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The decision issued by the French “Cour de Cassation” on September 27th, 2017, is an important curb on the enforceability of the bill of lading’s competent clauses regarding the real receiver.

We would like to thank Me DELPLANQUE for his comments which have been freely translated below :

- EXTRACT FROM THE DECISION -

*“Having observed, by various reasons, that the bill of lading has been issued to a designated person and that the company Hélium services did not figure in any quality, it is, without reversing the charge of proof that the Cour d’appel, which didn’t have to verify the research invoked in the 6th ground which was not asked, has considered, by legal explanations, that this company could not be considered as a third-party holder
Plus having observed by legal explanation that the company Hélium services did not acquire the bill of lading and could not be considered as a third-party holder, the Cour d’appel, (...) has exactly deduced that the attributive clause of jurisdiction inserted in the bill of lading was not enforceable to the cargo final receiver”*

- OPINION OF ME Xavier DELPLANQUE de MANDELLOT -

The decision issued by the French “Cour de Cassation” on September 27th, 2017, is an important curb on the enforceability of the bill of lading’s competent clauses regarding the real receiver.

We recall that the real receiver (that is to say the one, who is not mentioned in the bill of lading and has suffered the prejudice) has a direct right of action against the sea carrier.

It should be remembered that, following to the adoption of the European Union’s regulation governing the rules of jurisdiction, the “Cour de Cassation” has considerably expand the principle of enforceability of competent clauses to the third party holder.

In the decision, a Kenyan shipper had entrusted a freight forwarder the transport organization of a container full of avocados from Nairobi to Marseille.

This latest has given the sea transportation part to DAL which has loaded the container on-board of a DELMAS vessel under a VSA agreement. During the destuffing in the final receivers' warehouse at Marseille, the damages were the object of reserves.

The "Tribunal de Commerce de Marseille" declared itself territorially competent by a judgement issued on January 12th, 2007. The judges considered that the final receiver was not part of the bill of lading issued by the carrier.

By a decision of October 11th, 2007, the "Cour d'appel d'Aix en Provence" confirmed the judgement of the Tribunal de Commerce de Marseille. Was also added the reminded by the Court the needed notion of accepting the competent clause.

The "Cour de Cassation" decided on December 16th, 2008, that an attributive clause of jurisdiction which has been agreed by a carrier and a shipper, inserted into a bill of lading, was producing its effects on the third party holder of the bill of lading as long as, by acquiring it, he has taken over the shipper's rights and obligations in view of the applicable national law; on the contrary, had to be verified his consent to the clause as stated in article 27 of the above mentioned Regulation.

However, in various commercial situations, the final consignee does not know the carrier and does not acquire, in general, the bill of lading, which often, do not circulate anymore, as it is used for a recipe for boarding, notably for liner transportation

Still was pending the question of knowing if the final receiver, nor mentioned nor holder of the bill of lading, could avoid the opposability of the competent clause.

The decision mentioned today dedicates the unenforceability of the competence clause to the final receiver which was not mentioned nor has he acquires the bill of lading.

The acquisition of the Bill of lading has to be proved by the carrier. However and often, the bill of lading only exists between the freight forwarder and the carrier.

We remind that the freight forwarder can receive instructions to refuse the competent clause which will be, in that case, never enforceable.

The final receiver can therefore, and without any risk, asserts his rights against the sea carrier in front of the place of delivery's jurisdiction, notwithstanding any competence clause.

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