

# French Shipping Law

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## CASES

### **235. *Axa Corporate Solutions Assurance v Eukor Car Carriers*<sup>1</sup>**

*Bill of lading—jurisdiction clause—enforceability of a jurisdiction clause contained in a bill of lading against a consignee—special consent—readability of the clause*

A car company, PSA, (“the shipper”) instructed Eukor (“the sea carrier”) to carry new cars (the “cargo”) from Belgium to South Korea for delivery to Hanbul Motors (“the consignee”). The sea carrier issued several bills of lading mentioning Hanbul Motors either as “consignee” or “notify party”.

At delivery, part of the cargo was found damaged. Axa (“the insurer”) paid compensation to the consignee for the damage caused to its cargo. The insurer, subrogated to the rights of the consignee, commenced a claim against the sea carrier before the Commercial Court of Paris seeking compensation for the damage done to the cargo. Under the Civil Code, Art.14, a French party enjoys exorbitant jurisdiction to bring foreign defendants before the French courts, unless it has agreed not to do so by a binding jurisdiction clause. The insurer accordingly sought to rely on Art.14 to establish jurisdiction of the Paris Court.

The sea carrier did not make an appearance before the Paris Court. However, it later lodged an appeal against the Court’s judgment. The sea carrier challenged the jurisdiction of the French courts on the basis of the jurisdiction clause contained in the bills of lading, granting jurisdiction to the Seoul Civil District Court in Korea. The clause provided as follows: “Any and all action concerning custody or carriage under this Bill of Lading whether based on breach of contract, tort or otherwise shall be brought before the Seoul Civil District Court in Korea.” The bills of lading also provided for Korean law to apply to the contracts of carriage evidenced by the bills of lading.

By judgment of 30 June 2020, the Court of Appeal of Paris found (i) that the jurisdiction clause was valid but (ii) that it could not be enforced against the consignee on the grounds that it was illegible and that it had not been accepted by the consignee. The Court of Appeal accordingly upheld the jurisdiction of the Commercial Court of Paris.

The sea carrier lodged an appeal before the Supreme Court. Its main argument on appeal was that the law governing the conditions for acceptance and enforceability of a jurisdiction clause contained in a bill of lading was the law applicable to the contract of carriage, ie Korean law, not the law of the forum. In support of its appeal, the sea carrier also argued, in the alternative, that, assuming the consignee’s consent to the clause was

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1. Judgment of the French Supreme Court dated 14 December 2022, No 20-17.768.

required, such consent could be tacit. It was argued for the sea carrier that a special consent of this kind may result either from the fact that the clause in question is usually stipulated in the context of the business relations established between the parties, or from practice in the field of international carriage of goods, or from reference in the bill of lading to the sea carrier's general conditions containing the clause available on its website. The consignee and the sea carrier had been parties to hundreds of bills of lading in the past with the same law and jurisdiction clause.

*Decision:* Appeal dismissed.

*Held:* (1) The admissibility of an action based on contractual liability against a sea carrier is assessed independently from the references on the bill of lading. The bill of lading has an evidentiary function and the indications it contains do not limit the related claims exclusively to the parties mentioned in the bill of lading. The consignee can bring a contractual claim to seek compensation for loss and damage resulting from the carriage. In so doing, the consignee will be bound by the bill of lading terms in relation to carriage from loading to delivery, but not automatically by a jurisdiction clause. A jurisdiction clause contained in a bill of lading could not be binding on the consignee unless (i) the consignee had specially consented to it, or (ii) the court designated by the clause has jurisdiction by virtue of an international treaty or European Union law. The Supreme Court also noted that this requirement for special consent cannot be satisfied by any practice in the field of international carriage of goods, nor merely by previous business relations between the parties, nor by a reference on the face of the bill of lading referring to its reverse side.

(2) Even though a jurisdiction clause contained in a bill of lading, in favour of the Korean courts, in the jurisdiction of which the registered office of the sea carrier is located, is valid in principle, such a clause must also be readable to be enforceable.

*Comment:* By this judgment, the Supreme Court clarified the test to determine enforceability of a jurisdiction clause against a consignee in an international contract of carriage, where the clause in question provides for the jurisdiction of a court outside the EU. It is an approach that ignores the law applicable to the contract itself, relying instead on what the Supreme Court terms a "material rule": a rule that requires the French courts to have regard to matters of drafting, presentation and acceptance of the clause in issue.

This approach contrasts with the Recast Brussels Regulation,<sup>2</sup> where the jurisdiction clause in question must meet conditions of form and substance set by the Regulation and case law, including a condition that the clause must designate the courts of a Member State. In practice, within the EU, jurisdiction clauses are often upheld using a traditional conflict of laws approach first set by the ECJ in the *Coreck* case,<sup>3</sup> and then adopted by the First Civil Chamber of the French Supreme Court.<sup>4</sup> If under the law applicable to the contract of carriage the consignee is deemed to succeed to the rights and obligations of the shipper, the consent of the consignee is presumed and the jurisdiction clause agreed between the carrier and the shipper applies *ipso jure* to the consignee.

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

3. *Coreck Maritime GmbH v Handelsveem BV* (C-387/98) [2000] ECR I-9337.

4. Judgment of the Supreme Court dated 16 December 2008, No 07-18.834.

In the commented case, the facts did not allow for application of the Recast Brussels Regulation, which was not even discussed. The Supreme Court applied its own case law to verify whether the requisite special consent of the consignee was present. Part of the material rule is that the clause must be readable to be enforceable. This is perhaps logical, given that the clause must be readable in order for the consignee to be able to give his express or special consent. In the commented case, a magnifying glass was apparently required to read the jurisdiction clause, causing it to fall foul of a readability requirement.

Of note, by considering that the consignee was bound by the bills of lading only in respect of the conditions of carriage, the Commercial Chamber of the Supreme Court seems to consider that a jurisdiction clause inserted in a bill of lading is an exorbitant or unusual clause. This stands in contrast to the First Civil Chamber of the Supreme Court, which considers that a jurisdiction clause “is part of the economics of an international contract”.<sup>5</sup> The diverging views of the two chambers will require a plenary judgment to resolve this fundamental difference.

In summary, by confirming application of a material rule of law, the Supreme Court implicitly clarified that the conflict of laws test set by the *Coreck* case applies only to jurisdiction clauses that fall to be considered under EU law. Consequently, at least for the Commercial Chamber of the Supreme Court, the conflict of laws test is not applicable to a jurisdiction clause that gives jurisdiction to a court outside the EU.

The test described by the Supreme Court can have an important impact on the enforceability of a jurisdiction clause against a consignee. The alternative conflict of laws approach applicable to an EU situation is more likely to result in a jurisdiction clause being upheld against a consignee than the material rule special consent approach applicable in the commented case. There are almost no cases where a jurisdiction clause has been upheld applying the material rule approach. In one case where the material rule approach was taken and the jurisdiction clause enforced, a French appellate court found that the requisite special consent existed where three conditions were met: (i) the bill of lading was signed by the consignee, (ii) the jurisdiction clause was clear and visible/evident, and (iii) the clause was drafted in English, a language common in international contracts.<sup>6</sup> In certain Supreme Court decisions, it has been held *obiter* that the requisite special consent of a consignee cannot result from unreserved performance of the bill of lading,<sup>7</sup> nor from the mere possession of the bill of lading when there is nothing in writing evidencing special consent by the consignee to the jurisdiction clause.<sup>8</sup>

With the UK now having exited the EU, jurisdiction clauses in bills of lading calling for UK courts will now have to meet a much stricter test for enforceability where French courts are seised of a claim. In practice, going forward, such clauses may well not stand up against a consignee or its insurers who choose to bring a claim in the French courts. To address this new challenge, shipowners who prefer the UK dispute resolution process should consider incorporating an arbitration clause into their bills of lading, rather than a

5. Judgment of the Supreme Court, First Civil Chamber, dated 12 July 2001, No 98-21.591.

6. Judgment of the Court of Appeal of Caen dated 6 May 2008, No 08/00337.

7. Judgment of the Supreme Court dated 8 December 1998, No 96-17.913.

8. Judgment of the Supreme Court dated 16 December 2008, No 07-18.834.

jurisdiction clause. Different, much more favourable, rules are applied by French courts to arbitration clauses. Brexit has not affected the enforceability of London arbitration clauses contained in bills of lading.