The Validity of Jurisdiction and Arbitration Clauses as Against Third Party Holders of Bills of Lading - a Comparative Study Under French, English and Eu Law

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This paper’s aim is to comprehend the underlying policies behind the enforceability of a jurisdiction clause on a third party bearer of a bill of lading. Whether a jurisdiction clause incorporated into a bill of lading binds or not the third party consignee of the bill of lading is a question that has been discussed at a national, European and international level. The solutions adopted at these different levels have been presented in a comparative way in order to understand their considerations. However, it has been noticed that a consensus between these different levels has not been reached, generating conflicting positions and insecurity for the international trade operators. Consequently, it has been suggested to limit the forums that the parties can choose to jurisdictions that present a certain link with their dispute.

Introduction

A bill of lading is a contractual document used in the transportation of goods by sea. It has multiple purposes: it serves as a receipt of the goods, it gives constructive possession in the sale goods during the period of their carriage, and it is a document of title and a potentially transferable contract of carriage. Generally, pursuant to the conclusion of a contract of sale of goods, the seller enters into another contract for

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the transportation of the goods. It is the contract of carriage\textsuperscript{2} according to which the carrier accepts to carry and deliver the goods to the buyer. A bill of lading is issued by the carrier describing the goods and evidencing that the goods were shipped. He tenders this document to the seller/shipper who will send it to the buyer. The buyer who holds the bill will be entitled to receive the goods.

Moreover, the carrier generally introduces a jurisdiction clause or an arbitration clause in the contract of carriage and/or in the bill of lading\textsuperscript{3}. By a jurisdiction clause in advance, the parties choose the forum which is to have jurisdiction to determine their disputes. By an arbitration clause the parties agree to have recourse to the arbitral mechanism to settle their disputes. However, question has arisen whether these competence clauses bind the receiver/buyer of the goods that holds the bill of lading.

In fact, when the goods are damaged, short delivered or lost, the buyer wishes to sue the carrier under the contract of carriage. Different legal systems may differ as to the nature and extent of the rights which the transferee of the bill of lading has against the carrier, but most of them allow the third party to sue the carrier on the terms of the contract of carriage. However, in international trade transactions, in general, there is a jurisdiction problem: the carrier and the buyer are not domiciled in the same country. The buyer seizes the courts of the place of delivery, which are generally the courts of his domicile, and the carrier contests

\textsuperscript{2} The seller will contract the contract of carriage as principle in CIF contracts, and might contract as principle or as an agent of the buyer in FOB contracts differing pursuant to the type of the FOB contract agreed: classic FOB, strict FOB, extended FOB. The two most common types of international sales contract are the FOB and the CIF contract. Under the FOB (free on board) contract, the buyer pays for and arranges carriage and the seller’s duty is to load the goods onto a vessel nominated by the buyer. In contract, under a CIF (cost, insurance, freight) contract, it is the seller who pays for and arranges carriage, as well as takes out a policy of insurance on the goods, which will be assigned to the buyer.

\textsuperscript{3} The jurisdiction clause inserted in a charter party contract can be different from the clause inserted in the bill of lading issued pursuant this charter party, or the bill of lading may refer to the terms and conditions of the charter party. The third party bill of lading holder will only be bound by the terms of its bill, except when the bill refers expressly to the terms of the charter party.
their jurisdiction relying on the choice of court or arbitration agreement contained in the bill of lading. Can the buyer, who is not a party of the carriage contract, be bound by the jurisdiction clause? Does he have to go to the courts indicated in the bill of lading or to arbitration? What are the jurisdictional problems raised by the fact that the buyer is a third party to the contract of carriage made between the seller and the carrier? These questions concern jurisdictional problems arising out of the transfer of contractual rights and obligations between the seller and the buyer.

The question arises because it is an important one for the operators in international trade. The importance to ascertain the jurisdiction of a national legal order or of an arbitral tribunal is undeniable. From the competent court will derive the conflict of laws rules and from them the applicable law regarding the relationship between the parties and from it the rights and obligations of the parties, their liability, the nature and calculation of damages etc. It should also be noted that from the competent forum will drive procedural rules which can vary greatly from one country to another. From the competence of the arbitral tribunal derives a completely different dispute resolution procedure.

This question was much and still is discussed in the French doctrine because of a disagreement between the 1st Civil Chamber and the Commercial Chamber of the Cour de Cassation. The 1st Civil Chamber held the third party bearer of the bill of lading automatically bound by these competence clauses while the Commercial Chamber required the consent of the third party, evidenced by an express acceptance, to these


clauses for them to apply against him. Both chambers were disregarding the solution proposed by European Court of Justice (ECJ).

The *Tilly Russ*, the *Trumpy* and *Coreck* cases of the ECJ have dealt squarely with jurisdiction clauses in bills of lading invoked against a third party consignee/holder. In these cases, it was held that so long as the clause was initially valid as between shipper and carrier then if, according to the law governing the bill, the third party holder accedes to the shipper’s rights and obligations, the requirements of a valid jurisdiction clause are satisfied as between carrier and that third party. The ECJ referred to the ‘relevant law’ of the contractual relationship in order to determine the transfer of rights of suit under the bill of lading. The solution proposed was the use of a multilateral conflict rule.

The conflict was growing between the two chambers of the Cour de cassation and criticism from the international trade community was rising when both chambers decided to follow the ECJ jurisprudence. Nevertheless, it can be derived from French case law that the substantial solution retained is that the transfer of the bill of lading to the consignee of the goods does not operate an automatic transfer of all rights and obligations contained therein. In fact, it can be asserted that the French position on the subject is that the third party holder of the bill of lading is not bound by the competence clauses of the bill.

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On the other side of the Channel, English common law that did not even accept that the receiver could sue the carrier on the basis of the contract of carriage was supplemented by the Carriage of Goods by Sea Act 1992 (COGSA). Under this Act, the buyer is now entitled to sue the carrier who in turn has the right to invoke against him the jurisdiction clause or the arbitration clause. Moreover, it can be asserted from the English case law that English judges resort to a general conflict rule as the ECJ. They will determine whether the third party is bound or not by the jurisdiction clause by looking for the substantial solution retained in the relevant applicable law.

The solution proposed by the ECJ seems to have been accepted by the Member state courts. However, the debate is not settled because of the adoption of the Hamburg and Rotterdam Rules and because of the Resolution adopted by the EU Parliament. All these instruments limit or purport to limit the party autonomy for the prorogation of jurisdiction of national courts: they impose a specific link between the dispute and the forum elected. Even if an express acceptance is not required, this limitation shows a will to protect the consignee of the bill.

First, forum election clauses (I) will be discussed from a European point of view and then from a national point of view, specifically the position of French and English domestic law will be presented. These forums have been especially selected as they differ fundamentally in substance.

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13 Ss 2 and 3 of COGSA 1992.
in order to make a comparison of the policies underlying the solutions. In the second part, the controversies about whether the third party should or should not be bound by forum election clauses or whether there should be imposed some conditions for him to be bound will be discussed (II). As this is a limited paper, no specific point on arbitration clauses can be made, but reference will be made to such clauses when it is needed.

I. Forum election clauses

A worldwide consensus\(^{19}\) as to the legality of choice of court agreements exists. Under most national legal systems, the parties to a commercial contract are entitled to confer jurisdiction to a specific court or to a specific judicial order (to the courts in general of a country), to resolve all their disputes arising out of or relating to their contract. Bills of lading will almost invariably contain a choice of jurisdiction clause. If one of the parties is domiciled in an EU member state and if the jurisdiction clause designates a court or courts of a Member state, the Council Regulation No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement in Civil and Commercial Matters (Brussels I Regulation) will apply and the validity of such a clause will be determined pursuant to article 23 of this Regulation (A).

On the other hand, if none of the parties to the agreement are an EU resident and/or if the court or legal order designated is not that of a Member State, the Brussels I Regulation will not apply and the national court before which its jurisdiction or the jurisdiction of the court chosen is disputed will have to determine this issue regarding its own private international law rules on jurisdiction (B).

\(^{19}\) Hague Convention on Choice of Court Agreements concluded on 30 June 2005. This Convention does not, however, apply to contracts for the carriage of goods by sea.
A. European Union Law

A shipper and a carrier, one of whom domiciled in a Member state, conclude a contract of carriage, the bill of lading issued pursuant to this contract contains a forum election clause designating a court or courts of a Member State, for example the High Court of Justice in London or the Commercial Court of Paris. Most likely the choice of jurisdiction clause will provide for trial exclusively in the carrier’s home state. The carrier delivers the goods to the buyer at the port of destination but the goods are damaged, lost or short delivered. The buyer decides to sue the carrier before the courts of the place of delivery of the goods; most likely these courts will be that of the buyer’s jurisdiction. The carrier denies the jurisdiction of these relying on forum election clause contained in the bill of lading and the buyer refuses to be bound by such a clause to which he has not given his consent.

When an English court or a French court has been seized by such a dispute, it ought to apply the Brussels I Regulation. A court of a Member state can be seized by such a dispute in two circumstances. First, when it is the agreed forum seized by the carrier and the third party disputes its jurisdiction. Second, when it is the court of place of delivery of the goods seized by the buyer and the carrier disputes its jurisdiction relying on the forum election clause in the bill of lading (electing the court or courts of another Member state).

Faced with such a jurisdictional dispute, these courts have to apply article 23 of the Regulation as interpreted by the ECJ.

20 The third party holder of the bill of lading will rely on article 5(1) of the Brussels Regulation in order to bring the carrier/the defendant before the courts of the place of delivery.
1. The solution adopted by the European Court of Justice

Providing the ECJ case law in *Tilly Russ*\(^{21}\), if the jurisdiction clause incorporated in a bill of lading is valid under article 17 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention) (now article 23 of the Brussels I Regulation)\(^{22}\) as between the carrier and the shipper and if under the relevant national law, the holder of the bill of lading succeeds to the shipper’s rights and obligations, the jurisdiction clause can be pleaded against the third party holding the bill of lading without the need to ascertain whether he accepted the jurisdiction clause in the original contract. The *Coreck Maritime*\(^{23}\) case confirmed the *Tilly Russ* decision and pursued that if under the applicable national law, the party not privy to the original contract did not succeed to the rights and obligations of one of the original parties, the court seized must ascertain, having regard to the requirements laid down in the first paragraph of article 17 of the Convention (now Article 23), whether he actually accepted the jurisdiction clause relied on against him\(^{24}\). These principles were summarised in *Knorr-Bremse Systems for Commercial Vehicles Ltd v Haldex Brake Products GmbH*\(^{25}\): “the principle that a successor is bound is part of the law of the Re-

\(^{21}\) Case C-71/83 *Tilly Russ*, op.cit.

\(^{22}\) The regulation supersedes the Brussels Convention of 1968, which was applicable between the EU countries before the regulation entered into force. The convention continues to apply with respect to those territories of EU countries that fall within its territorial scope and that are excluded from the regulation pursuant to Article 299 of the Treaty establishing the European Community (now Article 355 of the Treaty on the Functioning of the European Union).

\(^{23}\) Case C-387/98 *Coreck*, op.cit.

\(^{24}\) Regard must be had to the formalities under Art 23(1) of the Brussels I Regulation. See Cass. Com., 4 Mars 2003 *Hapag Lloyd*, op.cit.: where the French Supreme court has a restrictive approach; it implicitly decided while assessing whether the buyer had accepted the jurisdiction clause, that the formalities of article 17(1) of the Convention are not met if it did not accept them expressly at the latest on the delivery.

gulation; but whether there has been such a succession in any particular case is a question for the national law governing the substantive contract.”

Justin Newton remarks that as this third party problem was not dealt with in the Convention, the ECJ had to come up with a proper solution: “the one advocated was the only possible solution to bill of lading cases, without ruining commercial relations in the free negotiability of bills”. That the third party holder himself did not ‘agree’, within Article 17(1), seemed irrelevant. “The solution was eminently of great commercial sense”.26

2. Validity of the forum election clause contained in a bill of lading between the shipper and the carrier

a. Principle of validity

The Regulation accepts the legality of choice of court agreements and does not impose any particular restrictions for their substantial validity. No requirement of connection between the courts designated and the dispute is imposed. The only substantial restriction prescribed is that the jurisdiction clause cannot defeat the jurisdiction of a Member court derived from the provisions of article 22 relating to exclusive jurisdiction and that articles 13, 17 and 21 relating to the protection of weak parties must be respected. Furthermore, submission by voluntary appearance before the courts of another Member State will override it.

In addition, the ECJ held, in its decision Benincasa27, that the jurisdiction clause was separate from the main contract so as the invalidity of the main contract does not affect the validity of the jurisdiction clause.

One source of divergence is the question of the applicable law to the validity of the choice of forum agreement. Article 23 is phrased in a way that seems to mention only formalities of consent. However, the ECJ case law reveals that article 23 requires itself a certain quality of con-

27 Case C- 269/95, Francesco Benincasa v Dentalkit Srl (1997), ECR I-03767.
sent so that application of national law concerning consent is excluded.28 The rules governing choice of law in contract are now contained in the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation). However, article 1.2.e of this Regulation excludes from its scope “agreements on the choice of court”. Consequently, there is no uniform conflict of laws rule on the validity of jurisdiction clauses and the law of some Member States refers to the lex fori (since choice-of-forum agreements constitute procedural contracts) whereas others refer to the lex causae.29 This problem is intended to be resolved by the European Commission as revealed in its Proposal30 by assessing the substantial validity of such clauses by the law of the State of the designated forum.31

b. Domicile requirement assessed regarding the original parties

The ECJ in the Coreck case held that “the validity of a jurisdiction clause under Article 17 of the (Brussels) Convention must be assessed by reference to the relationship between the parties to the original contract”.32 This means that at least one of the parties to the original contract must be domiciled in a Member State. It follows that, provided that the shipper or carrier is domiciled in a Member State, this requirement has been met and it does not matter that the third party holder of the bill of lading is not so domiciled. Conversely, where neither the shipper nor the carrier

29 i.e. the law of the contract which it forms a part; this is the case under English common law principles of the conflict of laws and French private international law rules.
31 This is the solution adopted also in Article 5(1) of the Hague Convention on Choice of Forum Agreements.
32 The Coreck case, op.cit., Para. 20. This follows the Tilly Russ case op.cit., Para. 24 and the Trumpy case, op.cit. Paras. 41-42.
is domiciled in a Member State this domicile requirement has not been met, even though the third party holder of the bill of lading, who has succeeded to the shipper’s rights and obligations, is domiciled in a Member State.33

c. **Formal requirements assessed regarding the original parties**

The formal requirements of Article 23 of the Regulation are to be interpreted strictly because their purpose is to ensure that parties have consented to a jurisdiction agreement derogating from the ordinary jurisdictional rules and that it is therefore necessary that this consent is clearly and precisely demonstrated34. The relationship between the formal requirements of Article 23 and the rules of national law as these determine the validity of an agreement, is not straight forward.

In *Benincasa*, the ECJ ruled out any role for the *lex contractus* in assessing the validity of a jurisdiction agreement, and stated that the formal requirements of Article 17 of the Convention (now article 23) were sufficient to ensure that there was a consensus35. The same view, rejecting the argument that the validity of the clause may be tested by reference to any law other than Article 17 itself, was expressed in the *Trumpy* case.36

There are three ways in which a jurisdiction clause may be effective. First, it may be in written or evidenced in writing. The *Tilly Russ* decision held that “the mere printing of a jurisdiction clause on the reverse of the bill of lading does not satisfy the requirements of article 17 of the Convention, [...].”37

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34 The *Tilly Russ* case *op.cit.*; Case C-106/95 Mainschiffahrts-Genossenschaft eG (MS- G)/.Les Gravieres Rhenanes SARL (1997), ECR 1997 I-00911; and the *Trumpy* case, *op.cit.*
35 Case C- 269/95, Francesco Benincasa, *op.cit.*, Para 25.
37 Case C-71/83, *Tilly Russ, op.cit.*, Para 16.
Further it is discussed when a jurisdiction clause appearing in the conditions printed on the bill satisfies the requirements of the Convention: when “the agreement of both parties to the conditions of the bill of lading containing that clause has been expressed in writing; or the jurisdiction clause has been the subject of a prior oral agreement between the parties expressly relating to that clause, in which case the bill of lading, signed by the carrier, must be regarded as confirmation in writing of the oral agreement”\(^{38}\)

The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States\(^{39}\) suggests that it is now common that an express jurisdiction agreement in the pre-printed text of the bill of lading is binding upon the shipper\(^{40}\). It asserts that this ‘form’ is now covered by Article 23(1) (c) of the Regulation, which did not apply to the *Tilly Russ* case\(^{41}\).

The second way in which a jurisdiction clause may be effective is if it is in a form which is in accordance with practices which the parties have established between themselves. The third way is, in international trade or commerce, in a form which accords with a usage of which the parties are or ought to be aware. The ECJ gave general guidance as to the determination of a usage of international trade in *Mainschifffahrts-Genossenschaft*.\(^{42}\) A usage will exist where a particular course of conduct is generally followed by parties operating in the same branch of international trade or commerce, in particular when they conclude contracts of a particular type. The contracting parties are presumed to be aware of that usage when they had previously trade or commerce relations between themselves or with other parties operating in the same branch of trade or commerce or when, in that branch, a particular course of conduct is generally and regularly followed when concluding a certain type of contract.

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\(^{40}\) Heidelberg Report, *op.cit.*, Para.283.

\(^{41}\) Clearly inferred from the *Trumpy* and *Coreck* cases.

\(^{42}\) Case C-106/95 *Mainschifffahrts-Genossenschaft*, *op.cit.*
The fact that the formal requirements have been satisfied under the contract between the shipper and carrier means that they are also automatically satisfied as between the carrier and third party, if the latter succeeds to the rights and obligations of the shipper.

3. Succession of the third party to the rights and obligations of the shipper under the relevant national law

Regarding this succession, question arises to which ‘relevant national law’ the Court of Justice refers to. In private international law, the issues are characterised under some categories that have a special connecting factor which connects the issue to the closest jurisdiction. The problem of characterisation consists in determining which juridical concept or category is appropriate in any given case. And according to the qualification retained of the issue the conflict of laws rules vary. In this case, the issue is the transmission to the third party bearer of the bill of lading the rights and obligations of the shipper relating to the forum election clause. According to Cachard, the categories can be ‘contracts’, ‘procedure’ or ‘negotiable instrument’. The ‘relevant national law’ will be then lex contractus if it is considered to be a contractual question, or it will be the law of the place of issue if it is considered as referring to a negotiable instrument and it will be the lex fori if it is considered to be a procedural matter.

The question has been asked to the ECJ in the Coreck case: “The question which national law is applicable for the purposes of determining the rights and obligations of a third party bearer of a bill of lading is not one of interpretation of the Convention it falls within the jurisdiction of the national court, which must apply its rules of private international law.”

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43 Case C-159/97 Trumpy, op.cit.
45 Article 67.2.b of the Rotterdam Rules refers to the lex fori also.
46 Coreck, op.cit. Para. 30.
refused to say what rules of substantive law applied in the event that the applicable national law provides no solution as to whether the third party upon acquiring the bill of lading succeeds to the shipper’s rights and obligations, this not being a question of interpretation of the Convention.47

The French Cour de cassation qualifies the issue as contractual.48 English law retains the contractual qualification also. Under English conflict rules, succession to a bill of lading contract is governed by the proper law of the contract49. Therefore, they will apply their conflict of laws rules on contracts as determined in the Rome I Regulation in order to determine the applicable law to a bill of lading contract.

First French and English courts will apply Article 3 of the Rome I Regulation. They will determine whether there is a succession to the shipper by the third party in application of the law chosen in the bill of lading by the original parties. In the absence of such a choice they will apply the provisions of article 5 of the Rome I Regulation in order to determine the proper law of the bill of lading.

Consequently the carrier by choosing the law for its contract of carriage can chose whether the jurisdiction clause will bind or not the third party bearer of the bill of lading.

4. Formal requirements as between the third party and the carrier

If the transferee of the bill of lading does not succeed to the rights and obligations of the shipper regarding the ‘relevant national law’ the court seized must ascertain whether the person against whom the jurisdiction clause is invoked, has accepted this clause. The court must decide this question by reference to the requirements laid down in the first paragraph of Article 23 of the Brussels I Regulation.

49 The Kribi [2000], op.cit.
When the bill of lading makes a general reference to a jurisdiction provision in the charter-party ("all terms and conditions as per charter party"), one has to deal with a complex problem of form. It might be difficult for the holder of the bill of lading to identify the respective charter-party and the terms and conditions thereof and in case of a dispute and short deadlines to meet; he would need to be able to predict the jurisdictional issue; a problem has not been discussed so far. Where the Judgment Regulation is applicable to the jurisdiction agreement, it is not clear whether the question of incorporation is answered by reference to the rules governing formality, or is, or is also, regulated as a matter of substantive law by the lex contractus of the agreement into which it is alleged the term was incorporated.

As this is an issue of consent, it must be dealt in application of the proper law of the contract, i.e. the bill of lading. This issue should not be confused with formal requirements which are dealt for jurisdiction clauses in the Regulation and for arbitration clause in the Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards (New York Convention). However, as the Regulation does not specify any law for the substantial validity of the jurisdiction clause this may cause confusion.

Where English law governs the second agreement, the usual rule, well established in cases of insurance and reinsurance, and also applicable to charter parties and bills of lading, is that general words of incorporation of one set of provisions from another contract will not incorporate a jurisdiction agreement into the second contract.

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50 Landau, T. Moollan, S. (2008), ‘Chapter 7 Article II and the Requirement of form’ in Enforcement of Arbitration Agreements and International Arbitral Awards the New York Convention in Practice (Edited Emmanuel Gaillard and Domenico Di Pietro), Cameron May: “Whether or not a reference in one contract to text in another document constitutes an effective incorporation is a question of consent and of the formation of contracts, and therefore a matter for the substantive governing law. However, incorporation by reference also raises issues of form, and these are frequently confused with the issues of substance”.


52 Siboti K/S v BP France SA [2003] EWHC 1278 (Comm.).
The comparable issue has been addressed within the context of arbitration clauses in a charter-party. The English Court of Appeal did not recognise a general reference to the charter-party without specifically mentioning the arbitration provision therein.\(^{53}\)

Whether the consignee or any further third party holder of the bill of lading “\([w]as\) or ought to have been aware \([o]f a usage\) which in such trade or commerce is widely known to, and regularly observed by, parties to contracts...” may arise a conflict to be dealt with in court. Delebecque\(^{54}\) insists that it is precisely in this context that the courts must remain vigilant and not immediately conclude that the insertion of a jurisdiction clause in a bill of lading is a usage of international trade. He remarks that this position may only be valid in the context of liner bills of lading and that it would still be necessary that the notion of line, around which the requirements of article 23(1) (c) could be synthesized, has a real content, which is asserted to be not the case. He explains that each company has its own bill of lading which differs as to the jurisdiction clause. As the usage must be determined, not in relation to the fact that bills of lading contain jurisdiction clauses, but in relation to the fact that such bill of lading confer jurisdiction to such forum, it would be difficult to identify the specific clause of which the parties ought to have been aware. In other words, it is suggested that the elements laid down in Article 23(1) (c) of the Community Regulation are in this area extremely difficult to meet.

On the other hand, for Cachard\(^{55}\), the simple insertion of a jurisdiction clause in a bill of lading forms part of the usages of maritime trade, thus in application of article 23(1) (c) should bind directly the consignee of the bill.

\(^{53}\) The Verena [1983] 3 All E.R. 645.


A. National Laws

National courts of Member states will have recourse to their own private international law rules on jurisdiction, when none of the parties to the original contract of carriage evidenced by the bill of lading are domiciled in the EU territory or when the courts elected are not those of a Member state.

We will successively analyse and compare the French and English position.

1. French law

a. French conflicting position on choice of courts agreements

French courts, specifically the Commercial Chamber, have been ignoring the *Tilly Russ-Coreck* formula, and refused to give effect to what appeared to be perfectly valid Article 23 jurisdiction clauses.

Before December 2008, the 1st Civil Chamber of the *Cour de Cassation* held that the third party bearer of the bill was directly bound by the forum election clause inserted in the bill of lading, and the Commercial Chamber of the same Court held that he was not bound automatically and that his express consent to that forum election clause was needed in order for him to be bound by it. In the great majority of the cases, they did not refer to the proper law of the bill of lading contract in order to determine whether the third party had succeeded to the shipper's rights and obligations. There is one case, the *Hapag Lloyd* case, where the commercial division of the *Cour de cassation* referred to the law governing

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the bill in order to determine the succession but found the proper law of the contract in application of article 4 of the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (the Rome Convention)\(^{59}\) disregarding the choice of law clause. In fact, the original parties to the contract have chosen German law which permits a succession to all rights and obligations of the shipper to the consignee, but the French court found that the proper law of the contract was French law in application of article 4 of the Rome Convention and held consequently that the consignee who did not accept expressly the forum election clause, was not bound by its terms. This solution has been criticized widely by French commentators. It has been asserted that this solution has “no legal basis”, the Cour de cassation should have applied article 3 of the Convention and not article 4 to determine the effects of a contract on third parties.\(^{60}\)

Consensus has been found between the two chambers by two decisions given on the 16\(^{th}\) of December 2008, following the exact same reasoning of the ECJ\(^{61}\): “A jurisdiction clause agreed between a carrier and a shipper inserted into a bill of lading shall have effect with respect to the third party holder of the bill of lading provided that, in acquiring the bill, he had succeeded to the rights and obligations of the shipper under the relevant national law”.\(^{62}\)

Even if it is a decision reached in application of the Article 23 of the Regulation, it is possible to deduce from it the approach of the French courts when confronted to a forum election clause falling outside the scope of the Brussels I Regulation. As the opposition between the two chambers did not differentiate whether the Regulation was applicable or not, we can deduce from this compromise that it concerns both Article

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\(^{59}\) The Rome Convention was replaced by the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.


\(^{61}\) The Tilly Russ case op.cit. and the Coreck case, op.cit.

23 jurisdiction clauses and others falling under the assessment of domestic rules. Nevertheless, it should be pointed out that a major distinction exists between the regime under the Regulation and the regime under the domestic jurisdictional rules: when article 23 of the Regulation applies the French courts are obliged to refer to the proper law of the bill of lading in order to determine whether the rights and obligations have been transferred but when the matter falls outside the scope of the Regulation the courts are not obliged to refer to the lex contractus unless the parties have brought this point before them.

b. French substantive rule on the succession

French Cour de cassation has decided to reason as the ECJ: the judge will look at the relevant national law of the bill of lading to decide whether the third party is bound or not but what does the French substantive rule stipulate on this matter?

According to the Cour de cassation’s jurisprudence, French law does not in its nature bind the third party holder to a jurisdiction provision in a bill of lading. According to the Hapag Lloyd judgment, “it does not result from any text law that the holder of the bill of lading, by accepting delivery of the goods, succeeds to the rights and obligations of the shipper (derived from the jurisdiction clause)”. The Commercial Chamber ruled, in the same decision, that the mere delivery of the bill of lading or even the cargo to the consignee or a further third party holder neither amounted to assuming all the rights and obligations of the shipper nor to consenting to the jurisdiction provision inserted into the bill of lading.

In fact, under French law, the person, whose name appears on the bill, the person presenting a bearer bill or the last endorsee of an order bill may all sue the carrier contractually, i.e. invoking the express or implied terms of the bill of lading, regardless of whether they were at risk or had property in the goods. Consequently, under French law, the third

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64 Article 49 of Decree No. 66-1078 of 31st December 1966 sur les contrats d’affrètement et de transport maritimes.
party bearer of the bill of lading is bound by some clauses of the bill, but not by all of its clauses.

The difference in attitude to the clauses, Delebecque⁶⁵ explains as follows: certain clauses – such as delivery clauses - belong or participate in what is termed the ‘économie’ of the contract; while others - such as jurisdiction clauses - do not so participate. The first types of clauses require no consent, while the latter do. Then he states that a delivery clause is “the expression of contractual freedom and that is known to be one of the rules based on the law of contract”. This presupposes therefore that jurisdiction clauses are not an expression of this freedom under French contract law.

Mazeaud appears to state, in the context of assignment, that a jurisdiction clause would be a manifestation of the ‘personal relationship’ between the original parties, in this case shipper and carrier and that the exceptions founded on the personal relationship of the carrier and the shipper do not bind the consignee.⁶⁶

However, this position conflicts greatly with the position adopted vis-à-vis arbitration clauses. Under French arbitration law, arbitration agreements are extended to third party holders of bill of lading without the need to ascertain their express consent as long as they participated in the execution of the contract of carriage.⁶⁷

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2. **English law**

   a. **English law position on choice of court agreements**

      English private international law rules will apply when the forum election clause chooses a non-Member State forum or when, while selecting the English forum, the clause has been concluded between two non-residents.\(^{68}\) English court will then apply the common law rules under which it has discretion to override the choice of jurisdiction\(^{69}\). Where the parties have agreed a choice of jurisdiction, the English court will usually give effect to that choice,\(^{70}\) unless the jurisdiction agreement is invalid by reference to its applicable law\(^{71}\) and unless it does not contravene a mandatory rule of English law. For example, when the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Hague Rules) as amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading in 1968 (Visby Rules) (together the Hague-Visby Rules)\(^{72}\), apply mandatorily and the effect of the choice of jurisdiction would result in the application of limits lower than those imposed

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\(^{68}\) If none of the parties to a jurisdiction clause for an EU Member State is domiciled in an EU Member State, Art 23(3) applies. It provides that the courts of the other EU Member States shall not have jurisdiction unless the court chosen declines jurisdiction.

\(^{69}\) Under *forum non conveniens* rule.


\(^{72}\) The Hague-Visby Rules are a set of international rules for the international carriage of goods by sea. The official title is “International Convention for the Unification of Certain Rules of Law relating to Bills of Lading” and was drafted in Brussels in 1924. After being amended by the Brussels Amendments (officially the “Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading”) in 1968, the Rules became known as the Hague-Visby Rules.
by the Hague-Visby Rules. Thus in *The Hollandia*\(^{73}\) the House of Lords held that the choice of the Amsterdam court, which would have applied the Hague Rules limit of about £250 rather than the Hague-Visby Rules limit of approximately £11,000 was null and void and of no effect in accordance with Art III r 8.

At the international level, the English courts and English law are very popular for maritime and shipping matters, most bills of lading choose English law and elect English forum. When none of the original parties to the contract of carriage are an EU resident and the English forum is the chosen forum, how will the English courts assess whether they have jurisdictions over the dispute between the carrier and the third party?

It is submitted that, if under the applicable law\(^ {74}\) the third party succeeds to the shipper’s rights and obligations, he should be able to rely on and should be bound by an English jurisdiction clause in the original contract of carriage.\(^ {75}\) The English courts have already effectively resorted to the proper law of the contract, when deciding whether there is a claim in respect of a contract of carriage for the purpose of determining service out of the jurisdiction under r 6.20(5).\(^ {76}\)

English courts will very commonly be faced with a foreign exclusive jurisdiction clause. This is because many carriers will be foreign and their standard terms and conditions will provide for trial in their home state.

English court seized in breach of the jurisdiction clause will exercise its discretion to grant a stay unless the claimant shows strong reasons, why the English proceedings should not be stayed. A stay will be refused if the choice of jurisdiction is contrary to a statutory rule against ousting


\(^{74}\) As determined by the application of the Rome Convention.


the jurisdiction of the court or against referring a dispute to the courts of
a foreign country.\footnote{Cf. \textit{The Hollandia}.}

In exercising its discretion whether or not to grant a stay, the court
considers all the circumstances of the case. In fact, the presence of a
closely related contract, the presence of related proceedings involving
similar issues in which experience had been gained by lawyers and expert
witnesses, the law applicable to the contract of carriage, the involvement
of insurers, the availability of witnesses, time bars, consolidation of liti-
gation, a claim for contribution are some of the factors considered in bill

If under the law applicable to the contract of carriage the third party
succeeds to the shipper’s rights and obligation he should be bound by
and should be able to rely on a foreign jurisdiction clause contained in
the original contract.\footnote{\textit{The Blue Wave} [1982] 1 Lloyd’s Rep 151. In this case, no evidence was adduced as to the
content of the foreign applicable law and the normal assumption was made that it was
the same as English law.}

\section{b. English substantive rule: COGSA
\textit{92 and title to sue}}

Two principles of English common law preclude the end buyer from
suing on the contract of carriage concluded between the shipper and the
ship owner. The first is the doctrine of privity of contract, whereby only
the parties to a contract may sue each other, notwithstanding that per-
formance of the contract may entail a benefit being conferred on a third
party. The second principle is that damages for breach of contract are as-
sessed by relation only to the loss suffered by a party to that contract. The
loss suffered by a third party is not recoverable. However, the courts have
developed some ways in which a third party may be able to seek remedy from the carrier, directly or indirectly, by using the law of contract\textsuperscript{80}.

The courts had recourse, depending on the facts of the case, to the principles of agency\textsuperscript{81}, assignment and implied contracts\textsuperscript{82}. However, these attempts to circumvent the principle of privity remained unsatisfactory.

The first legislative attempt to address the problems of title to sue for transit loss faced by cargo owners, other than the original shipper, was the Bills of Lading Act 1855. Section 1 effected a statutory assignment of the contract contained in the bill of lading to the consignee named in the bill or to the endorsee, provided that property in the goods had passed to them by reason of the consignment or endorsement, respectively. Both the benefits of this contract, the right to sue the issuer of the bill, and its burdens would follow the bill of lading as it passed down the chain of buyers until it ended up with the buyer who used it to take delivery of the goods.

However, the property link had the effect of excluding some categories of claimant who needed to establish a contractual means of recovering transit loss from the ship owner, for example: banks, financing sales through letters of credit, to whom the bill was indorsed by way of pledge, multiple buyers of an unascertained bulk of cargo who, by virtue of s 16 of the Sale of Goods Act 1979, were prevented from obtaining ownership in the goods until they had become ascertained on discharge etc.

The privity of contract doctrine has been radically altered by the Contracts (Rights of Third Parties) Act 1999, which enables, under some defined conditions, third parties to enforce a term of a contract in its own right. The Act, however, does not provide for third parties to become


\textsuperscript{81} \textit{Kapetan Markos NL} [1987] 2 Lloyd’s Rep 321, 329.

subject to the obligations imposed under a contract. More importantly, the effect of s 6(5) prevents third parties from obtaining positive rights of suit under contracts of carriage that are subject to the operation of COGSA 1992.


The statutory transfer of rights under the bill of lading contract now depends on the claimant establishing that it is the ‘lawful holder’ of the bill of lading at the time that it commences suit. Section 2(1) provides that the lawful holder “shall have transferred to and vested in it all rights of suit under the contract of carriage as if it has been a party to that contract”. Section 5(1) defines “contract of carriage” as “the contract contained in or evidenced by that bill of lading”. The effect of these provisions will be that the contractual rights, acquired under s 2(1), will be subject to all of the terms of the bill of lading, including jurisdiction clauses.

When a bill of lading is endorsed or transferred to the third party, in application of s 2(5), the previous holder will cease to be a ‘lawful holder’ and will lose any rights of suit conferred by s 2(1).

The original bill of lading holder will be liable for freight and demurrage in accordance with the terms of the bill of lading or will be obliged to go plead, if any dispute arises, in front of the courts chosen in the bill. The transfer of these contractual liabilities is dealt with separately under s 3. These will not automatically pass to those who obtain rights of suit under s 2(1). Liabilities will pass only if the third party takes delivery of the goods, makes a demand for delivery of the goods, or makes a claim against the carrier under the ‘contract of carriage’ in the bill of lading or waybill.
Under English law the lawful holder of a bill of lading will succeed to the rights and liabilities of the shipper and will therefore be bound by a choice of jurisdiction clause in the bill of lading.83

How could the reasoning behind this substantial law provision be explained?

The Law Commission and the Scottish Law Commission while examining the problems related to the rights of suit of third parties suggested that their approach to the problem “represents what [we] believe to be the most constructive way of reconciling the interests of all parties to a contract of sea carriage, in accordance with the dictates of good sense and commercial certainty”.84

The Law Commission proposed some explanations as to the transfer of contractual liabilities. It was suggested that “it would be unfair to shipowners to widen the category of persons able to assert contractual rights against them whilst, at the same time, taking away the ability of the shipowner to assert contractual rights against such persons”.85

Further, it explains that contractual liabilities are not to be automatically imposed on every holder of a bill of lading. However, when the holder of the bill of lading enforces any contractual rights under the contract of carriage, he should be able to do so on condition that he assumes any liabilities imposed on him under that contract.

“The bill of lading contract represents a sophisticated bundle of terms relating to shipment, delivery, payment, choice of forum, choice of law, etc. Whereas conceptually it is possible to analyse certain matters as being rights and others as being liabilities, this analysis has its limits. For instance, it may be difficult to characterise a choice of law clause as being either a right or a liability. Nonetheless, assuming that the analysis can be performed, we do not thing, as a general principle, that it is fair that the holder of a bill of lading can,

85 Law commission Report, op.cit., Para. 3.10.
so to speak, pick and choose those clauses which give him rights while claiming immunity from those clauses which happen to subject him to a liability”.

I. Controversies brought by the adoption of the Rotterdam Rules and the Resolution of the EU Parliament

The debate about the position of the third party holder of the bill of lading vis-à-vis the forum election clause inserted in the bill is still continuing but has left the French courts for an international and European level. Different positions are still conflicting: the Heidelberg report suggests to leave all the difficulties related to finding the proper law of the contract in order to determine whether the third party succeeds or not and suggests that he should be bound by the forum election clause immediately as soon as he becomes the lawful holder of the bill. This was the position held by the 1st Civil Chamber of the French Cour de cassation.

The current position represents the middle position: in order to determine whether the third party is bound or not reference is made to the law applicable to the bill, but there is no requirement of link between the forum chosen and the dispute.

On the other hand, the EU Parliament has adopted a Resolution where it suggests that the Judgment Regulation should be amended and the third party should be bound by a jurisdiction clause only if a link between the chosen courts and the dispute is established and if the consignee has been properly given notice of such a clause. No specific requirement of an express acceptance by the third party of the jurisdiction clause is imposed but the fact that there has to be a link between the dispute and the chosen forum serves the purpose of protection of the third party who did not have an opportunity to express its position regarding the forum chosen.

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87 European Parliament Resolution of 7 September, *op.cit.*
These different positions point out the tension between the needs of commercial transactions and the protection of the consignee of the bill of lading. This tension might also be hiding a deeper problem related to the choice of courts agreements giving jurisdiction to a forum with does not present any connection with the dispute.

First, the different solutions adopted by different international and European instruments will be presented (A), and then the policies underlying these conflicting positions will be examined (B).

**A. Different solutions proposed by international and European instruments**

1. **The current position under the Brussels I Regulation**

The current position under Brussels I Regulation is that the parties have freedom to choose the courts which will determine their disputes under a bill of lading. The parties are not restricted in their choice of court. It is asserted that as the Regulation aims to achieve legal certainty by making it possible to predict which court will have jurisdiction by fixing strict conditions as to form, there is no requirement of any link between the relationship in dispute and the court chosen.

Where the Regulation applies, if the choice of jurisdiction of the court of an EU Member State satisfies the requirements of art 23.1 (a), (b) or (c) as between the original parties to the bill of lading, the shipper and the carrier, transferees of the contract of carriage of goods by sea will also be bound by the jurisdiction clause “if [they] succeeded to the rights and obligations of the shipper under the applicable national law when [they] acquired the bill of lading”\(^{88}\).

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\(^{88}\) Tilly Russ, op.cit.; Trumpy, op.cit; Coreck Maritime, op.cit.
2. The Hamburg[^89] and the Rotterdam Rules[^90]

The Hamburg Rules in its article 21.1 on Jurisdiction cite the competent forums and limit the choice of parties regarding the forum to these jurisdictions. If the Hamburg Rules are adopted by some Member states[^91], its provisions will prevail over article 23 of the Regulation in application of its Article 71.[^92]

The Rotterdam Rules contain two chapters on jurisdiction and arbitration but States ratifying the Convention are not bound by these chapters unless they specifically opt into those chapters. Under chapters 14, the claimant against the carrier is given a number of options as to where it may sue and a choice of court jurisdiction or place of arbitration is only ever binding where the contract is a volume contract in limited circumstances and rarely against a third party where it is a ‘neutral choice’. The third party will only be bound by such a ‘neutral choice’, if the parties agree the jurisdiction of a court of a Contracting State after the dispute has arisen[^93] or the third party has submitted to the jurisdiction of a court of a contracting state without contesting its jurisdiction[^94] or there is jurisdiction by virtue of an international Convention[^95] such as the Arrest or Collision conventions.[^96]

Baatz[^97] argues that the chapter has failed to provide a satisfactory balance between the interests of the carrier and cargo interests. Indeed he argues that “the terms of the Convention go too far in favour of the shipper

[^91]: Austria, Hungary and Romania.
[^92]: Because the Hamburg Rules “govern jurisdiction or the recognition or enforcement of judgments”.
[^93]: Rotterdam Rules Article 72.1.
[^94]: Ibid, Article 72.2.
[^95]: Ibid, Article 70.
and much too far in favour of the third party consignee or transeree”. Therefore he does not recommend that the European Union opt in to these chapters.

The position in the Rotterdam Rules in relation to third parties to volume contracts limits the parties’ choice as to which court may be chosen. As a consequence, the third party could no be bound by the choice of a ‘neutral forum’ which has no connection with the parties or the dispute. It is asserted that it would have a significant impact on the choice of English court jurisdiction, which continues to be popular due to the English courts’ expertise in maritime law, efficiency and integrity. If the carrier is not domiciled in England and the facts of the dispute are not connected with England, an exclusive English jurisdiction clause could never bind a third party, even in the case of a volume contract.

3. The Heidelberg Report98

The Report indicates the point raised on this issue by the Netherlands Maritime and Transport Law Association. It states:

“The presumption... that a third-party bill of lading holder becomes vested in all rights and becomes subject to all obligations of the shipper, seems to show little understanding of the legal notions in operation in respect of bills of lading”.

The Association comments on the Tilly Russ, Coreck jurisprudence: this ruling “is interpreted by the courts of some countries so as to require the third-party holder to succeed the shipper in all rights and obligations. As this usually is impossible under the law governing the bills of lading, the carrier is not able to invoke a jurisdiction clause against a bill of lading holder99, while the carrier in fact will be allowed under the same national law to invoke all other clauses of the bill of lading against the bill of lading holder. This seems to be an abnormality.”


99 See French and Belgian case law: as discussed above, French law does not by itself bind the third party holder to a jurisdiction provision in a bill of lading.
Therefore, that Report supports the proposal of the Standing Committee of the Dutch Association that:

“a carrier under a bill of lading should be bound by, but should also be allowed to invoke, any stipulation of the bill of lading including a jurisdiction clause against the regular third party holder, unless of course the stipulation is unclear in such a manner that a third-party holder cannot easily determine in the courts of which place jurisdiction is vested.”

The reason given was that:

“For international maritime trade it would feel very artificial to distinguish the binding force of jurisdiction provisions on consignees pursuant to the law applicable to the transportation contract. After all, the third party holder is a third party beneficiary under the contract of transportation. Hence it is quite normal that he cannot acquire a better position than the shipper would have himself, should he also be the consignee”.

The Report from the Commission on the application of the Brussels I Regulation and the Green Paper do not suggest anything particular on this point and summarize the propositions of the Heidelberg Report.

4. Resolution of the European Parliament on the implementation and review of the Brussels I Regulation

Although article 13 of the Resolution suggests that there should be a new position dealing with jurisdiction clauses and third parties, it differs from the solution suggested by the Heidelberg Report. Recital O

100 Heidelberg Report, op.cit., Para.292.
101 Ibid, Para.293.
104 European Parliament Resolution of 7 September, op.cit.
states, “whereas third parties may be bound by a choice-of-court agreement (for instance in a bill of lading) to which they have not specifically assented and this may adversely affect their access to justice and be manifestly unfair and whereas, therefore, the effect of choice-of-court agreements in respect of third parties needs to be dealt with in a specific provision of the Regulation.”

A Third party would “be bound by an exclusive choice-of-court agreement concluded in accordance with the Regulation only if: (a) that agreement is contained in a written document or electronic record; (b) that person is given timely and adequate notice of the court where the action is to be brought; (c) in contracts for carriage of goods, the chosen court is (i) the domicile of the carrier; (ii) the place of receipt agreed in the contract of carriage; (iii) the place of delivery agreed in the contract of carriage, or (iv) the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.” The European Parliament also considers that it should further be provided that, in all other cases, the third party may bring an action before the court otherwise competent under the Regulation if it appears that holding that party to the chosen forum would be blatantly unfair.

It appears that the Resolution proposal seeks to align the provisions of the Brussels I Regulation with the provisions on jurisdiction in volume contracts for third parties in the Rotterdam Rules.

The provision suggested in the Resolution makes no distinction between volume contracts and other contracts, but applies to all contracts for carriage of goods.

The proposal states that the EU Parliament considers that it should be provided that, “in all other cases, the third party may bring an action before the court otherwise competent under the Regulation if it appears that holding that party to the chosen forum would be blatantly unfair.” What does ‘in all other cases’ cover? Does exclude the contracts for the carriage of goods by sea? Alternatively does it mean in all cases which are not contracts for the carriage of goods by sea which satisfy the requirement (i) to (iv)? In the latter case the carrier might still be able to rely on a neutral
choice of jurisdiction in a contract for the carriage of goods, provided it is not ‘blatantly unfair’ which sets a high threshold for unenforceability.

If the interpretation of ‘in all other cases’ means that the wording does not apply to any contracts for the carriage of goods by sea, then if the choice of court in a contract for the carriage of goods is not in place listed in (i) to (iv), the jurisdiction clause is not binding on the third party and this seems to be the likely interpretation. However, it is suggested that this interpretation goes too far as, like the Rotterdam Rules, the third party would never be bound by a neutral choice of jurisdiction as the place chosen must be one of the places stipulated and those places are the same as those provided for in the Rotterdam Rules.

What the Resolution seeks to do, as well as requiring the jurisdiction provision to be in a written document of which the consignee or holder of the bill of lading has timely and adequate notice, is to limit the courts which can have jurisdiction in relation to contracts for carriage of goods. In Baatz’s view that is wholly unnecessary in a commercial contract where the third party already has timely and adequate notice of a written provision.

She argues that the limit on the courts which could have jurisdiction is absolutely not necessary in the EU. The reason for it in the Rotterdam Rules is that parties should not be able to escape the Rules by providing for a jurisdiction which does not enforce those Rules. There is no need to limit the places which have jurisdiction in a commercial contract as the rules on choice of law in Rome I and Rome II Regulations seek “to designate the same national law irrespective of the country of the court in which an action is brought”.

There are no provisions in the Resolution relating to arbitration as arbitration falls outside the Regulation. This would create a set of rules in relation to jurisdiction agreements in contracts for the carriage of goods, such as bills of lading, and third parties who are very different from the rules applicable to arbitration agreements. There seems to be no justification for such difference. Furthermore it could drive parties to insert
arbitration clauses in their bills of lading rather than court jurisdiction clauses.

5. Proposal of the Commission for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

On 14 December 2010, the European Commission published its reasoned Proposal for amendments to the Brussels I Regulation. However, this proposal does not make any reference to the position of consignees of bills of lading regarding the choice of court agreements. The proposal includes three amendments which aim at improving the effectiveness of choice of court agreements:

The phrase ‘one or more of whom is domiciled in a Member State’ is erased. Consequently, when a jurisdiction agreement inserted in a bill of lading elects Member state courts, even though none of the parties to the original contract are domiciled in the EU, these courts will assess the validity of such a clause in application of article 23 of the revised Regulation. This proposition aims to ensure harmony regarding the prorogation of jurisdiction, the scope of national laws on the subject is even more reduced.

Where the parties have designated a particular court or courts to resolve their dispute, the proposal gives priority to the chosen court to decide on its jurisdiction, regardless of whether it is first or second seized. Any other court has to stay proceedings until the chosen court has established or – in case the agreement is invalid – declined jurisdiction. This modification will increase the effectiveness of choice of court agreements and eliminate the incentives for abusive litigation in non-

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106 This proposition is generally welcomed; it removes the controversies on the date on which the domiciliary connection was required to be satisfied. Art 23(1) is to be amended and Art 23(3) of the Brussels I Regulation is to be deleted.
competent courts. This proposition if adopted will set aside the *Gasser*\(^{107}\) jurisprudence.

Moreover, the proposal introduces a substantial ground for determining the validity of choice of court agreements: the law of the Member state chosen will determine whether this jurisdiction agreement is ‘null and void’. The proposal sets a conflict of laws rule on the substantive validity of choice of court agreements, thus ensuring a similar outcome on this matter whatever the court seized is.

However, this new provision has been criticized by some authors. For Briggs\(^{108}\), it is a “mixed blessing”. “There always was an issue of substance to address, and it is welcome that this is now acknowledged.” However, the rules of substantive law to which reference is made are neither identified as contractual nor confirmed as being not necessarily contractual; and the law of the Member State allegedly chosen appears to refer to the domestic law of the chosen court as distinct from the law which would otherwise be taken to have governed the substance of an agreement, such as its proper law. More importantly, this provision threatens the ‘autonomous interpretation’ of the Regulation imposed by the ECJ. In fact, “it already is the law of all the Member States that the validity of a jurisdiction agreement, including its substantive validity, is dependent on and determined by the Regulation itself, and not by some form of renvoi to contradictory rules of internal law”\(^ {109}\). Consequently, the reference to a national law takes one straight back to the jurisprudence on the autonomous interpretation of the Article itself.


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B. Considerations behind these policies

1. Direct enforceability

The 1st Civil Chamber of the *Cour de cassation*\textsuperscript{110} and the authors\textsuperscript{111} of the Heidelberg support that the jurisdiction clause inserted in a bill of lading should have a direct binding effect on the transferee of the bill without a need to ascertain its consent to this clause because of the general construction of the carriage of goods contract.

According to this chamber, the insertion of a jurisdiction clause in international contracts forms part of the general structure of this type of contracts and consequently binds the consignee of the goods. The enforceability of the jurisdiction clause upon the third party is in line with the “économie” of the contract. In these circumstances, it is unnecessary to consider the recipient’s consent, even though it does not succeed to the rights of the shipper. The ‘flow’ of the legal relationships thus would adequately be ensured.

According to the Heidelberg report, when the transferee relies on the bill of lading to sue the carrier, he should be deemed to have accepted all its clauses. This is so in order to satisfy the needs of the international maritime trade.

However, M.Potocki, reporter in the *Delmas Mascareignes* case\textsuperscript{112}, explains that the search of maximum efficiency for jurisdiction clauses can lead to some difficulties. “It is surprising for an operator to be imposed a judge whose jurisdiction is derived from an agreement to which it did not consent”. Consequently, the chosen judge has not the “state-institution legitimacy.” However, he points out that in the related field of arbitration clauses, one could be subject to the jurisdiction of arbitrators without an


\textsuperscript{111} Hess, B., Pfeiffer, T. and Schlosser, P.

express consent to it even though there is a general agreement on the fact that arbitral justice is based on the will of the parties.

In the field of international arbitration, French position is clear: cargo interests cannot claim the unenforceability of the arbitration clause against them in the absence of consent since it is usual to insert arbitration clause in international contracts of carriage of goods.\(^{113}\)

Olivier Cachard\(^{114}\) pleads for the same solution for jurisdiction clauses. According to the author, universalism, which characterizes the maritime law, and pragmatic solutions for complex chain of shipping cases are two major points to take into account when determining the solution of this issue. “Maritime law, more than many other is conducive to overcome national idiosyncrasy in a syncretic and universalist approach.” The elements for a universalist approach can be found in international conventions and in the standard forms of bills of lading and charter parties. “Where the universalist approach justifies the principle of legality of jurisdiction clauses in bills of lading, the pragmatism justifies that these clauses should be enforceable against the recipient without the formality of a special acceptance”.

On a regular shipping line, those entitled to the goods may be several hundred. Following the same event that damaged packages or containers belonging to a plurality of recipients, the carrier could be sued in a plurality of jurisdictions if the consignees are not bound directly by the jurisdiction clauses inserted in the bills, which is not a practical solution.

2. Express acceptation

The Commercial Chamber of the Cour de cassation\(^{115}\) subordinated the enforceability of the jurisdiction clause against the third party holder


of the bill of lading to its special acceptance. It justified its decision by invoking the need to protect the consignee of the bill who did not consent to such a clause. This suggestion is also considered in the European Parliament’s Resolution: Recital O states, “whereas third parties may be bound by a choice-of-court agreement (for instance in a bill of lading) to which they have not specifically assented and this may adversely affect their access to justice and be manifestly unfair and…”

According to Delebecque\textsuperscript{116}, this position is more aware of the requirements of the practice and more concerned with the security of the operators. It asserts that this case law is fully accepted in professional circles and envied by many countries. According to the author, during the discussion on jurisdiction clauses in the context of the Rotterdam Rules, the various solutions adopted by courts have been deeply examined and the French solution protector of the cargo interest has been put forward to circumvent certain proposals rather bold and very favourable to owners. Even if no consensus was finally reached, and even if it was decided to engage in a system of opting-in, he states that it is largely due to the influence of French jurisprudence.

On the other hand, this solution has been widely criticized by a part of the French doctrine indicating that such a position infringes the interests of international trade\textsuperscript{117}. This position is viewed as judicial protectionism and antipathy to foreign jurisdiction clauses. Brajeux\textsuperscript{118} offers one possible reason why, the court used to take such a strict view. He claims that the Cour de cassation was trying to reverse a national trend in the last twenty years of a decline in the French merchant fleet, and to quell the annoyance of French shippers and consignees at finding themselves subject to foreign jurisdiction clauses. Its aim was to protect the domestic consignee/shipper. In a related point, Delebecque has suggested that the

\textsuperscript{116} Delebecque, P. (2009), ‘Clauses attributives de compétence…’, op.cit., point 4.


\textsuperscript{118} Brajeux, G. Commentary under the Cour de cassation, the Nagasaki decision, Reuter Textline, Lloyd’s List, 13.11.1996.
French courts may be protecting French consignees from the lower limits of liability available from other Contracting State courts.\textsuperscript{119}

Another reason, albeit unlikely in a Brussels Convention context, may well be that the French courts perhaps consider foreign adjudication of the substantive questions as inappropriate, i.e.; an ‘ordre public’ exception.\textsuperscript{120}

Delebecque\textsuperscript{121} supports this solution: “It is thus legitimate to ask whether the Cour de cassation would not have done better to maintain this solution and make it an actual material rule of private international law.” He refers to the jurisprudence of the European Court of Human Rights that held that this essential right of access to justice should be evaluated taking into account the direct or indirect financial constraints.\textsuperscript{122}

For Briggs and Rees, as the ECJ does not refer to the \textit{lex contractus} for the substantial validity of the choice of court agreement, it is a possibility that the Regulation does not look at agreements on jurisdiction as contractual agreements. The Regulation may regard them as agreements by a party to waive the jurisdiction, i.e. as a unilateral act.\textsuperscript{123} If it is correct to consider the agreement as a unilateral agreement, then the “material question is whether that individual has made such an expression of agreement for himself”.\textsuperscript{124} From this point, it is difficult to ascertain that a third party may be taken to be bound by an agreement on jurisdiction which someone else made on its behalf. If this explanation is correct, then the approach of the Commercial Chamber is defendable.

This solution is adopted in order to protect the consignee from being obliged to plead in a forum which he could not have foreseen reasonably. For example, this is the case when the choice of courts agreement elects

\textsuperscript{119} Cf. \textit{The Hollandia}.

\textsuperscript{120} Newton, J. (2002) \textit{The Uniform Interpretation...}, op.cit., p. 219.

\textsuperscript{121} Delebecque, P. (2009), ‘Clauses attributives de competence...’, op.cit., point 9.

\textsuperscript{122} ECHR (1979), \textit{Airey v. Irlande}, 9 October 1979, Application n°6289/73.

\textsuperscript{123} Briggs, A. Rees, P. (2009) \textit{Civil Jurisdiction and Judgments}, op.cit., Par. 2.113

\textsuperscript{124} \textit{Ibid.}, Para. 2.120.
a forum which does not have any connection with the dispute or the parties.

3. Limits on the choice of courts agreements

The Hamburg and Rotterdam rules and the Resolution of the EU Parliament, in order to protect the consignee, found the solution in limiting the forums that can be competent for disputes arising out of or relating to a contract of carriage of goods by sea: the forum chosen has to have a connection with the dispute, thus the consignee may foresee reasonably the court.

According to Baatz\textsuperscript{125}, these provisions “run counter to the philosophy of party autonomy recognised by the EU Member States and English national law and introduce significant and complicated consumer protection into commercial contracts”. For the author, it is not necessary, in order to achieve predictability, to eliminate a court chosen by the parties which satisfies the formal and substantial requirement of the relevant applicable rule.

Cachard\textsuperscript{126} points out that these limitations on choice of courts agreements might explain the poor ratification of these international instruments: “the Hamburg rules which came into effect fourteen years after its signature, has been ratified neither by the major maritime nations, nor by shippers States aspiring to develop a commercial fleet.”

4. Discussion on party autonomy to attribute jurisdiction to a national forum which has no connection with the dispute

All these controversies point to a problem inherent to choice of court agreements: should the parties be permitted to choose a forum which does not have any connection with their dispute?


\textsuperscript{126} Cachard, O. (2008) ‘La force obligatoire vis-à-vis du destinataire des clauses relatives à la compétence internationale stipulées dans les connaissements’, \textit{op.cit.}
The question of whether the jurisdiction of a court can be prorogated or derogated by party autonomy is a question that only the law of that court can answer or at a European level the EU Regulation. There may be an international convention on this issue as the Hague Convention which is still not in force today.

And national legislations, EU Regulations or international conventions can permit the election of a forum which does not have any link with the dispute, and this is how they operate as for today. But is it the right solution?

Professor Vincent Heuzé in his research, concerning the subject, presented during his lecture within the framework of the Private International Law and International Commerce Master Degree in 2010 argues that the characteristics of this type of jurisdiction agreements presenting no link with the dispute are very similar to those of arbitration clauses.

The starting point of his analysis is the understanding that when reference is made to the international competence of courts, in fact it is a reference made to their power to judge a specific dispute presenting elements of internationality. This power derives from a national legal order. In other words, it is because there is an English jurisdictional power conferred to the English Courts that these courts have jurisdiction, i.e. they can state the law and have the *imperium*.

The question is to ascertain to what extent this power may be affected by a private agreement. The forum fixes its own rules as to the attribution of jurisdiction and it may well decide to confer itself jurisdiction on the agreement of the parties.

In international disputes, there is generally more than one forum which retain jurisdiction over the dispute. Consequently, the Claimant has always an advantage by the fact that it can select the forum in front of which it desires to plead. This is called ‘forum shopping’ and should be avoided as reasonably as possible. As a consequence, forum election clauses are useful as long as they remedy to this insecurity inherent to international disputes.
Heuzé distinguishes between two types of choice of court agreements: those which have only a negative effect and those which have a negative and a positive effect. If the jurisdiction clause designates a forum which would have had jurisdiction even if it was not selected, then the clause has only a negative effect, i.e. it only deprives other competent jurisdictions from hearing the case. On the other hand, if the jurisdiction clause designates a forum which would not have retained jurisdiction if it was not for the jurisdiction clause, then this clause has besides its negative effect a positive effect: it attributes jurisdiction to a forum which is normally incompetent.

The Hague Convention on jurisdiction clauses distinguishes also between these two types of clause as it permits States to make reservation regarding the second type of jurisdiction clause: States are not bound to accept the validity of a jurisdiction clause designating a forum which does not present any link with the dispute and the parties.

He suggests that the clauses that have only a negative effect can be justified as they permit to avoid the forum shopping: from all the competent forums the parties choose one for predictability reasons.

He asserts that the doctrine tried to give justifications for clauses with a positive effect: neutrality, expertise and economic liberalism would be the reasons why the parties are vested with the power to select a forum which presents no link with their dispute.

For Heuzé, none of them is a reasonable justification for the parties’ power to select a forum with no link.

a. Neutrality of the forum chosen

First the term ‘neutrality’ is defined as the will to elude the risk to go plead in front of a judge who would be inclined to favour its nationals. He indicates that from the point of view of the parties this is a sustainable justification, but when one refers to the point of view of the national legal orders this justification becomes unacceptable.
From the angle of the chosen jurisdiction, it certainly cannot accept the legality of these clauses arguing solely the partiality of the excluded jurisdictions without infringing the diplomatic relations. From the angle of the excluded jurisdictions, this motivation can certainly not be accepted as this will amount accepting their partiality.

Secondly, the term ‘neutrality’ might also be referring to the idea of equity: parties think that they would be disadvantaged if they had to plead in front of the judge of the other party as the latter knows better the law and the procedural rules of its own forum.

However, Heuzé suggests that if this definition is given effect, then the national courts of each party should never be granted jurisdiction. Further he signals that in fact, the parties are practically never in a position of total equality in front of the judge due to cultural, social or financial reasons.

b. The expertise of the judge chosen

Heuzé makes the same comments as for ‘neutrality’. The selected judges are certainly flattered but this fact might eventually lead to their congestion. He says that the judges do not want to deal with disputes which do not present any link with their jurisdiction, predicting the eventual problems as for the recognition and enforcement of their decisions in the interested forums.

However, it can be stated that the English forum is interested in dealing with such disputes as litigation brings money and as it increases English courts’ international reputation. This fact is especially true for maritime cases where it is asserted that the English courts have a special expertise on the subject. Even Heuzé admits this expertise and states that a jurisdiction clause electing the English forum, presenting no connection with the dispute, might be admissible for a maritime dispute.

On the other hand, the excluded judges will not easily accept their non-expertise in comparison to the selected judges.
As a conclusion he asserts that these justifications are not admissible in order to confer validity to forum election clauses which have a positive effect.

c. Economic liberalism

Heuzé suggests that it is possible that the economic liberalism could justify jurisdiction attributive clauses but he insists that this should be proven. The premise of this theory is that jurisdictional activity is a service. Consequently, granting Justice can be a profit-making activity. The market can develop a mechanism under which the parties in dispute will pay to obtain a ‘judicial decision’. This is the mechanism of arbitration.

However, for Heuzé the activity of granting Justice is not a service but it is the duty of each legal order.

This theory can be sustainable only if the national jurisdictions renounce to grant Justice on behalf of their legal orders and consent to settle disputes case by case without being a part of the enactment of societal rules.

Consequently, through jurisdiction attributive clauses national judges will bear the role of international arbitrators.

The issue is then whether these jurisdiction clauses which would confer a different role to national judges, a role of an arbitrator, should be given efficiency. The answer to this question is in opportunity. Is conferring such a role to the judge good or not?

Each legal order provides a different answer to this question ensuing from its own legal culture.

5. Conclusion for third party bill of lading holders

Undoubtedly there are some controversies about the position of third party holders of bills of lading regarding jurisdiction clauses contained therein. This debate is present at a national and at an international
level. We can infer from the discussion presented above that two major considerations conflict: the need to protect cargo interests and the need to secure international trade. Both of these concerns can be met if the position suggested in the Resolution of the EU Parliament expressed both in the Hamburg and Rotterdam Rules is upheld. The forum indicated in the bill of lading will be imposed upon the third party, thus ensuring security and predictability for the carrier. On the other hand, as the forums that can be elected are limited, the consignee could reasonably predict its position before being the lawful holder of the bill of lading. Furthermore, as these permitted forums are jurisdictions that relate in one way or another to the matter or to the parties (the domicile of the carrier, the place of delivery, the port of loading etc.), are potentially forums which would be normally competent under their own rules of private international law. As a consequence, this position respects the considerations raised by Heuzé.

**Conclusion**

The third party bearer of bill of lading will be bound by and could rely on a jurisdiction clause contained therein if it succeeds to the rights and obligations of the shipper under the relevant applicable law. This is a multilateral conflict of laws rule and is applied by the ECJ, the English courts and the French courts.

However, the English and the French substantial positions on the issue differ. Under COGSA 1992, English law transfers to the third party (holder of the bill of lading) all rights and obligations of the shipper, including the jurisdiction clause. On the other hand, French law, even if it transfers some rights and obligations to the third party upon acquiring the bill of lading, does not bind him to the jurisdiction clause. Consequently, under French law, in order to bind the third party to the jurisdiction clause its express consent is needed.

Four different positions exist on the issue. The first one, as expressed by the ECJ and adopted by French and English courts, is to resort to the law applicable to the bill of lading in order to determine whether the
consignee is bound or not by the jurisdiction clause. The second one is to apply a material rule of private international law. Without looking to the proper law of the contract, the consignee is automatically bound by the jurisdiction clause. This is the solution suggested by the 1st Civil Chamber of the Cour de cassation and by the Heidelberg Report. The third way is again the application of a material rule of private international law but in the opposite direction. The third party is not bound by the jurisdiction clause, even if he succeeds to the shipper, until he expressly consents to this jurisdiction clause. This was the solution adopted by the Commercial Chamber of the Cour de cassation. The fourth way is to limit the forums that can be chosen by the parties. This is the solution adopted by the Hamburg and Rotterdam Rules and proposed by the EU Parliament.

Heuzé has driven the attention to jurisdiction attributive clauses, stating that forum election clauses that designate jurisdictions which present no link with the dispute are similar in their function and effects to arbitration clauses and thus should be carefully managed.

These considerations supported the EU Parliament’s proposition which has not been taken into account by the Commission in its last Proposal\textsuperscript{127}.

**Bibliography**

**Cases**

*Brandt v Liverpool, Brazil & River Plate Steam Navigation Co. Ltd.* [1924] 1 K.B. 575

ECHR (1979), *Airey v. Irlande*, 9 October 1979, Application n°6289/73

*The Blue Wave* [1982] 1 Lloyd’s Rep 151

The Validity of Jurisdiction and Arbitration Clauses as Against Third Party...

The Verena [1983] 3 All E.R. 645

The Hollandia [1983] 1 AC 565

Case C-71/83 Partenreederei ms Tilly Russ v haven & Vervoerbedrijf Nova (1984) ECR 2417

Ilyssia Compania Naviera SA v Ahmed Abdul-Qawi Bamaodah (The Elli 2) [1985] 1 Lloyd’s Rep 107, CA

Cass. 1ère Civ. 25 November 1986, Siaci, Bull.civ. 1986 I n°277 p. 265

Kapetan Markos NL [1987] 2 Lloyd’s Rep 321, 329


Com. 26 May 1992, Ribra, Bull.civ., IV n°210 p. 146

The Gudermes [1993] 1 Lloyd’s Rep 311

The Pioneer Container (1994) 2 AC 324, PC

Com. 10 January 1995, GIE Réunion européenne c/ Société Plate et Ruys, n°92-21883

Standard Chartered Bank v Pakistan National Shipping Corp [1995] 2 Lloyd’s Rep 365

Com. 16 January 1996, Bull.civ. V, n°21 p.15

DVA v Voest Alpine [1997] 2 Lloyd’s Rep 279 CA

Com. 27 May 1997 Bull.civ., IV N° 160 p. 144

Com. 25 November 1997, Riunione Adriatica et autres c/ Capitaine du navire West-field et autres, Bull.civ.. IV n°310 p.266

Case C-106/95 Mainschiffahrts-Genossenschaft eG (MSG)./.Les Gravieres Rhenanes SARL(1997), ECR 1997 I-00911
Case C- 269/95, Francesco Benincasa v Dentalkit Srl (1997), ECR I-03767

Case C-159/97 Transporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA (1999) ECR I-1597

Case C-387/98 Coreck Maritime GmbH v Handelsveem BV & Ors (2000) ECR I-9337

Youell v Kara Mara Shipping Co Ltd [2000] 2 Lloyd’s Rep 102, 116

OT Africa Line Ltd v Hijazy & Anor (The Kribi) [2000], QBD (Comm.) [2001] C.L.C. 148


Com. 04 March 2003, Hapag Lloyd, Bull.civ., IV n°33 p. 39

Siboti K/S v BP France SA [2003] EWHC 1278 (Comm.)


Bols Distilleries BV v Superior Yacht Services Ltd [2006] UKPC 45 (PC)

The Mana [2006] 2 Lloyd’s Rep. 319 (QBD)

Com. 21 February 2006, Bull.civ. IV n° 41 p. 42

1ère Civ. 28 November 2006, n° 05-10464

The Validity of Jurisdiction and Arbitration Clauses as Against Third Party ...

Cass. Civ.1ère, 16 December 2008, Sté CMA-CGM c/ Sté BNP Paribas Suisse, Bull.civ., I n° 283


Paris Court of Appeal (5th Ch.), 6 May 2009, navire Humbolt Express, N° 06-18059

Rouen Court of Appeal (2nd Ch.), 10 September 2009, navire NYK Phoenix, N° 08/03137


**International Conventions**

International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Hague Rules)

Available:

http://www.admiraltylawguide.com/conven/haguerules1924.html


Available:


The Hague-Visby Rules - The Hague Rules as Amended by the Visby Rules 1968

Available:

http://www.jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/doc.html
Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)

Available:


Available:


Convention No 80/934/EEC on the Law Applicable to Contractual Obligations Opened for Signature in Rome on 19 June 1980 (the Rome Convention)

Available:


Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968

Available:


Hague Convention on Choice of Court Agreements, 30 June 2005

Available:


Available:


**Eu Instruments**

Council Regulation No 44/2001 on Jurisdiction and the Recognition and Enforcement in Civil and Commercial Matters (Brussels I)

Available:


Available:


Council Regulation No 864/2007 on the Law Applicable to Non-contractual Obligations (Rome II)

Available:


Council Regulation No 593/2008 on the Law Applicable to Contractual Obligations (Rome I)

Available:

Available:


Available:


Available:


Available:


**National Laws And Decrees**

(France) Decree No. 66-1078 of 31st December 1966 sur les contrats d'affrètement et de transport maritimes

Carriage of Goods by Sea Act 1992 (COGSA 92)

Available:


Available:


**Text Books**


**Articles**


Available:

www.i-law.com [accessed 06.06.2011]


Available:

www.i-law.com [accessed 06.06.2011]


Available:

www.i-law.com [accessed 09.06.2011]


Available:

www.i-law.com [accessed 06.06.2011]


