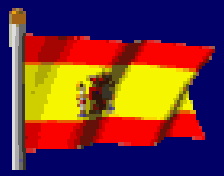
FORUM CLAUSES: THE PERSPECTIVE IN SPAIN WITH SPECIAL REFERENCE TO THE CLAIMS AGAINST THE SHIP AGENT.



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UNDER SPANISH LAW, THERE ARE SOME AREAS IN RESPECT OF WHICH THE JURISDICTION OF THE SPANISH COURTS CANNOT BE CONTESTED.

HOWEVER, IN THE LAST YEARS SPANISH COURTS HAVE ACCEPTED THE VALIDITY OF FOREING JURISDICTION CLAUSES.

MOST OF THE DECISIONS ADMITTING THE FOREIGN JURISDICTION CLAUSES REFER TO BILLS OF LADING.

AFTER MANY YEARS DURING WHICH SPANISH COURTS WERE RELUCTANT TO ACCEPT THE EFFECTIVENESS OF THE USUAL FOREIGN JURISDICTION CLAUSES, NOWADAYS THE TREND OF THE COURTS IS TO ACCEPT ITS VALIDITY AND DISMISS CARGO CLAIMS BROUGHT IN SPAIN BY CARGO OWNERS OR THEIR SUBROGATED UNDERWRITERS FOR LACK OF JURISDICTION IN THE PRESENCE OF SAID JURISDICTION CLAUSES IN BILLS OF LADING.

The legal grounds for this new trend is, as in other countries, article 17 of the Brussels Convention on jurisdiction and the Enforcement of judgments in Civil and Commercial matters, changed when the UK became a member of the EC in the Luxemburg Convention of 9 October 1978.

AS ALL YOU KNOW, THE FINAL VERSION IS CONTAINED IN ARTICLE 23 OF COUNCIL REGULATION (EC) 44/2001:

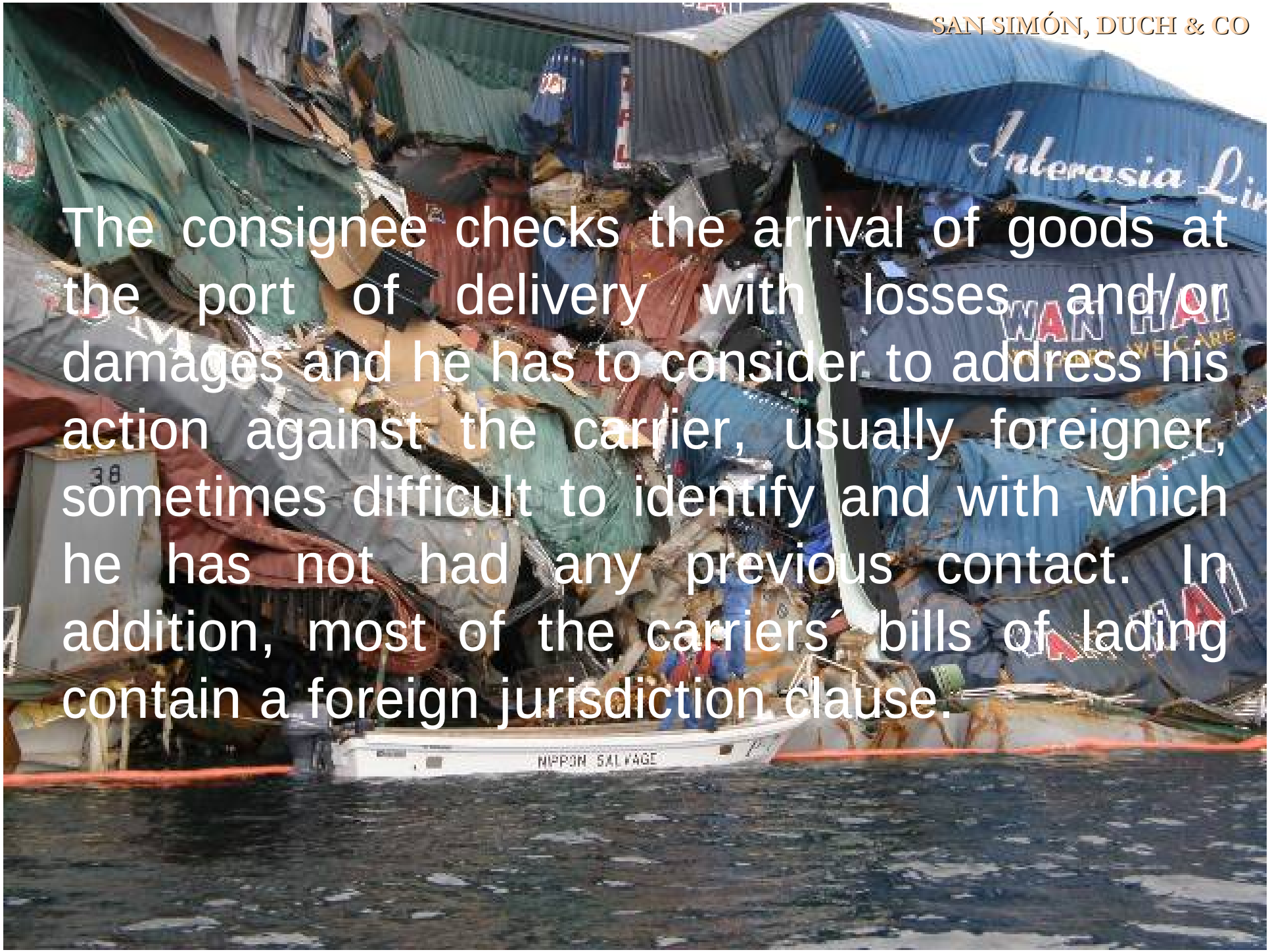
If the parties – one or more of whom is domiciled in a contracting state – have agreed that a court or the courts of a member state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction unless the parties have agreed otherwise.

The present trend followed by courts with regard to the jurisdiction clauses in the bills of lading is a relevant development in the Spanish legal system and the Carriers, Owners an P&I Clubs have found themselves somehow comfortable in the last years in conection with claims againts them for damages to cargo or losses.

The position up to now has been that cargo underwriteres consider that it is better to accept (low) settlements avoiding litigation, in view of the trend of Spanish Courts in relation with the jurisdiction clauses and that many of the usual jurisdiction clauses refer to English Courts. The general idea is that these courts usually favour Owners whilst legal proceedings in the UK are considered very expensive.

However, this scenario may change due to the judgement of the Spanish Supreme Court of 26th November 2007, pronounced by the full civil section, admitting the possibility to sue the ship agents for damages and/or losses of the carried goods.

Until said judgement, there has always been some controversy in Spain about the ship agent's responsibility, which is an issue of a considerable practical importance.



The consignee checks the arrival of goods at the port of delivery with losses and/or damages and he has to consider to address his action against the carrier, usually foreigner, sometimes difficult to identify and with which he has not had any previous contact. In addition, most of the carriers´ bills of lading contain a foreign jurisdiction clause.

Until the judgment of 26th November 2007 there had been judgements which asserted the shipping agent's responsibility for damages and/or losses of the carried goods and others which denied it.

YES

NO

The judgment of the Supreme Court of 26th November 2007 puts an end in Spain to the jurisdictional controversy on the responsibility which may be demanded from the ship agent for the damages and/or losses suffered by the goods during transport.

After several judgements on both senses from the Supreme Court, this judgement accepts the claim of the goods' insurer against the ship agent in the port of delivery for the suffered damages (defrosting of frozen fish) during transport and proven when unloaded.

The judgement of 26th November 2007 establishes as legal doctrine that the shipping agent is the legal and direct responsible against the owner of the damaged goods, regardless of the internal relationship between the ship agent and the carrier, and of the temporary or permanent nature.

This judgement, which makes the ship agent responsible, and appears as a defence mechanism of the rights of the cargo interests, has caused some kind of sensation to every intervening agent in the maritime market.

It has obviously been celebrated by a large sector of the market, not only by the direct beneficiaries of the same, but also by those who prefer legal security to debate in the field of maritime transport of goods.

Naturally, it has also been the object of the criticism of the Shipping Agent Associations and others, as well as of the scholars who were against the comparison between the shipping agent and the shipowner.

The practical importance of the judgement is obvious.

The insurers of the cargo shall quantify their reserves starting from the real assumption that their recovery action by the payments done for damages and/or losses of the goods insured can be started in Spain against entities domiciled in Spain and with assets in Spain.

The doctrine about the shipping agent's responsibility initially means an increase of the recovery possibilities.

The ship agents are obliged to insure or increase their responsibility insurance.

LLOYD'S

The situation created by the judgement of 26th November 2007 will be kept until the Bill of the General Shipping Law is approved, in case it is approved, since articles 350-355 establish that the shipping agent of a tramp vessel is a trade commissioner, and an agent if the consigned vessel is one of regular route.

Therefore, if the said Bill is approved, the shipping agent would only be responsible for the transport if he celebrates the contract of carriage it in his own name and without stating that he acts on his principal behalf, the shipowner.

Until then, the present position in Spain is, as mentioned, that cargo interest can bring the claim for damages to cargo or losses against the ship agent.

Therefore, the favourable scenario for carriers, owners and P&I clubs in view of the Spanish courts´ trend to accept the validity of the foreign jurisdiction clauses to which I referred before may be darkened.

As far as the foreign jurisdiction clauses are concerned, there are doubts as to whether or not the ship agent can successfully plead the clause which is included in the bill of lading or other title for the transport of the damaged or lost goods when the ship agent is sued.

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There are legal arguments which could avail the ship agent to invoke the foreign jurisdiction/arbitration clause in order to seek a dismissal of the cargo claim.

However, there are other legal arguments against such a possibility, which in balance I believe have more weight than those supporting the use by the ship agent of the foreign jurisdiction/arbitration clause in the bill of lading of other type of transport document

Since the judgement of 26th November 2007 legal proceedings against ship agents have obviously increased and we will see soon what is the position of the Spanish courts as to the validity of the foreign jurisdiction/arbitral clauses where lack of jurisdiction of said courts is pleaded by the ship agent by virtue of said clauses.

I guess that the judicial position will likely be the one against the possibility for the ship agents to invoke the foreign jurisdiction /arbitral clause and this will be and additional reason for them to think about the problems or difficulties which may entail the fact of transferring to their principals the amount of the legal sentence they may have against.

This may cause problems or difficulties to the "tramp" shipping agent given the lack of stable relationship with the carrier. In this case, it may have serious difficulties in transferring to the carrier the consequences of a judgment against the ship agent because of losses or damages during transport.

Such difficulties would not have taken place when damaged or lost goods had been transported by vessels of regular routes. In this case, the shipping agent is an "alter-ego" of the carrier, or at least, it keeps a stable relationship with it, which will enable a higher facility to transfer the consequences of the judgment.

Thank you very much for your attention.

Luis de San Simón

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