“Ut Res Magis Valeat Quam Pereat” as a “Dispositive” Choice of Law Factor: A Recent Decision from the Second Circuit

A divided panel of the Second Circuit held last week that federal common law, and not Brazilian law, would be applied to a contract for the shipment of goods, notwithstanding the fact that the contract was negotiated, executed, and performed in Brazil, by a Brazilian company and a corporation that regularly conducts business in Brazil, concerning goods that were at all times located in Brazil. Dispositive of the choice of law inquiry was the fact that federal common law would enforce the contract provisions, while Brazilian law would not.

In *Eli Lilly Do Brasil, Ltda. v. Federal Express Corp.*, No. 06-cv-0530 (2d Cir., Sept. 11, 2007), Eli Lilly sued Federal Express in New York for the the value of pharmaceuticals that were stolen in transit between plaintiff’s factory in Brazil to Japan. Defendant raised a limitation on liability contained in the waybill for shipment. On cross motions for summary judgment, Defendant sought to enforce the limitation on liability under federal common law, and Plaintiff sought to apply Brazilian law, asserting that it would invalidate the clause without proof of Defendant’s gross negligence. The District Court applied federal common law, and granted Defendant’s motion.

The Second Circuit reviewed the choice of law decision *de novo* and, like the court below, “consult[ed] the Restatement (Second) of Conflict Laws” for guidance. Under the Section 6 factors, made relevant through section 188, the balance clearly tilted in favor of Brazil. However:

> *“[the] recognition that Brazil’s interest . . . is greater than the United States’ cannot be the end of our inquiry or determinative of its conclusion. . . . Which state is most interested under § 188 is a different question from which state has the more significant relationship with the parties and the contract for purposes of [the final choice of law]. . . . In this case, even taking account of Brazil’s superior § 188 contacts, two of the § 6 factors emerge as determinative of*

> *United States venue: (1) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue in dispute, . . . and (2) protection of the parties' justified expectations. Once Lilly-for whatever reason-asked a United States court to consider its contract, it invited application of the well-settled 'presumption in favor of applying that law tending toward the validation of the alleged contract.' . . . This presumption is consistent with the general rule of contract construction that 'presumes the legality and enforceability of contracts.' The paramount importance of enforcing freely undertaken contractual obligations, especially in commercial litigation involving sophisticated parties, was obvious to the District Court and is obvious to us. The Restatement expressly provides that the justified expectation of enforceability generally predominates over other factors tending to point to the application of a foreign law inconsistent with such expectation."*

Under Federal common law, unlike Brazilian law, the limitation on the waybill is valid. The Second Circuit upheld the application of the former, and affirmed the decision below.

Judge Meskill filed a dissent. He generally opined tha "[t]he presumption in favor of applying the law that tends to validate a contract is [only] important where the alternative is no contract at all." Because there was no allegation that the entire waybill would be "completely invalidated" under Brazilian law, Judge Meskill would have vacated the summary judgment and remanded for a decision under Brazilian law. He also acknowledged that "while the federal common law's presumption in favor of applying the law that tends to validate contracts might mean that the United States has a *general* interest in validating contracts, the United States still does not have a 'significant' or 'close' relationship with *this* contract." Indeed, the United States' interest in enforcing contracts arises in any choice of law contract case filed in its courts. Therefore, under § 197 of the Restatement, "Brazil remains as the default jurisdiction whose laws govern this contract of transportation regardless of whether the liability limitation is valid under Brazilian law."

A link to the decision can be found here.