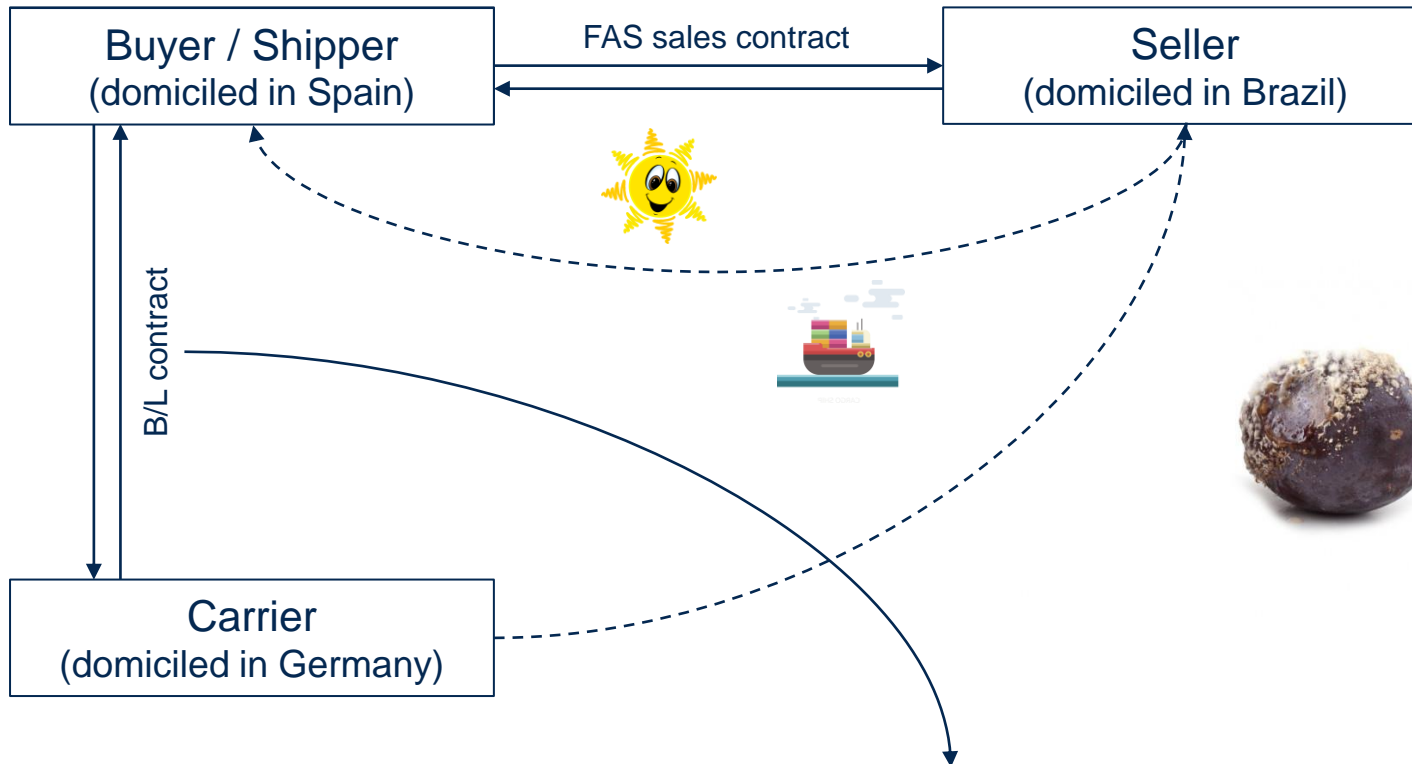


Contracts for the Carriage of Goods by Sea in the Spanish Maritime Navigation Act of 2014

Jurisdiction and Arbitration Clauses



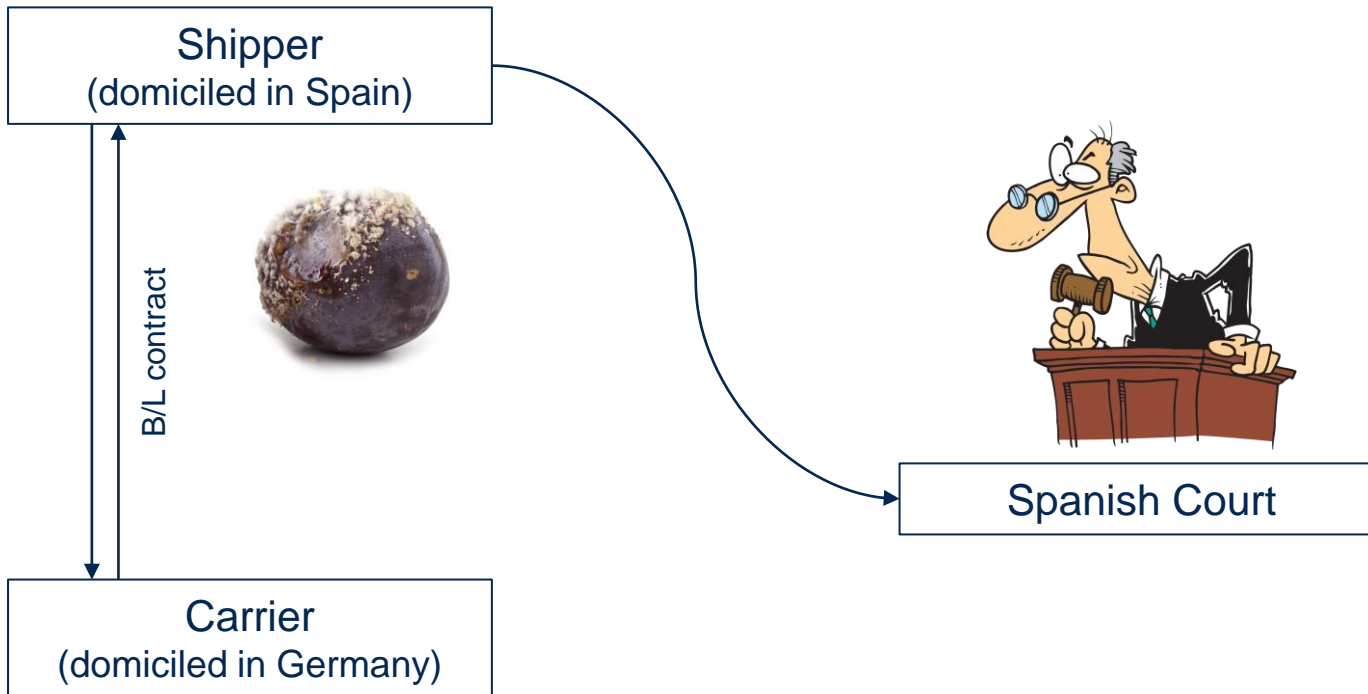
Introduction



4. Law and Jurisdiction.

Disputes arising out of or in connection with this Bill of Lading shall be exclusively determined by the courts and in accordance with the law of the place where the Carrier has its principal place of business, as stated on Page 1, except as provided elsewhere herein.

Introduction



*QUID
IURIS?*

Jurisdiction under a B/L Contract

- the HVR are silent on jurisdiction issues
- general rules on private international law [in particular, Arts. 7(1)(b) and 25 of the Brussels Ia Regulation or, if the criteria for the application of the latter are not met, national law]
- in Spain, Art. 469 MNA

Article 469. Criteria for attribution of competence.

1. Except if the parties have validly introduced an exclusive jurisdiction clause or an arbitration clause as established in this Chapter, the criteria foreseen in this Article shall apply.
2. In contracts for the use of the ship, the competent Courts, to be chosen by the plaintiff, shall be those of:
 - a) The domicile of the defendant;
 - b) Place where the contract is entered into;
 - c) Port of unloading. [...]

in the absence of a jurisdiction clause, the claim *could* indeed be brought before a Spanish court

“place [...] where the services [...] were provided or should have been provided”

the place of dispatch and the place of delivery?

CJEU 11.7.2018
C-88/17
Zurich
Insurance plc

Jurisdiction under a B/L Contract

BUT

Jurisdiction under a B/L Contract

- B/Ls often include, among the general conditions, a clause that envisages the submission to a specific court (and the choice of a specific law)
- frequently, the jurisdiction chosen is that of the country where the carrier's domicile or principal place of business is located

4. Law and Jurisdiction.

Disputes arising out of or in connection with this Bill of Lading shall be exclusively determined by the courts and in accordance with the law of the place where the Carrier has its principal place of business, as stated on Page 1, except as provided elsewhere herein.

CONLINEBILL 2016

- HOWEVER: submission to a foreign court (or arbitration tribunal) may hamper the exercise of the shipper's (or the consignee's) claims against the carrier

"(...) a jurisdiction clause (need not) be formulated in such a way that the competent court can be determined on its wording alone. It is sufficient that the clause state the objective factors on the basis of which the parties have agreed to choose a court or the courts to which they wish to submit disputes which have arisen or which may arise between them. Those factors, which must be sufficiently precise to enable the court seized to ascertain whether it has jurisdiction, may, where appropriate, be determined by the particular circumstances of the case"

CJEU 9.11.2000
C-387/98
Coreck Maritime

Jurisdiction Clauses and the MNA

- solution under the Spanish Maritime Navigation Act

Article 468. Jurisdiction and arbitration clauses.

Without prejudice to the terms foreseen in the international conventions in force in Spain and the provisions of the European Union, clauses of submission to a foreign jurisdiction or arbitration abroad shall be null and void and considered not to be included, as set forth in contracts for use of the ship, or in ancillary navigation contracts, when they have not been negotiated individually and separately.

In particular, insertion of a jurisdiction or arbitration clause in the printed conditions of any of the contracts referred to in the preceding paragraph shall not provide evidence, in itself, of fulfilment of the requisites established therein.

Article 251. Effectiveness of conveyance.

Conveyance of the bill of lading shall take the same effects as delivery of the goods represented, without prejudice to the relevant criminal and civil actions to which the party illegitimately dispossessed of such may be entitled. The acquirer of the bill of lading shall acquire all the rights and actions of the conveyor to the goods, with the exception of agreements regarding jurisdiction and arbitration, which shall require the consent of the acquirer pursuant to the terms stated in Chapter I of Title IX [i.e. Art. 468 MNA].



Jurisdiction Clauses and the MNA

- SO...

ARE CLAUSES THAT SUBMIT CONTROVERSIES TO THE JURISDICTION OF FOREIGN COURTS (OR TO ARBITRATION ABROAD) NULL AND VOID UNDER SPANISH LAW?

well... PERHAPS, because there usually is no individual and separate negotiation and, in fact, the B/L is often signed by the carrier only (or by the Master on its behalf)

Jurisdiction Clauses and the MNA

- BUT

- > Article 468 MNA itself recognises the primacy of international conventions and EU rules ←
- > which are these international conventions / EU rules?
 - Regulation No. 1215/2012 (Brussels Ia or Recast): directly applicable in all Member States
 - the 2007 Lugano Convention: applies to the relationship with the EFTA States (Switzerland, Norway, Iceland)
 - the 2005 Hague Convention on Choice of Court Agreements [but it does not apply to the carriage of passengers or goods, Art. 2(2)(f)]
 - the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

not
necessary
of course,
but a useful
reminder

Jurisdiction Clauses and the MNA

- Recast Regulation (≈ Lugano Convention, at least in this point)

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. 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 a usage of which the parties are 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.

Jurisdiction Clauses and the MNA

- what if the German defendant makes a plea to the jurisdiction?
 - > since the court agreed is an EU Member State, the Recast Regulation applies, as interpreted by the CJEU
 - CJEU 19.6.1984, 71/83, **Tilly Russ** (B/L signed by the carrier only)
 - a jurisdiction clause is valid if the “agreement” between the parties has been
 - expressed in writing
 - made orally, confirmed in writing (i.e., in the B/L)
 - made in the framework of a continuing business relationship between the parties (which is governed by general conditions containing the jurisdiction clause)
 - the clause is enforceable against a third party holding the B/L if
 - it is valid as between the carrier and the shipper
 - the third party succeeded, by virtue of the relevant national law, to the shipper’s rights and obligations upon acquiring the B/L



Jurisdiction Clauses and the MNA

- CJEU 16.3.1999, C-159/97, *Trasporti Castelletti*
 - in the time between the *Tilly Russ* and the *Trasporti Castelletti* judgments, Art. 17 of the 1957 Brussels I Convention had been amended
 - consent is still necessary for the clause to be valid, but
 - it is presumed to exist where conduct is consistent with a *usage* which governs the specific area of international trade or commerce and of which they are, or ought to have been, aware
 - awareness of the usage must be assessed with respect to the original parties to the choice-of-court agreement
 - additional requirements under national law shall *not* be taken into account

Jurisdiction Clauses and the MNA

- CJEU 9.11.2000, C-387/98, **Coreck Maritime**
 - it is sufficient that the clause state the objective factors that permit to identify the competent court/s (*supra*)
 - for the Brussels Convention to apply,
 - at least one of the parties must be domiciled in a Contracting State
 - the parties must have agreed to submit any dispute before a *court of a Contracting State*
 - *accordingly*, if the claim is brought before a court of a Contracting State although the jurisdiction clause designates a court *in a third country*, its validity must be assessed according to the applicable law (including PIL rules) at the court's seat (*lex fori*)
 - a third party holding the B/L is only bound by the clause if, according to national law (which is to be determined by the court), he or she succeeded to the rights and obligations of the shipper (*supra*) or if he or she has accepted the clause (according to the rules laid down in the Convention / Regulation)

Jurisdiction Clauses and the MNA

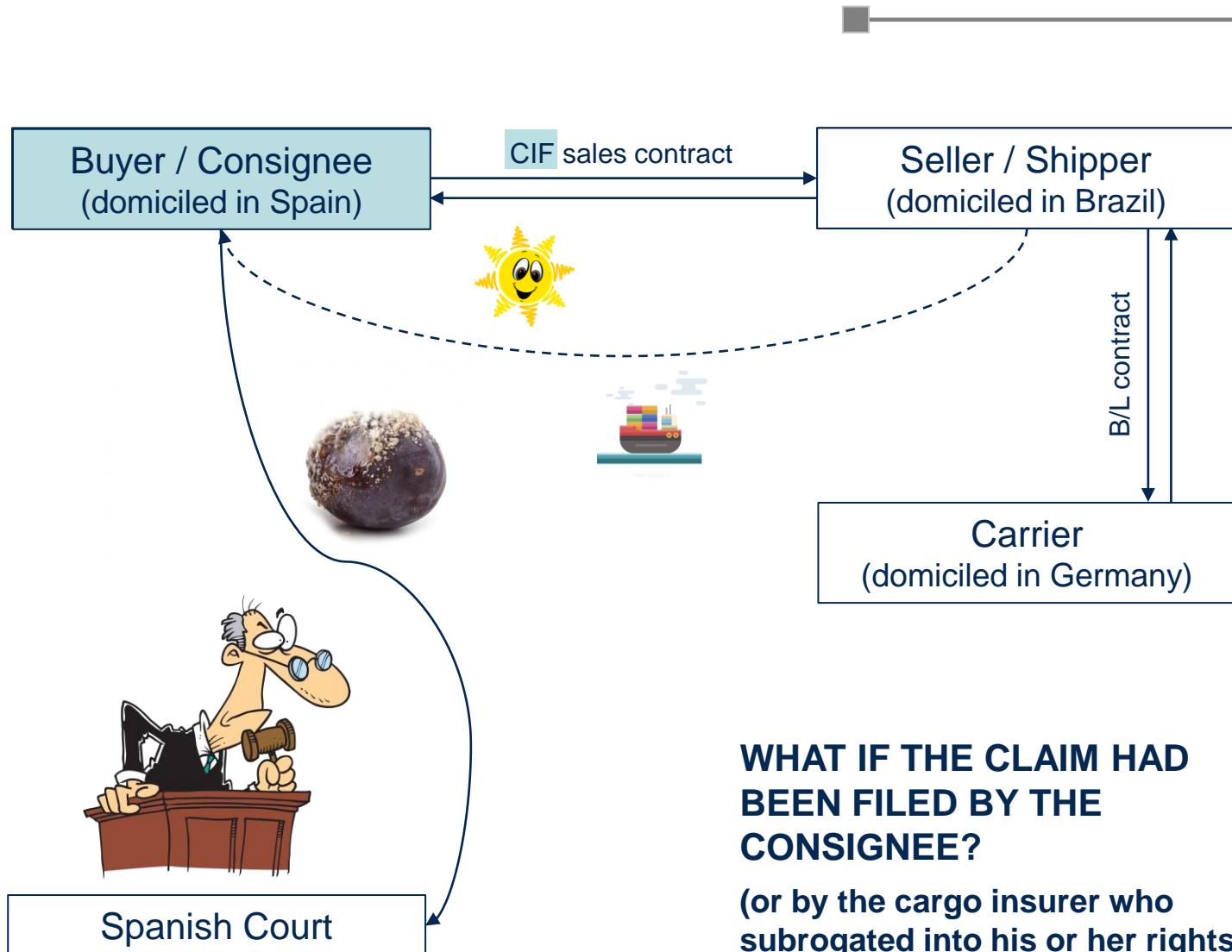
- CJEU 15.11.2012, C-456/11, ***Gothaer Allgemeine Versicherung***
 - the decision by which the court of a Member State declines its jurisdiction on the basis of a jurisdiction clause must be recognized in the other Member States
 - the decision as to the validity of the clause is binding
- the “**Italian Torpedo**”-rule in Article 32(1) Brussels Ia
 - “(...) where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement” (the jurisdiction agreed is exclusive, unless the parties have agreed otherwise)

Jurisdiction Clauses and the MNA

- *Quid iuris?*

- > Article 25 of the Regulation envisages the possibility that the submission is valid even if the clause has not been signed by the shipper (Art. 25(1)(c)) (CJEU *Tilly Russ*, *Castelletti*, *Coreck*)
- > given the primacy of the European provisions over national law, Article 468 MNA does not apply [unless the courts the parties submit to are precisely the Spanish ones, since the substantive validity of the choice of court clause is judged in the light of the law of the forum chosen by the parties (Art. 25(1) *i.f.*): an unthought-of consequence? DEBATABLE: Article 468 MNA only applies to jurisdiction clauses which submit claims to a *foreign* jurisdiction or to arbitration *abroad* (?)]
- > accordingly, **a possible plea to the jurisdiction by the German defendant would arguably have success**

Jurisdiction Clauses and the MNA



WHAT IF THE CLAIM HAD BEEN FILED BY THE CONSIGNEE?

(or by the cargo insurer who subrogated into his or her rights)



Jurisdiction Clauses and the MNA

- the answer depends on whether Article 251 MNA applies or not
- this is only possible if
 1. the B/L is, indeed, “transferred” to the consignee (which is debatable if it is its legitimate holder from the start) ←
 - and 2. the law applicable to the *transmission* of the B/L is Spanish law: nonetheless, it is unclear whether this is the case
 - the Rome I Regulation does not apply (negotiable documents are expressly excluded: Art. 2(d))
 - the *lex rei sitae* (that of the goods and the B/L) is certainly Spain (Art. 10(1) of the Spanish Civil Code), but the B/L has been issued in Brazil (Art. 10(3))
 - if the B/L has been endorsed or otherwise conveyed, the law of the place where the endorsement was “granted” may apply (this is the solution provided by Art. 100(2) of the Act on Bills of Exchange and Cheques, as well as by Art. 11(1) of the Civil Code)

Barcelona
Court of Appeal,
29.05.2020: the
B/L is indeed
conveyed or
transmitted to
the consignee

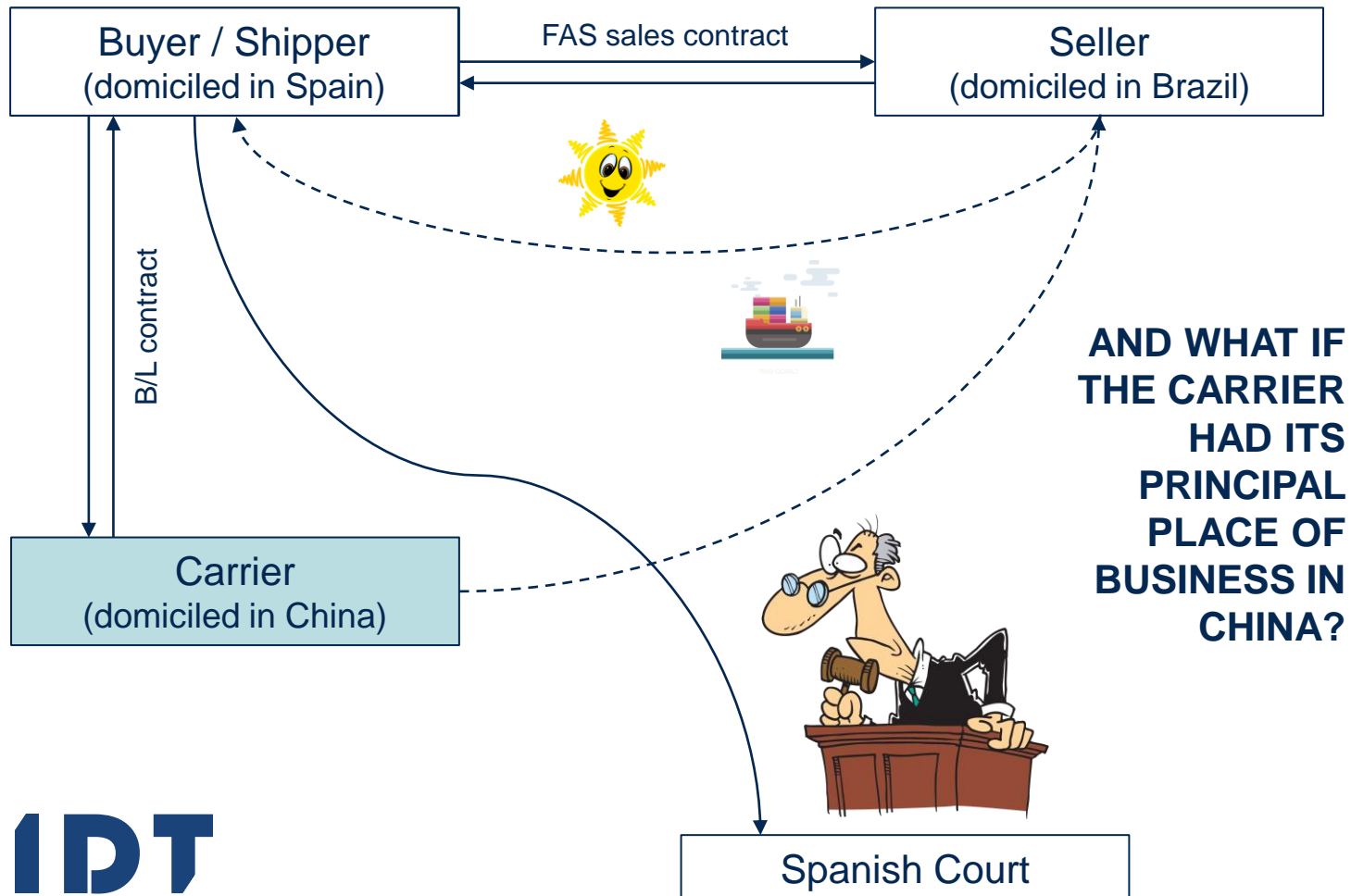
Art. III(4) *i.f.*
HVR?

Jurisdiction Clauses and the MNA

- *Quid iuris?*

- > if the law applicable to the transmission is Spanish law, the clause is liable to be considered unenforceable against the consignee [unless individual and separate negotiation] (Art. 251 MNA): **a plea to the jurisdiction by the German defendant would possibly have no success** (and is indeed held by many courts to have no success)
- > but even if the consignee did *not* succeed to the rights and obligations of the shipper (Art. 251 MNA), it would still have to be ascertained whether he *accepted* the clause according to Article 25 of the Brussels Ia Regulation (*Coreck Maritime*)

Jurisdiction Clauses and the MNA



Jurisdiction Clauses and the MNA

- the Recast Regulation does not apply (the court the parties submit to is not a court of a Member State)
- the Spanish Judiciary Act and Article 468 MNA do apply
 - > Articles 22 ter(4) in relation with Article 22 bis(2) of the Judiciary Act allow submission to a foreign court, *inter alia*, in relation to a contractual obligation
 - > however, being *lex specialis*, the provisions in Article 469 MNA prevail, which also admit prorogation of jurisdiction, but require individual and separate negotiation of the choice-of-court clause (Art. 468 MNA), which usually is not the case
 - > if this is so, the jurisdiction clause is not enforceable against the shipper or the consignee

Jurisdiction Clauses and the MNA

- one might consider that the choice-of-law clause, which is not subject to the criteria set forth in Article 468 MNA, prevents both this provision and Article 251 from being applied [but it is debatable whether a choice-of-law clause is admissible with respect to the transmission of a negotiable document: Rome I Regulation does not apply, and Art. 10(3) of the Civil Code does not envisage this issue]

Conclusions

- the only certain conclusion is that, as regards the relationship between the shipper and the carrier, Article 468 MNA does *not* apply where the validity of a jurisdiction clause is envisaged by the Recast Regulation (agreed court in a Member State) or by an international convention
- it is frequently held that the jurisdiction clause is unenforceable against the third party holder of the B/L, unless he or she accepted the clause in a separate and individual negotiation, but this is not necessarily true: Article 25 of the Recast Regulation also applies to the relationship between the carrier and the third party (Coreck Maritime), and substantial validity must be assessed according to the “law of the Member State the courts of which are named in the clause” (Art. 25(1))
- case law of the courts of appeal is contradictory: a clarifying judgment of the Supreme Court is necessary



**MANY THANKS FOR
YOUR ATTENTION**



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