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The incorporation
of a charterparty arbitration
clause
in the bill of lading: binding
effect of contract without
consent

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Summary

Arbitration as a dispute settlement mean is widely used in the disputes on a carriage of goods by sea. As world trade of goods is mainly based on the carriage by sea services, the predictability and certainty regarding to the arbitration of shipping disputes is very important. The fundamental question is an existence of a valid arbitration agreement and accordingly whether or not there is a duty to perform it. It is of critical importance in a maritime dispute to commence proceedings in the proper jurisdiction and correct institution within the time limit provided in contract of carriage.

Most disputes on a validity of arbitration agreement are related to the enforcement of a charterparty arbitration clause against the holder of a bill of lading. The holder of a bill of lading is not a signatory to the charterparty and usually in shipping practice he has not seen it and even unaware of its existence. Therefore, the intention of the holder of the bill of lading to be bound by a charterparty arbitration clause incorporated in the bill of lading can be disputable. Nevertheless, incorporation by reference is one of the legal theories that can be used to bind the bill of lading holder to an arbitration contract, which he has not signed.

This dissertation addresses the issue of binding the holders of a bill of lading to the arbitration contract created by incorporation of a charterparty arbitration clause in a bill of lading. The dissertation will answer to the question what are common principles that are to be followed for establishing that a charterparty arbitration clause is validly incorporated in the bill of lading and is binding to the holder of a bill of lading in according to a recent case law of leading maritime dispute forums in London and New York.

Preface

”Arbitration and chartering are both contracts, which must be negotiated, agreed upon and performed.”¹

¹ William Tetley, ‘Good faith in contract: particularly in the contracts of arbitration and chartering’, (2004) 35 JMARLC 561 (Journal of Maritime Law and Commerce). Available on the internet at *Westlaw* database. Last visited at April 1, 2010.

Abbreviations

BIMCO	Baltic and International Maritime Conference
LMAA	London Maritime Arbitration Association
SMA	Society of Maritime Arbitrators, Inc.
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
US	United States of America

1 Introduction

Many shipping disputes are referred for arbitration² as an alternative to the litigation because of the costs, delays and procedural complications of the court proceedings.³ The most frequent source of maritime arbitration is provided by the charterparties,⁴ which “...are remarkable contracts because of their number, their broad international scope, and their importance in facilitating world trade.”⁵ Many charterparty forms include their own arbitration clauses and in the majority of cases there is no dispute regarding the existence of an arbitration contract between the shipowner and the charterer.

However, international arbitration disputes regarding the incorporation of a charterparty terms in the bill of lading are the source for most disputes related to the enforceability of an arbitration agreement by and against the non-signatories.⁶ As in any agreement, an arbitration

² See: Robert Samuel Theodore Chorley, Charles Debattista, Nicholas J. J. Gaskell, O. C. Giles, Richard J. Swatton, *Chorley and Giles' shipping law*, 8th ed., Pitman, London, 1987, page 3; Thomas J. Schoenbaum, *Admiralty and maritime law*, 2nd ed., West Publishing, St Paul, MN, 1994, page 937.

³ Georgios I. Zekos, ‘Maritime arbitration and the Rule of law’, (2008) 39 JMARLC 523 (Journal of Maritime Law and Commerce), page 524.

⁴ Martin Davies, ‘Litigation fights back: Avoiding the Effect of Arbitration Clauses in Charterparty Bills of Lading’, (2004) 35 JMARLC 617 (Journal of Maritime Law and Commerce), page 618.

⁵ Tetley, *supra note 1*.

⁶ See, e.g.: *Chorley and Giles' shipping law*, page 179, 267, *supra note 2*; Paul Todd, *Contracts for the carriage of goods by sea*, BSP Professional Books, London, 1988, page 187; Julian Cooke, Timothy Young, Andrew Taylor, John D. Kimball, David Martowski, LeRoy Lambert, *Voyage charters*, 2nd ed., LLP, London, 2001, page 451; Clare Ambrose, Karen Maxwell, Angharad Parry, *London maritime arbitration*, Informa, London, 2009, page 51, 52, 54; James M. Hosking, ‘The third party non-signatory’s ability to compel international commercial arbitration: doing justice without destroying consent’, (2004) 4 PEPDRJ 469 (Pepperdine Dispute Resolution Law Journal). Available on the internet at *Westlaw* database. Last visited at April 4, 2010.

agreement can become binding on the parties only by their intention. The intention of the holder of the bill of lading to be bound by a charterparty arbitration clause incorporated in the bill of lading is the main reason for the disputes on the validity of the arbitration agreement. Arbitration agreements can apply to non-signatories only in rare circumstances.⁷ The incorporation by reference is one of the theories that are used to bind non-signatories to the arbitration agreement, which they have not signed.⁸

The existence and validity of an arbitration agreement is fundamental to the question of whether or not there is a duty to perform it and is essential to the outcome of the claim. It is of critical importance in a maritime dispute to commence proceedings in the proper jurisdiction and institution within the time limit provided in the bill of lading or imposed by one of the convention regimes. “Frequently more time and effort is expended in resolving the question of jurisdiction than any other issue. Once jurisdiction is established, competent lawyers generally ought to be in much better position to predict the outcome of the dispute and the terms on which it can be disposed of satisfactorily by agreement.”⁹ Clear common principles for establishing an enforceable arbitration agreement are essential for predictable and effective dispute resolution in the shipping business and the commercial world in general.

⁷ *The Rice Company (Suisse), S.A. v. Precious Flowers Ltd*, 523 F.3d 528, C.A.5 (Tex.), 2008.

⁸ “Typically, there are seven theories which can be used to bind nonsignatories to arbitration agreements: (1) alter ego/corporate veil piercing, (2) incorporation by reference, (3) assumption by conduct, (4) equitable estoppel, (5) agency, (6) successors in interest, and (7) third-party beneficiary.” Cited in Anthony M. DiLeo, ‘The enforceability of arbitration agreements by and against nonsignatories’, (2003) 2 JAMARB 31 (Journal of American Arbitration). Available on the internet at *Westlaw* database. Last visited at March 23, 2010;

⁹ David Joseph, *Jurisdiction and arbitration agreements and their enforcement*, 1st ed., Sweet & Maxwell, London, 2005, page 3.

1.1 Purpose

The purpose of this dissertation is to address the issue of binding the holders of a bill of lading to the arbitration contract created by incorporation of a charterparty arbitration clause in a bill of lading. This dissertation will answer to the question what are common principles that are to be followed for establishing that a charterparty arbitration clause is validly incorporated in the bill of lading and is binding to the holder of the bill of lading in according to a recent case law of leading maritime dispute forums in London and New York.

1.2 Delimitation

This dissertation does not cover disputes when there is a conflict between two different arbitration clauses, one in a bill of lading and other in a charterparty. The focus is on how the charterparty arbitration clause can become a binding agreement to the holder of the bill of lading. Although there are disputes whether the incorporation of the charterparty arbitration clause in the bill of lading can bind shipowner as a third party or non-signatory to the bill of lading this discussion is limited to consideration of position of shippers and consignees in the event of a dispute.

1.3 Method

The method used in the dissertation is the traditional legal method. The author presents the analysis of law, court cases and scholars' writings.

1.4 Disposition

First chapter presents a general overview on arbitration and a maritime arbitration contract created by incorporation of a charterparty arbitration clause in the bill of lading. First sub-chapter emphasize the formal requirements and the form of an arbitration agreement based on the standard

printed forms. The contractual nature of an arbitration clause (severability, parties' autonomy, breach of arbitration clause) is addressed in the next subchapter.

The analysis of court cases is presented on second chapter. The writer makes a distinction between position in English and American jurisprudence in relation to "express terms" requirement and identification of a particular charterparty in the bill of lading.

Last chapter presents a summary of analysis of courts cases and conclusions.

2 Arbitration and a reference in the bill of lading to a charterparty arbitration clause

Litigation and arbitration are two methods of a dispute settlement, which in the resolution of commercial and maritime disputes, "...coexist, complement each other, and to some extent, may be said to compete with each other..."¹⁰ Arbitration always has been seen as an alternative to the traditional dispute resolution mechanism which is litigation.¹¹ In the recent past, the law favoured litigation over arbitration and "[a]rbitration clauses were routinely struck down as invalid attempts to oust the jurisdiction of the courts."¹² In the US foreign maritime arbitration agreements acquire recognition only in 1995 with the Supreme Court decision in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*.¹³

"Obviously, each of these dispute resolution mechanisms must appear to offer disputants or their legal representatives some advantage; otherwise one process would have completely displaced the other."¹⁴ The main concern for parties to commercial disputes is about the speed and costs of

¹⁰ Force, Mavronicolas, 'Two models of maritime dispute resolution: litigation and arbitration', (1991) 65 TLNLR 1461 (Tulane Law Review). Available on the internet at *Westlaw* database. Last visited at January 4, 2010.

¹¹ Zekos, *supra* note 3.

¹² Davies, page 618, *supra* note 4.

¹³ See: *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 1994 AMC 1817 (1995). With that decision, the Court reversed the longstanding rule, uniformly followed by every federal court to have considered it, that foreign arbitration clauses in bills of lading were invalid because they worked to lessen the carrier's liability in violation of COGSA § 1303(8).

¹⁴ Force, Mavronicolas, *supra* note 10.

the proceedings. The advantages of arbitration include impartiality of the decision maker, finality, confidentiality, informality, speed, harmony, costs, and universal enforceability.¹⁵ Although according to some authors, some of these advantages undoubtedly exist but some may as well not be so apparent in maritime arbitration any longer.¹⁶

Compared with litigation, which usually is not based on the contract, arbitration "... is a method of dispute resolution which is justified by and dependent upon the existence of an agreement between the parties."¹⁷ In maritime disputes, the parties usually bind themselves to some form of arbitration by means of an arbitration clauses contained in a standard form contract. Frequently these contracts are the contracts of affreightment, such as the charterparties, or contracts of carriage in the form of bills of lading, which incorporate charterparties.¹⁸

The incorporation of arbitration clauses in the bills of lading and making them binding to the non-signatories involves particular difficulties that arise from the autonomy and severability of arbitration clauses, their specific contractual form based on the terms of the charterparty and the bill of lading, and from the shipping practice.

Generally the arbitration contract incorporated by reference can be recognized as a valid arbitration agreement at least by the most popular arbitration forums in the US, UK and France.¹⁹ However, there are still a lot of questions on the content and form of incorporation clauses in these

¹⁵ Tetley, *supra note 1*; See also: Olagoke O. Olatawura, 'The "privity to arbitration" doctrine: the withering of the common-law privity of contract doctrine in arbitration law', (2005) 16 AMRIARB 429 (American Review of International Arbitration). Available on the internet at *Westlaw* database. Last visited at March 23, 2010; Gaskell, N., Asariotis, R., Baatz, Y. *Bills of lading : law and contracts*. LLP, London, 2000, page 580; Robert Force, Martin Davies, 'Forum Selection Clauses in International Maritime Contracts' in *Jurisdiction and Forum Selection in International Law. Essays in Honor of Robert Force*, eds. Martin Davies, Kluwer Law International, Hague, 2005, page 2.

¹⁶ See: Gaskell, page 580, *ibid*; Force, Mavronicolas, *supra note 10*.

¹⁷ Ambrose, page 43, *supra note 6*.

¹⁸ *Ibid*.

¹⁹ Hosking, *supra note 6*.

countries.²⁰ As well, there is still a large variation between other countries. For example, in 2009 in *The Wadi Sudr*,²¹ the Spanish court held that under Spanish law no arbitration clause was incorporated in the bill of lading. In China, no common agreement for arbitration can be found when an arbitration clause is incorporated in the bill of lading.²² An arbitration clause

²⁰ “The strictness of the general rule expressed above has not met with consistent favour in the context of arbitration in certain common law countries which have adopted the UNCITRAL Model Law. The courts of Canada, Hong Kong and Bermuda have not imposed a requirement of express reference and have also considered it sufficient if general words of incorporation are used coupled by a dispute resolution clause that is sufficiently wide to embrace the dispute issue without manipulation. Likewise, the Swiss Federal Supreme Court has held a charterparty arbitration clause to be incorporated in the bill of lading contract by the use of general words of incorporation in the bill of lading. In contrast, the Court of Appeal in Singapore and the courts of New South Wales has more closely followed the approach adopted by the English courts, and generally in those courts specific reference to the incorporated arbitration clause will be required.” Cited in Joseph, page 145, *supra note 9*; See also Hosking, *supra note 6*.

²¹ *The National Navigation Co v. Endesa Generacion SA (The "Wadi Sudr")*. [2009] 1 Lloyd's Rep. 666. The bill of lading provided that "all terms, liberties and exceptions of the Charterparty dated as overleaf, including the Law and Arbitration clause are herewith incorporated". The vessel was subject to a head time-charter containing English law and London arbitration clauses, a sub-time-charter, and a voyage charter which contained a London arbitration clause. At 8 September 2008 the Almeria, Spain, the court delivered its judgment that under Spanish law no arbitration clause was incorporated in the bill of lading. The English court at 1 April 2009 concluded that an arbitration clause was incorporated into the bills of lading in this case.

²² “Chinese domestic arbitration law that requires for arbitration clauses to be consensual agreements to arbitration expressed clearly by the parties. The holder of the bill of lading is never the party who negotiated the clauses contained therein. The bill of lading is commercial instrument that may come into the hands of a party with no knowledge of the terms and conditions of the original charterparty. Accordingly, no common agreement for arbitration can be found when an arbitration clause is incorporated in the bill of lading.” Cited in Fei Lanfang, ‘A review of judicial attitudes towards the incorporation of arbitration clauses into bills of lading in China’, (2009) 14 JIML 1 (The Journal of International Maritime Law), page 102.

incorporated in a bill of lading can be a valid arbitration agreement in the United Arab Emirates.²³

This chapter addresses different issues relevant to the dispute on the enforceability of an arbitration clause incorporated from the charterparty in the bill of lading to the third-party like the shipper and the consignee. First, the writer gives general insight into international and national legal regulation of commercial arbitration and maritime arbitration. Next, the formal requirements of arbitration agreement are analysed. Finally, in order to emphasize the contractual nature of an arbitration contract created by reference in the bill of lading to the charterparty arbitration clause, the severability of an arbitration contract, parties' autonomy principle and the breach of an arbitration clause is pointed out.

2.1 Sources of legal regulation of arbitration

There are many different international and regional arbitration instruments,²⁴ but mostly they have not received wide acceptance from states. Particularly relevant among the international multilateral agreements on international commercial arbitration are the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

²³ Abu Dhabi Court of Cassation (Judgment No. 634/26 Dated 17 June 2008) held: "...the holder of a the bill of lading is considered to have interest in the bill of lading and, seeking to enforce the contract of carriage, stands in a position similar to the shipper, and is bound to all clause in the bill of lading including the charterparty as referred to it in the bill of lading. It is further a matter of settled practice that as long as the Claimant (Consignee) is deemed to have an interest in the bill of lading, his relationship with the Carrier (Defendant) is governed solely by the bill of lading, and the Claimant (Consignee) has to comply with the arbitration clause in the charterparty referred to it in his copy of the bill of lading." Cited in Yazan Saoudi, 'Holder of Copy of The bill of lading by Endorsement must comply with Arbitration Clause', A.T. Law Update 2008, 213, 46-46. Available on the internet at *Westlaw* database. Last visited at 4 March, 2010.

²⁴ For information on different International and Regional Arbitration Instruments see: The website of Association of International Arbitration: <http://www.arbitration-adr.org/resources/?p=conventions> ; The website of UNCITRAL: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html

(hereinafter the New York Convention).²⁵ In many countries, the legislation based on the UNCITRAL Model Law on International Commercial Arbitration as adopted on 1985, amended on 2006,²⁶ has been enacted. Within European Union states the formal requirements of a jurisdiction agreement are set up in the Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters²⁷ while for requirements for arbitration agreement needs to look into the New York Convention as arbitration is excluded from the mentioned Regulation.²⁸

The general viewpoint is that maritime arbitration is covered within the "general" conventions on commercial arbitration. Furthermore, even where states have formulated the "commercial reservation" provided for by the New York Convention, courts have treated "maritime" issues as "commercial" matters, thereby placing these disputes within the scope of the New York Convention.²⁹

²⁵ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention). In force in 144 countries on March 2010. Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html Last visited at March 12, 2010.

²⁶ UNCITRAL Model Law on International Commercial Arbitration as adopted in 1985, amended 2006. Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html Last visited at March 31, 2010.

²⁷ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:EN:PDF> Last visited at March 31, 2010.

²⁸ Joseph, page 57, *supra note 9*.

²⁹ Fabrizio Marrella, 'Unity and diversity in international arbitration: the case of maritime arbitration', (2005) 20 AMUILR 1055 (American University International Law Review). Available on the internet at *Westlaw* database. Last visited at March 23, 2010.

Such international mandatory³⁰ regimes of carriage of goods by sea as the Hague³¹ and Hague-Visby Rules³² do not deal expressly with the arbitration or dispute resolution of cargo claims. The topic is thus left to national law of state parties. The Hamburg Rules³³ addresses the jurisdiction and arbitration issue on Articles 21 and 22 respectively, which mainly deal with the regulation of arbitration place. The new UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (hereafter the Rotterdam Rules)³⁴ contains more detailed and complex provisions in relation to the forum selection although it is in great extent the regulation of the arbitration place. Similarly like under the above mentioned rules³⁵ the charterparties are excluded also from the application of the Rotterdam Rules except when the bill of lading (or according to the

³⁰ “It seems undisputed, if not unquestioned, that the international law of carriage of goods by sea subject to the Hague and Hamburg Rules is framed in language that makes the scheme of the Convention mandatory for the parties.” Alexander von Ziegler, ‘Jurisdiction and Forum Selection Clauses in a Modern Law on Carriage of Goods by Sea’ in *Jurisdiction and Forum Selection in International Law. Essays in Honor of Robert Force*, eds. Martin Davies, Kluwer Law International, Hague, 2005, page 94.

³¹ International Convention for the Unification of Certain Rules Relating to Bills of Lading, 1924 (the Hague Rules). In force since 2 June, 1931. Available at: <http://www.admiraltylawguide.com/conven/haguerules1924.html> Last visited at March 31, 2010.

³² Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968 (the Hague-Visby Rules). In force since June 23, 1977. Available at: <http://www.admiraltylaw.com/statutes/hague.html> Last visited at March 31, 2010.

³³ UN Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules). In force since 1 November 1992. Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-3&chapter=11&lang=en Last visited at March 31, 2010.

³⁴ UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (the Rotterdam Rules). Not in force yet. Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods.html Last visited at March 31, 2010.

³⁵ The Hague/Hague- Visby Rules, Article 1 (b); The Hamburg Rules, Article 2 (3); The Rotterdam Rules, Article 6.

terminology of the Rotterdam Rules- a transport document or electronic record) issued in accordance with the charterparty comes in hands of a holder who is not a party to the charter.³⁶ Generally, in such case the provisions of an arbitration chapter in the Rotterdam Rules become applicable to the dispute by virtue of Article 76 (2). However, the same Article 76 (2) states that the arbitration provisions will apply unless a transport document or electronic transport record:

- (a) Identifies the parties to and the date of the charterparty or other contract excluded from the application of this Convention by the reason of the application of article 6; and
- (b) Incorporates by specific reference the clause in the charterparty or other contract that contains the terms of the arbitration agreement.

From one side it looks like an arbitration contract created by incorporation of a charterparty arbitration clause in the bill of lading is excluded from an application of the Rotterdam Rules. But in practice it could be difficult for this arbitration contract to reach the above mentioned requirement and to be excluded from application of the Rotterdam Rules. The existing forms of the bills of lading usually identify charterparty only by date, which also can be left blank. Does wording “incorporates by specific reference the clause in charterparty” mean that there is no need for a specific reference to the arbitration clause in the bill of lading? Above stated wording corresponds to the new standard dispute settlement clause of the Baltic and International Maritime Conference (hereinafter BIMCO),³⁷ which do refers to the dispute settlement clause in the charterparty. However, the application of the arbitration provisions of the Rotterdam Rules will be limited only that states which will expressly declare to be bind by them.³⁸

It follows that arbitration issues in international commercial and maritime disputes are largely left to a national regulation through statutes

³⁶ See: The Hague/Hague- Visby Rules, Article 3 (8); The Hamburg Rules, Article 23 (1) and (2); The Rotterdam Rules, Article 7.

³⁷ See page 23, below.

³⁸ The Rotterdam Rules, Article 91.

and principles derived from court practice. In the US, a maritime arbitration is generally governed by the provisions of the Federal Arbitration Act,³⁹ in the UK by the Arbitration Act 1996.⁴⁰ Other countries have their own “arbitration codes.”

2.2 Formal requirements of an arbitration contract created by reference in the bill of lading to a charterparty arbitration clause

“The formal requirements of a contract in a narrow sense refer to the manner in which a contract must be marked or recorded.”⁴¹ This is mostly understand whether or not an agreement must be in writing,⁴² and an arbitration contract is one that has to be in writing. Arbitration contract created by reference in the bill of lading to the charterparty arbitration clause is based on provisions in standard forms of two documents – bill of lading and charterparty.

Therefore, this sub-chapter addresses the issue on “written form” requirement in relation to a charterparty arbitration clause incorporated in the bill of lading in general, and offers the analysis of incorporation clause and an arbitration clause in different bills of lading and charterparty forms.

³⁹ US Federal Arbitration Act, enacted February 12, 1925. Available at: <http://www.adr.org/sp.asp?id=29568>. Last visited at March 3, 2010.

⁴⁰ UK Arbitration Act 1996, into force since 31 January 1997. Available at: http://www.opsi.gov.uk/acts/acts1996/ukpga_19960023_en_1 Last visited at March 3, 2010.

⁴¹ Chitty on Contracts, Ch.4, and Treitel, The Law of Contract, (11th ed.), Ch.5, cited in Joseph, page 56, *supra note 9*.

⁴² Joseph, page 56, *supra note 9*.

2.2.1 Issue on “written form” requirement

Compared with general contract law where a contract can be evidenced by any means⁴³ the arbitration contract has to be in writing in order to be able to use all advantages attributed to it.⁴⁴ In relation to the maritime arbitration contracts, it is proper to discuss the necessary requirements in accordance with the New York Convention to be able to enforce an award in the New York Convention States. Article 2 paragraph 2 of the New York Convention prescribes:

The term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

How the above stated can be met in case of the charterparty arbitration clause incorporated in the bill of lading? The bill of lading contract is neither signed by both parties nor contained in an exchange of letters or telegrams. The bill of lading is signed by or on behalf of the carrier, but it is never signed by the third-party indorsee. In some cases, the carrier uses the information provided by the shipper to produce a mate's receipt acknowledging shipment of the goods and the charterer (or its agent) is then authorized to issue and sign the bill of lading in conformity with the mate's receipt, as agent of the master. As mentioned by Davies at best, it is the product of an exchange of correspondence between one of the contracting parties (the carrier) and a non-party (the charterer-shipper).⁴⁵

Even if Art. II § 2 the New York Convention is read literally, so that requirement is met by an exchange of letters or telegrams between anyone,

⁴³ “A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.” See: Article 11 of the UN Convention for the International Sale of Goods, 1980 (CISG). Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods.html Last visited at March 31, 2010.

⁴⁴ UK Arbitration Act 1996, Section 5 (1), *supra note* 40; US Federal Arbitration Act, Section 2, *supra note* 39.

⁴⁵ Davies, page 626, *supra note* 4.

whether or not they are a party to the contract, it would still not apply to an indorsed bill of lading.⁴⁶ The contract between the indorsee and the carrier is not "contained in" the written exchanges, it is contained in the bill of lading. The bill of lading may be the result of an exchange of letters or telegrams between the charterer-shipper and carrier. The intention of the paragraph is that if the contract between the parties is "contained in" a single written document, rather than an exchange of correspondence, both parties must sign that document. That is not true in case of indorsee who holds the charterparty bill of lading.⁴⁷

The issue that the writing requirement in the New York Convention is unduly restrictive and anachronistic was addressed before the UNCITRAL Working Group II in 2000.⁴⁸ In 2006 at the thirty-ninth session of UNCITRAL the Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of New York Convention was adopted which among other recommends as focus:

... that article II, paragraph 2, of the [New York Convention] be applied recognizing that the circumstances described therein are not exhaustive;

and

....that article VII, paragraph 1, of the [New York Convention] should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.⁴⁹

⁴⁶ *Ibid.*

⁴⁷ Davies, page 626, *supra note 4*.

⁴⁸ Report of the Working Group II on the work of its thirty – third session (Vienna, 21 November- 1 December, 2000). Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V00/604/07/PDF/V0060407.pdf?OpenElement> Last visited at March 31, 2010.

⁴⁹ UNCITRAL Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention), 7 July 2006. Available at: <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf> Last visited at March 31, 2010.

From the above mentioned statement it follows that although the exchange of messages between brokers is usually by e-mail, fax or telex, rather than an exchange of letters or telegrams, the definition in Art. II § 2 is merely inclusive and should be read broadly, so as not to exclude other forms of written communications regularly used to conduct commerce and not limit parties' rights to go for agreed arbitration. However, the issue of the arbitration contract between the carrier and consignee in the sense of the New York Convention requirement for written form is still disputable because there is usually no communication on this between the carrier and consignee before the contract is reached.

Court practice shows that generally "[i]f parties expressly incorporate the terms of a contract including the jurisdiction clause, it is sufficient if the terms to be incorporated are set out in recap telex or an exchange of telexes. It is not necessary that the terms be set out in a formal document as long as the terms to be incorporated are readily ascertainable."⁵⁰ In *P.E.P. Shipping (Scandinavia) APS v. Noramco Shipping Corp.*⁵¹ (1997) the parties agreed to use an earlier charter as a pro forma for the terms and conditions of the new charter. The court ruled that the arbitration clause of the pro forma was binding and enforceable. This was approved also in recent English case *The Epsilon Rosa*.⁵² On the contrary, when the terms to be incorporated are not readily ascertainable the court will hold them not to be incorporated.⁵³

⁵⁰ Joseph, page 146, *supra* note 9; See also: *Swiss Bank Corporation v. Novorissiysk Shipping Co. (The Petr Schmidt)*. [1995] 1 Lloyd's Rep. 287; *K/S v. BP France SA (Siboti)*. [2003] 2 Lloyd's Rep 364.

⁵¹ *P.E.P. Shipping (Scandinavia) APS v. Noramco Shipping Corp.* 1997 AMC 2933 (E.D.La.1997), cited in Michael Wilford, Terence Coghill, John D. Kimball, *Time charters*, 5th ed., LLP, London, 2003, page 497.

⁵² *Welex A.G. v. Rosa Maritime Limited, (The "Epsilon Rosa")*. [2003] 2 Lloyd's Rep. 509.

⁵³ *Sen Mar, Inc. v. Tiger Petroleum Corp.*, 774 F. Supp. 879, 882 (S.D.N.Y. 1991); *The Heidelberg*. [1994] 2 Lloyd's Rep. 287; *Samsun Corp. v Khozestan Machine Kar Co.*, 926 F.Supp. 436, 1996 AMC 1986 (S.D.N.Y. 1996), cited in Wilford, page 498, *supra* note 51; *Phoenix Bulk Carriers v. Oldendorff Carriers GMBH & Co.*, 2003 AMC 51 (S.D.N.Y. 2003), cited in Wilford, page 498, *supra* note 51.

*The Rice Company*⁵⁴ (2008) case shows that the lack of the written bill of lading does not exclude incorporation of the terms of a written charterparty. It was not disputed that a lack of a written bill of lading could exclude the incorporation of the arbitration clause. It was held that “[w]hen cargo has been stowed on board the vessel and bills of lading are issued, the bills of lading become binding contracts on the vessel *in rem* upon the sailing of the vessel with the cargo. The sailing of the vessel constitutes a ratification of bill of lading.”⁵⁵

2.2.2 Analysis of the bills of lading and charterparties forms

The earliest bills of lading dating back to the nineteenth century⁵⁶ were simply sheet of paper with details about the cargo and terms of the contract all contained together on one side.⁵⁷ Due to standardization of the trade documents generally, and the bills of lading in particular, most bills of lading are now on A4 paper with a standardized box layout on the face.⁵⁸ The content of bills is very similar, partly because of the influence of international bodies such as BIMCO.

Charterparty bills are normally distinguished from ordinary liner bills that might be issued in respect of a ship that happens to be under a charter, or bills which are in a full form dictated by the charterparty itself, but which are independent of it.⁵⁹ Typically, the charterparty bills of lading do not contain a forum selection clause or choice of law clause but often incorporate a charterparty arbitration clause. Many charterparty standard

⁵⁴ *The Rice Company (Suisse), S.A. v. Precious Flowers Ltd*, *supra* note 7; *Keytrade US, Inc. v. Ain Temouchent M/V*, 404 F.3d 891, C.A.5 (La.), 2005.

⁵⁵ *The Rice Company (Suisse), S.A. v. Precious Flowers Ltd*, *supra* note 7.

⁵⁶ Gaskell, page 31, *supra* note 15.

⁵⁷ Gaskell, page 29, *supra* note 15.

⁵⁸ Gaskell, page 32, *supra* note 15; The forms of the bills of lading are available at:

https://www.bimco.org/Corporate/Documents/Document_samples/Bill_of_Ladings.aspx

Last visited at March 31, 2010.

⁵⁹ Gaskell, page 692, *supra* note 15.

forms contain an arbitration clause providing for a specific court or courts of the carrier's or freight forwarder's principal place of business or give an option.

The writer provides an analysis below of the incorporation clauses in the different bills of lading forms and the charterparties' arbitration clauses to examine whether the references in bills of lading to the charterpartys' arbitration clauses gives clear information on arbitration contract to the holder of the bill of lading.

Older voyage charter bills like INTANKBILL 78, NUVOYBILL-84, SCANCONBILL 1993⁶⁰ do not refer expressly to incorporation of an arbitration clauses. INTANKBILL 78 incorporates "all terms and conditions, liberties and exemptions as per TANKER VOYAGE CHARTERPARTY" which has to be identified by code, name, place and date of issue. NUVOYBILL-84 issued to be used with NUVOY-84 charterparty identified by date and place, states that "all terms of charterparty" are incorporated. Universal voyage charterparty NUVOY-84⁶¹ refers that "any disputes arising under this charter" shall be referred to arbitration in accordance with parties' option indicated on the bill of lading. SCANCONBILL 1993 issued to be used with SCANCON charter incorporates "all the terms, conditions, liberties and exemptions" of the charterparty identified by date. However, voyage charter SCANCON⁶² does not include arbitration clause at all.

The most best-known and most used of the charterparty bills, CONGENBILL 1978,⁶³ revised in 1994, 2000, and 2007, was mainly intended to be used with the GENCON Charter but could also be used with other charterparties. The GENCON,⁶⁴ the best-known and most widespread contractual voyage charter model, until its 1994 revision, did not provide for any arbitration agreement. Therefore, the CONGENBILL in conjunction

⁶⁰ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁶¹ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁶² See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁶³ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁶⁴ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

with the GENCON Charter was revised to ensure that the incorporation clause in the bill of lading incorporates BIMCO Standard Law and Arbitration Clause from GENCON charter.⁶⁵ BIMCO Standard Law and Arbitration Clause provides that “any disputes arising out of this Charterparty or any The bill of lading issued hereunder” shall be referred to the arbitration in London conducted in accordance with London Maritime Arbitration Association (hereinafter LMAA) terms, or arbitration in New York in accordance with the rules of Society of Maritime Arbitrators, Inc. (hereinafter SMA), or to arbitration place at parties’ option in accordance with the rules applicable there. If choice in Box 25 is not provided the disputes go to London arbitration.

Revision was done taking into consideration an approach of the English court to the incorporation issue.⁶⁶ Since 1994, the “Law and arbitration” clause is incorporated in the CONGENBILL.⁶⁷

Similarly, AUSTWHEATBILL, CHEMTANKVOYBILL, NORGRAINBILL, POLCOALBILL, QAFCOBILL 2001, RUSWOODBILL incorporates the arbitration clauses by express reference to the arbitration clause in the charterparty.⁶⁸ All these bills are designed to be used with the particular charters identified by date except POLCOALVOY charter, which has to be identified not only by date, but also by the contract number and stem number. In accordance with the Austwheat Charter 1990, amended 1991,⁶⁹ any dispute arising under the charterparty from events, which occur in Australia, has to be decided by the

⁶⁵ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁶⁶ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁶⁷ Congenbill 1994: “All terms and conditions, liberties, and exceptions of the Charterparty, dated as overleaf, including the Law and Arbitration Clause (Cl.41) are herewith incorporated.”

Congenbill 2007: “All terms and conditions, liberties, and exceptions of the Charterparty, dated as overleaf, including the Law and Arbitration Clause/Dispute Resolution Clause, are herewith incorporated.” See:

https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁶⁸ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁶⁹ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

arbitration in Australia and the dispute arising from events, which occur in other places, goes to arbitration in London. The Standard voyage charterparty CHEMTANKVOY⁷⁰ includes BIMCO standard arbitration clause. NORGRAIN 89⁷¹ charterparty states that the arbitration for “all disputes arising out of this contract” is carried out in New York or in London. One option should be deleted as appropriate. Voyage Charter 1971 model contract POLCOALVOY,⁷² modified in 1997, provides that “any disputes arising under this charterparty and any the bill of lading issued hereunder” addresses to the arbitration identified in box 35. If agreed that arbitration place is London, then Clause 33 provides detailed procedure. Voyage charter form QAFCOCHARTER⁷³ states that “any dispute arising out of or in connection with this Charterparty” shall be referred to the arbitration in London. RUSWOOD charterparty⁷⁴ declares that “any dispute arising out of Charterparty or The bill of lading hereunder issued” shall be referred to the arbitration in London or at another place.

The arbitration clause in the Asbatankvoy Form of the tank voyage charterparty allows for a arbitration in New York or London by arbitrators not restricted to commercial men and specifies the procedure for compelling the constitution of an arbitration panel. The SYNACOMEX 2000, created by the Syndicat National du Commerce Extérieur des Céréales of Paris in 1957, modified in 1960, 1974, and 1990 and finally in 2000 assigns the dispute resolution to the arbitration at the Chambre Arbitrale Maritime de Paris.⁷⁵ The American Welsh Coal Charter model contract AMWELSH 93 created in 1953, modified in 1979 and in 1993, provides that “all disputes arising out of this contract” shall be arbitrated in New York or in London.⁷⁶

⁷⁰ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁷¹ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁷² See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁷³ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁷⁴ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁷⁵ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁷⁶ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

Modern charterparty forms like BIMCHEMVOYBILL 2008, CEMENTVOYBILL 2006, COAL-OREVOYBILL, FERTICONBILL 2007, GASVOY 2005, GRAINCONBILL, HEAVYCONBILL 2007, HEAVYLIFTVOYBILL⁷⁷ expressly refer to the dispute resolution clause, i.e. that “all terms and conditions, liberties, and exceptions of the Charterparty, dated as overleaf, including Dispute Resolution Clause, are herewith incorporated.”⁷⁸ In accordance with BIMCO Standard Dispute Resolution Clause the parties should make a choice between (a) London, (b) New York and (c) any other place and state their choice in the appropriate box in Part I. Otherwise, sub-clause (a) which provides for English law will apply. Sub-clause (d) which provides for the referral of the dispute to mediation will always apply. All these bills are designed to be used with the particular charterparty, which has to be identified by date on the bill of lading. All particular charterparties include BIMCO Standard Dispute Resolution Clause.

Among the contractual forms of time charterparty, the best known and most widespread are the Time Charter New York Produce Exchange Form NYPE 93 and the Uniform Charterparty BALTIME 1939.⁷⁹ NYPE 93 first was created in 1913, modified in 1921, 1931, 1946, 1981 and 1993. The NYPE charterparty states that “all disputes arising out of this contract” should be arbitrated in London or New York, without indicating which choice shall be the default. Parties can delete paragraph (a) or (b) as appropriate.

BALTIME 1939, revised 2001, now includes BIMCO new dispute resolution clause for “any disputes arising out of or in connection with Charter”. Other revised model contracts such as BIMCHEMTIME 2005, the first standard time charterparty designed specifically for container vessels BOXTIME 2004, and Time Charterparty for Offshore Service Vessels SUPPLYTIME 2005 also include BIMCO new dispute resolution clause.⁸⁰

⁷⁷ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁷⁸ See https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁷⁹ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁸⁰ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

BPTIME3 Time Charterparty provides for an option to refer the disputes to the High Court in London or, by mutual agreement, to arbitration. Uniform time charterparty for vessels carrying liquid gas the GASTIME form states that "any dispute arising out of this Charterparty" shall go to arbitration in London if parties do not state other option. General time charterparty GENTIME contains BIMCO Standard Law and Arbitration Clause that "any disputes arising out of or in connection with this Charterparty" shall go to arbitration in London, New York, or other mutually agreed place. If parties' choice is not indicated, the dispute goes to arbitration in London.⁸¹

It follows from the above discussed that the vast majority of the charterparties contain the arbitration clauses that call for an arbitration in London or New York, or other place in accordance with the parties' agreement. Not so many charterparties of the mentioned above contain only one option for an arbitration place. That means that even if the bill of lading includes references to the charterparty, the shipper has no information on a particular arbitration place indicated in the charterparty as the terms of the charterparty are not enclosed in the bill of lading. Sometimes it is difficult for the consignee to obtain a copy of the charterparty.⁸² Provisions of dispute resolution are even more unclear where a newly developed BIMCO standard dispute resolution clause is incorporated in the bill of lading as ordinary meaning of term "dispute settlement" means also litigation. Even when the shipper possesses information within the negotiations of a bill of lading, it is very unlikely that a third party holder of a bill of lading will be aware of it.⁸³

⁸¹ See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

⁸² *The "Wadi Sudr"*, *supra note 21*.

⁸³ See: Force, Davies, page 3, *supra note 15*; Caslav Pejovic, 'The identity of carrier problem under the charters: diversity despite unification of law', (2000) 31 JMARLC 379 (Journal of Maritime Law and Commerce). Available on the internet at *Westlaw* database. Last visited at January 4, 2010.

2.3 Contractual nature of arbitration clause

The position of an arbitration clause as one of the contracts, usually contained in other contract, is supported by the principle of separability. As in any contract also in an arbitration agreement, the parties' intention to undertake certain rights and obligations is paramount to conclude that the contract between the parties is binding. A party has the rights to claim the satisfaction for damages from another party who has breached its obligations under the arbitration contract. The writer addresses these issues here below in relation to contractual nature of the charterparty arbitration clause incorporated by reference in the bill of lading.

2.3.1 Separability of arbitration clause

The principle of separability means that “[i]n the case of both an arbitration and choice of court agreement, the parties have given rise to a separable contractual obligation for the resolution of their disputes. In each case this agreement stands and operates independently of the life of the substantive contract.”⁸⁴ This principle is well established in legislation and court practice of common and civil law countries.⁸⁵

Lord Diplock in *Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd*⁸⁶ (1981) stated:

“...an agreement to submit future disputes to arbitration is an agreement ancillary to the substantive contract as to what each party will do upon occurrence of an event, namely the occurrence of dispute within the terms of the arbitration agreement. The arbitration agreement can remain executory long after the performance of the primary obligations under the substantive contract. It remains executory while any disputes remain unresolved. The

⁸⁴ Joseph, page 100, *supra* note 9.

⁸⁵ See: Joseph, page 104, *supra* note 9; Adrian Briggs, *Agreements on jurisdiction and choice of law*, eds. Adrian Briggs, Oxford University Press, Oxford, 2008, page 102; UK Arbitration Act 1996, Section 7, *supra* note 40.

⁸⁶ *Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] A.C. 909, 981 -982.

arbitration agreement survives repudiation of the substantive bargain. Likewise, the arbitration agreement survives frustration irrespective of whether the substantive contract remained wholly executory at the time of the frustration.”⁸⁷

In *Harbour Assurance Co. (UK) Ltd v Kansa General International Insurance Co. Ltd*⁸⁸ (1993) it was held, that an arbitration agreement was a separate and collateral contract and that the alleged illegality of the reinsurance did not affect the validity of the arbitration agreement. In *The Fiona Trust & Holding Corporation and Others v. Privalov and Others*⁸⁹ (2007) the shipowner disputed that the charterparty, including an arbitration clause, is invalid because its conclusion was affected by bribery. The Court of Appeal rejected the owners' arguments and held that “arbitration clause is a separate (and unrescinded) agreement unimpeached by the claim to set aside the charterparties and wide enough to determine whether the charterparties can indeed be set aside.”⁹⁰

The separability of an arbitration clause requires an express intention to be bound by arbitration clause also in the dispute regarding the enforceability of the arbitration clause incorporated from the charterparty to the holder of a bill of lading.

2.3.2 Intention and parties autonomy

“In an international commercial arbitration the arbitration agreement is seen as an expression of the will of the parties”⁹¹ and “a party cannot be required to submit to arbitration any dispute which he has not agreed so to

⁸⁷ Joseph, page 98, *supra* note 9.

⁸⁸ *Harbour Assurance Co. (UK) Ltd v Kansa General International Insurance Co. Ltd and others* [1993], (*Harbour v Kansa*). 1 Lloyd’s Rep. 455.

⁸⁹ *Fiona Trust & Holding Corporation and Others v. Privalov and Others*, [2007] 2 Lloyd’s Rep. 267, CA (Civ Div).

⁹⁰ *Ibid.*

⁹¹ Alan Redfern, Martin Hunter, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, London, 1986, page 4.

submit.”⁹² The intention of the holder of a bill of lading to be bound by a charterparty arbitration clause is central in the disputes on the validity of the arbitration contract created by the reference to the charterparty.

In order to state that the holders of the bills of lading have an intention to be bound by the charterparty arbitration clause incorporated in the bill of lading, they have to be aware of the incorporation of arbitration clause. In the ordinary way the shipper does not know that the vessel carrying cargo is under a time charter. The next, is to know which charter is sought to be incorporated. The ship’s master may not even have a copy on board, especially where there are sub-charters, and will be equally ignorant.⁹³ Unless the bill of lading holder can have the copy of a charterparty it will not have a clear idea on the particular arbitration clause in case of a potential dispute. Even if, as a business person, the holder of the bill of lading should know that the transportation agreement will probably contain a forum selection clause because such clauses are frequently used, he has no way of knowing which forum selection or arbitration clause is selected. Because as it follows from the analysis of charterparty forms above usually there are two or three options for arbitration in case of dispute and modern forms offer even more complex provisions by adding mediation as an option.

The typical situation of these confusing legal relations between charterer, shipowner and consignee in a contract of carriage can be found in *Hawkspere Shipping Co., Ltd. v. Intamex, S.A.*:⁹⁴

ICTS [charterer] played no role in the preparation of the bills of lading, as the bills involved only Hawkspere [shipowner], as carrier, and Intamex and Amalco [Shippers], as shippers. Conversely, Intamex and Amalco were in no way involved with the Hawkspere-ICTS voyage charterparty. In fact, prior to the initiation of this admiralty proceeding, neither Intamex nor Amalco ever saw a copy of the charterparty, nor were they otherwise aware of its terms. Moreover, neither shipper had any communication whatsoever with Hawkspere prior to the June 2000 arrival of their cargo in Baltimore.

⁹² Hosking, *supra* note 6.

⁹³ Gaskell, page 693, *supra* note 15.

⁹⁴ *Hawkspere Shipping Co., Ltd. v. Intamex, S.A.*, 330 F.3d 225, C.A.4 (Md.), 2003.

The holder of the bill of lading, which does not participate in the formation of, or is otherwise unaware of, the charterparty, should not be held to the terms of which existence he does not know. “When incorporating terms and conditions of another contract, it is not generally possible to conclude that the parties intended to make the separate and ancillary dispute resolution provision part of their agreement without express reference.”⁹⁵

2.3.3 Breach of arbitration clause

The presence of an arbitration clause in the contract means that the parties recognize that one or another may perform or fail to perform an agreement and that the other party may be entitled to redress.⁹⁶

A breach of an arbitration contract will have a range of consequences. The innocent party can seek an order for performance of the contract, to claim damages, or to terminate the contract, or some combination of these.⁹⁷ However, it could be reconsidered whether an arbitration agreement is wide enough to include claims for damages caused by the breach of an arbitration agreement.⁹⁸

In relation to the claim for damages, it is suggested that “ordinary contractual principles governing causation, proximity and mitigation will apply. (...) Subject to questions of remoteness, an innocent party ought to be compensated by the contract breaker by payment of such sum as will put the innocent party to the position it would have enjoyed had the contract had been performed.”⁹⁹ Usually loss that a party will suffer is the reasonable costs incurred in dealing with the proceedings brought in the breach of

⁹⁵ Joseph, page 144, *supra* note 9.

⁹⁶ Force, Davies, page 3, *supra* note 15; Daniel Tan, Enforcing international arbitration agreements in federal courts: rethinking the court’s remedial powers, (2007) 47 VAJIL 545 (Virginia Journal of International Law). Available on the internet at *Westlaw* database. Last visited at January 4, 2010.

⁹⁷ Richard Stone, ‘The modern law of contract’, ed. Richard Stone, 7th ed., Routledge-Cavendish, Abingdon, 2008, page 547.

⁹⁸ Joseph, page 403, *supra* note 9.

⁹⁹ Joseph, page 401, *supra* note 9.

contract: “the legal fees and related costs incurred by the defendant in investigating and defending the claims in the foreign proceedings instituted by the plaintiff in breach of the exclusive forum selection clause.”¹⁰⁰

“Whereas the domestic law of remedies offers a sophisticated framework of responses to address the breaches of legal obligations, in the private international law context, the proper remedial responses to breaches of forum selection agreements remain unclear. Despite the prevalence of arbitration agreements in international commercial contracts, the remedies that the courts may use to enforce these agreements and the circumstances in which these remedies would be available are still uncertain.”¹⁰¹ Therefore, each case has to be looked at its own facts.¹⁰²

¹⁰⁰ William Tetley, ‘Jurisdiction Clauses and *Forum Non Convenience* in the Carriage of Goods by Sea’ in *Jurisdiction and Forum Selection in International Law. Essays in Honor of Robert Force*, eds. Martin Davies. Kluwer Law International, Hague, 2005, page 260.

¹⁰¹ Tan, *supra note 96*.

¹⁰² Joseph, page 403, *supra note 9*.

3 Rules for valid incorporation in accordance with recent courts' practice

The general rule of incorporation of the arbitration clause from the charterparty in the bill of lading is the “express terms” requirement.¹⁰³ If the general words of incorporation in the bill of lading will be effective to incorporate the terms germane to the shipment, then such general words are not effective to incorporate an arbitration clause.¹⁰⁴ Nevertheless, a valid arbitration agreement can be created also if the incorporation clause in the bill of lading is general but sufficiently wide to incorporate an arbitration clause from the charterparty and the arbitration clause in the charterparty expressly refers to the disputes under the bill of lading.¹⁰⁵ Although under both English and American practices, the emphasis is on the express incorporation terms in the bill of lading, the US approach can be treated as a question of notice,¹⁰⁶ and is criticized by supporters of the English approach.¹⁰⁷

¹⁰³ Joseph, page 140, *supra* note 9.

¹⁰⁴ Joseph, page 140, 142, *supra* note 9.; Stewart C. Boyd, Steven Berry, Andrew S. Burrows, Bernard Eder, David Foxtton, Christopher F. Smith, *Scrutton on charterparties and bills of lading*, 21st ed., Sweet & Maxwell, London, 2008, page 75; Cooke, *Voyage charters*, page 450, 451, *supra* note 6.

¹⁰⁵ See: *Chorley and Giles' shipping law*, page 267, *supra* note 2; *The Rena K* [1978] 1 Lloyd' s Rep. 545.

¹⁰⁶ Force, Davies, pages 28-32, *supra* note 15.

¹⁰⁷ “What is required is incorporation, not notice of the existence or terms of the other contract. Unfortunately, the matter is complicated by the accumulation of a century’s worth of authority, much of it conflicting and some of it now dated and in need of reconsideration.” Cited in Gaskell, page 694, *supra* note 15; See also: Force, Davies, page 32, *supra* note 15.

The next issue that is important, in holding of whether the arbitration clause is validly incorporated in the bill of lading or not, is the identification of the particular charterparty. Quite often in the shipping business ships are chartered and sub-chartered so that it is not easy to discern which is the carrier and which charterparty in a chain of charterparties were intended to be incorporate into the contract if the printed form of bill is not completed and does not identify the charterparty.

In this chapter, the writer provides an analysis to the “express terms” requirement and the issue of identification of the charterparty in accordance with recent English and American cases. In order to show the development of the existing rule in this particular area the writer provides on insight also into earlier leading court cases.

3.1 English courts’ approach

The analysis of the English approach is based on the following recent cases: *The "Delos"*¹⁰⁸ (2001); *The Siboti*¹⁰⁹ (2003); *The "Epsilon Rosa"*¹¹⁰(2003); *The "Ythan"*¹¹¹ (2007); *The "Skier Star"*¹¹² (2008); *The "Kallang" (No 2)*¹¹³ (2008); *The "Duden"*¹¹⁴ (2008); *The "Wadi Sudr"*¹¹⁵ (2009).

¹⁰⁸ *The "Delos"*. [2001] 1 Lloyd's Rep. 703.

¹⁰⁹ *The Siboti*, *supra* note 50.

¹¹⁰ *The "Epsilon Rosa"*, *supra* note 52.

¹¹¹ *Primetrade AG v. Ythan Ltd (The "Ythan")*. [2005] EWHC 2399 (Comm).

¹¹² *Verity Shipping SA and Another v. NV Norexa and Others (The "Skier Star")*. [2008] 1 Lloyd's Rep. 652.

¹¹³ *Kallang Shipping SA Panama v. Axa Assurances Senegal and another (The "Kallang" (No 2))*. [2009] 1 Lloyd's Rep. 124.

¹¹⁴ *Sotrade Denizcilik Sanayi VE Ticaret AS v. Amadou LO and others (The "The "Duden")*. [2009] 1 Lloyd's Rep. 145.

¹¹⁵ *The "Wadi Sudr"*, *supra* note 21.

3.1.1 Express terms in incorporation clause of the bill of lading

The “express terms” requirement is very strictly upheld by English courts. In accordance with the English approach an express incorporation terms mean that the terms contain an explicit reference to arbitration like in a Congenbill 1994.¹¹⁶ The principle that the arbitration clause can not be incorporated by general terms is quite old. “The development of this attitude can be traced back to *Hamilton & Co. v. Mackie & Sons*, [(1889) 5 T.L.R. 677.] decided over 100 years ago.”¹¹⁷

The next leading case *TW Thomas & Co Ltd v Portsea Steamship Co Ltd*¹¹⁸ which still remains leading in this area is from 1912. In this case the House of Lords held that the words “Deck load at shipper’s risk, and all other terms and conditions and exceptions of charter to be per charterparty” written on the margin of the bill of lading were too general to incorporate the arbitration clause in the bill of lading. The interpretation of *Thomas v. Portsea* for quite long was that general words of incorporation are never sufficient to incorporate an arbitration clause from a charterparty¹¹⁹ and this interpretation dominated and was supported by English authorities till *The Merak*¹²⁰ (1964).

The recent English cases follow the same strict approach. In *The “Delos”*¹²¹ (2001), *The Epsilon Rosa* (2003), *The “Ythan”* (2007), *The*

¹¹⁶ „All terms and conditions, liberties and exceptions of the Charterparty, dated as overleaf, including the Law and Arbitration Clause (Cl.41) are herewith incorporated.” See: https://www.bimco.org/en/Corporate/Documents/Document_samples.aspx

¹¹⁷ ‘Case Comment, Charterparty arbitration clause not incorporated in the bill of lading’, Sweet & Maxwell Limited and Contributors, 1989, May, J.B.L. (Journal of Business Law). Available on the internet at Westlaw database. Last visited at April 12, 2010.

¹¹⁸ *TW Thomas & Co Ltd v Portsea Steamship Co Ltd*. [1912] A.C. 1 (HL).

¹¹⁹ Paul Todd, ‘Interpretation of arbitration clauses into bills of lading’, (1997) J.B.L., Jul, 331-349 (Journal of Business Law). Available on the internet at Westlaw database. Last visited at January 4, 2010.

¹²⁰ *The Merak*. [1964] 2 Lloyd’s Rep. 527; [1965] P. 223.

¹²¹ *The “Delos”*, *supra* note 108.

“*Skier Star*” (2008), *The “Wadi Sudr”* (2009), *The “The “Kallang”” (No 2)* (2009), *The “The “Duden”* (2009) the arbitration clauses were incorporated by the explicit reference to arbitration. The role of the terms of the bill of lading and particularly the role of the express incorporation terms was emphasized in *The Siboti* (2003):

The inquiry begins and ends with the bill of lading. It is unnecessary and irrelevant to have regard to the terms of the charter-party. (...) The intention of the parties *to the charter-party*, expressed in cl. 49(e) is irrelevant to the construction of the bill of lading contract.

“In order to give effect to the parties’ expressed intention to arbitrate or litigate disputes under the subject contract, the English courts have shown a willingness to adapt or manipulate the wording of the dispute resolution provision in the incorporated contract so that disputes under the subject contract are referred to arbitration or litigation as the case may be. Again, however, it is a matter of construction in each case.”¹²²

3.1.2 General terms in incorporation clause of the bill of lading

Nevertheless, there is the English case, which shows that incorporation can be made valid also without express reference to the arbitration clause in the bill of lading. If incorporating words of the bill of lading are general but wide and an arbitration clause expressly addresses both disputes under the charterparty and disputes under any bill of lading issued under it, the charterparty arbitration clause can be incorporated in the contract.

¹²² Joseph, page 145, *supra note 9*; *The Rena K*, *supra note 105*; *Pride Shipping v. Chung Hua Pulp* [1991] 1 Lloyd’s Rep. 126; *Daval Aciers d’ Usinor v. Armare S.R.L. (The Nerano)* [1996] 1 Lloyd’s Rep. 1.

In *The Merak*¹²³ (1964) there were two charterparty contracts on the same form and in the same terms. After loading of cargo, the bills of lading were issued with the following incorporation clause:

"All the terms, conditions, clauses and exceptions including clause 30 contained in the said charterparty apply to this the bill of lading and are deemed to be incorporated herein."

The additional complication in that case was caused because clause 30 was a misprint for clause 32, which was the arbitration clause. Clause 30 gave the shipowner a right to substitute another vessel for the voyage, and was completely inappropriate for incorporation in the bill of lading. The other clause of the charterparty stipulated that any bills of lading should incorporate "all the terms, conditions, clauses (including clause 32) ... as per this charter", and clause 32 expressly applied to disputes under both the bill of lading and the charterparty. It was clear that it was the intention of all parties that the arbitration clause was incorporated, and if there would not been the misprint there would have been no doubt. The Court's of Appeal expressed the opinion that it is not allowed simply to substitute in the bill of lading "clause 32" for "clause 30".

The Court of Appeal distinguished *Thomas v. Portsea* on the wording of the arbitration clause, applying as it has referred to the disputes under the bill of lading rather than being limited to the disputes under the charterparty. Davies L.J. also distinguished *Thomas v. Portsea* on the ground that this was an exceptional case, quite unlike the normal case where the bill of lading was in the hands of a stranger, because the plaintiffs actually knew of the terms of the charterparty, even with "clause 32" mistakenly replaced by "clause 30", the incorporation clause was as wide as it could be, and certainly far wider than that in *Thomas v. Portsea*. The following principles were derived by the court in this case:

First, in order to decide whether a clause under a bill of lading incorporates an arbitration clause in a charterparty it is necessary to look at both the precise words in the bill of lading alleged to do the incorporating, and also

¹²³ *The Merak*, *supra* note 120.

the precise terms of the arbitration clause in the charterparty alleged to be incorporated. Secondly, it is not necessary, in order to effect incorporation, that the incorporating clause should refer expressly to the arbitration clause. General words may suffice, depending on the terms of latter clause. Thirdly, when the arbitration clause is, by its terms, applicable only to disputes under the charterparty, general words will not incorporate it in the bill of lading so as to make it applicable to disputes under the contract contained in, or evidenced by, that document. Fourthly, where the arbitration clause by its terms applies both to disputes under the charterparty and to disputes under the bill of lading, general words of incorporation will bring the clause in the bill of lading so as to make it applicable to disputes under that document.¹²⁴

The outcome of *The Merak* can be seen as a serious challenge for the courts in later disputes where an incorporation clause was in general wording. In *The Federal Bulker*¹²⁵ (1989) the bills of lading included general incorporation clause:

"All terms, conditions and exceptions as per charterparty dated January 20, 1986, and any addenda thereto to be considered as fully incorporated herein as if fully written."

The charterparty, which was on the Baltimore Berth Grain Charterparty Form C. provided that "[i]t is also mutually agreed that this contract shall be completed and superseded by the signing of Bills of Lading in the form customary for such voyages for grain cargoes, which Bills of Lading shall contain the following clauses." An arbitration clause provided that "[a]ll disputes from time to time arising out of this contract shall ... be referred to the final arbitrament of two Arbitrators carrying on business in London ...".

The vessel sailed to Japan. The bills of lading were negotiated to nine cargo receivers, who complained that the goods had been delivered in a damaged condition. As a result, arbitration proceedings were begun in

¹²⁴ *The Merak*, *supra* note 120.

¹²⁵ *Federal Bulk Carriers Inc v C Itoh & Co Ltd (The Federal Bulker)*. [1989]. 1 Lloyd's Rep. 103 (CA (Civ Div)).

London by the charterers and the nine cargo receivers against the shipowners. The shipowners did not challenge the arbitrators' jurisdiction to resolve the charterers' claim against them, because in accordance with the above mentioned arbitration clause it was clear that there was a binding arbitration contract between the shipowners and charterers. The shipowners contested that there was no arbitration agreement between them and the cargo receivers. The Court of first instance decided in favour of the shipowners, and the cargo receivers appealed.

The main question before the Court of Appeal was whether the charterparty arbitration clause could be construed as being within one or other of the items in the phrase "terms, conditions and exceptions." According to the court, the nearest case in which the similar language used in the present case had proved effective to incorporate a charterparty arbitration clause was *The Merak* (1964). The Court of Appeal concluded that the arbitration clause was not incorporated, because "all terms" are not so wide as "clauses" that was used in *The Merak* (1964). Furthermore the words in the charterparty "under this contract" in their context meant "under this charterparty contract," and did not include the bill of lading contract.¹²⁶

In *The "Delos"*¹²⁷ (2001) the two forms of the bill of lading were issued one of which on a Congenbill form by an explicit reference incorporated the charterparty arbitration clause, second form on an Ocean bill stated that "all the terms whatsoever of the said charter ... apply to and govern rights of the parties..." The incorporation by the Congenbill was valid but in regarding to the Ocean Bill court stated:

... the Ocean bills did not make any reference to any arbitration clause nor did the arbitration clause in the charter-party refer to the bills; it was not necessary to consider the logic of incorporation derived from a provision in the charter-party because there was no relevant explicit reference at all.¹²⁸

¹²⁶ *The Federal Bulker*, *supra* note 125.

¹²⁷ *The "Delos"*, *supra* note 108.

¹²⁸ *The Delos*, *supra* note 108.

In *The Siboti*¹²⁹ (2003) the incorporation clause in the bill of lading also was in general terms: “all the terms whatsoever of the said charter apply to and govern the rights of the parties concerned in this shipment...” Similarly, like in *The Merak* the charterparty included the express reference to the bill of lading: “All bills of lading under this Charterparty shall incorporate this exclusive dispute resolution clause.” The court held that the word "clauses" in *The Merak* was sufficient to incorporate the arbitration clause, whereas the word “all terms whatsoever” in particular case is insufficient to incorporate the arbitration clause from the charterparty.

“*The Merak* alone stands in the way of the general conclusion that arbitration clauses, whatever their wording, can be incorporated only by explicit words in the bill of lading. All other contrary statements are no more than dicta (since only in *The Merak* was the arbitration clause actually incorporated).”¹³⁰

3.1.3 Identification of a charterparty in the bill of lading

Under recent UK, case law if there is no doubt about the incorporated charterparty than lack of date or parties’ names in relation to the charterparty do not affect validity of an arbitration contract.¹³¹

In *The Epsilon Rosa* (2003) where a printed box: “Freight payable as per CHARTER-PARTY dated...” was left blank the court stated that “the absence of an identifying date on the bill of lading did not negative the incorporation”. In *The Wadi Sudr* (2008) the bill of lading did not identify the charterparty whose terms were to be incorporated. The court held that “it is well-established that where a the bill of lading purports to incorporate a

¹²⁹ *The Siboti*, *supra* note 50.

¹³⁰ Paul Todd, *supra* note 119.

¹³¹ *Scrutton on charterparties and bills of lading*, page 72, *supra* note 104; *Pacific Molasses Co and United Molasses Trading Co v Entre Rios Compania Naviera SA (The San Nicholas)* [1976] 1 Lloyd's Rep. 8 (CA (Civ Div)); *The SLS Everest*, [1981] 2 Lloyd's Rep. 389; *The Siboti*, *supra* note 50.

charter, but fails to identify its date or other details of the charter concerned, that is not fatal to the incorporation of the charter if it can otherwise be properly identified.”¹³²

More problematic issue for the English courts is to find which charterparty is incorporated if there is more than one, which is not identified.

First, if there is conflict between the head charter and sub-charters, there is quite a strong tendency following the leading case in this area *The San Nicholas*¹³³ (1976) that the incorporation clause incorporates the head charter, since that is the one to which the shipowner, who issues the bill of lading, is a party.¹³⁴

Prevalence of the head charter is still under discussion, especially when different kinds of charters are involved.¹³⁵ “[I]n *The San Nicholas* both the head and the sub-charterparty were voyage charters and the position is different where the head charter is a time charterparty. Many of the terms of a time charterparty are quite inappropriate for incorporation in the bill of lading, for example reference to the period, delivery, redelivery, and hire. So, if the head charterparty is a time charter, and the sub-charter is a voyage charter, the general rule will not apply, and the sub-charter will be incorporated.”¹³⁶

This principle was approved in the recent cases *The Kallang*¹³⁷ (2008) and *The Wadi Sudr*¹³⁸ (2008). In *The Kallang* there were two charterparties dated 1 February 2005. On 1 February 2005 the vessel *Kallang* was

¹³² *The Wadi Sudr*, *supra* note 21.

¹³³ *The San Nicholas*, *supra* note 131.

¹³⁴ See: Todd, page 190, *supra* note 6; *Scrutton on charterparties and bills of lading*, page 72, *supra* note 104; Cooke, page 454, *supra* note 6; Gaskell, page 696, *supra* note 15.

¹³⁵ Lars Gerspacher, ‘The ambiguous incorporation of charterparties into bills of lading under English law: a case of too many cooks?’, (2006) 12 JIML 3 (Journal of International Maritime Law), page 197; *Scrutton on charterparties and bills of lading*, page 72, *supra* note 104.

¹³⁶ Todd, page 190, *supra* note 6; Gaskell, page 696, *supra* note 15.

¹³⁷ *The Kallang*, *supra* note 113.

¹³⁸ *The Wadi Sudr*, *supra* note 21.

chartered by the owners to Brobulk Ltd on the NYPE form (time charter) and on the same day the vessel was sub-chartered on the Gencon form (voyage charter). Each had an English arbitration clause but in slightly different terms. The bills of lading expressly states that all terms and conditions, liberties and exceptions of the charterparty dated 1 February 2005 "including the Law and Arbitration Clauses" were incorporated. On general principle, because of the express identification of the arbitration clause, that would be sufficient to incorporate a charterparty arbitration clause. Arbitrator Jonathan Hirst QC held:

That is naturally a reference to the voyage charter under which freight (as opposed to hire) is payable. Further the terms of the voyage charter are more naturally germane to a bill of lading. In my judgment, it is clear that the intention was to incorporate the terms of the voyage charter, including its arbitration clause, in the bill of lading contracts.¹³⁹

Similarly, in *The Wadi Sudr* the vessel was subject to various charters: a head time-charter dated 1 October 2007 containing English law and London arbitration clauses, a sub-time-charter to Morgan Stanley Capital Group Inc (Morgan Stanley), and a voyage charter between Morgan Stanley and Carboex which contained a London arbitration clause. The bill of lading did not identify the charter whose terms are to be incorporated.¹⁴⁰ The court ruled in favour of the voyage charter:

In my judgment, the more appropriate candidate for incorporation here is the voyage charter, for the following reasons:

- (i) the head charter is a time charter, many of the terms of which would not be relevant in the context of the bill of lading contract;
- (ii) the voyage charter is a contract of affreightment on voyage charter terms, for the carriage of the coal from the loading port in Indonesia to Ferrol (alternatively, Carboneras).¹⁴¹

¹³⁹ *The Kallang*, *supra* note 113.

¹⁴⁰ *The Wadi Sudr*, *supra* note 21.

¹⁴¹ *The "Wadi Sudr"*, *supra* note 21.

3.2 American courts' approach

Also under the US court express incorporation terms in the bills of lading are the main rule for incorporation of the charterparty arbitration clause. In *The Continental Ins. Co. v. Polish S.S.*, it was held:

“It has long been clear that “[w]here terms of the charterparty are (...) expressly incorporated into the bills of lading they are a part of the contract of carriage and are binding upon those making claim for damages for the breach of that contract just as they would be if the dispute were between the [parties to the charter agreement].” *Son Shipping Co. v. De Fosse & Tanghe*, 199 F.2d 687, 688 (2d Cir.1952).”¹⁴²

The following recent cases are addressed below in this chapter *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*¹⁴³ (2002); *Continental Ins. Co. v. Polish S.S. Co.*¹⁴⁴ (2003); *Cargill Ferrous Intern. v. SEA PHOENIX MV*,¹⁴⁵ (2003); *Hawkspere Shipping Co., Ltd. v. Intamex, S.A.*¹⁴⁶ (2003); *Keytrade USA, Inc. v. Ain Temouchent M/V*¹⁴⁷ (2005); *Ibeto Petrochemical Industries Ltd. v. M/T Beffen*¹⁴⁸ (2007); *The Rice Company (Suisse), S.A. v. Precious Flowers Ltd.*¹⁴⁹ (2008); *Cementos Andinos Dominicanos, S.A., v. Eitzen Sealift A/S and East Bulk Shipping SA*¹⁵⁰ (2008).

¹⁴² *Continental Ins. Co. v. Polish S.S. Co.* 346 F.3d 281, C.A.2 (N.Y.),2003.

¹⁴³ *Thyssen, Inc. v. Calypso Shipping Corp., S.A.* 310 F.3d 102. C.A.2,2002.

¹⁴⁴ *Continental Ins. Co. v. Polish S.S. Co.*, *supra* note 142.

¹⁴⁵ *Cargill Ferrous Intern. v. SEA PHOENIX MV.* 325 F.3d 695. C.A.5 (La.),2003.

¹⁴⁶ *Hawkspere Shipping Co., Ltd. v. Intamex, S.A.*, *supra* note 94.

¹⁴⁷ *Keytrade USA, Inc. v. Ain Temouchent M/V.*, *supra* note 54.

¹⁴⁸ *Ibeto Petrochemical Industries Ltd. v. M/T Beffen.* 475 F.3d 56. C.A.2 (N.Y.),2007.

¹⁴⁹ *The Rice Company (Suisse), S.A. v. Precious Flowers Ltd.*, *supra* note 7.

¹⁵⁰ *Cementos Andinos Dominicanos, S.A., v. Eitzen Sealift A/S and East Bulk Shipping SA*, 2008 WL 5473004 (S.M.A.A.S), SMA NO. 3993.

3.2.1 “Express terms” requirement

Because of a wide use of the modern forms of the bills of lading, usually the terms of bills of lading explicitly refers to the arbitration clauses like in *Thyssen, Inc. v. Calypso Shipping Corp. S.A.* (2002), *Keytrade USA, Inc. v. Ain Temouchent M/V.* (2005) and *Cementos Andinos Dominicanos, S.A., v. Eitzen Sealift A/S and East Bulk Shipping SA.* (2008) where the charterparty arbitration clauses were found incorporated. In *Hawkspere Shipping Co., Ltd. v. Intamex, S.A.* (2003) the bill of lading explicitly referred to the charterparty arbitration clause but the US Court of Appeals, Fourth Circuit, affirmed the judgment of a district court that the bill of lading did not in fact successfully incorporate the terms of a charterparty because the charterparty was not identified.¹⁵¹

Under the US court approach before establishing a valid incorporation of an arbitration clause there should be a valid incorporation of the charterparty for which the main criteria is whether the charterparty is identified on the bill of lading. It was held by court in *The Continental Ins. Co. v. Polish S.S. Co.* (2003):

“Generally, to incorporate a charterparty effectively, the bill of lading must "specifically refer[] to a charterparty" and use "unmistakable language" indicating that it is incorporated. See *Import Export Steel Corp. v. Mississippi Valley Barge Line Co.*, 351 F.2d 503, 506 (2d Cir.1965)

In that case above the clause in the bill of lading referred to the incorporation of all terms of charterparty but not explicitly to the arbitration clause. The charterparty arbitration clause stated "All disputes arising out of this contract which cannot be amicably resolved shall be refereed [sic] to Arbitration in London." The court found that the charterparty was effectively incorporated:

Here, the bills in question expressly incorporate all provisions of the charterparty. On their face they refer to conditions of carriage on the

¹⁵¹ *Continental Ins. Co. v. Polish S.S.*, *supra note* 142; See also *Cargill Ferrous Intern. v. SEA PHOENIX MV*, *supra note* 145.

overleaf, the first of which reads: "All terms and conditions, liberties and exceptions of the Charterparty, dated as overleaf, are herewith incorporated." We have previously concluded that similar language effectively demonstrates intent to incorporate the arbitration clause of a charterparty.¹⁵²

So in *Cargill Ferrous Intern. v. SEA PHOENIX MV* (2003) the US court of Appeals, Fifth Circuit, held that the incorporation clause "All terms and conditions, liberties and exceptions of the charter-party, dated as overleaf, are herewith incorporated" incorporated the arbitration clause even a charterparty was not identified but if from all facts it was clear which charterparty was intended to be incorporated.

Similarly in *Ibeto Petrochemical Industries Ltd. v. M/T Beffen*¹⁵³ (2007) the bill of lading stated that the shipment was "carried under and pursuant to the terms of the Charterparty dated 31 December 2003 between Chemlube International, Inc. as Charterer and Bryggen Shipping and Trading A/S as Owner and all conditions and exceptions whatsoever thereto." The charterparty Fixture incorporated the standard form Asbatankvoy Tanker Charterparty, which called for arbitration, and the Chemlube terms that provided for London as the place of arbitration and for the application of English law. The US Court of Appeals, Second Circuit, held that the bill of lading expressly incorporates arbitration clause:

We long have held that "a broadly-worded arbitration clause which is not restricted to the immediate parties may be effectively incorporated by reference into another agreement." (...) According to this rule, a charterparty provision for such arbitration is binding on the parties to a bill of lading that incorporates the Charterparty by reference. (...) In the case before us, the Charterparty was specifically identified by date (December 31, 2003) and by the parties thereto (...). That was more than sufficient to identify the relevant Charterparty (...) and therefore to give effect to the incorporation of the arbitration clause under the provision incorporating "all conditions and exceptions whatsoever."¹⁵⁴

¹⁵² *Continental Ins. Co. v. Polish S.S. supra note 142.*

¹⁵³ *Ibeto Petrochemical Industries Ltd. v. M/T Beffen, supra note 148.*

¹⁵⁴ *Ibeto Petrochemical Industries Ltd. v. M/T Beffen, supra note 148.*

Thus, “express terms” under the American approach has a completely different meaning if comparing with the English approach. If in according to the English approach, usually there is a need for an explicit reference in incorporation clause to the arbitration then under the American approach “all terms and conditions, liberties and exceptions” usually is enough express words for the incorporation of the arbitration clause. The American courts prior to deal with the incorporation of the arbitration clause will consider first whether all charterparty is incorporated. It is important for the charterparty incorporation to be sufficiently identified in the bill of lading.

3.2.2 Identification of a charterparty in the bill of lading

Under US approach to the incorporation as an issue of notice, the identification of particular charterparty in the bill of lading is very important in deciding whether a particular arbitration clause is incorporated or not.

Generally, the bill of lading efficiently incorporates a charterparty when its date, parties, and location are identified on the bill of lading. Although here is strong recent line of US decisions holding that there is sufficient notice on an arbitration clause merely if the date of the charterparty appears on the bill of lading and it is clear from other facts that only that particular charterparty can be incorporated.¹⁵⁵

If the charterparty is not specified by date or in any other way the arbitration clause could be held not incorporated. In *Cargill Ferrous Intern. v. SEA PHOENIX MV* (2003) the Court of Appeals of Fifth Circuit did not find incorporation where the space provided on the bill of lading for identifying of a charterparty was left blank:

In such situations, we have been unwilling to find incorporation. *GOLDEN CHARIOT*, 31 F.3d at 318 (“[W]here the date and name of the charterparty is left blank, there is no incorporation.”) (...) *Cargill Inc. v. GOLDEN CHARIOT MV*, 31 F.3d 316 (5th Cir.1994), and the cases applying it, make

¹⁵⁵ *Keytrade US, Inc. v. Ain Temouchent M/V*, *supra* note 54 ; *Continental Ins. Co. v. Polish S.S. supra* note 142.

clear that when a the bill of lading fails to specify either the name or the date of the charterparty, the bill does not incorporate the charterparty. Thus, *GOLDEN CHARIOT* would seem to make our job in this case quite simple: the bills of lading failed to include sufficiently specific terms of incorporation, so they did not incorporate the voyage charter (or its arbitration clause).¹⁵⁶

The arbitration clause still could be held not incorporated without a specification of charterparty even if from all the facts it is clear that only one particular charterparty could be incorporated. In *Hawkspere Shipping Co., Ltd. v. Intamex, S.A.*¹⁵⁷ (2003) there were approximately eight charterparties between the same shipper and charterer and the bill of lading under which the dispute had arisen did not identify which charterparty was incorporated. In each instance, the form was modified with different details and rider terms, depending on the nature of the particular shipment. The Court of Appeals, Fourth Circuit, held:

Identification is particularly important when, as here, there are multiple charter agreements between the same parties simultaneously. In this case, the date of the charterparty was not included in the bills of lading. In fact, the bills contained no reference whatsoever to the relevant, April 28, 2000, charterparty, and Intamex and Amalco were provided no effective notice of the charterparty's terms. Under the circumstances, we cannot say that there was a successful incorporation of that document's terms.¹⁵⁸

Judge Niemeyer was of a different opinion in this case:

Because there was only one charterparty for the ANANGEL FIDELITY--that dated April 28, 2000 between Hawkspere and ICTS--the particular charterparty that is incorporated has not been cast in doubt by the omission of the date. (...) I would conclude, contrary to what the majority concludes

¹⁵⁶ *Cargill Ferrous Intern. v. SEA PHOENIX MV*, *supra* note 145.

¹⁵⁷ *Hawkspere Shipping Co., Ltd. v. Intamex, S.A.*, *supra* note 94.

¹⁵⁸ *Ibid.*

in Part IV.B, that the bills of lading in this case effectively incorporated the terms and conditions of the charterparty between Hawkspere and ICTS.¹⁵⁹

In *Keytrade US, Inc. v. Ain Temouchent M/V*¹⁶⁰ (2005) US Court of Appeals, Fifth Circuit, did not follow the previous rule. The court decided that incorporation can be valid even if the charterparty is not identified in the bill of lading but there is no confusion which charterparty is intended to be incorporated. In that dispute a Congenbill was used, which explicitly incorporated the arbitration clause, but did not specify the date. The Court held that although generally, the bill of lading can incorporate the charterparty if the bill of lading specifically refers to the charterparty, here the voyage charter's arbitration clause was incorporated because there was "no confusion" as to which charterparty the bill of lading sought to incorporate. The Court considered:

The underlying concern for the "no confusion" requirement is that a third party, which did not participate in the formation of, or is otherwise unaware of, the charterparty, should not be held to terms of which it had no notice. (...) ("[T]hird parties, since they are strangers to the charterparty, should be able to rely on clean bills of lading free from the restraint of agreements between the shipowner and charterer, as to which the third parties have no notice."). The original charterparty, by itself, is poor evidence of whether a third-party was aware of the charterparty's terms, as many third-parties will be aware of the charterparty only *after* the charterparty's formation, if at all.¹⁶¹

¹⁵⁹ *Hawkspere Shipping Co., Ltd. v. Intamex, S.A.*, *supra* note 94.

¹⁶⁰ *Keytrade US, Inc. v. Ain Temouchent M/V*, *supra* note 54.

¹⁶¹ *Ibid.*

4 Summary of cases' analysis and conclusions

4.1 Summary of cases' analysis

From the English cases, a strict rule follows that a charterparty arbitration clause can be incorporated in the bill of lading only by express terms that mean, that an incorporation clause should include an explicit reference to arbitration. Under the English approach a wording as "all terms and conditions as per charterparty" will be found too general to incorporate an arbitration clause from the charterparty. If an arbitration clause covering disputes under the charterparty is expressly incorporated, the words can be "manipulated" to cover also the disputes under the bill of lading.

A charterparty arbitration clause can be incorporated also with general incorporation clause when a rule derived from *The Merak*¹⁶² is applicable. *The Merak* is so far the only case where the English court found that the incorporation clause in wide terms can incorporate an arbitration clause from the charterparty which itself refers also to the disputes under the bills of lading. Some can argue that it was an exemption based on particular facts of that case, nevertheless it has not yet been overruled and its application is considered in later disputes. It should be emphasized that court authorities after *The Merak* have established a very strict rule regarding to application of *The Merak* rule. *The Merak* rule can only be applicable where sufficiently wide incorporation clause is used, and it seems that it could be sufficiently wide if a term "clauses" is used as it was in *The Merak*. Wording "all terms" is found to be too narrow to incorporate an arbitration clause. Additionally to a sufficiently wide incorporation clause, the arbitration clause itself has to refer also to the disputes under the bill of lading.

¹⁶² *The Merak*, supra note 120.

In relation to the identification of a particular charterparty in the bill of lading it is clear that the lack of date is not an obstacle to refuse incorporation in dispute before the English court if it is clear which charterparty was intended to be incorporated. In deciding which charterparty is incorporated if there are more than one charterparty the recent court cases follows the general principle that if there are a head and sub-charter then the head charter will be incorporated and if there are a time and voyage charterparty then the voyage charterparty will be incorporated.

Also under the American approach, the express terms are very important for incorporation of a charterparty arbitration clause in the bill of lading. However, under the American approach the emphasis lies on the incorporation of all charterparty. Usually the wording in the bill of lading "All terms and conditions, liberties and exceptions of the charter-party, dated as overleaf, are herewith incorporated" will be found as the express incorporation of a charterparty and as such demonstrates the parties intention to incorporate also the arbitration clause. On the contrary, under the English courts' approach such wording would not be sufficient to incorporate an arbitration clause even following *The Merak* rule, which requires a use of term "clauses."

The next important principle for the incorporation of a charterparty and accordingly its arbitration clause in the bill of lading under the American approach is that the charterparty has to be specifically identified at least by date. Although latest cases show that, a charterparty can be incorporated also without being specifically identified in the bill of lading if there is no confusion which charterparty is intended to be incorporated.

Here the development of standard forms of bills of lading and charterparty should be mentioned. In the modern charterparties BIMCO Standard Law and Arbitration Clause is replaced by BIMCO Dispute Resolution Clause.¹⁶³ As well, the bills of lading forms are updated

¹⁶³ For a description of the BIMCO Standard Dispute Resolution Clause, please see BIMCO Special Circular, No 1, 16 January /2002. Available at: https://www.bimco.org/~media/Documents/Special_Circulars/SC2002_01_16.ashx Last visited at April 2, 2010.

accordingly to incorporate a dispute resolution clause. The main difference is that the new clause includes mediation. Mediation provisions are designed to function in conjunction with the chosen arbitration option, whether that is English law, London arbitration; US law, New York arbitration; or law and arbitration as agreed. BIMCO mediation provision is only triggered once the arbitration proceedings have commenced and then runs in parallel with those proceedings, if the parties choose so. This has been done to ensure that one party cannot invoke mediation as a delaying tactic. It also provides for the parties to mediate all or some of the issues being arbitrated.

The meaning of the term “dispute resolution” is very wide because it includes not only arbitration, but also litigation. In the writer’s view, it can not be seen as an express reference to the arbitration in accordance with the leading English “express terms” approach. The incorporation by such clause follows rather *The Merak* rule. As incorporation clause includes a term “clause” it could be wide enough to incorporate a charterparty arbitration clause in according to principle followed from *The Merak*. However, additionally a charterparty also has to refer to the disputes under the bill of lading. The clause is very complex as additionally to three possible arbitration places includes provisions on mediation procedure. Without having a copy of the charterparty the shipper and consignee can not know where to go for dispute resolution even if they know which standard form is used.

4.2 Conclusions

The analysis of courts’ cases of two leading maritime forums shows that there are different positions to the incorporation of the charterparties arbitration clauses in the bills of lading. The English courts’ position in this sense can be described as strict, as generally an arbitration clause can be incorporated only by explicit reference. The American courts’ approach is more liberal and the incorporation clause that would not be sufficient for incorporation under the English courts’ position could easily be found sufficient by the American court.

With such different approaches from the leading maritime forums and taking into a consideration different approaches in other countries it is not possible to conclude that there is uniform rule in relation to the incorporation of a charterparty arbitration clause in a bill of lading. Therefore, the arbitration of marine cargo claims remains a controversial issue and an ongoing challenge for maritime carriage of goods law everywhere.¹⁶⁴

The incorporation of the terms of a charterparty in the bill of lading is one of legal instruments in maritime law that evidence of the shipowners' leading role in the shipping business and strongest position comparing with the cargo owner in the past and still act for the protection of the shipowners' interests. Initially it was intended by shipowners to protect them from being exposed the greater liability for the bill of lading issued by the charterers. In its turn protections of cargo owner, shipper and consignee interests in this case are very limited. As the charterparty terms are not available to the shipper and consignee, they may not be able to assert the terms of the contract favourable to their position while seeking to go for the arbitration or avoid the operation of the arbitration agreement. Even nowadays shippers are multinational companies being capable to stand for their interests, the contractual nature of the arbitration clause requires not only the shipowners' rights to express their will to be bound by the contract but also the cargo owners' rights to negotiate and agree on arbitration contract.

There is a very fragile link in this complex situation between the shippers' and consignees' intention and a charterparty arbitration clause agreed between the shipowner and the charterer and incorporated in the bill of lading. This link is the explicit reference in the bill of lading to the incorporation of the arbitration clause, which should be the first and main prerequisite for binding the holder of a bill of lading to a charterparty arbitration clause. The incorporation of the arbitration clause by general terms like under "terms and conditions" etc., is in conflict to the nature of the arbitration contract as a separate contract which requires an express

¹⁶⁴ Tetley, page 263, *supra note* 100.

intention to be bound by the contract. If the bill of lading does not contain an express reference to the arbitration clause in the charterparty, the consignee is not aware of it and could not be bound by it. Even when there is the express reference, the consignee usually does not know about content of the arbitration clause. Then they at least are aware that such clause exists and can ask to present its terms, as well the fact that consignee does not object it could be interpreted as their consent.

The different positions of authorities from different countries to particular issue facilitate a forum shopping, i.e. search for favourable forum. In many cases, the battle about forum is a surrogate for the battle about liability, which can be affected by the limitation advantages, a preferred legal system and law, ranking of shipping claims, desirability of other convention regimes, speed, costs and reliability of practice, requirements of countersecurity for arrest damages and costs.¹⁶⁵ Very often parties are involved in the disputes about the incorporation of the charterparty arbitration clause in the bill of lading in order to avoid the liability¹⁶⁶ instead of to reach the dispute resolution on its merits. The clear uniform rules in relation to the valid arbitration contract created by the incorporation clause in the bill of lading could minimize possibility of forum shopping, work in favour of the dispute resolution on its merits and save the costs of the parties.

A lack of the uniform rules in relation to the incorporation of arbitration clause in the bill of lading does not bring certainty and transparency in relation to the judgments on the validity of the arbitration agreement between the consignee and shipowner in case discussed in present dissertation. Instead, it involves parties in complicated proceedings before different courts in different countries, increases the costs and delays

¹⁶⁵ Martin Davies, 'Forum selection clauses in maritime cases', (2003) 27 TLNMLJ 367 (Tulane Maritime Law Journal). Available on the internet at *Westlaw* database. Last visited at January 4, 2010; See also: John Hare, 'Shopping for the Best Admiralty Bargain' in *Jurisdiction and Forum Selection in International Law. Essays in Honor of Robert Force*, eds. Martin Davies. Kluwer Law International, Hague, 2005, page 164, 165.

¹⁶⁶ See Schoenbaum, page 644, *supra* note 2.

the final solution. All above mentioned discredits maritime arbitration as a competent dispute settlement institute.

The importance of the certainty and predictability in the particular field has been emphasized by many authorities,¹⁶⁷ but what is the solution?

The Article 76 (2) of the newly adopted Rotterdam Rules states that the provisions of rules applies to the arbitration contract between the parties unless the transport document identifies the parties to and date of the charterparty and incorporates by specific reference the clause in the charterparty that contains the terms of the arbitration agreement. It follows that the Rotterdam Rules offers a new approach for establishing of a valid arbitration agreement by incorporation of the charterparty arbitration clause in the bill of lading, i.e. for a valid incorporation the charterparty date and parties have to identified on the bill of lading and the incorporation clause has to include a specific reference to the clause in the charterparty that contains the terms of the arbitration agreement. That will be seen in the future how many states will submit their declaration to be bind by arbitration provisions of the Rotterdam Rules and how courts will interpret those provisions.

However, today the issue mainly is left to interpretation before the national courts, which follow different national law and national approaches, and the arbitration institutions, where leading amongst them also have different approaches.

In the writer's view, the main initiative is up to maritime law experts to develop and promote the uniform rules in this area and forms of charterparties and the bills of lading, which do not leave a space for confusion. For merchants involved in the carriage of goods by sea the best solution would be to use the bill of lading forms, which include explicit reference to the charterparty arbitration clause. The cargo owners and the shippers have to request provisions of the charterparty intended to be incorporated.

¹⁶⁷ Lord Denning M.R. in *The Annefield*, Sir John Donaldson M.R. and Oliver L.J. in *The Varenna*, Bingham L.J. in *The Federal Bulker*. See: Case Comment, *supra note* 117.

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