Estudios de Deusto

Revista de Derecho Público

Vol. 72/2 julio-diciembre 2024

DOI: https://doi.org/10.18543/ed7222024

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THE ENFORCEABILITY OF JURISDICTION CLAUSES AGAINST A THIRD-PARTY HOLDER OF THE BILL OF LADING

La aplicabilidad de las cláusulas de jurisdicción ante terceros tenedores del conocimiento de embarque

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https://doi.org/10.18543/ed.3218

Fecha de recepción: 04.11.2024
Fecha de aprobación: 02.12.2024
Fecha de publicación en línea: diciembre 2024

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Abstract

This essay explores the enforceability of jurisdiction clauses against a third-party holder of the bill of lading under the Spanish and European Private International Law. The analysis addresses the tension between Regulation Brussels I bis article 25(1) and the Spanish Maritime Navigation Act (MNA) articles 251 and 468, which impose additional validity requirements. The essay evaluates the European Court of Justice's recent ruling in joined cases C-345/22 to C-347/22, clarifying how to determine the applicability of jurisdiction clauses against a third-party holder of the bill-of lading and explaining that the Spanish additional requirement of individual and separate negotiation of the clauses is not applicable when Regulation Brussels I applies. Ultimately, the paper highlights the primacy of EU law over conflicting national provisions and its implications for legal certainty in contracts of carriage of goods by sea.

Key-words

Jurisdiction clauses – bill of lading – Regulation Brussels I bis – Maritime Navigation Act (MNA) – European Court of Justice (ECJ)

Resumen

Este ensayo explora la aplicabilidad de las cláusulas de jurisdicción ante terceros tenedores de conocimientos de embarque en virtud del Derecho Internacional Privado español y europeo. El análisis aborda la tensión entre el artículo 25(1) del Reglamento Bruselas I bis y los artículos 251 y 468 de la Ley de Navegación Marítima (LNM) española, que impone requisitos adicionales de validez. Se evalúa la reciente sentencia del Tribunal de Justicia de la Unión Europea para los asuntos acumulados C-345/22 a C-347/22, aclarando cómo determinar la aplicabilidad de las cláusulas de jurisdicción frente a un tercero tenedor del conocimiento de embarque y explicando que el requisito adicional español de negociación individual y separada de las cláusulas no es aplicable cuando se aplica el Reglamento Bruselas I bis. En definitiva, se destacan la primacía del Derecho de la UE sobre las disposiciones nacionales contradictorias y sus implicaciones para la seguridad jurídica en los contratos de transporte marítimo de mercancías.

Palabras clave

Cláusulas de jurisdicción – conocimiento de embarque – Reglamento Bruselas I bis – Ley de Navegación Marítima (LNM) – Tribunal de Justicia de la Unión Europea

I. INTRODUCTION

Although there is no doubt that trust underpins commercial relations, further guarantees are arguably equally essential, and the international transportation of goods by sea is no exception to this. As acknowledged by World Trade Organization (WTO hereinafter), the maritime carriage of goods is also referred to as the "life blood of world trade" and constitutes over four-fifths of the world's trade volume[1]. Evidently, the vast quantities of merchandise that are shipped daily and all the money this implies cannot not be simply contingent upon trust. This need for additional safeguards gave birth to the bill of lading. In fact, it is no coincidence that the birth of the modern bill of lading coincides with the creation of the great commercial cities in the Mediterranean in the XIst century[2]. However, while trust and other additional safeguards along with good faith meaningfully decrease the likelihood of disputes being brought to the courtroom, one can never underestimate the fact that any commercial relationship can end up in a judicial dispute.

In the international maritime carriage of goods, being involved in a judicial process that is taking place in a foreign country means incurring high costs. This is why a jurisdiction clause is often added to the bill of lading

[1] «Maritime transport », World Trade Organisation, accessed on April 3rd of 2024 https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_maritime_e.htm

[2] Chester B. Jr Mclaughlin. «The Evolution of the Ocean Bill of Lading». *The Yale Law Yournal*. (March 1926, Vol. 35, No. 5): 550

determining which country's courts will be competent to hear the case in the future. However, as it will be discussed later, the bill of lading is a document of title, which means that the bill can be transferred to a third party. When this occurs and when there is a third party holding a bill, the question of whether the jurisdiction clause still is applicable or not, rises. The focus of this essay is the analysis of this question under Spanish and European Private International law.

In Spain, in a context where European Union law and national law that regulate the validity of such jurisdiction clauses co-exist, there is no unanimous answer to the enforceability of jurisdiction clauses against a third-party holder of the bill of lading. Different experts differ on their opinion and when it comes to the law and courts, legal certainty is not a given either. To determine the validity of jurisdiction clauses against a third-party holder of the bill of lading, the first question that rises is which law should determine that. The second controversial question is whether the Spanish law, which requires individual and separate negotiation of those clauses, is contrary to the European Union law.

The pertinence of the topic lies on the fact that as jurisdiction is a fundamental basis of the judicial process, it is crucial to know whether a jurisdiction clause is valid to determine if the court has jurisdiction to hear the case or not. Hence the importance of resolving this major legal uncertainty. Furthermore, the current relevance of the topic is undeniable as a request for a preliminary ruling was made to the European Court of Justice (ECJ hereinafter) in 2022 and very recently the ECJ has given judgement resolving the question brought to it on 25 April 2024.

This essay aims to analyse the enforceability of jurisdiction clauses against a third-party holder of the bill of lading in Spain and in the European Union framework. In that direction, the essay first goes through the carriage of goods by sea under the bill of lading system. Second, what jurisdiction clauses are, and their legal framework are established. Third, the current doctrinal debate is introduced. And, finally, the ECJs judgement closes the essay with the Court's arguments and the ruling on the topic.

II. THE CARRIAGE OF GOODS BY SEA UNDER THE BILL OF LADING SYSTEM

1. *Definition and legal framework*

The carriage of goods by sea under the bill of lading system is merely a contract of carriage whose objects are the goods and not the vessel[3]. On the

[3] Juan Luis Pulido Begines, *Curso de Derecho Marítimo de la Navegación Marítima.* (Madrid: Tecnos, 2015), p.215

other hand, the bill of lading is the document that regulates the legal relationship between the parties upon the occasion of the conclusion of a contract of carriage of specific goods by sea[4].

The shipping companies that operate in international carriage of goods sector normally offer their services through their websites and they usually have their own general terms and conditions set out[5]. When the transport is under the bill of lading system, the bill of lading incorporates the aforementioned general conditions, which include the jurisdiction clause, without the shipper of the goods being able to negotiate them individually. However, on the other hand, the shipper, who is usually the weaker party, is compensated for this loss of freedom of choice by other determining factors that encourage them to contract, such as the quality, safety, duration and price of the carriage[6].

The carriage of goods by sea under the bill of lading system is subject to a combination of national and international regulations. When it comes to the Spanish national regulation, it is regulated by Act 14/2014, Dated 24th July, on Maritime Law (Ley de 14/2014, de 24 de julio, de Navegación Marítima) better known as The Maritime Navigation Act (MNA hereinafter)[7]. To be more specific, it is regulated in the Title IV, Chapter II, section 5 of the MNA.

Regarding international conventions, the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules have to be mentioned[8]. The relevance of mentioning these rules lies in the fact that the contract of carriage of goods by se under the bill of lading is internationally regulated by public policy and therefore the parties cannot adopt private agreements that violate these regulations[9]. Firstly, the Hague Visby rules refer to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (1924)

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4 Ignacio Arroyo Martínez, *Compendio de derecho marítimo.* 5.ª edición. (Madrid: Tecnos, 2014), p.272

5 See for example Terms of Carriage of Maersk available in https://terms.maersk.com/carriage (last accessed on April 3rd of 2024) or General Conditions of Carriage of Moldtrans Group in https://www.moldtrans.com/en/general-conditions-of-carriage/ (last accessed on April 3rd of 2024)

6 Aurora Hernández Rodríguez, «Las cláusulas de elección de foro en los contratos de transporte marítimo de mercancías en régimen de conocimiento de embarque. Los arts. 251 y 468 de la Ley de Navegación Marítima», *Cuadernos de Derecho Transnacional.* (Marzo, 2023, Vol. 15, Nº1): p.405-406

7 It has also been translated as "The Shipping Act". However, in this work it will be denominated as The Maritime Navigation Act given that this is the translation employed by the Spanish Ministry of Justice.

8 Javier Del Corte López, «El contrato de transporte marítimo en régimen de conocimiento de embarque» en *Los contratos sobre el buque en derecho español*. *Análisis práctico.* (Madrid: Ed. Dykinson, 2018), 151-153

9 Silvia Badiola Coca, *La responsabilidad del porteador marítimo* (Barcelona: J.M, Bosch, 2022), 32

which have been amended twice by the Amending Protocols of 1968 and 1979. The Hague-Visby rules regulate the carrier's liability in maritime transport of goods[10]. Secondly, the so-called Hamburg rules refer to the United Nations Convention on the Carriage of Goods by Sea (1978). However, the treaty has not been widely accepted internationally and in fact, Spain is not a party to the treaty[11]. For last, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by sea (2008), which is better known as the Rotterdam Rules, is "intended to provide a modern successor to earlier international conventions in the field"[12], that is, to the Hague-Visby and Hamburg Rules. Nevertheless, although Spain has ratified it, the Convention is not in force at the time being[13]. Therefore, the only international convention that should be considered at the time of analysing the carriage of goods by sea under the bill of lading system in Spain, are the Hague-Visby rules.

According to article 2 of the MNA, the *Act shall be applied as long as it does not oppose the terms set forth in the international treaties in force in Spain*. This may lead to think that the application of the MNA is rather residual, however, the Hague Visby Rules regulate only regulate the most essential aspects of the carrier's liability and, therefore, when this is not enough the conflict rules may lead to national rule[14]. In addition, the duality of regulatory sources, national and international, is only formal since in substance the two coincide, at least in the most essential parts[15].

2. *The parties and their obligations*

The parties to the contract are the carrier and the consignor. The carrier is obliged to perform the carriage for a fee. However, undertaking

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[10] According to article 1 of Hague-Visby rules, the "Contract of carriage" only refers to those which are covered by a bill of lading or any similar document of title

[11] «United Nations Convention on the Carriage of Goods by Sea 1978», United Nations Treaty Collection, accessed on April 9th, of 2024 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-3&chapter=11&clang=_en

[12] «The Rotterdam Rules», United Nations Trade & Development, accessed on April 9th of 2024, https://unctad.org/topic/transport-and-trade-logistics/policy-and-legislation/international-maritime-transport-law/rotterdam-rules

[13] «United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea», United Nations Treaty Collection, accessed on April 9th of 2024 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-8&chapter=11&clang=_en

[14] Del Corte López, «El contrato de transporte marítimo en régimen de conocimiento de embarque», 150

[15] Arroyo, *Compendio*…, p.266

the performance of transport does not necessarily mean executing the transport themselves, because the MNA distinguishes three figures: the contractual, the successive and the effective carrier. The contractual carrier figure includes *transport commission agents, clearing agents and other person who undertake to the consignor to provide the transport by means of others* (article 278.2). Time charterers by time or voyage who contract the with third parties the carriage of goods under the bill of lading system also fall under this category (articles 207 and 278.2). The effective carrier is the one who actually transports the goods, always including *the ship-owner of the ship carrier* (article 278.3). The MNA delimits different levels of liability for the contractual and effective carrier. They both share joint and several liability (article 278.1) but the contractual carrier has the right to be reimbursed by the effective carrier (article 278.4). Finally, the MNA takes for granted the definition of the successive carrier and establishes them joint and several liability, unless otherwise agreed on the bill of lading.

The MNA establishes to the carrier meaningful obligations among with their major obligation of performing the carriage. Before the transport, the carrier has three main obligations to fulfil. First, the carrier must make ship available (article 211), the ship must be seaworthy (article 212) and fulfil the characteristics agreed in the contract (article 213). Second, carrier must undertake the loading and stevedore operations, unless otherwise agreed by the parties (article 218.2). And third, the carrier must *deliver the consignor a bill of lading, evidencing the right to be returned those goods at the destination port,* this obligation may be fulfilled by the master or the agent to the carrier as well (article 246). During the transport, the carrier has the duty of custody over the merchandise (article 223) and the voyage must be performed *without undue delay and using the route agreed or, failing to that, by the most appropriate according to the circumstances* (article 220). For last, after the transport, the carrier *undertakes, except if otherwise agreed, to perform the unstacking and unloading at is expense and risk* (article 227) and, of course, the carrier is also obliged to deliver the goods carried to the recipient authorised to receive them (article 228).

On the other hand, the consignor is the party who has ordered the carriage. The consignor is also referred to as the shipper. The definition of consignor includes the contractual shipper as well as the effective shipper, the one who physically delivers the goods for carriage. When it comes to the obligations of the consignor, they have two main obligations: delivering the goods for loading (article 229) and paying the carriage. Along with the consignor, the figure of the consignee must be mentioned as well. The consignee is the person to whom the goods are addressed and may be determined or undetermined at the time of celebrating the contract. The status of consignee derives

from the lawful holding of the bill of lading that contains the right of delivery of the goods[16]. Of course, the consignor may also be the consignee at the same time[17]. However, when the consignor and the consignee are not the same person, the consignee is not a party to the contract. In these cases, the consignee will be a third-party holder of the bill of lading who has the right to receive the goods object to the contract of the carriage.

For last, it may be added how bill of ladings circulate as they may be to the bearer, to the order or nominative. *Bearer bills of lading shall be transmitted by delivery, those to the order by endorsement, and nominative ones by assignment according to the rules governing assignment of non-endorsable credits* (article 250). Nevertheless, the acquirer in good faith is protected by the MNA since when a new holder acquires the bill of lading by in good with through a *inter vivos* transaction pursuant to the law on circulation of the document, they are not obligated to return it.

3. *Functions of the bill of lading*

The bill of lading has three basic functions: representing the contract of carriage, acknowledging the receipt of the merchandises and being a document of title[18]. These functions run parallel to the dynamics of transport, coinciding with the moments of the celebration of the contract, the execution of the contract and the circulation of the contract[19].

Article 205 of MNA acknowledges that when the carriage of goods is determined by their weight, size or class, the conditions of the contract may be recorded in the bill of lading or a similar document. Therefore, it is an *ad probationem* and the contract exists by the agreement of the parties, and the bill of lading is the document in which it is embodied[20]. Furthermore, it does not only proof the existence off the contract, but it also proofs the content of the contract. In fact, the mandatory and optional statements included in the bill of lading form part of the content of the contract and document the rights and obligations of the parties[21].

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16 Del Corte López, «El contrato de transporte marítimo en régimen de conocimiento de embarque»,157-158

17 Arroyo, *Compendio*…, p.271

18 «Transporte. Conocimiento de Embarque Marítimo», Instituto Español de Comercio Exterior, accessed on April 9th of 2024 https://www.icex.es/es/todos-nuestros-servicios/informacion-de-mercados/tramites-gestiones-exportacion/documentos-generales/documentos-de-transporte/conocimiento-embarque-maritimo

19 Arroyo, *Compendio*…, p.274

20 Del Corte López, «El contrato de transporte marítimo en régimen de conocimiento de embarque», 161

21 Arroyo, *Compendio*…, p.275

According to article 256.1 of the MNA *except for proof to the contrary, a bill of lading shall certify delivery of the goods by the consignor to the carrier for the carriage and their delivery with the characteristics and in the state recorded in the document.* This can be a rebuttable presumption, however, it becomes irrebuttable and the proof to the contrary is not admissible against a person other than the consignor, if they received the bill of lading in good faith and without gross negligence (article. 256.1). In all cases, the carrier may include reservations to the bill when the received merchandise differs from what it is declared in it. In consequence, the *inclusion of one or several reservations on a bill of lading shall deprive the document of validity as proof under the terms of the reservation* (article 259). Articles 257 and 258 establish how the reservations are to be made. In absence of reservations the carrier will be assumed to have received the goods in proper condition.

Although the MNA does not expressly recognise the bill of lading as a document of title, this is a characteristic that is unequivocally derived from its regulation[22]. In fact, the MNA has considered the experience accumulated under previous legislation and rulings, and thus contains provisions that recall the principles of documents of title law. This becomes more evident when considered that bills of lading can be to the bearer, to the order or nominative. In consequence, the of lading is a document of title, and more precisely, a title representative of the goods[23]. As article 251 of the MNA establishes, *conveyance of the bill of lading shall take the same effects as delivery of the goods represented, without the prejudice to the relevant criminal and civil actions to which the party illegitimately dispossessed of such may be entitled. The acquirer of the bill of lading shall acquire all the rights and actions of the conveyor to the goods, with the exception of agreements regarding jurisdiction, and arbitration, which shall require the consent of the acquirer pursuant to the terms stated in Chapter I of Title IX.* To finish, it can be mentioned that the reiterated nature of document of title and a title representative of the goods implies that it is an enforceable title: the bill of lading entails the enforcement of the obligation to return the goods delivered to the carrier for the carriage[24].

4. *Formal elements of the bill of lading*

The bill of lading must include the mandatory mentions set out in article 248.1 of the MNA. To briefly mention them, the bill of lading must include

[22] Carlos Llorente Gómez De Segura, «El contrato de fletamento», en *Comentarios a la Ley de Navegación Marítima* (Madrid: Dykinson, 2015), 160

[23] Arroyo, *Compendio*…, p.277

[24] Arroyo, *Compendio*…, p.278

the following details: the carrier's and the consigner's information, a description of the merchandise that will be transported, including their quantity and condition, the pick-up and delivery locations and the date of delivery of the goods to the carrier for carriage. In addition, if must be specified if the goods may be transported on the deck or if they are hazardous. As one can notice, jurisdiction clauses are not an essential part of the bill of lading regarding their obligatoriness. However, the MNA acknowledges that besides the mandatory provisions, the bill of lading *may also contain all the mentions or clauses that may be validly agreed by the consignor and the carrier* (article 248.2).

For last, the MNA regulates the bill of lading in two different sub-sections: the bill of lading in paper format (articles 246 to 261) and the bill of lading on electronic media (articles 262 to 266). The sub-section that regulates the electronic bills of lading focuses exclusively on regulating the aspects that derive from its electronic nature[25]. In fact, according to article 264 *an electronic bill of lading shall be subject to the same regime and have the same effects as the bill issued in paper format, with no further specialties than those contained in the issue contract.*

III. JURISDICTION CLAUSES

Bills of lading frequently incorporate jurisdiction clauses, which represent a formal agreement between the parties regarding the designated forum for resolving potential disputes. This express agreement on jurisdiction, also referred to as express submission, is a legally binding agreement between the contractual parties by virtue of which it is specified which court will have the competence to adjudicate any disputes that have arisen, or may potentially arise, between them[26]. This is indeed very important because jurisdiction is the power to hear and determine the resolution to legal disputes. In this sense, it is clear that jurisdiction constitutes a prerequisite to the judicial process since if, by application of its rules, the courts of a state do not have jurisdiction, they cannot hear the matter[27]. In other words, one can argue that jurisdiction is the very foundation of the judicial process.

In order for jurisdiction clauses to be applicable, they must be valid formally and materially. When these two conditions are met, the jurisdiction

[25] Carlos Llorente, «Los documentos del transporte», en *Los contratos sobre el buque en derecho español*, (Madrid: Dykinson, 2018), 189

[26] Alfonso-Luis Calvo Caravaca and Javier Carrascosa González, *Derecho internacional Privado. Volumen I.* Decimoctava edición. (Granada: Comares, 2018), 143

[27] Carlos Esplugues Mota and Guillermo Palao Moreno, *Derecho internacional privado*. 17.ª edición. (Valencia: Tirant lo Blanch, 2023), 121

clauses exert two effects: the prerogative effect and the derogative effect. The prerogative effect means that the designated courts will be the only competent ones to hear the dispute. On the other hand, the derogative effect conveys that the rest of the courts shall not declare themselves competent to hear the dispute[28].

Having considered this and going back to the bills of lading, the parties may incorporate a jurisdiction clause in the bill conferring jurisdiction to the courts of a specific country or countries. Therefore, if a dispute rises between the carrier and the consigner, only the state who has been conferred jurisdiction upon will be competent to hear the case. For example, a Dutch carrier and a German consignor may agree that the competent court to hear any dispute that may arise from their contractual relationship will be the Dutch courts.

As it has been established, jurisdiction clauses have no effect unless they are both formally and materially valid. This is why it is essential to know in which court and according to which law will be the validity of jurisdiction clauses determined. In Spain in a European Union framework, when a third-party holder of the bill of lading becomes part of the equation, the question of whether the jurisdiction clause applies to them or not rises. This is not a trivial question because without jurisdiction the courts have no competence to hear the case and any action taken by them will be void. In fact, it is no secret that jurisdiction clauses incorporated in a bill of lading can become a procedural nightmare for the Spanish consignees and their insurance companies[29]. To analyse where the question rises from, the European Union regulation and the Spanish national regulation must be considered. Regarding the international conventions that regulate the bills of lading and were mentioned before, as explained the only applicable international convention applicable to this matter in Spain is the Hague-Visby rules. However, the Hague-Visby rules do not contain provisions on jurisdiction.

1. *Regulation Brussels I bis*

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) (Regulation Brussels

[28] Beatriz Campuzano Días, et al., *Manual de derecho internacional privado.* 10.ª edición, (Madrid: Tecnos, 2023), 53-54

[29] Francisco De Borja Langelaan Osset, «Consideraciones normativas sobre las cláusulas de jurisdicción insertas en conocimientos de embarque a la luz de la jurisprudencia de las audiencias provinciales», *Revista Jurídica de la Universidad Autónoma de Madrid.* Enero 2020, nº39, 164

I bis hereinafter) is the most important European legal instrument to determine jurisdiction given its material scope of application[30]. The spirit of this regulation lies on two main objectives which consist of creating an European space of justice and enhancing the smooth functioning of the internal market[31]. However, in order for Regulation Brussels I bis to be applicable, all 4 scopes of application must be met:

— The material scope of application: this refers to what matters is the regulation applicable. In accordance with article 1 of Regulation Brussels I bis, the Regulation *shall apply in civil and commercial matters.* Hence, without prejudice to the exceptions set out in paragraph 2 of article 1, none of which being relevant to the topic of the essay, Regulation Brussels I bis applies to all civil and commercial matters that include an international element. Therefore, it applies to the carriage of goods by sea under the bill of lading system.
— The personal scope of application: in other words, this means to whom the Regulation applies. A connection with European Union territory is a requisite for its applicability. This connection can come in three different ways: the defendant being domiciled in a member state (article 24), a member state having the exclusive jurisdiction (article 24), or the parties having a tacit or express agreement on jurisdiction in favour of a member state (articles 25 and 26). Therefore, it is applicable to jurisdiction clauses that confer jurisdiction to the courts of a member state.
— The territorial scope of application: this refers to where it applies, and the answer is that Brussels Ia Regulation is applicable in the territory of a member state according to article 81. However, it must be noted that Denmark is an exception to this rule as it is established by articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the Treaty of the European Union (TEU hereinafter) and to the Treaty on the Functioning of the European Union (TFEU hereinafter).
— The temporal scope of application: regarding since when the Regulation applies, in accordance with article 81 it is applicable to proceedings instituted after 10 January 2015.

Having checked the four scopes of application, the next step is to analyse what confers jurisdiction to courts according to the regulation. The

[30] Hernández Rodríguez, «Las cláusulas de elección de foro en los contratos de transporte marítimo de mercancías en régimen de conocimiento de embarque. Los arts. 251 y 468 de la Ley de Navegación Marítima», 407

[31] Alfonso-Luis Calvo Caravaca and Javier Carrascosa González. *Compendio de Derecho Internacional Privado.* Segunda edición. (Murcia: Rapid Centro Color, 2020), 57

regulation designs a set of jurisdictional forums articulated in a hierarchical manner[32]: exclusive jurisdiction, prorogation of jurisdiction, by tacit or express agreement, special jurisdiction, by reason of the subject matter or by reason of the protection of the weaker party or general forum, and the defendant's domicile jurisdiction.

Since this essay concerns on the jurisdiction clauses incorporated in the bills of lading, the precepts on express agreement on jurisdiction must be considered. In this regard, article 25.1 of Regulation Brussels I bis establishes de following:

> *1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:*
>
> *(a) in writing or evidenced in writing;*
>
> *(b) in a form which accords with practices which the parties have established between themselves; or*
>
> *(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.*

The concept of "jurisdiction clause" should be guided by the principle of freedom of choice enshrined in article 25 of Regulation Brussels I bis[33]. Regardless of where they live, the parties to a contract can choose a court or courts in a European Union country to settle any future disputes. The parties can also decide if that chosen court or courts will be the only ones with jurisdiction or if others may have jurisdiction too. Regulation Brussels I bis aims to balance two objectives: facilitating commercial transactions while preventing the enforcement of clauses that could go unread or unnoticed in the contract. To achieve this, in article 25 of Regulation Brussels I bis, the EU legislator advocated for clear and mandatory formal requirements that at the same time avoided excessive formalities that could hinder commercial practice[34].

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32 Esplugues Mota and Palao Moreno, *Derecho*…, 141

33 Opinion of Advocate General Collins. *Joined Cases C-345/22 to C-347/22*. 16 November 2022. par.34

34 Geert Van Calster, *European Private International Law*. Second edition, (Oxford: Hart, 2019) 114

To summarize, the material validity of the agreement is to be determined according to the law of the competent court. That is, if the Spanish courts are competent to hear a case and the applicable law is the German law, the substance of the case will be determined according to the German law, but the material validity of the jurisdiction clause will be determined according to the law that is applicable in accordance with the Spanish conflict laws. When it comes to the formal validity of the agreement, the agreement is required to have been made either in writing or evidenced in writing, as per the usual way of the contractual parties of making business or following the usage of international trade or commerce.

In any case, it is important to mention that the jurisdiction clause is an autonomous agreement within the contract that it is inserted. The autonomy of the clause means that the clause may be valid, even if the contract is null and void[35], or the other way around, that the jurisdiction clause may be null and void even when the rest of the contract is perfectly valid.

2. *Maritime Navigation Act*

As it has already been explained, the national legislation to consider on the carriage of goods by sea is the Maritime Navigation Act. Regarding the enforceability of jurisdiction clauses incorporated in a bill of lading against a third-party holder of that document, the articles to consider are articles 251 and 468. These two articles establish the following:

> *Article 251. Effectiveness of conveyance.*
>
> *Conveyance of the bill of lading shall take the same effects as delivery of the goods represented, without prejudice to the relevant criminal and civil actions to which the party illegitimately dispossessed of such may be entitled. The acquirer of the bill of lading shall acquire all the rights and actions of the conveyor to the goods, with the exception of agreements regarding jurisdiction and arbitration, which shall require the consent of the acquirer pursuant to the terms stated in Chapter I of Title IX.*
>
> *Article 468. Jurisdiction and arbitration clauses.*
>
> *Without prejudice to the terms foreseen in the international conventions in force in Spain and the provisions of the European Union, clauses of submission to a foreign jurisdiction or arbitration abroad shall be null and void and considered not to be included, as set forth in contracts for use of the ship, or in ancillary navigation contracts, when they have not been negotiated individually and separately.*

[35] AAP de Pontevedra de 16 de junio de 2022, nº573/2022, Ref. Aranzadi, JUR 2022/192011, AAP de Pontevedra de 16 de junio de 2022, nº574/2022, Ref. Aranzadi, JUR 2022/191029, and AAP de 16 de junio de 2022, nº575/2022, Ref. Aranzadi, JUR 2022/192275

> *In particular, insertion of a jurisdiction or arbitration clause in the printed conditions of any of the contracts referred to in the preceding paragraph shall not provide evidence, in itself, of fulfilment of the requisites established therein.*

In other words, transferring the bill of lading has the same effect as delivering the goods themselves. That is, the new holder of the bill of lading has all the rights and actions as the previous holder of the bill of lading had. However, an exception is set up for the cases of jurisdiction and arbitration, where the agreement on jurisdiction will be null and void unless it has been individually and separately negotiated between the parties. The MNA also adds that just including a jurisdiction clause in standard contract terms is not enough to prove to have fulfilled the requirement of individual and separate negotiation.

Therefore, and in relation to what is established in article 25.1 of the Regulation Brussels I bis, it must be highlighted that the MNA adds an extra requisite for the validity of the jurisdiction clauses incorporated in the bill of lading. The requisite of independent and separate negotiation of the jurisdiction clauses, a requisite that is not fulfilled when a third-party becomes the holder of the bill of lading.

For the cases where the jurisdiction clause is invalid, article 469.2 establishes the following:

> *In contracts for the use of the ship, the competent Courts, to be chosen by the plaintiff, shall be those of:*
>
> a) *The domicile of the defendant;*
> b) *Place where the contract is entered into*
> c) *Port of loading or unloading.*

What the Spanish legislator sought with this regulation was to avoid the abuses frequently detected in maritime traffic, echoing the abuses sometimes suffered by third-party holders of bills of lading who are forced to submit to foreign courts or international arbitration when in fact they have not negotiated the jurisdiction clauses or could even be unaware of them[36]. The underlying conviction is that forcing domestic businesses that ship and receive goods to litigate small claims in a foreign jurisdiction may in practice lead to a denial of effective judicial protection[37]. This explains why the MNA

[36] Marta Casado Abarquero, «Extensión al consignatario de los efectos de una cláusula de elección de foro prevista en un conocimiento de embarque. Comentario al auto de la Audiencia Provincial de Barcelona No. 62/2020, de 24 de abril de 2020». *Cuadernos de Derecho Transnacional*. Marzo, 2021, Vol. 13, Nº 1: 779

[37] AAP de Pontevedra de 16 de junio de 2022, nº573/2022, AAP de Pontevedra de 16 de junio de 2022, nº574/2022 and AAP de Pontevedra de 16 de junio de 2022,

considers invalid the jurisdiction clauses against a third-party holder of the bill of lading by adding a requirement that is not fulfilled, and leaves on the hands of the plaintiff a wide choice of court that can confer jurisdiction to the Spanish courts.

3. *Relationship between national and European law*

Given the existence of two distinct legal sources -national and European- potentially applicable to the enforceability of jurisdiction clauses against a third-party holder of the bill of lading, it becomes crucial to define the relationship between these two sources of law.

The European Union lacks any sovereignty and therefore, it has no regulating power per se. On the contrary, as established by of the Treaty on the European Union (TEU), the contracting parties confer competences to the European Union to *attain objectives they have in common* (article 1) and these competences are governed by the principles of subsidiarity and proportionality (article 5). Furthermore, the TEU clarifies that the *competences not conferred to the [European] Union in the Treaties remain with the Member States.*

The categories and areas of competence that have been conferred to the European Union are set out in Title I of Part One of the Treaty on the Functioning of the European Union (TFEU hereinafter). More precisely, article 4(2) (j) confers jurisdiction to the European Union in the area of justice. This competence is shared, which means that the Union and the Member States can legislate and adopt legally binding acts in that area, but the Member States *shall exercise their competence to the extent that the Union has not exercised its competence (article 2(2) of TFEU).* This means that the European Union has a preference to regulate, which implies that if the European Union exercises their power to regulate, Member States shall only regulate those aspects on which the European Union legislation does not act or on which the European Union legislation leaves room for sate action[38].

Therefore, both Spain and the European Union have the competence to regulate jurisdiction in general, and the enforceability of jurisdiction clauses incorporated in a bill of lading against a third-party holder of that document in specific. However, given that it is a shared competence, it is paramount to bear in mind that the MNA can only regulate so far as the European Union has not regulated.

In addition, the principle of primacy is a key element to understand the relationship between national and European Union law. The principle of

nº575/2022

[38] Jorge Urbaneja Cillán, et al., *Introducción al Derecho de la Unión Europea.* (Valencia: Tirant lo Blanch, 2020). 36-37

primacy rests upon the fundamental principle that in any conflict between a provision of a national law and a provision of European Union law, the European Union law will prevail. Primacy is essential to ensure the effective implementation of European Union policies and prevent Member States from leaving the European Union law without effects by simply establishing their own national laws hierarchically above[39]

The principle of primacy has been established through the settled case law of the ECJ[40]. It is not explicitly included in the TEU and the TFEU, however, the 17th declaration annexed to the TFEU includes a short concerning primacy annexed to it. This declaration acknowledges that the principle of primacy is a *cornerstone principle of Community law* that as the European Court of Justice (ECJ hereinafter) acknowledges is *inherent to the specific nature of the* European Union. At a national level, the principle of primacy was challenged before the Tribunal Constitucional de España (Spanish Constitutional Court), arguing that the principle of primacy violated the Spanish Constitution's supremacy. However, the Tribunal Constitucional explained that primacy is not a primacy of general scope but refers exclusively to the European Union's competences. Finally, the Court declared that the proclamation of the primacy of the European Union law does not contradict the supremacy of the Spanish Constitution[41].

In summary, the European Union and Spain share the competence to regulate the applicability of jurisdiction clauses. However, Spain can only regulate to the extent that the European Union has not and in case of contradiction between both regulations, the European Union law, Regulation Brussels I bis in this case, prevails over the national law, the MNA in this case.

IV. JOINED CASES C-345/22, C-346/22 AND C-347/22

Article 25.1 of Regulation Brussels I bis and articles 251 and 468 of the MNA considered together have created several doubts which have been

[39] «Primacy of EU law (precedence, supremacy)», Eur-Lex, accessed on May 20th of 2024 https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law-precedence-supremacy.html

[40] Judgement of the Court of 15 July 1964, as Case 6-64, Flaminio Costa v E.N.E.L, ECLI:EU:C:1964:66; Judgement of the Court of 17 December 1970, as Case 11-70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, ECLI:EU:C:1970:114; Judgment of the Court of 9 March 1978, Amministrazione delle Finanze dello Stato v Simmenthal SpA, Case 106/77, ECLI:EU:C:1978:49; and, Judgement of the Court (Sixth Chamber) of 13 November 1990, Marleasing SA v La Comercial Internacional de Alimentacion SA, C-106/89, ECLI:EU:C:1990:395

[41] Declaración del Pleno del Tribunal Constitucional 1/2004, de 13 de diciembre de 2004. BOE núm. 3, de 4 de enero de 2005. Ref. Aranzadi, RTC 2004/256

reflected in repeated litigation before the Spanish courts. Because although it is true that Regulation Brussels I bis regulates the existence and validity of express agreement on jurisdiction, it is silent on their effectiveness of conveyance, leaving the task of solving this loophole on the hands of the CJEU[42]. Subsequently, on 16 may of 2022 the Audiencia Provincial de Pontevedra (Pontevedra Court, Pontevedra, Spain) agreed to requested for a preliminary ruling from the ECJ through judicial decrees[43], joining three similar cases that were on trial.

Two main answers were sought though this preliminary ruling. First, whether the validity of jurisdiction clauses extending to a third-party shall be analysed according to the law of the court which the parties have conferred jurisdiction. And second, whether national law establishing additional requirements for the validity of jurisdiction clauses incorporated in a bill of lading was contrary to Regulation Brussels I bis.

1. *The previous debate*

It is interesting to note that the debate on the enforceability of jurisdiction clauses against a third-party holder of the bill of lading in Spain within the European Union framework had started long before the Audiencia Provincial de Pontevedra requested for a preliminary ruling. This is evidenced by the non-uniform jurisprudence that was being developed all around Spain. On one hand, some courts adjudicated the validity of the jurisdiction clauses in favour of other European Union courts and in consequence declared that Spanish courts lacked jurisdiction[44]. On the other hand, considered the jurisdiction clause invalid and declared the Spanish courts to have jurisdiction[45].

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[42] Hernández Rodríguez, «Las cláusulas de elección de foro en los contratos de transporte marítimo de mercancías en régimen de conocimiento de embarque. Los arts. 251 y 468 de la Ley de Navegación Marítima», 405

[43] AAP de Pontevedra de 16 de junio de 2022, nº573/2022, Ref. Aranzadi, JUR 2022/192011 AAP de Pontevedra de 16 de junio de 2022, nº574/2022, Ref. Aranzadi, JUR 2022/191029 and AAP de Pontevedra de 16 de junio de 2022, nº575/2022, Ref. Aranzadi, JUR 2022/192275

[44] See for example: AAP de Valencia de 8 de noviembre de 2016, nº1620/2019, Ref. Aranzadi, JUR 2017/14921; AAP de Castellón de 23 de mayo de 2017 nº134/2017, Ref. Aranzadi, JUR 2018/26095; or, AAP de Vizcaya de 28 de marzo de 2018, nº236/2018, Ref. Aranzadi, JUR 2018/195432

[45] See for example: AAP Vizcaya de 7 de junio de 2019, nº940/2019, Ref. Aranzadi, JUR 2019/215225; AAP de Barcelona de 7 de octubre de 2019, nº167/2019, Ref. Aranzadi JUR 2019/293937; or AAP de Barcelona de 10 de junio de 2022 nº118/2022, Ref. Aranzadi, JUR 2023/82645

Estudios de Deusto
© Universidad de Deusto • ISSN 0423-4847 • ISSN-e 2386-9062, Vol. 72/2, julio-diciembre 2024, págs. 419-448
https://doi.org/10.18543/ed.3218 • http://www.revista-estudios.deusto.es/

Equally, the doctrine could not find any consensus. From one angle, some claimed that the application of articles 251 and 468 of the MNA were only to be applied when Regulation Brussels I bis was not applicable as they defended that these articles go against the EU law. In this direction, they argued that the application of articles 251 and 468 of the MNA respond to the undistinguished interest of the Spanish insurance companies and are unsustainable in a country that supports free trade, the market economy and is integrated in the European single market[46].

Contrarily, there were also experts claiming that the Spanish courts evaluating the jurisdiction clause should start their analysis from the application of article 468 of the MNA[47]. These side also argued that articles 251 and 468 were necessary to break the trend of recognizing agreements that stipulated submission to foreign courts. They claimed that this recognition was causing clear damage to Spanish companies, which were suffering irrecoverable losses due to the enormous costs of litigation in foreign courts[48].

2. *Preliminary ruling procedure*

If a court or a tribunal of a member state has a question regarding the validity or the interpretation of acts of the European Union and considers that an answer to the question is necessary to enable to give a judgement, the court or the tribunal may request the ECJ to give a ruling thereon. This is done through the preliminary ruling process, which is established by article 267 of the TFEU. This article confers jurisdiction to the ECJ to give preliminary rulings on the interpretation and validity of European Union acts.

According to article 267 rising the question referred for a preliminary ruling is optional for the courts that do not judge at last instance. On the other hand, for the courts that decide at last instance, the Tribunal Supremo (Supreme Court) in case of Spain, requesting for a preliminary ruling is mandatory when a question relating to the validity or interpretation of European Union acts are in place, as the final resolution of the dispute depends on it.

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[46] Aitor Zurimendi Isla, «Las cláusulas de jurisdicción y arbitraje incluidas en el conocimiento de embarque tras la Ley de Navegación Marítima», *Revista de derecho del transporte: Terrestre, marítimo, aéreo y multimodal,* Nº18, 2016: 89-110 and Nerea Iráculis Arregui, «La controvertida negociación individual y separada de las cláu sulas de jurisdicción y arbitraje en la Ley de Navegación Marítima», *Revista de derecho del transporte: Terrestre, marítimo, aéreo y multimodal*, Nº. 19, 2017: 173-208

[47] Ana María Sánchez-Horneros Adán, «La Ley 14/2014, de 24 de julio, de navegación marítima: última llamada para la jurisdicción española en asuntos marítimos», *Diario La Ley,* núm. 8802, 2016: 10-11

[48] Julio Carlos Fuentes Gómez, «La competencia judicial internacional en los litigios de derecho marítimo» (tesis doctoral, Comillas Universidad Pontifica, 2023), 426

Regarding the parties to the dispute, although they are not entitled to directly request for a preliminary ruling to ECJ, the role they play in practice is meaningful as they are the ones who plea necessary to determine the validity and the interpretation of European Union acts before the national courts.

When the request for a preliminary ruling is presented before the ECJ, the judicial process that is taking place at the national court is left pending. Once the ECJ receives the request for a preliminary ruling, an Advocate Geneal is appointed, who along with the rest of the legitimated parties presents a written statement. An oral phase follows the written phase of the process, and finally, ECJ gives judgement. The judgement is given according to the competence that the ECJ has, that is, regarding the validity and interpretation of the European Union act, and not about the merits of the case. In consequence, the ECJ notifies the national court their judgement, and, afterwards, the national court, which is the one who has the competence to hear the case, gives judgement on the judgement[49].

To finish, it is worth noting that the judgement on the preliminary ruling is binding not only to the court that requested for the preliminary ruling but to all the courts and tribunals of all member states that are to adjudicate on the same legal matter. In addition, the judgements set a legal precedent that the ECJ is prone to follow in analogous cases[50].

3. *The disputes in the main proceedings: joined cases C-345/22 to C-347/22*

As aforementioned, the request for a preliminary ruling was done by three judicial decrees. This is because three different cases were on trial before the Audiencia Provincial de Pontevedra. These three cases were denominated as C-345/22, C-346/22 and C-347/22 by the ECJ.

In Case C-345/22, a contract for carriage of goods by sea was concluded on 9 April 2018 between Maersk Line Perú S.A.C. (Maersk hereinafter) and Aguafrost Perú, where Maersk was the carrier and Aguafrost was the shipper. The contract was evidenced by a bill of lading. The bill of lading included a jurisdiction clause according to which it would be "*governed and interpreted in accordance with English law and any disputes arising therefrom shall be submitted to the High Courts of Justice [(England & Wales) (United Kingdom)] of London [(United Kingdom)], the jurisdiction of the*

[49] Alfonso Ramos De Molins, Francisco Sanz Gandasegui And Begoña Rodríguez Díaz, *Manual de ámbito jurisdiccional comunitario e internacional: guía práctica para abogados ante la UE y el TEDH.* (Madrid: Dykson, 2015),.84-85

[50] Carl Otto Lenz. «The Role and Mechanism of the Preliminary Ruling Procedure», *Fordham International Law Journal*. Volume 18, issue 2. 1994: 403

courts of another country being excluded". In addition, the clause allowed for the carrier to bring proceedings against the trader at the place where the trader carried their activity. On the other hand, Oversea Atlantic Fish SL (Oversea hereinafter), became a third-party holder of the bill of lading.

The issue on the validity of jurisdiction clauses rose when after the goods having arrived damaged, Allianz, the insurance company subrogated to Oversea's rights, brought legal action against Maersk before the Juzgado de lo Mercantil nº3 de Pontevedra (Commercial Court No 3 Pontevedra, Spain) seeking compensation for damages.

Maersk argued that the Spanish courts had no jurisdiction to hear the case based on the jurisdiction clause that was incorporated in the bill of lading in favour of the English courts, but, the Court rejected Maersk's plea. In response, Maersk brought an internal appeal against such rejection. However, Maersk's request was once again dismissed, and the Court judged in favour of Allianz's claim acknowledging Allianz's right to be compensated. Maersk appealed the judgement before Audiencia Provincial de Pontevedra (Provincial Court, Pontevedra, Spain) claiming that the jurisdiction clause was enforceable against the third-party holder of the bill. The argument for the claim was that article 251 of the MNA was not to be applied given the contradiction that it presented against what establishes article 25 of the Regulation Brussels I bis.

Similarly, in Cases C-346/22 and C-347/22, contracts of carriage where concluded. In Case C-346/22, MACS is the carrier, Tunacor Fisheries Ltd is the shipper, Fortitude Shipping SL is the third-party holder of the bill of lading and Mapfre the insurance company that subrogated to Fortitude Shipping SL's rights. On the other hand, in Case C-347/22, Maersk is the carrier, Aguafrost Perú is the shipper, Oversea is the third-party holder of the bill of lading and Allianz is the insurance company that subrogated to Oversea's rights. In both cases, the contract between the carrier and the shipper was evidenced by a bill of lading that included a jurisdiction clause that conferred exclusive jurisdiction to the High Court of Justice (England & Wales) of London. Both contracts also established that the bill of lading was to be governed in accordance with English law.

In Cases C-346/22 and C-347/22 as well, the goods arrived damaged at the port of destination and the insurance companies subrogated to the third-parties holder of the bill of lading brought action against the carriers. Similarly to what occurred in C-345/22, the carriers argued in the right procedural times that the jurisdiction clauses conferring jurisdiction to the English courts were applicable to the third-party holders of the bills of lading, and therefore, the Spanish courts lacked jurisdiction. With no success in the first instance where the courts ruled in favour of the insurance companies claims, the carriers brought an appeal against those judgements before Audiencia Provincial de Pontevedra (Provincial Court, Pontevedra, Spain).

4. *The questions referred for the preliminary ruling*

In the judicial decrees through which the Audiencia Provincial de Pontevedra agreed to request for a preliminary ruling, Auto de la Audiencia Provincial de Pontevedra de 16 de junio de 2022, nº573/2022, Auto de la Audiencia Provincial de Pontevedra de 16 de junio de 2022, nº574/2022 and Auto de la Audiencia Provincial de Pontevedra de 16 de junio de 2022, nº575/2022, the Court expressed their belief that there is no problem for domestic law to contain a specific regulation in cases where the European Union law is not applicable. However, the Court explains that questions arise when domestic rules are intended to be of general application with the aim of filling the apparent gaps that arise in the application of the European Union law. And this is what they point out to be the reason behind the decision of requesting the preliminary ruling to the ECJ. More specifically, the questions referred for the preliminary ruling are the following:

1) When article 25 of Regulation Brussels I bis specifies that the validity of jurisdiction clauses is determined by the law of the Member State to which jurisdiction is conferred, does this encompass the specific question of whether the clause's extension to a third-party, not party to the original contract, is considered valid?
2) Is article 251 of the MNA, which requires a clause to be individually and separately negotiated to be enforceable against a third party, compatible with article 25 of Regulation Brussels I bis and the interpretations established by the case-law of the ECJ?
3) Can national laws, under the European Union law, introduce additional conditions for the validity of jurisdiction clauses in bill of lading regarding their effectiveness against third parties?
4) Does a provision like article 251 of the MNA introduce an additional validity requirement for jurisdiction clause that contradicts article 25 of Regulation Brussels I bis?

5. *The ECJ's judgement*

After the written and oral parts of the procedure, on 25 April 2024 the ECJ gave judgement. First, the Court added a preliminary observation referring to whether Regulation Brussels I bis applies to the specific cases where the jurisdiction clause confers jurisdiction to the United Kingdom. The Court explains that based on the Withdrawal Agreement and the fact that Allianz and Mapfre brought their respective actions before the end of the transition period on 31 December 2020, Regulation Brussels I bis applies to the main proceedings in dispute. However, it is important to highlight that a

jurisdiction clause in favour of the United Kingdom's courts is not a jurisdiction clause in favour of a member state anymore, and Regulation Brussels I bis is not applicable to those cases.

Afterwards, the ECJ analyses which law governs the enforceability of a jurisdiction clause against a third-party holder of the bill of lading. To finish, the Court answers questions two, three and four together as it is understood by the Court that what in essence is sought to know is if articles 251 and 468 of the MNA are contrary to article 25(1) of Regulation Brussels I bis.

A. The applicable law governing the extension of jurisdiction clause to third parties

Regarding this question, the ECJ acknowledges that the first sentence or article 25(1) of Regulation Brussels I bis does not specify if the jurisdiction clause can be enforceable to a third party that later succeeds, complete or partially, to the rights and obligations of one of the contractual parties, as they already had in previous judgements[51].

The ECJ explains that the jurisdiction clause is enforceable against a third-party only when this third-party has succeeded a contractual party wholly in their rights and obligations in accordance with the law that is applicable according to the national substantive law. In this sense, the ECJ explains on that while the law of the designated court determines the substantive validity of a jurisdiction clause, the enforceability of that clause against a third-party holder of the bill of lading focuses on the effects of the jurisdiction clause and not the validity. And therefore, the assessment of the enforceability, which determines if the third-party has succeeded wholly a contractual party, comes after establishing the clause's substantive validity.

Consequently, the ECJ concludes the following in paragraph 54 of the judgement:

> *"…in the present case, the referring court were to find that Oversea and Fortitude, as third-party holders of bills of lading, are respectively subrogated to all of the rights and obligations of Aquafrost and Tunacor Fisheries, as shippers and therefore original parties to the contracts of carriage at issue in the main proceedings, that court would have to conclude therefrom, in accordance with Article 25(1) of the Brussels Ia Regula-*

[51] Judgement of the Court (First Chamber) of 7 February 2013, as C-543/10, Refcomp SpA v Axa Corporate Solutions Assurance SA, para. 25, ECLI:EU:C:2013:62; Judgement of the Court (First Chamber) of 20 April 2016, as C-366/13, Profit Investment Sim SpA v Stefano Ossi, para. 23, ECLI:EU:C:2016:282; and, Judgement of the Court (First Chamber) of 18 November 2020, as C-519/19, Ryanair DAC v DelayFix, para. 40, ECLI:EU:C:2020:933

> *tion, as interpreted by the case-law of the Court, that the jurisdiction clauses at issue in those cases are enforceable against those third parties. By contrast, that provision is not relevant to the examination of whether those third parties are subrogated to all of the rights and obligations of those shippers, since that subrogation is governed by national substantive law as established by applying the rules of private international law of the Member State of the referring court."*

On those grounds, the ECJ rules as it follows:

> "*Article 25(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that the enforceability of a jurisdiction clause against the third-party holder of the bill of lading containing that clause is not governed by the law of the Member State of the court or courts designated by that clause. That clause is enforceable against that third party if, on acquiring that bill of lading, it is subrogated to all of the rights and obligations of one of the original parties to the contract, which must be assessed in accordance with national substantive law as established by applying the rules of private international law of the Member State of the court seised of the dispute."*

B. The compatibility of articles 251 and 468 of MNA with article 25(1) of Regulation Brussels I bis

To begin, the ECJ explains that jurisdiction clauses are enforceable against a third-party holder of the bill of lading as long as two conditions are met. First, the clause must be deemed valid in the original contract of carriage between the carrier and the consignor. Second, according to the applicable national law, as determined by the rules of private international law of the member state to which the court hearing the dispute belongs, when the third-party acquires the bill of lading they must have succeeded to wholly to the rights and obligations of one of the original parties to the contract. Therefore, in cases C-345/22 to C-345/22, the Spanish Court, must have checked whether the third party had succeeded in the rights of the consignor, and if they had succeeded, there would be no need to check that the third-party had agreed to the jurisdiction clause. That is, if the applicable law to the substance were the Spanish law, the succession of the third-party in the place of the consignor would be analysed in accordance with the MNA.

However, the Court expresses its agreement with the General Advocate when this argued in the written part of the preliminary ruling process that article 251 in conjunction with article 468 "*has the effect of circumventing Article 25(1) of the Brussels Ia Regulation, as interpreted by the case-law of*

the Court and is therefore contrary to thereto"[52]. To this, it is added that the effects of applying articles 251 and 468 have infringe the jurisprudence established by the judgement of 9 November 2000, Coreck, since it would mean granting the third-party more rights than what the original contract parties had, as they would be allowed to not be bound to the jurisdiction clause[53].

Inevitably, the ECJ concludes that the application of articles 251 and 468 of the MNA, where succession is partial and a separate and individual negotiation of jurisdiction clauses is required for the clause to be enforceable against a third-party, breaches the European Union law. In consequence, the Court reminds that the principle of primacy obliges national court to interpret, as far as possible, domestic law in accordance with European Union law to guarantee the effectiveness of them. Furthermore, the principle of primacy forces national judges to apply European Union law when the application of the national law is not compatible with the European Union law. That is, it is imperative for national judges and courts to leave unimplemented when this contradicts with the European Union law.

In the light of all of the above, the court rules as follows:

> *"Article 25(1) of Regulation No 1215/2012 must be interpreted as precluding national legislation under which a third party to a contract for the carriage of goods concluded between a carrier and a shipper, who acquires the bill of lading evidencing that contract and thereby becomes a third-party holder of that bill of lading, is subrogated to all of the shipper's rights and obligations, with the exception of those arising under a jurisdiction clause incorporated in the bill of lading, where that clause is enforceable against that third party only if the third party has negotiated it individually and separately."*

V. CONCLUSION

To determine the enforceability of jurisdiction clauses against a third-party holder of the bill of lading in the European Union framework where Regulation Brussels I bis is applicable, the first step is to look at the material validity of the jurisdiction clause according to the law of the Member State that is hearing the case. The second step is to determine whether the third-party has succeeded a contractual party following the national law applicable to the substance that is applicable according to the rules of private

[52] Opinion of Advocate General Collins. *Joined Cases C-345/22 to C-347/22*. 16 November 2022. par.61

[53] Judgement of the Court (Fifth Chamber) of 9 November 2000, as C-387/98 Coreck Maritime GmbH v Handelsveem BV and Others, Rec. 2000, p.I-09337, ECLI:EU:C:2000:606

international law. The third step is to look at if the jurisdiction clause confers jurisdiction to the court of a member state. If the rules of private international law determine that the applicable law is the Spanish law, articles 251 and 468 of the MNA would have to be left aside as they are contradictory to article 25(1) of Regulation Brussels I bis. In consequence, the jurisdiction clause that confers jurisdiction to a European Union member state, is enforceable against a third-party holder of the bill of lading.

On the contrary, if Regulation Brussels I bis is not applicable to the case because it is outside its scope of application and the applicable law to the substance of the case is the Spanish law, then articles 251 and 468 are applied, and in consequence, given that the individual and separate negotiation requirements are not met, the jurisdiction clause would not be enforceable against a third-party holder of the bill of lading.

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