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***“The Validity and Enforcement of Jurisdiction Clause
inserted in Bills of Lading under the Brazilian Courts’
perspective”***

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Brazilian's Perspective of Foreign Jurisdiction

- **Art. 5, II of the Federal Constitution – Principle of legality – Free will of the parties to contract the jurisdiction clause. If there being no legal prohibition, it is nor upon the Judiciary to prohibit the election of foreign jurisdiction.**
- **Art. 421 of the Civil Code – Freedom of will of the parties.**
- **Precedent 335 of the STF – Validity of the jurisdiction election clause.**
- **Art. 111 of the Civil Procedures Code – allows the parties to elect the jurisdiction to which they intend to submit eventual disputes. “Territorial jurisdiction” is not an absolute rule, so the parties may agree.**

Brazilian's Perspective of Foreign Jurisdiction

➤ INTERNATIONAL JURISDICTION OF THE BRAZILIAN COURTS

Art. 88 of the Brazilian Civil Procedures Code:

“Art. 88 – It is upon the Brazilian judiciary authority when:

I – the defendant, whatever his nationality, is domiciled in Brazil;

II – the obligation must be complied with in Brazil;

III – the lawsuit originates from a fact occurred or act practiced in Brazil.

Sole paragraph – For purposes of the provision in no. I, above, the foreign corporate entity with an agency, branch or office in Brazil is reputed to be domiciled in Brazil.”

In this particular, we understand that the above article should be applied in cases of Civil Responsibility (Tort Actions), when there is no contract involved or if the contract is silent on the jurisdiction aspect.

Art. 89 of the Civil Procedures Code - Brazilian law provides exclusive competence in certain case, related to public order matters. (Real State and probate)

Art. 90 of the Brazilian Civil Procedures Code – Inexistence of International *Lis pendens*. The Brazilian jurisdiction has concurrent competence, considering that there is no pendent jurisdiction if a foreign lawsuit is filed with the same object of a lawsuit filed in Brazil.

Jurisdiction Clause

➤ JURISDICTION ELECTION CLAUSE

Through the jurisdiction election clause the parties agree as to the jurisdiction to which they desire to be submitted in the case of eventual controversy.

➤ BRAZILIAN JURISDICTION X FOREIGN JURISDICTION

The parties may elect a certain court jurisdiction in Brazil or abroad. In the case of contracts that provide for jurisdiction within Brazilian territory, freedom of will usually prevails, permitting the rejection of any jurisdiction different from the one agreed by the parties.

The situation is more complicated when the elected jurisdiction is outside Brazilian territory. In such cases there is no uniform understanding by our courts. Sometimes prevalence is granted due to the principle of freedom of will, and sometimes prevalence is denied due to concurrent competence, understanding that Brazil is competent to analyze the case, and an eventual lawsuit brought abroad would not configure pendent jurisdiction inasmuch as competence would be concurrent.

Jurisdiction Clause

- **Concurrent competence of the Brazilian Judiciary (art. 88, II, CPC) x Respect of the freedom of will of the parties (art. 421 Civil Code and art. 111 Civil Procedures Code).**
- **Courts – tend towards concurrent competence.**
- **Doctrine – validity of the jurisdiction election clause to foment international trade.**

1950's – Brazil Validates Foreign Jurisdiction Clause

- Extraordinary Appeal 30636/DF, Supreme Court of Justice – admission of Uruguayan jurisdiction for a contract to be performed in Brazil:

“Jurisdiction of the contract – Admissibility of election of foreign jurisdiction – Art. 12 of the Introduction to the Civil Code.

Brazilian law recognizes contractual jurisdiction except in the case of impediment of the public order.”

(Supreme Court of Justice, Extraordinary Appeal nº. 30.636/DF, Reporting Justice Cândido Motta Filho, First Bench)

2005 - STJ Finally Acknowledges the Validity of the Jurisdiction Election Clause

- Subsequently, quoting the 1950's decision, the Superior Court of Justice admitted the election of foreign jurisdiction, as follows:

“SPECIAL APPEAL - PREQUESTIONING - PRECEDENTS 282/STF AND 211/STJ – REEXAMINATION OF EVIDENCE AND CONTRACTUAL INTERPRETATION – PRECEDENTS 5 AND 7 – CONCURRENT INTERNATIONAL JURISDICTION – ELECTION OF FOREIGN JURISDICTION – ABSENCE OF MATTERS OF PUBLIC ORDER - VALIDITY – DIVERGENCE NOT CONFIGURED.

1. In Special Appeals evidence is not reexamined and contractual clauses are not interpreted (Precedents 5 and 7).

2. The election of foreign jurisdiction is valid, except when the case involves public interests.

3. In order to configure divergence of case law, it is necessary to analytically demonstrate the symmetry between the compared judgments. The simple transcription of precedent decision does not suffice.”

(Special Appeal n^o. 242383 / SP, Reporting Justice Humberto Gomes de Barros, T3 – Third Bench, j. on 03/02/05)

2005 - STJ Finally Acknowledges the Validity of the Jurisdiction Election Clause

- **At the time, the understanding of the STJ (Superior Court of Justice) was in the sense of inserting Brazil in the context of world trade. It is worth emphasizing part of the vote of Reporting Justice Humberto Gomes de Barros:**

“In this case, the election of foreign jurisdiction also eliminates domestic jurisdiction, as there is no question of public order involved.

*As to the assertion that “the competence of the Brazilian judge cannot be rejected by the will of the parties” (REsp 251.438/ Barros Monteiro), the Federal Supreme Court, at the end of the 1950’s in a case involving a similar situation and interpreting Art. 12 of the Introductory Law to the Civil Code – the essence of art. 88 of the CPC – **indicated the possibility of electing foreign jurisdiction (...)***

Therefore, the election of foreign jurisdiction is valid except when the case involves public interests.(...)”

2005 - STJ Finally Acknowledges the Validity of the Jurisdiction Election Clause

- Furthermore, the understanding of the Justice Carlos Alberto Direito is clear as to the need to insert Brazil in the globalized context of world trade:

*“As demonstrated by Judge Humberto Gomes de Barros, there is nothing to prevent inserting the elected jurisdiction in international contracts, inasmuch as when we restrict the possibility of international jurisdiction, **we are limiting the negotiating capacity of the country in a world that nowadays processes contracts rapidly in supra-national terms.***

I therefore follow the vote of Judge Humberto Gomes de Barros...”

2008 – Brazilian’s Court set back from the Validity of the Jurisdiction Election Clause

- 2008 – Retreat in the understanding of the STJ.
- Concurrent Brazilian competence – art. 88, II of the CPC.

“Civil procedures. International competence. Contract for distribution in Brazil of products manufactured by a company headquartered in the United Kingdom.” Impropropriety of the term “laws of the United Kingdom”. Execution of Brazilian sentence abroad. Matters not prequestioned. Precedents 282 and 356 of the STF. Contractual execution essentially in Brazilian territory. Concurrent competence of the Brazilian judiciary. Art. 88, item. II, of the CPC. Precedents.

- The allegations not faced and decided by the local Court cannot be examined by the STJ due to the absence of prequestioning. Precedents 282 and 356 of the STF.

–The Brazilian judiciary authority is competent to examine the lawsuit brought by the Brazilian representative of a foreign company for purposes of maintaining the representation contract and indemnity for expenses incurred with the distribution of products.

- The performance of the representation contract was effectively carried out in Brazilian territory; the allegation that payment was always effected abroad does not imply lack of competence of the Brazilian judiciary.

Special Appeal rejected.”

(Superior Court of Justice, Special Appeal nº. 804306 / SP, Reporting Justice Nancy Andrighi, T3 – Third Bench j. on 19/08/08)

2008 – Brazilian's Court set back from the Validity of the Jurisdiction Election Clause

- The Reporting Justice Nancy Adrighi understood that art. 88, II, of the Civil Procedures Code should be applicable, since the obligation had to be accomplished in Brazil:

*“... the State Court rendered decision, to whom the jurisdiction election clause is valid, even in the adhesion contracts, “as long as there is not abusiveness and losses to the defense”, losses of which that has been evident .(...) Appealed decision correct, since that no violation of referred art. 88, subsection II of the CPC has ever been configured. **Such provision observing the hypothesis of concurrent competency, precisely determines that the Brazilian Judiciary is competent when “ the obligation has to be fulfilled in Brazil”, which exactly what occurs in the case...**”*

Contract of Sea Carriage (Bill of Lading)

- **Adhesion contract – legal, valid and effective contract.**
- **Possibility of repudiation – damage to hypossufficient party.**
- **Abusiveness and hindrance of defense – repudiation of jurisdiction election.**

Ex: A consignee of a Bill of Lading with low economical capability may not litigate in Europe, so the validity of the election clause, in a contract that the party did not discuss its terms, might be mitigated.

Contract of Sea Carriage (Bill of Lading)

- In contracts of carriage where the contractual jurisdiction is within Brazilian territory, there is a higher degree of acceptance by our Courts as per the judgments below:

“SPECIAL APPEAL. CIVIL PROCEDURES. ELECTED JURISDICTION. PREVALENCE.

1. The elected jurisdiction clause in the contract of adhesion between auto assembly company and their dealership (distributor/seller), is effective and valid and must only be rejected when, according to praetorian understanding, the abusiveness thereof is acknowledged resulting on the other hand, in unfeasibility or difficulty in access to the judiciary.

2. Precedent of the STJ.

3. Special appeal accepted.”

(Superior Court of Justice, Special Appeal nº. 466179 / MS; Reporting Justice Fernando Gonçalves; 4th Bench; j. 03/06/03 – our bold)

Contract of Sea Carriage (Bill of Lading)

➤ REDRESS ACTION FILED BY CARGO INSURER – ENFORCEMENT OF BILL OF LADING’S CLAUSE – CONTROVERSY

“CIVIL PROCEDURES. RELATIVE COMPETENCE. ELECTED JURISDICTION. INTERNATIONAL PRIVATE LAW. CONTRACT OF SEA CARRIAGE. SUBROGATION OF INSURANCE COMPANY. THE CLAUSE OF JURISDICTION ELECTION ESTABLISHED IN THE CONTRACT OF SEA CARRIAGE IS VALID.. Precedents of the STJ (RESP 379949). Through subrogation, the intact legal contractual relationship is transferred to the insurer, including the credits and their contractual peculiarities. DECISION The records of this Bill of Review no 130439-2 having been examined and discussed, the Judges of the Fourth Civil Chambers of the Court of Appeals of the State of Pernambuco agree and decide, pursuant to the minutes of judgment and respective shorthand notes, to unanimously grant the appeal, ordering the forwarding of the records do the Courts of the City of Rio de Janeiro Recife, July 13, 2006.”

(State Court of Pernambuco, Interlocutory Appeal nº. 130439-2, Reporting Judge Frederico Ricardo de Almeida Neves, j. on 13/06/06)

Contract of Sea Carriage (Bill of Lading)

➤ REJECTION OF JURISDICTION CLAUSE ON BEHALF OF CARGO ISSURER:

“SPECIAL APPEAL – OCEAN CARRIAGE CONTRACT – REDRESS LAWSUIT – SUBROGATION – JURISDICTION ELECTION CLAUSE – PROCEDURAL SUBJECT MATTER – NON OPPOSITION TO THE SUBROGATE – ABSENCE OF INSURGENCY IN RESPECT TO ALL GROUNDS OF THE APPEALED FINAL COURT DECISION – INCIDENCE BY ANALOGY OF STF ´S PRECEDENT DECISION NO. 283 – APPEAL NOT ACKNOWLEDGED.

I – The institution of the subrogation solely transfers the credit with the characteristics of material right thereof. The jurisdiction election clause set forth in the contract between assured and carrier does not produce effects in relation to the subrogated underwriter/insurer agent.

II – The Final Court Decision based on more than one ground, without all of them having been object of challenge. Application, by analogy, of STF ´s precedent decision no. 283.

III – Special Appeal not acknowledged. “

(Superior Court of Justice, Special Appeal nº. 1038607/SP; Reporting Justice Massami Uyeda, T3 – Third Branch, j. 20/05/08)

Contract of Sea Carriage (Bill of Lading)

➤ EFFECTIVENESS OF ELECTION OF FOREIGN JURISDICTION:

Case-by-case analysis – one must ascertain eventual prejudice to the party if the lawsuit is processed abroad.

In effect, a foreign jurisdiction agreement is accepted in a Bill of Lading, and has been accepted by our courts:

“This is an exceptio fori motion brought by HJ SCHRYVER & CO alleging, in summary, that the elected jurisdiction agreed by the parties is Hamburg, Germany and not São Paulo. Challenge was offered. The incident is grounded. The parties - legal entities – perform activities and are not to be considered consumers for purposes of the Consumer Act. Thus, there is no abusiveness and the principle of pacta sunt servanda must prevail, including as to jurisdiction. In view of this, I JUDGE the exception grounded and declare this court to be incompetent to examine and judge the case. No defeat fees.”

(State Court of São Paulo – 1st Instance, proc. n^o. 583.00.2006.211634-2, p. on 17/05/07)

Contract of Sea Carriage (Bill of Lading)

“However, for lawsuits arising from the contract, the jurisdiction election clause is valid (STF, Precedent 335). This clause, in the case at hand, establishes that “any dispute arising from the contract of this Bill of Lading will be decided in the country where the carrier has their principal place of business and the laws of that country will apply except where provided otherwise in this Bill of Lading” (as per Clause 2, page 50). Based on this clause, the appellant argues the competence of the jurisdiction of Athens (Greece), where they have their principal place of business (pages 47/48).

There is no reason to repudiate the jurisdiction election clause non-application thereof to the insurance company not being correct, the insurer being subrogated in the rights, actions, privileges and guarantees of the assured (CC, art. 988). The latter, if not for the insurance coverage, would bring suit against the carrier in the City of Rio de Janeiro (Brazil). The subrogated insurance company not having more rights than the assured.

Contract of Sea Carriage (Bill of Lading)

Two decisions from the São Paulo Court of Appeals establish exactly that, providing first that “the insurer that pays out indemnity for damage to goods is subrogated in the rights of the assured, including in what refers to the competent jurisdiction”. (Reporting Judge Moretzsohn de Castro, in RT 515/92). Secondly, a decision that fits like a glove, states that “the election of jurisdiction inserted in a Bill of Lading is valid, and applies to the insurer as subrogated party and successor to the shipper (Reporting Judge José Cardinale, in RT 529/96).”

(State Court of São Paulo, 2nd Civ. Chamb. - A.I. nº. 366.847-4, Reporting Judge Sena Rebouças, em 28.11.86)

Contract of Sea Carriage (Bill of Lading)

- However, the acceptance of the Jurisdiction Clause is not that simple, the Superior Court of Justice have rejected that clause understanding that elected contractual jurisdiction by the parties does not prevail when for the assumed obligation by the transportation company, the discharge of the goods is performed in Brazil:

“OCEAN CARRIAGE. CONSTITUTIONAL AMENDMENT NO. 7/77. TERMINATION LAWSUIT. RESIDUAL COMPETENCY OF THE EXTINGUISHED FEDERAL COURT OF APPEALS. FOREIGN JURISDICTION CONTRACTUAL ELECTION. PREVALENCE OF BRAZILIAN JURISDICTION. APPLICATION OF ART. 88, SUBSECTION II THE CPC AND THE SUBMISSION PRINCIPLE.

The elected contractual jurisdiction by the parties does not prevail when for the assumed obligation by the transportation company, the discharge of the goods is performed in Brazil. Application of article 88, subsection II of the Civil Procedural Code, as well as the submission principle due to the previous acceptance of the Brazilian jurisdiction.

Termination action deemed groundless by the lack of existence of legal requisites”.

(Superior Court of Justice, AR nº. 133 / RS; Reporting Justice Claudio Santos, S2 – Second Session, j. 30/08/89)

Contract of Sea Carriage (Bill of Lading)

“Exceptio Fori Motion – compensation lawsuit for material damages – Ocean carriage of goods – claim of carrier, petitioning the predominance of the contractual clause that elected the jurisdiction/court of the City of Hamburg in Germany or subsidiarily the general rule of defendant’s domicile at the Capital (CPC, art. 94 and 100 subsection IV – a) inadmissibility lack of validity of election clause – characterized adhesion contract – abuse present – CDC applicable “in casu” – Law 8078/90 – jurisprudence of the C. STJ – competence of domicile of the plaintiff consumer – exceptio rejected - appeal not granted.” (State Court of São Paulo, Interlocutory Appeal nº. 7228580-2, Reporting Judge Jovino de Sylos, 16^a Civil Chamber, j. 10/06/08)

In view of the foregoing, the validity of the jurisdiction election clause in Brazil is still mitigated and controversial, specially in the case of the Bill of Lading, as the Brazilian Courts still understand such as adhesion contract and therefore are conservative in dealing with international trade, tending to consider themselves concurrently competent with foreign courts indicated in the jurisdiction clause.

Arbitration Clause X Court Jurisdiction Clause

- Dichotomy – arbitration clause and jurisdiction election clause.
- Arbitration – possibility of electing foreign jurisdiction without negative interference of the judiciary.

Art. 267, Civil Procedures Code:

“Proceedings are extinguished without resolution of merit (...)

VII – if the parties have agreed to solve its disputes through arbitration”

For that reason, it might be most effective to agree/insert an arbitration clause in a Bill of Landing than a Court Jurisdiction Clause, since the Courts tend to accept the first one based on article 267 of CPC and reject the second one alleging that violates public interests and is against the provisions of article 88 – concurrent jurisdiction.

Arbitration Clause X Jurisdiction Election Clause

- To illustrate that understanding, please find below a decision that the State Court of Rio de Janeiro Court accepted the arbitration clause, even with foreign elected jurisdiction:

“COLLECTION LAWSUIT – ARBITRATION COMMITMENT CLAUSE VALIDLY AGREED ON A CHARTER CONTRACT – COVENANT AGREED BETWEEN PLAINTIFF AND THE TWO DEFENDANTS – LAWSUIT FILED AGAINST DEBTORS OPPOSITION BY THE CO-DEFENDANT OF PRELIMINARY OF SUBMISSION OF CONTROVERSY TO THE ARBITRATION LAW CONSTITUTIONALITY OF THE ARBITRATION LAW ALREADY ACKNOWLEDGED BY THE PLENARY OF THE SUPREME COURT – APPEAL DENIED.”

(State Court of Rio de Janeiro, Appeal nº. 2007.001.21338, Reporting Judge Ernani Klausner, First Civil Chamber, j. 31/07/2007)

CONCLUSION: FORUM SHOPPING IN RIO!?!





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Visions of Earth
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THANK YOU !

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