

**Forum Clauses and Forum Shopping:  
A Chilean perspective with special remarks on the  
Hamburg Rules enforcement**

**International Law Seminar  
Recognition of Forum Clause and Forum  
Shopping: Foreign Perspectives**

**The Plaisterers' Hall  
London, November 6, 2008**

**By Ricardo Rozas**

**L&R Abogados  
Apoquindo 3001, 9th Floor  
Santiago, Chile**

**Tel: (+56-2) 411 9200**

**Fax: (+56-2) 411 9300**

**<http://www.lyrabogados.cl>**

**Email: rrozas@lyrabogados.cl**

# Forum Clauses and Forum Shopping: A Chilean perspective with special remarks on the Hamburg Rules enforcement

## 1. Introductory comments

In 1982, Chile ratified the United Nations Convention on the Carriage of Goods by Sea 1978 (the "Hamburg Rules"), which were in force internationally as of November 1, 1992. Additionally, the Chilean legislature included them in the Chilean Code of Commerce in 1988 (Paragraph 3<sup>rd</sup> of Title V of Book III), with minimal changes (the "Chilean adoption of the Hamburg Rules").

This paper will deal with some of the most interesting issues related to the Hamburg Rules enforcement in Chile in the light of forum shopping and the validity of forum clauses.

## 2. Definitions

### (a) Contractual and Actual Carrier:

Chilean law recognizes a basic distinction between the "carrier" (also known as the "contractual carrier") and the "actual carrier". The former is defined as *"any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper"*<sup>1</sup> and the latter as *"any person to whom the performance of the carriage of the goods, or part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted"*.<sup>2</sup>

### (b) Shipper

As per Chilean law "shipper" means *"any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier,*

---

<sup>1</sup> Article 975 No. 1 of the Chilean Code of Commerce (based on Article 1.1 of the Hamburg Rules).

<sup>2</sup> Article 975 No. 2 of the Chilean Code of Commerce (based on Article 1.2 of the Hamburg Rules).

*and any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.”*

Under Chilean practice the scope of this definition comprises both the person concluding the contract of carriage of goods by sea and that actually delivering the cargo, provided they are not the same person.

(c) Consignee

By “consignee” it is meant “*the person entitled by a document of title to take delivery of the goods*”,<sup>3</sup> which comprises his servants or agents. Accordingly, his identification will normally be evidenced by the information contained in the bill of lading or other document evidencing the contract of carriage by sea.

(d) Goods

Article 976 of the Chilean Code of Commerce defines “goods” as “*any sort of chattel, including live animals*”. Where the goods are consolidated in a container, pallet or similar article of transport or where they are packet, “goods” includes such article of transport or packaging if supplied by the shipper.<sup>4</sup> In this respect it is worthy to note that the definition of goods is not subject to deck cargo exclusion provided under the Hague/Hague-Visby regimes.

(e) Contract of Carriage by sea

Under Chilean law a “contract of carriage by sea” means “*any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea.*”<sup>5</sup>

---

<sup>3</sup> Article 975 No. 4 of the Chilean Code of Commerce (based on Article 1.1 of the Hamburg Rules).

<sup>4</sup> Article 976 of the Chilean Code of Commerce (based on Article 1.5 of the Hamburg Rules).

<sup>5</sup> Article 974 of the Chilean Code of Commerce (based on Article 1.6 of the Hamburg Rules).

(f) Bill of lading

Article 977 of the Chilean Code of Commerce provided that the bill of lading "*is a document which establishes the existence of a contract of maritime transport and verifies that the carrier has taken charge or has loaded the goods and has undertaken to deliver them against presentation of that document to a determined person to his order or to the bearer.*"<sup>6</sup>

### **3. Scope of Application**

Under Chilean law any party may be subject to the provisions of our rules regarding carriage of goods by sea, which are applicable if:

- (a) the port of loading or discharge as provided for in the contract of carriage by sea is located in Chile; or
- (b) the bill of lading or other document evidencing the contract of carriage by sea (such as the sea waybill; through bill of lading; short form bill of lading; etc.) stipulates that the contract will be governed by Chilean law (such as through a "Paramount" Clause); or
- (c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in Chile.

The Chilean adoption of the Hamburg Rules are compulsory applicable regardless of the nationality of the ship, carrier, actual carrier, shipper, consignee or any other interested person.

### **4. Contracts Covered**

The Chilean adoption of the Hamburg Rules are applicable to all contracts of carriage by sea and it is not a condition that they are necessarily evidenced in a bill of lading or other documents of title such as a sea way bills or short-sea notes. In respect to combined transport bills or through bills of Lading the Chilean adoption of the Hamburg Rules are applicable only to the corresponding sea leg carriage.

---

<sup>6</sup> Based on Article 1.7 of the Hamburg Rules.

The Chilean adoption of the Hamburg Rules do not apply to charter parties. Nonetheless, a bill of lading issued in compliance with a charter party is under the Chilean adoption of the Hamburg Rules if it governs the relation between the carrier and the holder of the bill of lading other than the charterer.

In case of contracts providing for future carriage of goods in a series of shipment during and agreed period (e.g. "Tonnage" or "Volume" contracts used for cargo projects) the Chilean adoption of the Hamburg Rules apply to each shipment. However, where a shipment is made under a charterparty the Chilean adoption of the Hamburg Rules do not operate, except for the exception explained in the preceding paragraph.

## **5. Jurisdiction**

Notwithstanding the general Chilean rules on jurisdiction, in judicial proceedings relating to carriage of goods under the Chilean adoption of the Hamburg Rules the plaintiff, at his option, may also institute an action in a court which is competent and within the jurisdiction of which is situated one of the following places:

- (a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or
- (b) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
- (c) the port of loading or the port of discharge; or
- (d) any additional place designated for that purpose in the contract of carriage by sea.

Notwithstanding the preceding provisions, an action may be instituted in the courts of any port or place in Chile at which the carrying vessel or any other vessel of the same ownership may have been arrested. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in letters (a) to (d) above for the determination of the claim. This petition must be handled as a formal defence as per the applicable rules to the so-called "dilatatory exceptions". In addition, before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action. All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest.

No judicial proceedings relating to carriage of goods under the Chilean adoption of the Hamburg Rules may be instituted in a place not specified as per the above-mentioned rules. However, these provisions do not constitute an obstacle for obtaining provisional or protective measures, commencing arbitration proceedings as per the rules explained in section 6 below and the special jurisdiction rules that apply in bankruptcy proceedings.

Notwithstanding the above, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an actions, is effective.

## **6. Arbitration**

Article 1203 of the Chilean Commerce Code establishes the general principle that – except for few exceptions- the resolution of any maritime dispute is subject to mandatory arbitration.

In case of disputes arising from carriage of goods by sea contracts, the arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

- (i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or
- (ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
- (iii) the port of loading or the port of discharge; or
- (iv) in the actions against the carrier any place designated for that purpose in the arbitration clause or agreement.

The above provisions are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is deemed as unwritten.

In this respect, the arbitrator or arbitration tribunal shall apply the rules of the Chilean adoption of the Hamburg Rules.

## **7. Effect of Contractual Stipulation that may Conflict with the Chilean adoption of the Hamburg Rules**

Under Chilean law any stipulation in the contract of carriage by sea, in the bill of lading or in any other document evidencing the contract of carriage by sea that deviates directly or indirectly from the Chilean provisions is deemed unwritten.<sup>7</sup> This sanction does not affect the validity of other stipulations in the contract or document of which it forms part.

When the holder of goods experiences damage as a consequence of a stipulation that must be deemed unwritten the carrier must pay an indemnity in the amount necessary to redress the holder of the goods for any loss or damage thereto or for delay in delivery thereof.

## **8. Validity of Forum Clauses**

Within the scope of the Chilean adoption of the Hamburg Rules, clauses providing a foreign jurisdiction for dispute resolution or the application of foreign law are treated as unwritten. This criteria was confirmed by the Chilean Supreme Court in the case *A.J. Broom vs. Exportadora*,<sup>8</sup> which referred to a cassation remedy in connection to the application of a defence based on alleged lack of jurisdiction of the Chilean courts due to the fact that the pertinent bill of lading had a clause establishing jurisdiction in Spain.

The Supreme Court rejected the above-mentioned defence and held that this type of clause had to be treated as unwritten as it was contrary to public order rules of law, i.e. the obligation to institute actions according to the jurisdiction rules pointed out in section 5 above.

---

<sup>7</sup> The Hamburg Rules use the expression “null and void” instead of “Unwritten”.

<sup>8</sup> Supreme Court Case File No. 683-98.

## 9. Forum Shopping

Notwithstanding our previous comments, the following are some of the most important issues when choosing to apply the Chilean adoption of the Hamburg Rules:

### a) Contractual & Actual Carrier

As explained in section 1 above, Chilean law recognizes a basic distinction between the "carrier" and the "actual carrier", which has simplified very much the identity of the carrier problem as anyone who issues a bill of lading as a principal may be treated as a Contractual Carrier. This applies even to freight forwarders in case they issue their own "House" bill of lading and actually many cargo claims are just normally based on these documents. With this regard it is important to note that under Chilean practice "demise clauses" have no effect.

It is also worthy to note that where the performance of the carriage or part thereof has been entrusted to an actual carrier the carrier nevertheless remains responsible for the entire carriage. In this respect the carrier is joint and severally responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment. Additionally, all the provisions governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him.

### b) Period of Responsibility

According to Article 4.1 of the Hamburg Rules the responsibility of the carrier is from "port to port". This encompasses the period during which the goods are in custody of the carrier "*at the port of loading, during the carriage and at the port of discharge.*"

The Chilean system goes one step further and Article 982 of our Code of Commerce provides that the carrier is responsible for the goods while they are in his custody, "*be this ashore or during their actual transport*". Therefore, the Chilean system is rather closer to a "door to door" period of responsibility. Accordingly, the test for establishing when the carrier's period of responsibility is triggered does not depend on whether or not the goods reached the port of loading but actually on the exact time and place where the goods are handed over to the carrier (e.g. at the shipper's premises).



For the purpose of Article 982 the carrier is deemed to be in charge of the goods from the time he has taken over the goods from:

- (i) the shipper, or a person acting on his behalf;
- (ii) an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment.

The carrier's custody period ends when he delivers the goods:

- (i) by handing over the goods to the consignee; or
- (ii) in cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge;
- (iii) or by handing over the goods to an authority or other third party to who, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.

#### c) Presumed Fault or Neglect and Duty of Diligence

The main principle is that the liability of the carrier is based on presumed fault or neglect. Accordingly, the carrier is liable for loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence that caused the loss, damage or delay took place while the goods were in the carrier's charge as described in b) above.

However, the carrier may avoid liability if he discharge the burden of proving that that he, his servants or agents adopted all measures that could reasonably be required to avoid the cause of loss or damage, and consequences thereof. Therefore, under this approach the carrier is subject to a much more rigorous regime than the one provided under the Hague/Hague-Visby Rules. For instance, the exception based on nautical fault does not operate and thus the carrier is responsible –unless he proves otherwise - for acts, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

d) Delay in Delivery

Under Chilean law it is understood to occur when the goods have not been delivered at the port of discharge stipulated in the contract of carriage by sea (i) in the period expressly agreed or, in absence of such agreement, (ii) when they have not been delivered in the period that would be reasonable to require of a diligent carrier given the pertinent circumstances. Additionally, losses of goods will be deemed to exist if they have not been delivered to its destination within 60 days following expiration of the term for delivery.

e) Event of Fire

The carrier is liable both for the loss or damage of the goods as well as the delay in delivery thereof if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents. Accordingly, the burden of proof is reversed and includes fault or neglect in the adoption of all measures that could be reasonably required to put out the fire and avoid or mitigate the consequences thereof.

f) Limitation Rules

Chilean law draws a distinction between lost or damaged goods and delayed goods. In the former case the carrier's liability is limited to an amount equal to 835 Special Drawing Right ("SDR")<sup>9</sup> per package or other shipping unit or 2.5 SDR per kg of gross weight, if the latter is higher.<sup>10</sup>

In case of delayed goods the carrier's liability is limited to an amount equivalent to 2.5 times the freight payable for the goods delayed, but not exceeding the total sum of the freight payable under the respective contract of carriage by sea.

---

<sup>9</sup> The Special Drawing Right as defined by the International Monetary Fund.

<sup>10</sup> Article 992 of the Chilean Code of Commerce (based on Article 6.1(a) of the Hamburg Rules). For the purpose of calculating which amount is the higher the following rules apply:

(a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit (Article 996 No. 1 of the Chilean Code of Commerce (based on Article 6.2(a) of the Hamburg Rules).

(b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit. (Article 996 No. 2 of the Chilean Code of Commerce (based on Article 6.2(b) of the Hamburg Rules).

It is worthy to note that the above rules do not comprise neither the interests arisen from the value of the goods damage nor judicial costs.

g) Limitation of Actions

Under Chilean law the general principle is that any action relating to maritime disputes is time-barred in two years.<sup>11</sup> In case of cargo claims this period commences on the day on which the carrier has delivered the goods or part thereof. If there is no delivery, the period is counted from the end of the last day on which the goods should have been delivered.

Is interesting to note that actions for indemnity by a person held liable may be instituted even after the expiration of the limitation period if instituted within 6 months. The time allowed is counted as of the person instituting such an action has settled the claim or has been served with process in the action against himself. Under Chilean practice, cargo claimants normally sue anyone that may fall within the carrier and actual carrier definitions. Therefore, carriers must be aware of this provision particularly in the actions for indemnity they may have against other carriers, stevedores, ship agents, freight forwarders, or any other party that may have responsibility thereof.

Ricardo Rozas  
L&R Abogados

---

<sup>11</sup> Article 1249 of the Chilean Code of Commerce. In this respect it is worthy to note that actions relating to passage contracts, freight, general average and contributions are time-barred within six months (Articles 1246 and 1247 of the Chilean Code of Commerce).