Clarification of the enforceability of a jurisdiction clause against consignees bringing a contractual liability action against the maritime carrier (Ruling n° 753 - 20-17.768)

14/12/2022

Ruling No. 753

PARTIAL QUASHING

FRENCH REPUBLIC

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ON BEHALF OF THE FRENCH PEOPLE

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RULING OF THE COMMERCIAL, FINANCIAL AND ECONOMIC CHAMBER OF THE *COUR DE CASSATION* (COURT OF CASSATION), OF 14 DECEMBER 2022

Eukor Car Carriers Inc., a company operating under the laws of a foreign country, with registered office at [Address 2] (South Korea), lodged Appeal No. B 20-17.768 against the ruling delivered on 30 June 2020 by the *cour d'appel* (Court of Appeal) of Paris (Division 2, Chamber 5) in the dispute against:

1. Axa Corporate Solutions Assurance, a public limited-liability company, whose registered office is [Address 3],

2. XL Insurance Company SE, a public limited-liability company incorporated under Irish law, whose registered office is [Address 1]

(Ireland), successor to the rights of Axa Corporate Solutions Assurance, respondents to the quashing.

The appellant bases their appeal on the four pleas of quashing appended to this ruling.

The case file was sent to the Prosecutor-General.

On the report of Ms Guillou, judge, the observations of SCP Rocheteau, Uzan-Sarano and Goulet, lawyer of Eukor Car Carriers Inc., of SARL Le Prado - Gilbert, lawyer of Axa Corporate Solutions Assurance and XL Insurance Company SE, and the advisory opinion of Ms Henry, Advocate-General, following debate in the public hearing of 25 October 2022 in the presence of Mr Vigneau, President, Ms Guillou, judge-rapporteur, Ms Vaissette, elder judge, Ms Vallansan, Ms Bélaval, Ms Fontaine, Mr Riffaud, Ms Boisselet, Mr Bedouet, judges, Ms Barbot, Ms Brahic-Lambrey, judge referees, Ms Henry, Advocate-General, and Ms Mamou, Chamber Registrar,

the Commercial, Financial and Economic Chamber of the *Cour de cassation* (Court of Cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the abovementioned president and judges, after deliberation thereof in accordance with the Law, has delivered this ruling.

Account of the dispute

Facts and Procedure

1. According to the ruling under appeal (Paris, 30 June 2020), between 7 July 2015 and 3 February 2016, the company Eukor Car Carriers Inc. (the Eukor company), a company incorporated under Korean law, issued several ocean bills of lading for the transport of vehicles from [Address 4] in Belgium to the Republic of Korea. The vehicles were delivered to the company Hanbul Motors Corporation (the company Hanbul Motors), mentioned as a consignee on some of the bills of lading and as a notify party on the others.
2. As the damage was noted on the cars upon delivery, Hanbul Motors requested a joint survey, carried out by Hyopsung Shipping Corp. in agreement with the Eukor company. The

Axa Corporate Solutions Assurance (Axa) company, whose rights are owned by XL Insurance Company SE, compensated Hanbul Motors and then brought an action against Eukor before the Paris Commercial Court. On appeal, the latter, who had not appeared at first instance, declined jurisdiction by opposing a clause of the bill of lading granting jurisdiction to the Civil District Court of Seoul (Republic of Korea).

Pleas

Examination of the pleas

Concerning the first plea

Statement of plea

3. The Eukor company objects to the ruling ordering it to pay Axa certain sums for the costs of repairing the cars and carrying out the appraisal, thus rejecting the plea of lack of jurisdiction raised by Eukor, whereas:

"(1) whereas the conditions of acceptance of a choice-of-jurisdiction clause stipulated in an international bill of lading are governed not by the law of the court receiving the referral, but by that applicable to the contract of carriage; whereas, as such, it is for the French judge to whom a claim has been referred depending on the implementation of a choice-of-jurisdiction clause stipulated in a bill of lading to research the law applicable to the contract of carriage and then determine its content, with the assistance of the parties if necessary, in order to apply it; whereas, in this case, the judges themselves noted that Eukor invoked Korean law as the sole law applicable to the contract of carriage in accordance with Article 25 of its general conditions; whereas, by nevertheless assessing the acceptance of this clause in the light of the rules applicable in French law, when it was up to the *cour d'appel* (Court of Appeal) to verify whether Korean law was not applicable and to deduce, if necessary, the solution, in accordance with Korean law, regarding the enforceability of the choice-of-jurisdiction clause against Axa, the *cour d'appel* (Court of Appeal) infringed Article 3 of the Civil Code;

(2) whereas the special acceptance of the choice-of-jurisdiction clause on a bill of lading may be tacit and result from the usual stipulation of that clause in the context of established business relations between the parties; whereas, in this case, in order to establish that the choice-of-jurisdiction clause was enforceable against Hanbul Motors, insured with Axa, Eukor referred to several hundred bills of lading drawn up over several years between the same parties, all containing the disputed clause; whereas, by holding that the choice-of-jurisdiction clause stipulated in the bills of lading was unenforceable against Axa, subrogated to the rights of the consignee, for the sole reason that the general conditions appearing in these bills of lading were "illegible", without investigating whether the choice-of-jurisdiction clause could not be made enforceable due to the usual stipulation thereof in the context of the established business relations between the parties, the *cour d'appel* (Court of Appeal) deprived its ruling of legal basis under the former Article 1134 of the Civil Code;

(3) whereas the special acceptance of the choice-of-jurisdiction clause appearing on a bill of lading may be tacit and result from usual practices in the international carriage of goods; whereas, in this case, in order to establish that the choice-of-jurisdiction clause was enforceable against Hanbul Motors, insured with Axa, Eukor relied on the existence of a practice in international maritime transport consisting of stipulating such a clause on the back of the bills of lading issued by the carrier; whereas, by ruling that the choice-of-jurisdiction clause stipulated in the bills of lading was unenforceable against Axa, subrogated to the rights of the consignee, for the sole reason that the general conditions appearing in these bills of lading were "illegible", without carrying out any inquiry as to whether the stipulation could not be made enforceable on the basis of the existence of a use in the international transport of goods, the *cour d'appel* (Court of Appeal) deprived its ruling of legal basis under the former Article 1134 of the Civil Code;

(4) whereas the special acceptance of the choice-of-jurisdiction clause appearing on a bill of lading may be tacit and result from reference to the general conditions containing such clause and of which the other party to the contract has been given the opportunity to become aware; whereas, in this case, in order to establish that the choice-of-jurisdiction clause was enforceable against Hanbul Motors, insured with Axa, Eukor argued that the attention of the shipper and the bearer had been drawn to a paragraph at the top of the bill of lading stating that acceptance of the bill of lading was equivalent to acceptance of all the provisions appearing on the reverse, and it added that the same general conditions appeared on its website; whereas, by holding that the choice-of-jurisdiction clause stipulated in the bills of lading was unenforceable against Axa, subrogated to the rights of the consignee, for the sole reason that the general conditions appearing in these bills of lading were "illegible", without explaining the presence of a paragraph at the top of the bill of lading indicating

that signing it was equivalent to accepting all the provisions appearing on the reverse, or the availability of the same general conditions on the Eukor company's website, the *cour d'appel* (Court of Appeal) deprived its ruling of legal basis under the former Article 1134 of the Civil Code;

(5) whereas the terms of the dispute are determined by the respective claims and pleas of the parties; whereas, in this case, Eukor explained that the originals of the bills of lading were held by Axa, the latter indicating that it had the originals at the disposal of the judges; whereas, by nevertheless accusing Eukor of having failed to produce an original that it was common knowledge that it did not have, the *cour d'appel* (Court of Appeal) disregarded the terms of the dispute in breach of Article 4 of the Code of Civil Procedure."

Statement of reasons

Court's response

4. The admissibility of the action for contractual liability against a sea carrier is assessed independently of the statements of the bill of lading issued in order to constitute, in particular, the evidence of the contract of carriage, since these statements are not intended exclusively to attribute to the persons they indicate the status of party to that contract, such that the contractual action may be initiated by the consignee who claims damage as a result of the carriage. However, the consignee is bound by this document only insofar as it defines and specifies the conditions of transport itself, from acceptance to delivery. Therefore, the choice-of-jurisdiction clause contained in the bill of lading may not be invoked against them unless they have specially accepted it or the international jurisdiction it institutes is imposed by virtue of a treaty or European Union law. The acceptance of this choice-of-jurisdiction clause cannot be deduced from the existence of a practice in international transport, nor from the sole prior commercial relations between the parties, nor from the presence of a mention on the front of the bill of lading referring to the general conditions appearing on the reverse of said document.
5. Firstly, the objections in the second, third and fourth parts, which state the opposite, have no basis in law.
6. Secondly, having noted that the reverse of the bills of lading contains a clause 25 which states that claims shall be governed exclusively by Korean law and that any action relating to custody or carriage under this bill of lading, based on contractual, tortious or other liability, shall be brought before the Civil District Court of Seoul, the ruling states that, while it is customary in international law for carriers to include in the bills of lading a choice-of-jurisdiction clause for the courts in whose jurisdiction their registered office is located, such a clause, valid in principle, must nevertheless be legible. It notes that the original of the clauses appearing on the back of the bill of lading shows that they are written in very small print, in very pale ink, without attention being drawn to this clause 25, inserted in a very dense list of twenty-seven clauses whose reading requires the use of a magnifying glass.
7. By these findings and assessments, the *cour d'appel* (Court of Appeal), which ruled on the basis of the originals and examined, pursuant to a rule of substantive law, whether the disputed clause, relating to the settlement of international disputes, met the conditions of enforceability that result from the general principles concerning the drafting, material presentation and acceptance of such clauses, independently held that the clause was illegible.
8. The plea is therefore unfounded.

Pleas

On the second part of the second plea

Statement of plea

9. The Eukor company objects to the ruling ordering it to pay certain sums to Axa for the costs of repairing the cars and carrying out the appraisal, thus rejecting the dismissal based on Axa's lack of capacity to bring an action on the basis of subrogation, whereas "the contractual subrogation must be express and made at the same time as the payment; by failing to verify, as it was asked to do, that, in order to consider that a payment had taken place, it had occurred simultaneously with the subrogation, the *cour d'appel* (Court of Appeal) deprived its decision of a legal basis under the former Article 1250 of the Civil Code."

Statement of reasons

Court's response

Having examined Article 1250 in its wording prior to that resulting from the order of 10 February 2016:

10. According to this text, the insurer's contractual subrogation to the rights of the insured party results from the latter's express intention, manifested simultaneously or prior to the payment received from the insurer.
11. In order to recognise Axa's capacity to bring an action, after having noted that it produced each document of subrogation signed by Hanbul Motors, the ruling maintains that the subrogation is therefore contractual. It adds that Hanbul Motors was the actual consignee of the damaged goods, which justifies its compensation, and that the mere express will of the beneficiary is sufficient to subrogate the insurer.
12. In so deciding, without investigating, as it was asked to do, whether the alleged payment had occurred simultaneously with the subrogation, the *cour d'appel* (Court of Appeal) did not provide a legal basis to its decision.

Pleas

On the first part of the third plea

Statement of plea

13. Eukor makes the same complaint against the ruling, whereas "in commercial matters, there are no specific requirements for evidence; whereas, in that regard, no text imposes a particular formal or substantive requirement on the translation of a document drawn up in a foreign language for it to be produced in court; whereas, in this case, in order to demonstrate that the damage invoked had not occurred during the carriage, Eukor produced expert reports written in English, the relevant passages of which it translated in its pleadings; whereas, by ruling that no translation in accordance with the rules of procedure was produced, when no rule of procedure prohibited the offer of a free translation of passages of documents written in a foreign language, the *cour d'appel* (Court of Appeal) infringed Article L. 110-3 of the Commercial Code."

Statement of reasons

Court's response

In view of Article 111 of the Villers-Cotterêt order of 25 August 1539 and Article 9 of the Code of Civil Procedure:

14. Since the first of these texts concerns only procedural acts, it is up to the court hearing the case, in the exercise of its independent power, to assess the probative value of the documents produced, even if they are written in a foreign language.
15. According to the second text, it is the responsibility of each party to prove, in accordance with the law, the facts necessary for their claim to succeed.
16. In dismissing Eukor's claim that the shipper had insufficiently protected the cars, the ruling noted that Eukor relied solely on the expert damage reports, which were drawn up entirely in English and no translation in accordance with the rules of procedure was produced.
17. In so ruling, whereas no text imposes a particular rule on the translation of documents written in a foreign language for them to be produced in court, since the erroneous nature of the free translation made by Eukor in its submissions was not argued, the *cour d'appel* (Court of Appeal) infringed the aforementioned texts.

Pleas

And on the first part of the fourth plea

Statement of plea

18. The company Eukor makes the same complaint against the ruling, whereas "the judges cannot rely exclusively on a non-judicial appraisal carried out at the request of one of the parties; whereas, in this case, by relying solely, in order to assess the amount of damage suffered by the cars, on the expert reports carried out by Hyopsung Surveyors at the request of Hanbul Motors, to whose rights Axa stated it had subrogated, the*cour d'appel* (Court of Appeal) infringed Article 16 of the Code of Civil Procedure."

Statement of reasons

Court's response

In view of Article 16 of the Code of Civil Procedure:

19. Pursuant to this text, the court cannot rely exclusively on a non-judicial appraisal drawn up at the request of one of the parties.
20. In ordering Eukor to pay Axa certain sums for the costs of repairing the cars and making an appraisal, the ruling maintains that Eukor made no reservation with regard to the receipt of the appraisal reports sent to it by

Hyopsung Surveyors.

21. In so ruling, by relying exclusively on non-judicial appraisals, the *court d'appel* (Court of Appeal) acted in breach of the above-mentioned provision.

Operative part of the ruling

ON THESE GROUNDS, and without the need for ruling on the other objections, the Court:

QUASHES AND SETS ASIDE, except insofar as it recognises the competent French courts, the ruling delivered on 30 June 2020 between the parties by the *cour d'appel* (Court of Appeal) of Paris;

Returns, except on this point, the case and the parties to the status existing prior to the said ruling and refers them to the *cour d'appel* (Court of Appeal) of Paris, otherwise composed;

Orders Axa Corporate Solutions Assurance and XL Insurance Company SE, successor in title to Axa Corporate Solutions Assurance, to pay the costs;

In accordance with Article 700 of the Code of Civil Procedure, rejects the application made by Axa Corporate Solutions Assurance and XL Insurance Company SE and orders them to pay Eukor Car Carriers Inc. the sum of EUR 3,000;

At the request of the Prosecutor-General of the *Cour de cassation* (Court of Cassation), this ruling shall be forwarded for transcription in the margin or at the bottom of the partially quashed ruling;

Thus decided by the Commercial, Financial and Economic Chamber of the *Cour de cassation* (Court of Cassation), and delivered by the president in a public hearing on the nineteenth day of the month of October of the year two thousand and twenty-two.

Pleas attached

PLEAS ATTACHED to this ruling

Pleas submitted by SCP Rocheteau, Uzan-Sarano and Goulet, Supreme Court Lawyer, for Eukor Car Carriers Inc.

FIRST PLEA FOR QUASHING

The ruling is under appeal for HAVING ordered Eukor Car Carriers to pay Axa Corporate Solutions Assurance the sums of EUR 18,699.13 for the costs of repairing the cars and USD 7,200 for the costs of the expert appraisal, thus rejecting the plea of lack of jurisdiction raised by Eukor Car Carriers;

ON THE GROUNDS THAT, concerning the territorial jurisdiction of the Commercial Court of Paris; concerning the validity of the choice-of-jurisdiction clause, at the top of each disputed bill of lading the following appears: "In accepting this bill of lading, the shipper, owner or consignee of the goods, and the bearer of this bill of lading, expressly accept and agree to all provisions, exceptions and conditions, whether written, stamped or printed, as if fully signed by said shipper, owner, consignee and/or bearer. No agent shall be authorised to withdraw any provision of such clauses"; whereas this mention thus refers in particular to clause 25 of the bill of lading, drafted as follows: "Applicable law and jurisdiction: Claims arising from, in connexion with or relating to this Bill of Lading shall be governed exclusively by Korean law unless

otherwise stated in this Bill of Lading. Any action relating to custody or carriage under this bill of lading, based on contractual, tortious or other liability, shall be brought before the Civil District Court of Seoul, Korea." whereas neither the Transport Code nor the Brussels Convention of 1924, which governs the international maritime transport of goods, prohibit the adoption in an international maritime transport contract of specific choice-of-jurisdiction clauses that go against ordinary law; whereas, moreover, in this type of carriage, it is customary in international law for carriers to include in the bills of lading a choice-of-jurisdiction clause for the courts in whose jurisdiction their registered office is located; whereas, in particular, the existence of a practice is established when a certain behaviour is generally and regularly followed by operators; whereas, where necessary, the same approach is adopted by the European Union law, where Regulations 1215/2012 (Art. 25) and 44/2001 (Art. 23) allow the following to be "extensions of jurisdiction" when concluded in writing or orally with written confirmation or in a form that is in accordance with the practices the parties have established between them or, in the case of international trade, in a form that is in accordance with established practice; whereas the principle of validity of such a choice-of-jurisdiction clause not contested by the parties is therefore not in question; whereas it follows that the only question here is the enforceability of said clause; whereas, concerning the enforceability of the clause on the basis of its illegibility, Axa argues that the courts regularly and systematically set aside choice-of-jurisdiction clauses after having noted that they are not perfectly legible, and, moreover, French law (Article 48 of the Code of Civil Procedure) requires that a clause be stipulated in a very clear manner, together with proof of the consent of the other party; whereas it is clear that a choice-of-jurisdiction clause must be legible; whereas, in this case, the original of the clauses on the back of the bill of lading shows that they are written in very small print (approximately two millimetres) in very pale ink, with no possibility of attention being drawn to clause 25, included in a very dense list of 27 clauses, the reading of which requires the use of a magnifying glass if it is to be deciphered;

whereas the fact that the appellant alleges that it produces (exhibit No. 17) "a legible copy of the reverse of one of the bills of lading" does not convince the Court, since Eukor does not produce the original of the bill of lading and in any event, said "copy" is open to the same criticism as regards the small size of the text and the fact that attention is not drawn to clause 25, which is drowned out in a list of 27 clauses; whereas, since the legibility of the original clause remains non-existent, it cannot be opposed by the appellant vis-à-vis the insurer; whereas, moreover, it is not the insured party's responsibility to make an original clause legible, which is not the case, by copying the document to darken the colour of the original, which must be intrinsically legible in itself; whereas, concerning the scope of the clause, Eukor claims that all of the 18 bills of lading issued contain a clause No. 25, which is worded as follows: "Applicable Law and Jurisdiction - Claims arising from, in connection with or relating to this Bill of Lading shall be governed exclusively by Korean law unless otherwise stated in this Bill of Lading. Any action relating to custody or carriage under this bill of lading, based on contractual, tortious or other liability, shall be brought before the Civil District Court of Seoul, Korea"; whereas it follows that the national law applicable to the contract of carriage is Korean law; whereas the insurer replies that the*Tribunal de commerce* (Commercial Court) of Paris holds specific jurisdiction by application of Article 14 of the Civil Code, which allows the applicant, provided that they are of French nationality, to prosecute a foreign national in France, irrespective of the nationality of the original holder of the rights in question; whereas it adds that the question of conflicts of jurisdiction is independent from that of conflicts of law and that no Franco-Korean treaty addresses conflicts of jurisdiction; whereas, in addition, all transport contracts are established in [Address 5], via a French transport agent and a shipping agent in [Address 5]; whereas, moreover, for all these claims the shipper (Peugeot or Citroën) has had

systematic recourse to a freight forwarder, Gefco; whereas, if Article 14 of the Civil Code offers the French applicant only a simple option, said text nevertheless applies when it is demonstrated that the applicant has not accepted the choice-of-jurisdiction clause that appears in the bill of lading; whereas, in view of the illegibility of said clause as noted by the Court, it cannot be said that Hanbul Motors, to which Axa alleges that it was subrogated, gave its consent thereto; whereas it follows from all the above that the plea of lack of jurisdiction must be rejected;

1. WHEREAS the conditions of acceptance of a choice-of-jurisdiction clause stipulated in an international bill of lading are governed not by the law of the court receiving the referral, but by that applicable to the contract of carriage; whereas, as such, it is for the French judge to whom a claim has been referred depending on the implementation of a choice-of-jurisdiction clause stipulated in a bill of lading to research the law applicable to the contract of

carriage and then determine its content, with the assistance of the parties if necessary, in order to apply it; whereas, in this case, the judges themselves noted that Eukor invoked Korean law as the sole law applicable to the contract of carriage in accordance with Article 25 of its general conditions; whereas, by nevertheless assessing the acceptance of this clause in the light of the rules applicable in French law, when it was up to the*cour d'appel* (Court of Appeal) to verify whether Korean law was not applicable and to deduce, if necessary, the solution, in accordance with Korean law, regarding the enforceability of the choice-of-jurisdiction clause against Axa, the*cour d'appel* (Court of Appeal) infringed Article 3 of the Civil Code;

2. WHEREAS, subsidiarily, the special acceptance of the choice-of-jurisdiction clause on a bill of lading may be tacit and result from the usual stipulation of that clause in the context of established business relations between the parties; whereas, in this case, in order to establish that the choice-of-jurisdiction clause was enforceable against Hanbul Motors Corporation, insured with Axa, Eukor Car Carriers referred to several hundred bills of lading drawn up over several years between the same parties, all containing the disputed clause; whereas, by holding that the choice-of-jurisdiction clause stipulated in the bills of lading was unenforceable against Axa, subrogated to the rights of the consignee, for the sole reason that the general conditions appearing in these bills of lading were "illegible", without investigating whether the choice-of-jurisdiction clause could not be made enforceable due to the usual stipulation thereof in the context of the established business relations between the parties, the*cour d'appel* (Court of Appeal) deprived its ruling of legal basis under the former Article 1134 of the Civil Code;
3. WHEREAS the special acceptance of the choice-of-jurisdiction clause appearing on a bill of lading may be tacit and result from usual practices in the international carriage of goods; whereas, in this case, in order to establish that the choice-of-jurisdiction clause was enforceable against Hanbul Motors

Corporation, insured with Axa, Eukor Car Carriers relied on the existence of a practice in international maritime transport consisting of stipulating such a clause on the back of the bills of lading issued by the carrier; whereas, by ruling that the choice-of-jurisdiction clause stipulated in the bills of lading was unenforceable against Axa, subrogated to the rights of the consignee, for the sole reason that the general conditions appearing in these bills of lading were "illegible", without carrying out any inquiry as to whether the stipulation could not be made enforceable on the basis of the existence of a use in the international transport of goods, the*cour d'appel* (Court of Appeal) deprived its ruling of legal basis under the former Article 1134 of the Civil Code;

4. WHEREAS the special acceptance of the choice-of-jurisdiction clause appearing on a bill of lading may be tacit and result from reference to general conditions containing such clause and of which the other party to the contract has been given the opportunity to become aware; whereas, in this case, in order to establish that the choice-of-jurisdiction clause was enforceable against Hanbul Motors Corporation, insured with Axa, Eukor Car Carriers argued that the attention of the shipper and the bearer had been drawn to a paragraph at the top of the bill of lading stating that acceptance of the bill of lading was equivalent to acceptance of all the provisions appearing on the reverse, and it added that the same general conditions appeared on its website; whereas, by holding that the choice-of-jurisdiction clause stipulated in the bills of lading was unenforceable against Axa, subrogated to the rights of the consignee, for the sole reason that the general conditions appearing in these bills of lading were "illegible", without explaining the presence of a paragraph at the top of the bill of lading indicating that signing it was equivalent to accepting all the provisions appearing on the reverse, or the availability of the same general conditions on the website of the company Eukor Car Carriers, the*cour d'appel* (Court of Appeal) deprived its ruling of legal basis under the former Article 1134 of the Civil Code;
5. WHEREAS the terms of the dispute are determined by the respective claims and pleas of the parties; whereas, in this case, Eukor Car Carriers explained that the originals of the bills of lading were held by Axa, the latter indicating

that it had the originals at the disposal of the judges; whereas, by nevertheless accusing Eukor Car Carriers of having failed to produce an original that it was common knowledge that it did not have, the*cour d'appel* (Court of Appeal) disregarded the terms of the dispute in breach of Article 4 of the Code of Civil Procedure."

SECOND PLEA FOR QUASHING (subsidiary)

The ruling is under appeal for HAVING ordered Eukor Car Carriers to pay Axa Corporate Solutions Assurance the sums of EUR 18,699.13 for the costs of repairing the cars and USD 7,200 for the costs of the expert appraisal, thus rejecting the dismissal based on the lack of capacity of Axa Corporate Solutions Assurance on a subrogatory basis;

ON THE GROUNDS THAT, in this case, Axa produces each document of subrogation signed by Hanbul Motors and, the subrogation being thus contractual, it does not presuppose demonstration of the fact that the payment was made in accordance with the policy, as required by Article L. 121-12 of the Insurance Code, with regard to the legal subrogation from which the insurer benefits; whereas it makes no difference that Hanbul Motors appears only 6 times out of 8 as the consignee of the goods, since it is not disputed that for the 2 other bills of lading on which they appear as "notify", they were indeed the actual consignee of the said goods, which justifies their compensation; whereas the mere express will of the beneficiary is then sufficient to subrogate the insurer, such that Axa justifies its capacity to bring an action;

1. WHEREAS contractual subrogation presupposes the existence of a payment; whereas, by failing to verify, as it was asked to do, whether Axa Corporate Solutions Assurance, allegedly subrogated to Hanbul Motors Corporation, had in fact made a payment to the latter, the *cour d'appel* (Court of Appeal) deprived its decision of a legal basis under the former Article 1250 of the Civil Code;
2. WHEREAS the contractual subrogation must be express and made at the same time as the payment; whereas, by failing to verify, as it was asked to do, that, in order to consider that a payment had taken place, it had occurred simultaneously with the subrogation, the *cour d'appel* (Court of Appeal) deprived its decision of a legal basis under the former Article 1250 of the Civil Code.

THIRD PLEA FOR QUASHING (subsidiary)

The ruling is under appeal for HAVING ordered Eukor Car Carriers to pay Axa Corporate Solutions Assurance the sums of EUR 18,699.13 for the costs of repairing the cars and USD 7,200 for the costs of the expert appraisal;

ON ITS OWN GROUNDS, WHEREAS, with regard to the presumption and exoneration clauses, the insurer considers that the law applicable to the case is the Brussels Convention of 1924, namely the law chosen by the parties in an express clause when drawing up the contract, that in this case the BL Eukor (paramount clause) systematically refers to the Brussels Convention of 1924, as amended in 1968, and that, in application of said law, the carrier is presumed liable; whereas it adds that the damage having occurred during the period of liability of the sea carrier, the place where the damage occurred is of little importance; whereas, lastly, no proof of a case for exoneration is provided; whereas EUKOR recalls that, according to the terms of the bill of lading, damage that occurred before acceptance by the sea carrier cannot be attributed to it; whereas, in addition, the sea carrier shall not be liable of damage to or loss of the vehicle accessories; whereas, in any event, and above all, according to Article 4.2 of the amended Brussels Convention of 25 August 1924 applicable to the transport operations concerned, the following is provided: "Neither the carrier nor the ship shall be liable for loss or damage resulting or arising from: i) An act or omission by the shipper or owner of the goods, their agent or representative; n) Insufficient packaging; q) Any other cause not arising from the act or fault of the carrier or from the act or fault of the agents or employees of the carrier [...]"; and whereas, in this case, the vehicles concerned have not been sufficiently protected by the shipper, as is usual practice for the sea transport of vehicles; whereas Eukor does not contest the application of the amended Brussels Convention, which establishes a presumption of liability for the carrier; whereas it nevertheless invokes section 4.2 of this convention to reverse this presumption by alleging a fault

prior to carriage due to insufficient packaging by the shipper or their representative; whereas, however, in order to prove this fault, it relies solely on the expert reports on the damage, which are all drawn up in English without a translation in accordance with the rules of procedure; whereas, since no other means of proof is available to the Court, the latter can only dismiss EUKOR's claim and confirm its liability as carrier, it being moreover stated that it did not express any reservation to the bills of lading regarding the objection in question; whereas, concerning the accessories, Axa argued that the loss of accessories was necessarily charged to the carrier, which Eukor opposed; whereas, however, Eukor demonstrates neither the reality or details of the thefts and deterioration it invokes—the Court will recall that the only evidence invoked consists of the aforementioned reports, which are not translated—nor the agreement of the parties to not compensate such claims, that in fact, clause 24 A (3) of the Eukor bill of lading cannot be invoked in this regard, since the Court has ruled that the clauses of the latter are illegible and, consequently, has recognised their unenforceability against Axa;

AND ON THE GROUNDS POSSIBLY ADOPTED, WHEREAS Article 1147 of the Civil Code provides that, "The debtor is ordered to pay damages if necessary either because of the non-performance of the obligation, or because of the delay in performance each time they fail to justify that the non-performance comes from a third-party cause that cannot be attributed to them, even though there is no bad faith on their part"; whereas sea transport is also governed by the Brussels Convention, which imposes a presumption of liability on the carrier; whereas, between 7 July 2015 and 3 February 2016, Citroën commissioned the company Eukor Carriers Inc. to transport several new Citroën or Peugeot vehicles in Korea; whereas Wallenius Wilhelfmsen Logistic, acting as agent in France for Eukor Carriers, issued 8 bills of lading in respect of said carriage, without mention of any reservation; whereas a copy of the bills of lading has been provided to the tribunal; whereas Hanbul Motors, acting as the consignee (notify) of the vehicles, requested an expert appraisal of the vehicles on their arrival; whereas the carrier has been invited to participate in the appraisal operations; whereas it follows from the examinations carried out on the arrival of the vehicles that they had been damaged during the carriage, that this damage was noted and quantified by the expert; whereas copies of these expert opinions have been provided to the tribunal; whereas, the company Eukor Carriers, which was the recipient of these estimates, did not dispute them; whereas the vehicles have been repaired and the costs of the repairs and expertise have been assumed by Axa Corporate Solutions via its local agent, Siaci; whereas Eukor Carriers Inc. did not comply with the requests for reimbursement sent to it by Axa Corporate Solutions; whereas, therefore, the Court shall order Eukor Carriers Inc. to pay the company Axa Corporate Solutions the sum of: EUR 18,699.13 in respect of repair costs, and USD 7,200 in respect of expert fees, and shall state that said sums will bear interest at the legal rate as from the date of the summons and that said interest will be capitalised in accordance with the terms of Article 1154 of the Civil Code;

1. WHEREAS, in commercial matters, evidence is not binding; whereas, in that regard, no text imposes a particular formal or substantive requirement on the translation of a document drawn up in a foreign language for it to be produced in court; whereas, in this case, in order to demonstrate that the damage invoked had not occurred during the carriage, Eukor Car Carriers produced expert reports written in English, the relevant passages of which it translated in its pleadings; whereas, by ruling that no translation in accordance with the rules of procedure was produced, when no rule of procedure prohibited the offer of a free translation of passages of documents written in a foreign language, the cour d'appel (Court of Appeal) infringed Article L. 110-3 of the Commercial Code;
2. WHEREAS the terms of the dispute are determined by the respective claims and pleas of the parties; whereas, in this case, Eukor Car Carriers relied on Article 24 of its general conditions, under the terms of which its liability did not extend to mere scratches and other bodywork defects; whereas, by ruling that this clause was as illegible as the choice-of-jurisdiction clause, and that it should be declared unenforceable against the subrogated insurer for the same reason, when the latter merely argued that this stipulation of the general conditions was null and void as being contrary to Article 3 of the Brussels Convention of 1924, the *cour d'appel* (Court of Appeal) disregarded the terms of the dispute in breach of Article 4 of the Code of Civil Procedure;
3. WHEREAS the carrier issues to the shipper a bill of lading stating, in particular, the condition of the goods to be carried; whereas, in this case, Eukor Car Carriers argued that the various bills of lading indicated that the condition

of the vehicles had been noted in an expert report drawn up before loading, in view of the impossibility of detailing the damage affecting each of the vehicles in the space intended for that purpose on the bills of lading; whereas, by opposing the fact that Eukor Car Carriers had not issued any reservations to the bills of lading with regard to the bodywork defects of the vehicles, without investigating whether said reservations were not contained in the expert reports attached to the bills of lading and to which they referred, the*cour d'appel* (Court of Appeal) deprived its decision of a legal basis under Articles 3 and 4 of the Brussels Convention of 25 August 1924 for the unification of certain rules on bills of lading, together with the former Article 1147 of the Civil Code.

FOURTH PLEA FOR QUASHING (subsidiary)

The ruling is under appeal for HAVING ordered Eukor Car Carriers to pay Axa Corporate Solutions Assurance the sums of EUR 18,699.13 for the costs of repairing the cars and USD 7,200 for the costs of the expert appraisal;

ON ITS OWN GROUNDS, WHEREAS the appellant considers that the annexes to the expert reports are clearly insufficient as documents to justify the amounts claimed; whereas it argues that only the reports issued by the Intertek expert on behalf of Hanbul Motors should be considered as agreed documents and used to assess possible damage, provided that the extent and amount of the damage are justified; whereas the insurer replies that the Unicar pre-transport appraisal is not probative, the style reservations entered in the bills of lading being null and void; whereas Eukor did not make any reservation regarding the receipt of the expert reports carried out by Hyopsung Surveyors that were notified to it;

AND ON THE GROUNDS POSSIBLY ADOPTED, WHEREAS Article 1147 of the Civil Code provides that, "The debtor is ordered to pay damages if necessary either because of the non-performance of the obligation, or because of the delay in performance each time they fail to justify that the non-performance comes from a third-party cause that cannot be attributed to them, even though there is no bad faith on their part"; whereas sea transport is also governed by the Brussels Convention, which imposes a presumption of liability on the carrier; whereas, between 7 July 2015 and 3 February 2016, Citroën commissioned the company Eukor Carriers Inc. to transport several new Citroën or Peugeot vehicles in Korea. ; whereas Wallenius Wilhelfmsen Logistic, acting as agent in France for Eukor Carriers, issued 8 bills of lading in respect of said carriage, without mention of any reservation; whereas a copy of the bills of lading has been provided to the tribunal; whereas Hanbul Motors, acting as the consignee (notify) of the vehicles, requested an expert appraisal of the vehicles on their arrival; whereas the carrier has been invited to participate in the appraisal operations; whereas it follows from the examinations carried out on the arrival of the vehicles that they had been damaged during the carriage, that this damage was noted and quantified by the expert; whereas copies of these expert opinions have been provided to the tribunal; whereas, the company Eukor Carriers, which was the recipient of these estimates, did not dispute them; whereas the vehicles have been repaired and the costs of the repairs and expertise have been assumed by Axa Corporate Solutions via its local agent, Siaci; whereas Eukor Carriers Inc. did not comply with the requests for reimbursement sent to it by Axa Corporate Solutions; whereas, therefore, the Court shall order Eukor Carriers Inc. to pay the company Axa Corporate Solutions the sum of: EUR 18,699.13 in respect of repair costs, and USD 7,200 in respect of expert fees, and shall state that said sums will bear interest at the legal rate as from the date of the summons and that said interest will be capitalised in accordance with the terms of Article 1154 of the Civil Code;

1. WHEREAS judges may not rely exclusively on non-judicial appraisals carried out at the request of one of the parties; whereas, in this case, by relying solely, in order to assess the amount of damage suffered by the cars, on the expert reports carried out by Hyopsung Surveyors at the request of Hanbul Motors Corporation, to whose rights Axa Corporate Solutions Assurance stated it had subrogated, the*cour d'appel* (Court of Appeal) infringed Article 16 of the Code of Civil Procedure";
2. WHEREAS the parties are free to apply any means to prove further and against the submissions of an appraisal report, regardless of whether they expressed no reservations during the appraisal procedure or on receipt of the expert report; whereas, in contrast in this case, in order to retain the assessment of the expert reports of

Hyopsung Surveyors, by holding that Eukor Car Carriers had not issued any reservation after having received notification of the reports, the *cour d'appel* (Court of Appeal) infringed Articles 9 and 16 of the Code of Civil Procedure, together with the right to evidence guaranteed by Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

President : Mr Vigneau
Advocate-general : Ms Henry
Reporting Judge : Ms Guillou
Lawyer(s) : SCP Rocheteau, Uzan-Sarano and Goulet - SARL Le Prado - Gilbert

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