Who is bound by Choice of Court Agreements in Bills of Lading?

According to the doctrine of privity of contract, only parties to a choice of court agreement are subject to the rights and obligations arising from it. However, there are exceptions to the privity doctrine where a third party may be bound by or derive benefit from a choice of court agreement, even if it did not expressly agree to the clause. A choice of court agreement in a bill of lading which is agreed by the carrier and shipper and transferred to a consignee, or third-party holder is a ubiquitous example.

Article 25 of the Brussels Ia Regulation does not expressly address the effect of choice of court agreements on third parties. However, CJEU jurisprudence has laid down that the choice of court agreement may bind a third party in some contexts even in the absence of the formal validity requirements. Effectively, this is a context specific harmonised approach to developing substantive contract law rules to regulate the effectiveness of choice of court agreements. Article 25 of the Brussels Ia Regulation prescribes formal requirements that must be satisfied if the choice of court agreement is to be considered valid. Consent is also a necessary requirement for the validity of a choice of court agreement. (Case C-322/14 *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH* EU:C:2015:334, [26]; Case C 543/10 *Refcomp* EU:C:2013:62, [26]). Although formal validity and consent are independent concepts, the two requirements are connected because the purpose of the formal requirements is to ensure the existence of consent (*Jaouad El Majdoub*, [30]; *Refcomp*, [28]). The CJEU has referred to the close relationship between formal validity and consent in several decisions. The court has made the validity of a choice of court agreement subject to an 'agreement' between the parties (Case C-387/98 *Coreck* EU:C:2000:606, [13]; Case C-24/76 *Estasis Salotti di Colzani Aimo e Gianmario Colzani s.n.c. v Ruwa Polstereimaschinen GmbH* EU:C:1976:177, [7]; Case C-25/76 *Galeries Segoura SPRL v Societe Rahim Bonakdarian* EU:C:1976:178, [6]; Case C-106/95 *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravieres Rhenanes SARL* EU:C:1997:70, [15]). The Brussels Ia Regulation imposes upon the Member State court the duty of examining whether the clause conferring jurisdiction was in fact the subject of consensus between the parties, which must be clearly and precisely

demonstrated (ibid). The court has also stated that the very purpose of the formal requirements imposed by Article 17 (now Article 25 of Brussels Ia) is to ensure that consensus between the parties is in fact established (Case 313/85 *Iveco Fiat v Van Hool* EU:C:1986:423, [5]).

In similar vein, the CJEU has developed its case law as to when a third party may be deemed to be bound by or derive benefit from a choice of court agreement. In the context of bills of lading, the CJEU has decided that if, under the national law of the forum seised and its private international law rules, the third-party holder of the bill acquired the shipper's rights and obligations, the choice of court agreement will also be enforceable between the third party and the carrier (C 71/83 *Tilly Russ* EU:C:1984:217, [25]; C-159/97 *Castelletti*EU:C:1999:142, [41]; C 387/98 *Coreck* EU:C:2000:606, [24], [25] and [30], C 352/13 *CDC Hydrogen Peroxide* EU:C:2015:335, [65]; Cf. Article 67(2) of the Rotterdam Rules 2009). There is no separate requirement that the third party must consent in writing to the choice of court agreement. On the other hand, if the third party has not succeeded to any of the rights and obligations of the original contracting parties, the enforceability of the choice of court agreement against it is predicated on actual consent (C 387/98 *Coreck* EU:C:2000:606, [26]; C 543/10 *Refcomp* EU:C:2013:62, [36]). A new choice of court agreement will need to be concluded between the holder and the carrier as the presentation of the bill of lading would not *per se* give rise to such an agreement (AG Slynn in *Tilly Russ*).

Article 17 of the Brussels Convention and Article 23 of the Brussels I Regulation did not contain an express provision on the substantive validity of a choice of court agreement. The law of some Member States referred substantive validity of a choice of court agreement to the law of the forum whereas other Member States referred it to the applicable law of the substantive contract (Heidelberg Report [326], 92). However, Article 25(1) of the Brussels Ia Regulation applies the law of the chosen forum (*lex fori prorogatum*) including its choice of law rules to the issue of the substantive validity of a choice of court agreement ('unless the agreement is null and void as to its substantive validity under the law of that Member State').

The CJEU recently adjudicated on whether the enforceability of English choice of court agreements in bills of lading against third party holders was governed by the choice of law rule on 'substantive validity' in Article 25(1) of the Brussels Ia Regulation. (Joined Cases C 345/22 and C 347/22 *Maersk A/S v Allianz Seguros y*

Reaseguros SA and Case C 346/22 *Mapfre España Compañía de Seguros y Reaseguros SA v MACS Maritime Carrier Shipping GmbH & Co*.) The CJEU held that the new provision in Article 25(1) referring to the law of the Member State chosen in the choice of court agreement including its private international law rules is not applicable. A third-party holder of a bill of lading remains bound by a choice of court agreement, if the law of the forum seised and its private international law rules make provision for this. Notwithstanding, the principle of primacy of EU law precludes Spanish special provisions for the subrogation of a choice of court agreement that undermine Article 25 as interpreted by CJEU case law.

In the three preliminary references under Article 267 TFEU, the enforceability of English choice of court agreements between Spanish insurance companies and maritime transport companies was at issue. The insurance companies exercised the right of subrogation to step into the shoes of the consignees and sued the maritime transport companies for damaged goods. The central issue in the proceedings was whether the choice of court agreements concluded in the original contracts of carriage evidenced by the bills of lading between the carrier and the shipper also bound the insurance companies. The transport companies objected to Spanish jurisdiction based on the English choice of court agreements. The Spanish courts referred questions to the CJEU on the interpretation of choice of court agreements under the Brussels Ia Regulation.

At the outset, the CJEU observed that the Brussels Ia Regulation is applicable to the disputes in the main proceedings as the proceedings were commenced by the insurance companies before 31 December 2020. (Article 67(1)(a), Article 127(1) and (3) of the EU Withdrawal Agreement)

The CJEU proceeded to consider whether Article 25(1) of the Brussels Ia Regulation must be interpreted as meaning that the enforceability of a choice of court clause against the third-party holder of the bill of lading containing that clause is governed by the law of the Member State of the court or courts designated by that clause. The CJEU characterised the subrogation of a choice of court agreement to a third party as not being subject to the choice of law rule governing substantive validity in Article 25(1) of the Brussels Ia Regulation. (C 519/19 *DelayFix* EU:C:2020:933, [40]; C 543/10 *Refcomp* EU:C:2013:62, [25]; C 366/13 *Profit Investment SIM* EU:C:2016:282, [23]) The CJEU relied on a distinction between the substantive validity and effects of choice of court

agreements (*Maersk*, [48]; AG Collins in *Maersk*, [54]-[56]). The latter logically proceeds from the former, but the procedural effects are governed by the autonomous concept of consent as applied to the enforceability of choice of court agreements against third parties developed by CJEU case law.

Although Article 25(1) of the Brussels Ia Regulation differs from Article 17 of the Brussels Convention and Article 23(1) of the Brussels I Regulation, the jurisprudence of the CJEU is capable of being applied to the current provision (*Maersk*, [52]; C 358/21 *Tilman*, EU:C:2022:923, [34]; AG Collins in *Maersk*, [51]-[54]). The CJEU concluded that where the third-party holder of the bill of lading has succeeded to the shipper's rights and obligations in accordance with the national law of the court seised then a choice of court agreement that the third party has not expressly agreed upon can nevertheless be relied upon against it (C 71/83 *Tilly Russ* EU:C:1984:217, [25]; C-159/97 *Castelletti* EU:C:1999:142, [41]; C 387/98 *Coreck* EU:C:2000:606, [24], [25] and [30], C 352/13 *CDC Hydrogen Peroxide* EU:C:2015:335, [65]; *Maersk*, [51]; Cf. Article 67(2) of the Rotterdam Rules 2009). In this case, there is no distinct requirement that the third party must consent in writing to the choice of court agreement. The third party cannot extricate itself from the mandatory jurisdiction as 'acquisition of the bill of lading could not confer upon the third party more rights than those attaching to the shipper under it' (C 71/83 *Tilly Russ* EU:C:1984:217, [25]; C-159/97 *Castelletti* EU:C:1999:142, [41]; C 387/98*Coreck* EU:C:2000:606, [25]; *Maersk*, [62]). Conversely, where the relevant national law does not provide for such a relationship of substitution, that court must ascertain whether that third party has expressly agreed to the choice of court clause (C 387/98 *Coreck* EU:C:2000:606, [26]; C 543/10 *Refcomp* EU:C:2013:62, [36]; *Maersk*, [51]).

According to Spanish law, a third-party to a bill of lading has vested in it all rights and obligations of the original contract of carriage but the choice of court agreement is only enforceable if it has been negotiated individually and separately with the third party. The CJEU held that such a provision would undermine Article 25 of the Brussels Ia Regulation as interpreted by the CJEU case law (*Maersk*, [60]; AG Collins in *Maersk*, [61]). As per the principle of primacy of EU law, the national court has been instructed to interpret Spanish law to the greatest extent possible, in conformity with the Brussels Ia Regulation (*Maersk*, [63]; C 205/20*Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)* EU:C:2022:168) and if no such interpretation is possible, to disapply the

national rule (*Maersk*, [65]).

The choice of law rule in Article 25(1) is not an innovation without utility. A broad interpretation of the concept of substantive validity would encroach upon the autonomous concept of consent developed by CJEU case law yet it could avoid the need for a harmonised EU substantive contract law approach to the enforceability of choice of court agreements against third parties. The CJEU in its decision arrived at a solution that upheld the choice of court agreement by the predictable application of its established case law without disturbing the status quo. In practical terms, the application of the choice of law rule in Article 25(1) would have led to a similar outcome. However, the unnecessary displacement of the CJEU's interpretative authorities on the matter would have increased litigation risk in multi-state transactions. By distinguishing substantive validity from the effects of choice of court agreements, the CJEU does not extrapolate the choice of law rule on substantive validity to issues of contractual enforceability that are extrinsic to the consent or capacity of the original contracting parties. On balance, a departure from the legal certainty provided by the extant CJEU jurisprudence was not justified. It should be observed that post-Brexit, there has been a resurgence of English anti-suit injunctions in circumstances such as these where proceedings in breach of English dispute resolution agreements are commenced in EU Member State courts.

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