

London, 2017

**VALIDITY OF  
FOREIGN JURISDICTION CLAUSES  
IN  
BILLS OF LADING  
UNDER SPANISH LAW**

- In 2014 it came into force in Spain our “new” Navigation Act
- Main objects:
  - Overcome the existing contradictions
  - Modernize the Spanish maritime legal regime
- Any controversial provisions...?? Of course, YES!!!!!!!!!!!!



## HOT TOPICS

- Introduction of new rules on specialities of jurisdiction and competence:
  - Negotiated Individually and separately (art. 468).
  - Unenforceability against the third acquirer (art. 251).

- **Trend of Spanish Courts previous to the Navigation Act**

- Dismissal of cargo claims for lack of jurisdiction in the presence of jurisdiction clauses in bills of lading.

- Legal basis:

Art. 17 B. Convention  Art. 23 Reg. 44/2001  Art. 25 R.1215/2012  
EU Court Justice statements (Tilly Russ, Castelleti and Coreck Maritime Judgement).

Art. 25 R.B.R 1215/2012:

- (i) The parties confer jurisdictional power to a court of a contracting State.
- (ii) The dispute has an international nature.

- **Art. 25 Recast Brussels Regulation 1215/2012**

The agreement conferring jurisdiction shall be either:

*“(c) In international trade or commerce, in a form which accords with a usage of which the parties are aware or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by parties to contracts of the type involved in the particular trade or commerce concerned.”*

- **Trasporti Castelleti v Hugo Trumphy case**

**Consent of the parties to the clause (paragraphs 19-21):**

It is assumed that the contracting parties have given their consent to the jurisdiction clause when said parties' behavior corresponds to a usage which is typical in the area of international trade or commerce in which they operate and which they are aware of or should be aware of (p. 21).

- Coreck Maritime v Handelsveem case

Jurisdiction clause pleading against the third party holding the B/L:

*“As long as, under the relevant national law, the holder of the bill of lading succeeds to the shipper's rights and obligations”.*

- **Trend of Spanish Courts previous to the Navigation Act**

Controversial cases:

- Dismissal of cargo claims for lack of jurisdiction, without discretion.
- Just on the basis of following the trend.
- Accepting jurisdiction clauses poorly drafted or not clear enough.
- Without performing a real and strict analysis of the clause.
- Acceptance of non-EU jurisdiction clauses admitted in the light of the Brussels Convention applied by analogy.



- **Preamble of the Navigation Act**

- Spain, eminently shipper country.
- Trend not popular in the cargo sector.
- Hot topic in Spain
- Preamble of the Navigation Act:
  - Echoes the position of the cargo sectors.
  - Without prejudice the preferential application of international conventions and UE provisions.
  - Provisions on specialties of jurisdiction aims to avoid abuse detected.

## HOT TOPIC

- **Jurisdiction clauses provisions**

Debate between the doctrine. Two clear positions:

1. Optimistic position: Opportunity for our Courts to hear disputes in Spain.
2. Critical position: “original” and rather extravagant, with a very limited, if any, scope of applicability.

## UP TO DATE

- No case law from our Supreme Court
- The first and important decisions from the Courts of Appeal:
  - Four decisions from Valencia
  - One decision from Barcelona
- New trend of the Spanish Courts?.

- **Courts of Appeal decisions:**
  - Examination of the submissions clauses on “a case -by- case basis”.
  - The Recast Brussels Regulation prevails over national provisions of law.
  - Not always and in every case a jurisdiction clause defeats automatically the Spanish Courts competence.

- **Judgement Num. 1243 of 27<sup>th</sup> July 16**
  - Validity not admitted.
  - Grounds of Law:
    - No agreement between parties.
    - Clause not duly incorporated.
    - The challenging party was not aware of the usage of trade in relation to foreign jurisdiction clauses in Bs/L.
- **Judgement Num. 1244 of 27<sup>th</sup> July 16**
- **Judgement Num. 1681 of 17<sup>th</sup> November 2016**
  - Validity admitted.
  - Grounds of Law:
    - Agreement between parties.
    - Clause duly incorporated.
    - Ample experience of both contracting parties in the industry and the prior course of dealing between them.

## Barcelona Court of Appeal Judgement Num. 218 of 21<sup>st</sup> December 16

- Jurisdiction clauses referring to the Court of a Member State of the UE.
- Different possible scenarios:
  1. The shipper as claimant:
    - The Recast Brussels Regulation prevails over the Spanish domestic law.
    - Consequence: article 25 RBR cannot be superseded by article 468 NA.
    - The validity of the jurisdiction clause cannot be examined under Spanish law but under the law of the Member state which Courts are mentioned in the submission clause.
  2. The “third” holder of the bill of lading as claimant:

The conveyance of the B/L is to be studied under Spanish Law, in the light of art 251 NA.

- **Valencia Court of Appeal Judgement Num. 615 of 15<sup>th</sup> May 17:**
  - Jurisdiction clause referring to the Court of a non-EU Member State Court (Hong Kong Courts).
  - Validity not admitted.
  - Grounds of Law:
    - Nor the EU Provisions, nor the EU Court of Justice doctrine are applicable.
    - Inexistence of an International Convention or Treaty on Jurisdiction between Spain and China.
    - The jurisdiction clause is to be examined under Spanish Law.
    - The content of the clause and the way it has been inserted to the B/L bill does not show enough evidence of the consent of the shipper by an individual and separate negotiation.

- **Conclusions:**

- ✓ There is still a lot of questions to be answered.
- ✓ These decisions are clearing up the legal position in Spain.
- ✓ Practical consequence: increase of recovery claims.