accordance with those agreements for international ocean shipping services for certain roll-on, roll-off cargo to and from the United States and elsewhere at collusive and non-competitive prices.

All three ocean carriers have pled guilty to price fixing in violation of the Sherman Act, which carries a maximum penalty of a $100 million criminal fine for corporations. The Department of Justice states that the maximum fine may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime, if either of those amounts is greater than the statutory maximum fine.

The Department of Justice Press Release announcing the December 29, 2014 NYK guilty plea states that the total agreed upon fines in the current investigation now exceeds U.S. $135 million. It also quotes Bill Baer, Assistant Attorney General in charge of the U.S. Department of Justice’s Antitrust Division, as stating:

“Including today’s charges, three companies have now agreed to plead guilty to participating in this long-running conspiracy. We are not done. Our investigation is ongoing.”
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ITC Programs at the ABA International Law Section’s Spring 2015 Meeting

The International Transportation Committee will be presenting two programs at the ABA’s Section of International Law’s Spring Meeting in Washington, D.C. The first, to be held on April 29th, is Pink Mustaches and Charging Stations: Keeping the Law Up to Speed with Cars’ Changing Faces and Refueling Spaces. The second, The Open Road: Transparency and Compliance in the New African Transportation Frontier, will be held on May 1st.

The Committee is also co-sponsoring several other programs at the ABA International Law Section’s Spring 2015 Meeting, including programs on Financing for Infrastructure Investment in Africa and the WTO’s Trade Facilitation Agreement.

Please join us in Washington this Spring!

EDITOR’S NOTE

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