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The Shipper Pays Twice

A multi-link chain of subcontracting, where the shipper concludes a contract with one carrier, and the transport services are performed by a second or even a third subcontracted carrier, is a widely spread situation in the Spanish market of transport services.

The Law of Land Transport in Spain was amended in 2013. The introduction of the so-called right to "direct claim" was one of the most important changes for the carriers. The carriers were waiting for this amendment for a long time, and the shippers did not want to put up with it at all. The "direct claim" is intended to ensure – or at least to increase the chances of – the final carrier in the subcontracting chain (the one who performed the transportation with the help of its own infrastructure) receives the payment for services provided.

For that purpose, the legislature decided to grant the final carrier the right to claim not only against the shipper, but also against any of the carriers precedent in the subcontracting chain. Although it's been five years since the reform came into effect, due to the multiple questions of interpretation that arose, the consolidation of the amendment has begun recently – namely, when this rule began to be applied in judicial practice.

1. The Shipper as a Guarantor of Payment

In 2017, the Spanish Supreme Court finally clarified one of the most important aspects of the interpretation of this rule: the court concluded that the shipper was not exempt from liability to the final carrier by meeting his payment obligations to the intermediate carrier.

In accordance with this interpretation, payment of the services of the first carrier does not relieve the consignor of the obligation to pay for the services of the third carriers that were subcontracted. Moreover, such payment is not even partially taken into account. Thus, in practice, this means that the shipper may be required to pay twice, acting as a kind of "guarantor" for the payment of the services of the ultimate carrier who carried out the transportation.

It is important to note that this regulation is imperative, which means that the exclusion of its application by the parties does not have legal force and would be declared invalid by the court. Therefore, we recommend that, in order to avoid unpleasant surprises, consignors and carriers involved include in the contract a prohibiting subcontracting clause. Thus, they will be able to avoid the possible position of the "guarantor" of obligations to third carriers in the contractual chain.

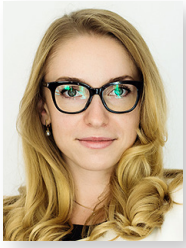
Unfortunately, a number of issues still have not received concrete, consistent interpretations from the Spanish courts. In particular, there are still several issues important for the practical effectiveness of the regulation, such as the statute of limitations and the impact of the bankruptcy procedure of the intermediate carrier that seem to be insufficiently defined.

2. Application of Statutory Limitations Period

Regarding the statutory limitations period, first of all, it should be noted that the Law of Land Transport does not contain a statute of limitations. Consequently, there are doubts as to whether the statute of limitations established in the Law on the Contract for Transport Services or the general provisions contained in the Civil Code should apply.

At the moment, most of the judicial practice tends to the interpretation that the right of "direct claim" is not an independent substantive right, but only a procedural tool, and, therefore, the rules applicable to all other claims arising from the contract for transportation services should apply. Though, it is paradoxical: after all, there are no contractual relations between the final carrier and the consignor.

The Law on the Contract for Transport Services establishes the limitation period of one year. The clock is ticking the countdown "after three months from the date of the



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conclusion of the contract or from the moment when the claim could be presented if such an opportunity comes later."

While the term of 15 months from the date of the conclusion of the agreement does not raise doubts, it is not so clear when the "opportunity of claim" arises: from the moment an outstanding invoice hasn't been paid or from the declaration of the bankruptcy of the intermediate carrier?

What if the shipper was a debtor to the intermediate carrier, who, at the same time, started the process of bankruptcy? Would the court accept the direct claim in this case? Would the payment of the services by the shipper to the first carrier have a different treatment if it was made in frames of the process of bankruptcy? The law is silent on this.

3. Intermediate Carrier's Bankruptcy

Nevertheless, until now, it has not been clear how the intermediate carrier's bankruptcy process affects the possibility of a direct claim by the final carrier. We can see two scenarios here:

1. A consignor who has fulfilled its obligations to the first carrier.
2. The consignor-debtor who has not paid for the services of the first carrier.

If the shipper has fulfilled its payment obligations to the intermediate carrier, which subsequently began the bankruptcy process, the success of the direct claim is beyond doubt. In this case, the claim against the consignor is based solely on its role as a "guarantor" to the final carrier, in accordance with the aforementioned interpretation of the Supreme Court, and has no binding to the bankruptcy estate.

However, many questions arise from the situation where the shipper did not fulfill the payment obligations to the intermediate carrier. In this case, his debt should be considered a receivable in the bankruptcy estate, and, in accordance with the principle of *par conditio creditorum*, all creditors of the intermediate carrier (including the final carrier) must be in equal conditions and can make claims only in the bankruptcy proceedings, but not outside it.

In connection with the above, most national courts continue to deny the admission of direct claims if the bankruptcy procedure has already been commenced, or to suspend the consideration of direct claims admitted before the intermediary carrier begins bankruptcy proceedings until its completion.

In our opinion, this practice should soon change, as it runs counter to the interpretation proposed by the Supreme Court. We find it difficult to justify the restriction of the right of direct claim by the presence of the shipper's receivables, since, if the "guarantor" is required to pay twice, it can equally be obliged both to pay off the debt in the bankruptcy proceedings (thus avoiding the violation of the principle of equality of creditors) and to fulfill its obligations of the "guarantor" to the final carrier.

Nevertheless, the regional courts have not yet adapted their practice to the new interpretation suggested by the Supreme Court, which may lead to the following tricky situation: an intermediate carrier that fails to fulfill the payment obligations begins a bankruptcy procedure. In this regard, the court does not admit the direct claim of the final carrier against the shipper-debtor while the bankruptcy proceedings are pending. Meanwhile, the limitation period is not suspended and expires before the bankruptcy proceedings are finalized. As a result, the final carrier loses its right to direct action.

Based on this situation, we can conclude that the final carrier should not postpone the filing of a direct claim. In the context of uncertainty of judicial practice, it is better to hurry up and file the direct claim, preventing the possible commencement of bankruptcy proceedings (in the worst case, the consideration of the claim will be suspended) than being late with the filing. In most cases, the bankruptcy procedure lasts much longer than the statute of limitations of the direct claim; that's why the final carrier risks losing his right to claim the payment of the provided services directly from the shipper. P