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## THE SELECTED ASPECTS OF JURISDICTION CLAUSES IN BILLS OF LADING UNDER INTERNATIONAL, EUROPEAN AND POLISH LAW<sup>1</sup>

### INTRODUCTION

Jurisdiction clauses play a significant role in each contract of international trade, including that of carriage, because they provide the parties to the contract with the right to control the setting or jurisdiction in which disputes can be determined. Such clauses may guarantee that a dispute is heard in the country that has experienced commercial litigators and judges familiar with issues originating from international commerce<sup>2</sup>. However, jurisdiction clauses in bills of lading can also be used to decide about such a court location which is geographically convenient for the ship-owner or the one that applies law favouring the ship owner's interests. The standard bills of lading drafted by the shipping organizations contain the jurisdiction clauses the content of which corresponds to the very interest of a given branch, it is at least recommended to the members of such organizations that these clauses should be used. In effect, it can be observed that throughout contract practice jurisdiction favouring one party to an international transaction

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<sup>2</sup> Y. Baatz in: *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules*, (ed.) D.R Thomas, LPL 2009, p. 277, M. Lynch (Piper Alderman .Trade and Transport News. March 2011): Choose your Jurisdiction carefully. *Referred to: AP Moller Maersk A/s v Sonaec Villas Cen Sad Fadoul and Others* [2010] EWHC 355 (Comm) [http://www.forwarderlaw.com/library/view.php?article\\_id=764](http://www.forwarderlaw.com/library/view.php?article_id=764), 18 July 2016.

is forced, making use of a less favourable negotiating position of the other party<sup>3</sup>. The standard clauses inserted in a carrier's bill of lading terms tend to call for suit in the court located where the carrier should have the principal place of business.<sup>4</sup>

## 1. INTERNATIONAL CONVENTIONS ON CARRIAGE OF GOODS BY SEA

The choice of the place of suit has been, until the recent time, left to a contract by the international maritime transport conventions<sup>5</sup>. The Hague Rules<sup>6</sup> contain no mandatory provisions on jurisdiction allowing the ship owners to designate law and jurisdiction within their bill of lading terms. The jurisdiction provisions are not included in the Hague-Visby Rules<sup>7</sup>, either. The first particularized provisions on jurisdiction can be found in the Hamburg Rules<sup>8</sup>. It is stated in Article 21.1 that the shipper claimant has the right to call for suit in one of the following places:

1. *The principal place of business or, in the absence thereof, the habitual residence of the defendant carrier, or*
2. *The place where the contract was made, provided that the defendant has a place of business, branch or agency there through which the contract was made, or*
3. *The port of loading or the port of discharge, or*
4. *Any additional place designated for that purpose in the contract of carriage by sea.*

Both a shipper consignor and a shipper consignee willing to bring a claim would be able to do so under those provisions within their home jurisdictions. The exclusive jurisdiction agreements' effect is limited in this case; their effect is

<sup>3</sup> J. Łopuski: *Konwencja lugańska o jurysdykcji i wykonywaniu orzeczeń sądowych w sprawach cywilnych i handlowych*, Bydgoszcz 2001, p. 74.

<sup>4</sup> W. Tetley: *Marine Cargo Claims*, vol 2. 4<sup>th</sup> ed., Les Éditions Yvon Blais Inc., Montreal 2008, p.1912, M. Dragun-Gertner: *Ograniczenie autonomii woli stron morskich kontraktów żeglugowych*, Gdańsk 1996, p. 116.

<sup>5</sup> See the short presentation of the regulation of jurisdiction clauses in maritime conventions on carriage of goods by sea and in national law W. Tetley: *Marine Cargo Claims*, vol 2. 4<sup>th</sup> ed., Les Éditions Yvon Blais Inc., Montreal 2008, pp. 1912–1920, M. Dragun-Gertner: *Ograniczenie autonomii woli stron morskich kontraktów żeglugowych*, Gdańsk 1996, pp. 124–134.

<sup>6</sup> The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Brussels 25 August 1924).

<sup>7</sup> *Ibidem* as amended by the Protocol signed at Brussels on 23 February 1968 and by the Protocol signed at Brussels on 21 December 1979.

<sup>8</sup> The UN Convention on the Carriage of Goods by Sea, 1978.

only optional<sup>9</sup>. Such agreements are not invalid, but they would be refused the effect of derogating the jurisdiction of courts under other conditions competent unless agreed after the claim has arisen (Article 21.5 of the Hamburg Rules). Formal requirements for jurisdiction clauses are not specifically stated and the Hamburg Rules do not include a provision that deals particularly with the effect of the jurisdiction agreements on third party cargo receivers. The Hamburg Rules have not been granted the international approval. It has to be mentioned, however, that the provisions of the Rotterdam Rules<sup>10</sup> on jurisdiction and arbitration are influenced by those of the Hamburg Rules, but they give greater autonomy to the party.<sup>11</sup>

According to Article 66 of the Rotterdam Rules: *unless the contract of carriage contains an exclusive choice of court agreement that complies with article 67 or 72, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:*

(a) *In a competent court within the jurisdiction of which is situated one of the following places:*

(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 goods are finally discharged from a ship; or*

(b) *In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.*

Other courts' jurisdiction, mentioned in Article 66 (a) cannot be derogated by a jurisdiction clause, however, in accordance with Article 72.1 the parties to the dispute have the right to enter into a jurisdiction agreement before any court after the dispute has arisen.

Article 3 of the Rotterdam Rules concerning the form requirements provides that jurisdiction clauses have to be in writing. The use of electronic communication is included<sup>12</sup>. There is no demand however, of specific formalities for jurisdiction agreements mentioned in Article 72.1.

<sup>9</sup> Similar provisions have been introduced in some national legislations on jurisdiction (Canada, Nordic Countries) see Y. Baatz in: *A new Convention for the Carriage of Goods By Sea-The Rotterdam Rules*, (ed.) D.R Thomas, LPL 2009, p. 259.

<sup>10</sup> The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008, signed in Rotterdam in September 2009.

<sup>11</sup> Y. Baatz in: *A New Convention for the Carriage of Goods by Sea-The Rotterdam Rules*, (ed.) D.R Thomas, LPL 2009, p. 259.

<sup>12</sup> Article 3 of the Rotterdam Rules: *The notices, confirmation, consent, agreement, declaration and other communications referred to in articles [...]66; [...], shall be in writing. Electronic communications*

Third party cargo receivers have no obligation to bring a claim before the court stipulated by the jurisdiction clause as in accordance with the Article 66 they are given the choice between different locations of jurisdiction. The freedom under this article encompasses all plaintiffs in action against the carrier<sup>13</sup>. Only the contracts to which the parties are deemed to be in need of mandatory protection are covered by the rule of Article 66 of the Rotterdam Rules. The freedom of contract, though still limited, has more significance for parties to volume contracts (Article 80 of the Rotterdam Rules)<sup>14</sup>.

As the opinions on the binding force of jurisdiction agreements differed during the process of the Rotterdam Rules preparation a compromise had to be reached<sup>15</sup>. Article 74 provides that: *The provisions of [Chapter [14 (jurisdiction)]] shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.* The same rules are implemented when it comes to an arbitration agreement in Article 78 of the Rotterdam Rules. As the result of the applied solution diversity will remain.

Since the competence concerning the issues of jurisdiction has been transferred to the EU by its Member States a single country cannot override the rules of its Judgements Regulation<sup>16</sup> by entering into a new international convention. The EU has a right to make such a declaration in accordance with Article 93 of the Convention. Otherwise, the applicable EU regulations should prevail over the provisions of the Rotterdam Rules.

## 2. THE BRUSSELS – LUGANO REGIME

The Brussels-Lugano regime<sup>17</sup> is a set of uniform rules concerning jurisdiction. They include several instruments which have been gradually implemented.

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*may be used for these purposes, provided that the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated.*

<sup>13</sup> F. Sparka: *Jurisdiction and Arbitration Clauses in Maritime Transport Documents. A Comparative Analysis*, Springer-Verlag Berlin Heidelberg 2010, p.201.

<sup>14</sup> Y. Baatz in: *A New Convention of Carriage of Goods by Sea-The Rotterdam Rules*, (ed.) D.R Thomas, LPL 2009, p. 263.

<sup>15</sup> *Ibidem*, p. 261.

<sup>16</sup> 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 (recast), 2012 O.J. (L 351) 1.

<sup>17</sup> F. Sparka: *Jurisdiction and Arbitration Clauses in Maritime Transport Documents. A Comparative Analysis*, Springer-Verlag Berlin Heidelberg 2010, pp. 24, 25.

The 1968 Brussels Convention<sup>18</sup> originated the European framework for a jurisdiction agreement. It involved the then members of the EU. The Lugano Convention 1988<sup>19</sup> can be seen as a corresponding treaty between the European Community and the Member States of the European Free Trade Association. In 2001 Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>20</sup>, replaced the 1968 Brussels Convention. That Judgements Regulation was later replaced by Regulation 2015/2012 (recast)<sup>21</sup>. Since many of the states that took part in the 1988 Lugano Convention had become members of the EU, this convention was revised in 2007<sup>22</sup> and now defines the relation between the Member States and those who are the party to the convention but are not the Member States at the same time. The convention follows closely Regulation 44/2001.

Normally, to determine if a carrier's bill of lading terms shall be upheld in relation to the claimed jurisdiction the governing instrument for European domiciled shippers is the EU Regulation<sup>23</sup>. Whenever there is a conflict between the provisions of the Regulation and the international convention, to which the Member States are the party, the convention prevails as Article 71 of the Regulations 44/2001 and 1215/2012 provides that in relations concerning the contracts of carriage of goods by sea that might be only, as is presented before, the case of the Hamburg Rules.

### 3. THE SCOPE OF APPLICATION

According to Article 23 of the previous Regulation 44/2001 its application rested on two different conditions:

- at least one of the parties had its domicile in one of the Member States and
- the forum chosen was located in a Member State.

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<sup>18</sup> The Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1968 O.J (C 27) 1 (consolidated version).

<sup>19</sup> Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1988 O.J. (L 319) 9.

<sup>20</sup> Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12) 1.

<sup>21</sup> 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 (recast), 2012 O.J. (L 351) 1.

<sup>22</sup> 2007 O.J. (L 339)3.

<sup>23</sup> Choice of law and jurisdiction [http://www.fta.co.uk/policy\\_and\\_compliance/sea/long\\_guide/law\\_jurisdiction.html](http://www.fta.co.uk/policy_and_compliance/sea/long_guide/law_jurisdiction.html), FTA, 18.07.2016.

If those two conditions were not met the national law applied<sup>24</sup>.

This instrument did not have to be applied when the EU residents agreed on a forum in a non-Member State or when two non-residents entered into a jurisdiction agreement except for that what is stated in Article 23 (3). Article 23 of the Lugano Convention 2007 provides for the same regulation concerning the Contracting States.

That provision was however amended<sup>25</sup> and the requirement that at least one of the parties has its domicile in one of the Member States is no longer valid. This Regulation, though, applies only when a court or courts of a Member State are chosen or have jurisdiction to settle the dispute.

#### 4. THE FORM OF JURISDICTION AGREEMENT IN THE EU LAW

It is emphasised in the EU legislation that the validity of jurisdiction clauses depends upon the fulfilment of the particular formal requirements. The Brussels Convention in its pre-1978 text of Article 17 had provided for a rule requiring the courts of the Contracting States to respect written jurisdiction agreements<sup>26</sup>.

<sup>24</sup> Article 23

*1. If the parties, one or more of whom is domiciled in a State bound by this Convention,/ Member State have agreed that a court or the courts of a State bound by this Convention / 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. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.*

*3. Where such an agreement is concluded by parties, none of whom is domiciled in a State bound by this Convention/Member State, the courts of other States bound by this Convention/Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.*

<sup>25</sup> According to its Article 25

*1. If the parties, regardless of their domicile, 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 agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.*

<sup>26</sup> Criteria for a valid clause from Article 17 were formulated in a detailed way by the ECJ in *Partenreederei ms. Tilly Russ and Ernest Russ v NV Haven-&Vervoerbedrijf Nova and NV Goeminne Hout* – Case No 71/83, (1984) E.C.R 2417. In this decision the Court held, among others, that *a clause printed on the back of a bill of lading does not constitute an agreement in writing*. See also on this subject F. Sparka: *Jurisdiction and Arbitration Clauses in Maritime Transport Documents. A Comparative Analysis*, Springer-Verlag Berlin Heidelberg 2010, p. 101, N. Gaskel, R Asariotis, Y. Baatz: *Bills of Lading Law and Contracts*, LLP London 2000, p. 599, W Tetley: *Marine Cargo Claims*, vol 2, 4th ed. Les Éditions Yvon Blais Inc., Montreal 2008, p. 1921.

That article was amended and its new version became a model for Article 23 of Regulation 44/2001, Article 23 of the Lugano Convention of 1988 and of 2007 as well as Article 25 of Regulation 1215/2012<sup>27</sup>. According to them the jurisdiction agreement must be:

- a) concluded in writing or
- b) evidenced in three alternative forms:
  - in writing
  - in a form that the parties have established between themselves
  - in a form that accords with international trade usage.

Loosening the formal requirements that the jurisdiction clauses should meet aimed at extending the possibilities of the recognition of their efficiency<sup>28</sup>. Such form of defining formal requirements that were to be met by jurisdiction agreements created interpretive difficulties in judicial practice<sup>29</sup>.

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The ECJ in *Estasis Salotti di Colzani Aimò e Gianmario Colzani s.n.c.v.Ruwa Polstereimaschinen GmbH* – Case No 24/76, (1976) E.C.R 1831 decided that “[...] requirement of a writing under the first paragraph of article 17 of the Convention (...) is fulfilled only if the contract signed by both parties contains and expresses reference to those general conditions”.

<sup>27</sup> As provided in this new formulation: (...) *The agreement conferring jurisdiction shall be either*

- (a) In writing or evidenced in writing
- (b) In a form which accords with practices which the parties have established between themselves or,
- (c) In international trade or commerce, in a form which accords with the usage of which the parties should have been aware and which in such trade or commerce is widely familiar and frequently experienced by parties to contracts of the type involved in a specific branch concerned

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing.

<sup>28</sup> It was the pursuit of the Great Britain that wanted an amendment to the Jurisdiction Convention to safeguard the jurisdiction of the High Court in London which tends to be chosen in many international standard form contracts.. J. Łopuski: *Konwencja lugańska o jurysdykcji i wykonywaniu orzeczeń sądowych w sprawach cywilnych i handlowych*, Bydgoszcz 2001, p. 79, N. Gaskel, R. Asariotis, Y. Baatz: *Bills of Lading Law and Contracts*, LLP London 2000, p. 598.

<sup>29</sup> J. Łopuski: *Konwencja lugańska o jurysdykcji i wykonywaniu orzeczeń sądowych w sprawach cywilnych i handlowych*, Bydgoszcz 2001, p. 79, Y. Baatz [in]: *A New Convention for the Carriage of Goods by Sea-The Rotterdam Rules*, (ed.) D.R Thomas, LPL 2009, p. 276.

## 5. DECISIONS OF THE EU COURTS

In the light of case law of the European Court of Justice<sup>30</sup> concerning the interpretation of formal requirements that have to be met to ensure validity of an exclusive jurisdiction clause European law accepts clauses inserted in bills of lading where a genuine consent between the parties to the contract to sue in a determined forum is reflected by those provisions.

There is a need for a clear and precise acceptance of the third party. The jurisdiction clause can be effectively incorporated by reference into a bill of lading where the language of the bill, interpreted with the consideration of the commercial background of the case, demonstrates clearly that the parties have reached a consensus on the subject matter of the clause<sup>31</sup>.

In its judgment in *Coreck Maritime GmbH v Handelsveem BV, Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA, Partenreederei ms Tilly Russ and Ernest Russ v NV Haven&Vervoerbedrijf Nova and NV Goeminne Hout* the ECJ has held that a jurisdiction clause agreed in a bill of lading contract between a shipper and a carrier will be binding on a third party receiver only when the latter succeeds to the rights and obligations of the shipper pursuant to the applicable national law<sup>32</sup>. Otherwise the validity of the clause is subjected by courts to evidence that it has been accepted by the receiver. Looking merely at the

<sup>30</sup> W. Tetley: *Marine Cargo Claims*, vol 2, 4th ed. Les Éditions Yvon Blais Inc., Montreal 2008, pp. 1921–1926. Concerning ECJ jurisdiction see also N.Gaskel, R.Asariotis, Y.Baatz: *Bills of Lading Law and Contracts*, LLP London 2000, pp. 598 – 606, Y. Baatz [in]: *A New Convention for the Carriage of Goods by Sea-The Rotterdam Rules*, (ed).D.R Thomas, LPL 2009, pp. 276–279, J.Łopuski: *Konwencja lugańska o jurysdykcji i wykonywaniu orzeczeń sądowych w sprawach cywilnych i handlowych*, Bydgoszcz 2001, pp. 79–86, M. Dragun-Gertner: *Ograniczenie autonomii woli stron morskich kontraktów żeglugowych*, Gdańsk 1996, pp. 121–133, A.Torbus: *Umowa jurysdykcyjna w systemie międzynarodowego postępowania cywilnego*, Toruń 2012, pp. 244–249.

The importance of the following decisions is commonly emphasised:

*Estatis Salotti di Colzani Aimo e Gianmario Colzani s.n.c. v Rüwa Polstereimaschinen GmbH* – Case No 24/76, (1976) E.C.R. 1831, *Partenreederei ms. Tilly Russ and Ernest Russ v NV Haven & Vervoerbedrijf Nova and NV Goeminne Hout* – Case No 71/83, (1984) E.C.R 2417, *Mainschiffahrts-Genossenschaft eG(MSG) v Les Gravières Rhénanes SARL* – Case No C-106/95, (1997) E.C.R I-911, *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* – Case No C-159/97, (1999) E.C.R I-1597, *Coreck Maritime GmbH v Handelsveem BV* – Case No C-387/98, (2000) E.C.R I-9337, *Sibotiv.BP France S.A* (2003) 2 Lloyd's Rep. 364.

<sup>31</sup> In *Estatis Salotti di Colzani Aimo et Gianmario Colzani s.n.c. v Rüwa Polstereimaschinen GmbH* – Case No 24/76, (1976) E.C.R. 1831 the EJC held that the writing requirement “*is satisfied only if the reference is expressed and can be checked by a party exercising reasonable care*”.

<sup>32</sup> More on this judgment see N.Gaskel, A. Asariotis, Y. Baatz: *Bills of Lading Law and Contracts*, LLP London 2000, p. 601.

words of the contract is insufficient<sup>33</sup>. Most issues of consent remain governed by the applicable national law<sup>34</sup>.

In its several judgments the ECJ has emphasised the essential importance of a genuine agreement between the parties. The clause could not be binding on a shipper or receiver in the absence of strict evidence that the latter had accepted the clause. As a rule the carrier would be obliged by such evidence to indicate the approval of the clause by the signature on the bill of lading by the shipper. However, these documents are ordinarily signed by the carrier. This rule applies also to the bills of lading jurisdiction clauses confirming a previous oral agreement between the shipper and the carrier<sup>35</sup> (what is not often met in maritime trade)<sup>36</sup> and to clause forming part of the steady business relations between the parties.<sup>37</sup>

The courts are not unanimous in their decisions concerning the third alternative: a form that accords with the international trade usage. The question to be answered is whether the above mentioned provisions state, in essence, that in international commerce an agreement on jurisdiction, which is in accordance with the practice of the branch of trade in question, will be valid without the demonstration of evidence that the parties have explicitly agreed to the content of the clause in question?

Could this be the case of the jurisdiction clause in a bill of lading considering that this is the generally and regularly followed practice to insert such clauses in its provisions?

Is there a possibility that the knowledge of the usage of introducing jurisdiction clauses in bills of lading could be imposed on the shipper or consignee of the bill of lading?

Formalities required by the article are a complete, sufficient and perfect guarantee of the existence of consent or consensus as it is underlined by the ECJ. It has to be remembered, however, that a genuine acceptance in the case is to be

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<sup>33</sup> W. Tetley: *Marine Cargo Claims*, vol 2, 4th ed. Les Éditions Yvon Blais Inc., Montreal 2008, p. 1926.

<sup>34</sup> E.Sparka: *Jurisdiction and Arbitration Clauses in Maritime Transport Documents. A Comparative Analysis*, Springer-Verlag Berlin–Heidelberg 2010, p. 174.

<sup>35</sup> The confirmation doesn't have to be presented in a written form, it's satisfactory to deliver signed approval to the contract to the other party that does not object to the contract in a reasonable time – “Berghoffer” v “Asa” – Case No 221/84, (1985) E.C.R 2699.

<sup>36</sup> E.Sparka: *Jurisdiction and Arbitration Clauses in Maritime Documents. A Comparative Analysis*, Springer-Verlag Berlin–Heidelberg 2010, p. 102.

<sup>37</sup> F. Sparka: *Jurisdiction and Arbitration Clauses in Maritime Documents. A Comparative Analysis*, Springer-Verlag Berlin–Heidelberg 2010, p. 102, N. Gaskel, R. Asariotis, Y. Baatz: *Bills of Lading Law and Contracts*, LLP London 2000, p. 599, M. Dragun-Gertner *Ograniczenie autonomii woli stron morskich kontraktów żeglugowych*, Gdańsk 1996, pp. 122–123.

examined for the sake of safety of contractual relationships<sup>38</sup>. A formally valid clause shall be viewed as a suggestion not a replacement of the consent<sup>39</sup>. It is significant to determine the actual facts<sup>40</sup>.

In *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SPA* and in *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL* the ECJ held that the weaker party to the contract should be supported by avoiding jurisdiction clauses incorporated in a contract by one party alone going unnoticed.

In cases where commercial practices exist in the relevant branch of international trade or commerce consensus is presumed in this regard which the parties are or are expected to have been aware of. It can be made out to what extent the parties to a contract are actually or presumably aware of the usage, by showing either that they had formerly had commercial oral trade relations between themselves or with other parties operating in the branch concerned, so that, in that branch, a specific course of conduct is well known and tends to be followed when the contract is conducted<sup>41</sup>. There is not any specific form of publicity which might be given to the standard form on which the clause is present that could influence the knowledge of the usage concerned<sup>42</sup>. Only through the general and regularly followed practice the aim of which is to conclude certain type of a contract the existence of usage shall be established. A certain trade usage does not require a universal acceptance. It is not necessary for a course of conduct to be established in specific countries<sup>43</sup> or in particular in all contracting States<sup>43</sup>. It is

<sup>38</sup> *Mainschiffahrts-Genossenschaft eG(MSG) v Les Gravières Rheanes SARL* – Case No C 106/95, (1997) E.C.R I-911.

<sup>39</sup> F. Sparka: *Jurisdiction and Arbitration Clauses in Maritime Transport Documents. A comparative Analysis*, Springer-Verlag Heidelberg 2010, p. 103.

<sup>40</sup> A. Torbus: *Umowa jurysdykcyjna w systemie międzynarodowego postępowania cywilnego*, Toruń 2012, p. 245, calling in this measure M. Pazdan, *Konwencja wiedeńska o umowach międzynarodowej sprzedaży towarów. Komentarz*, (ed.) M. Pazdan, Warszawa 2000, p. 143.

<sup>41</sup> See N.Gaskel, R. Asariotis, Y.Baatz: *Bills of Lading law and Contracts*, LLP London 2000, pp. 602, 603. According to the decision in *Rechtbank van Koophandel te Antwerpen* (2005) ETL 687 the forum requirements of Regulation 44/2001 are not satisfied where two parties operate in different branches of international trade-see W. Tetley: *Marine Cargo Claims*, vol 2, 4th ed. Les Éditions Yvon Blais Inc., Montreal 2008, p. 1924, fn. 58.

<sup>42</sup> W. Tetley: *Marine Cargo Claims*, vol. 2. 4th ed. Les Éditions Yvon Blais Inc., Montreal 2008, p. 1923, N. Gaskel, R. Asariotis, Y. Baatz: *Bills of Lading Law and Contracts*, LLP London 2000, p. 602.

<sup>43</sup> *Francesco Benincasa v Dentalkit S.R.L.* – Case No 269/95, (1997) E.C.R I-03767, see N.Gaskel,R.Asariotis,Y.Baatz: *Bills of Lading law and Contracts*, LLP London 2000, p.602, A.Torbus: *Umowa jurysdykcyjna w systemie międzynarodowego postępowania cywilnego*, Toruń 2012, p. 246.

irrelevant to either party to the contract to possess the objective knowledge of the trade usage. Such knowledge is “imposed” on the shipper<sup>44</sup>.

Since jurisdiction clauses in maritime transport documents accord with the trade usage within the meaning of the provisions of the EU regulation (at present Article 25.1(c) of Regulation 1215/2012) a presumption applies that a third party cargo receiver who makes a claim under a transport document has accepted a jurisdiction clause that is inserted into that document. We can find views of this type present in literature on the subject concerned<sup>45</sup>. This opinion is also shared by some courts and reflected in their decisions. *Cour de Cassation*, the French Supreme Court in *CMA CGM and Banque Paribas* rendered in March 2013<sup>46</sup> held that: it is customary in bill of lading contracts, maritime law being a specific branch of international commerce, that the bill of lading contract will include a clause providing that disputes shall be referred to the courts of the place of business of the carrier. The clause in the bill of lading referred to was therefore lawful and binding on the bank on whose command the bill of lading had been issued<sup>47</sup>. In *Hof van Beroep te Antwerpen* 2005 the Belgium court decided that it was assumed that the jurisdiction clause had been accepted by the consignee because it was “settled practice” to insert such clauses into bills of lading<sup>48</sup>. If such judgements are taken into consideration the opinion that “*it is yet far from clear that challenges to jurisdiction clauses appearing in standard bill of lading terms have ceased although the task of persuading the courts that the jurisdiction clause should not be upheld is becoming increasingly difficult*”<sup>49</sup> could be viewed as legitimate. The argument brought up to protect third party cargo receivers from the bill of lading jurisdiction clauses stating that they do not take part in negotiations has become much more meaningful<sup>50</sup>. The third party cargo receivers can find more easily information concerning the terms of the contract, thanks to modern in-

<sup>44</sup> The similar approach was expressed in *Coreck Maritime GmbH v. Handelsveem BV* – Case No C 387/98, (2000) E.C.R. I-9337, *Sibotiv.BP France S.A* (2003) 2 Lloyd’s Rep.364, see W Tetley: *Marine Cargo Claims*, vol. 2. 4th ed. Les Éditions Yvon Blais Inc., Montreal 2008, p. 1923.

<sup>45</sup> F. Sparka: *Jurisdiction and Arbitration Clauses in Maritime Transport Documents. A Comparative Analysis*, Springer-Verlag Berlin–Heidelberg 2010, p. 173, fn. 8.

<sup>46</sup> P. Iglkowski: French Supreme Court upholds jurisdiction clause, <http://www.standard-club.com/media/11699938/french-supreme-court-upholds-jurisdiction-clause.pdf>, 18 July 2016.

<sup>47</sup> About the question of the “imposed knowledge” in decisions of French Courts see: W.Tetley: *Marine Cargo Claims*, vol. 2. 4th ed. Les Éditions Yvon Blais Inc., Montreal 2008, p. 1923, fn. 57.

<sup>48</sup> W. Tetley: *Marine Cargo Claims*, vol. 2. 4th ed. Les Éditions Yvon Blais Inc., Montreal 2008, p. 1925, fn. 65.

<sup>49</sup> P. Iglkowski: *French Supreme Court upholds jurisdiction clause*. <http://www.standard-club.com/media/1699938/french-supreme-court-upholds-jurisdiction-clause.pdf>. 18 July 2016.

<sup>50</sup> F. Sparka: *Jurisdiction and Arbitration Clauses in Maritime Transport Documents. A Comparative Analysis*, Springer-Verlag, Berlin–Heidelberg 2010, pp. 223–224.

formation technology, in advance and enter into those that fulfil their expectations. Applying the consumer protection style of regulation to such relations has no justification. Even a newcomer to business who enters into a contract within the frame of a given branch operating internationally should be aware of its common practice, including the tacit acceptance of jurisdiction clauses. For Article 25.1 (c) of Regulation 1215/2012 to be applied two conditions have to be met: the existence of trade custom and at least the potential awareness of its existence. The provision introduces a normative presumption of custom awareness, that could be excluded by both parties to the contract<sup>51</sup>.

## 6. BILL OF LADING JURISDICTION CLAUSES FROM THE POLISH PERSPECTIVE

This is still the matter of an open question whether the liberal approach to the formalities of jurisdiction clauses mentioned above might be the case of the Polish case law in the future. The interpretations that once favoured shippers may no longer be applied. The Polish Code of Civil Procedure (Article 1104-prorogation, Article 1105-derogation) used to require a written form of a jurisdiction agreement since Poland was not a Member State of the EU at that time. At present both written and electronic forms are provided<sup>52</sup>. Also the new provision has been added (Article 1105(1) ) stating that: *Reference in the main agreement to a document which contains provisions corresponding to a prorogation agreement meets the requirements concerning the form of that agreement if the main agreement is made in writing and the reference incorporates prorogation agreement into the main agreement.* These provisions of the Polish Code of Civil Procedure are applied, however, to the cases which are not the subject of the EU Regulation 1215/2012. The form of a jurisdiction agreement can be therefore defined by one of two legal regimes depending on whether the court chosen by the parties is or is not the court of the EU Member State.

Polish courts have only rarely heard cases referring to the binding force of jurisdiction clauses<sup>53</sup>. The Polish Supreme Court held, on the basis of the former

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<sup>51</sup> A. Torbus: *Umowa jurysdykcyjna w systemie międzynarodowego postępowania cywilnego*, Toruń 2012, pp.246,247, [referring to] M.Pazdan: *Konwencja wiedeńska o umowach międzynarodowej sprzedaży towarów*. Komentarz, (ed.) M.Pazdan, Warszawa 2000, p. 147.

<sup>52</sup> According to Article 1105 of the Polish Code of Civil Procedure: *The requirement that an agreement shall be in writing is met by an electronic communication if information contained therein is accessible so as to be useable for subsequent reference.*

<sup>53</sup> (I CZ 3/68); (ICZ 66/69).

provisions on jurisdiction agreements, that the bill of lading was not an agreement, thus a jurisdiction agreement contained therein did not meet the requirements provided for such agreement in the Polish Code of Civil Procedure<sup>54</sup>.

The fact that the EU Regulation 1215/2012 does not require the formally written form for jurisdiction agreements poses the question about the possible way of interpretation of its Article 25 1(c). Considering this provision from the liberal point of view it is provided, however, in the draft of the new Polish Maritime Code that: *“A clause contained in a bill of lading is considered as meeting there requirements of the jurisdiction agreement if its content is clearly established in the relevant provision of the contract of carriage, under which such a document has been issued and the consignee beyond any doubt agreed to be bound by such a clause.”*

## FINAL CONCLUSIONS REGARDING THE FORMAL VALIDITY OF JURISDICTION CLAUSES

The legal aspects concerning the jurisdiction clauses in bills of lading are regarded as special. It can be concluded from the fact that the relevant specific regulations are included in the Hamburg Rules and the Rotterdam Rules. The new Convention on Choice of Courts Agreement, which was developed under the auspices of the Hague Conference on Private International Law and signed at the Hague on 30 June 2005 does not cover jurisdiction agreements in the carriage of goods by sea<sup>55</sup>. The formalities under the EU Judgements Regulation seem to be less restrictive and complex than the provisions of the Hamburg Rules and the Rotterdam Rules. This diversity might mean that in the future rather liberal interpretation as to formal validity of a jurisdiction clause in bills of lading in the sphere of the Brussel Lugano regime could be challenged. The approach which is against the acceptance of exclusions of national (local) jurisdictions if the parties did not express their will clearly could dominate. It has to be particularly

<sup>54</sup> See more: M. Dragun-Gertner: *Ograniczenie autonomii woli stron morskich kontraktów żeglugowych*, Gdańsk 1996, pp. 118–119, J.Łopuski: *Konwencja lugańska o jurysdykcji i wykonywaniu orzeczeń sądowych w sprawach cywilnych i handlowych*, Bydgoszcz 2001, p.86, A.Torbus: *Umowa jurysdykcyjna w systemie międzynarodowego postępowania cywilnego*, Toruń 2012, p. 249.

<sup>55</sup> This convention does not apply to the carriage of goods by sea (art.2(f)) because:

- a) some states would not agree to its provisions which permitted a carrier to escape the liability which the Hague Visby Rules impose mandatorily by choosing the jurisdiction of another state
- b) at the time when the Convention was adopted the details of the draft Rotterdam Rules were still being finalized, see: Y. Baatz in: *A New Convention for the Carriage of Goods by Sea-The Rotterdam Rules*, ed.D.R Thomas, LPL 2009, pp. 259, 260.

remembered that loosening of the formalities which complied with the British request, under the circumstances in which the country has decided to leave the EU, might be reflected in the interpretation of formal requirements that should be met by the jurisdiction clauses according to the provisions of the EU Judgements Regulation. The Great Britain could, however join the Lugano Convention, where the principle of harmony of the provisions with the EU regulations is dominant.

**Substantive questions.** In Regulation 44/2001 any questions other than a form of agreement (substantive questions) were subject to the applicable national contract law. However, there were different opinions concerning the question whether the proper law is determined by the conflict of law rules of the forum, or if it is the substantive law of *lex fori*. In Regulation 1215/2012 the latter of the two options was accepted. Article 25 provides that *the chosen court shall have jurisdiction, unless the agreement has no substantive validity under the law of that Member State*.

**The effect of mandatory liability rules.** The effect of mandatory liability rules is also the subject of a debate. As jurisdiction is not specifically regulated by the Hague Visby Rules, they do not displace the provisions of the Brussels-Lugano regime. It was held in *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA* that a possibility of violating the national mandatory liability provisions does not render a jurisdiction agreement invalid. The aim of legal certainty which lies right in the middle of the Brussels-Lugano regime would be violated by a public policy regulation of jurisdiction agreements. The regime incorporates substantial safeguards and no additional review of the legitimacy of the agreement is necessary<sup>56</sup>. The questions concerned with public policy are transferred to the stage of recognition and enforcement of the court decisions.

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<sup>56</sup> P. Schlosser: *EU Zivilprozessrecht Kommentar*, 3 rd ed., München, Beck 2009, ( Art. 23), quoted after F. Sparka: *Jurisdiction and Arbitration Clauses in Maritime Transport Documents. A Comparative Analysis*, Springer-Verlag, Berlin–Heidelberg 2010, p. 134.