The incorporation of a charterparty arbitration clause into a bill of lading

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I hereby declare that the work submitted is mine and that where I have made use of another’s work, I have attributed the source(s) according to the Regulations set in the Student’s Handbook.

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Abstract

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law at the International Hellenic University.

In carriage of goods by sea, the charterparty and the bill of lading are the most important contracts. The parties to a charterparty contract very frequently wish to refer their disputes arising under the contract to arbitration and not litigation. For this reason charterparties contain arbitration clauses. Bills of lading on the other hand do not contain any forum selection clauses but they incorporate the clause contained in the charterparty under which they are issued. The main purpose of the incorporation clause is to enable the shipowner or the charterer, who is also the carrier under the bill of lading, to deal with the holder of the bill of lading on the same terms as his charterparty.

As a result, it is a common practice the incorporation clauses in bills of lading. However, there is a great controversy about the validity of the incorporation of a charterparty arbitration clause in the bill of lading and whether it will be binding upon the holder, who is not the original party to the agreement and in most cases had never seen the arbitration agreement. The issue is of great importance since an invalid incorporation will not bind third parties.

This dissertation will survey the requirements for a valid incorporation of a charterparty arbitration clause into a bill of lading, through a comparison between English and US law. We will refer to case law that has formulated the present rules and outline the recent developments in the incorporation issue.

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I dedicate this thesis to my mother, Violetta Charisi for her endless support during my postgraduate studies.

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## CONTENTS

Abstract ............................................................................................................................... iii
Introduction .......................................................................................................................... 5
Structure of the thesis ........................................................................................................ 6
1) Arbitration Agreement ................................................................................................. 7
   Presumptive validity ....................................................................................................... 7
   Separability doctrine ..................................................................................................... 8
   Formal Requirements .................................................................................................... 9
2) The incorporation of an arbitration clause from a charterparty into a bill of lading........ 12
   Formal Requirements .................................................................................................. 12
   I) What words are considered sufficient for a valid incorporation? ......................... 13
      A) English law ........................................................................................................... 13
      B) US Law ................................................................................................................. 17
   II. Manipulation of the incorporated charterparty arbitration clause ...................... 18
      A) English Law .......................................................................................................... 18
      B) US Law ................................................................................................................. 19
   III. Which contract controls the incorporation? ......................................................... 20
      A) English Law .......................................................................................................... 20
      B) US Law ................................................................................................................. 20
3) Identifying the relevant charterparty in the bill of lading ......................................... 22
4) The Congenbill form of bills of lading ..................................................................... 27
5) International Conventions’s position on the issue .................................................... 29
6) Summary of cases’ analysis ....................................................................................... 31
7) Conclusion/ My opinion ............................................................................................ 33
Bibliography ..................................................................................................................... 35
Introduction

In shipping industry arbitration has emerged as the dominant industry choice for resolving disputes, in particular charterparty disputes. Arbitration is an alternative dispute resolution method, which can be defined as “a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording each party an opportunity to present its case”. ¹

The international character of maritime disputes, involving multinational parties, as well as, the need for predictable, confidential, final and easily enforceable decisions justify why maritime arbitration is preferred as a dispute resolution method rather than litigation.

The arbitration agreement plays the most critical role to the existence of every arbitration process. Given the fact that arbitration is a matter of consent parties should express their intent to refer any dispute that may arise to arbitration in a clear way by drafting a proper arbitration agreement. The question of the validity of the arbitration agreement can arise either when one party is trying to enforce it or at the enforcement proceedings, when one party refuses to accept the award, claiming that the agreement to arbitrate was invalid.²

Very often international contracts do not contain arbitration clauses but they incorporate arbitration agreements from other contracts (between the same or different parties). Even if this practice is very usual in business, it creates questions regarding both formal and substantive validity of the incorporated arbitration agreement. In cases of incorporation the risk of challenging the validity of the arbitration clause is bigger because the third party can argue that the arbitration agreement is not validly incorporated or not exist at all.

Specifically, in case of maritime arbitration and in particularly in charterparty disputes, a common issue that arises is whether a bill of lading can incorporate the

arbitration clause contained in the charterparty. The issue is of great importance since, failing an effective incorporation third parties are neither bound nor can they enjoy the benefits of an arbitration clause in the charterparty.3

What is more, given the fact that bills of lading are transferrable instruments that pass through the hands of numerous traders, it is important to the courts to give effect only to the intention of the original parties to the bill of lading that can objectively be ascertained from the wording of the incorporation clause.

Even though most arbitral rules acknowledge the possibility of incorporation of an arbitration clause by reference they do not contain any rules as to how this incorporation can be valid, leaving the issue to court interpretation.

**Structure of the thesis**

In the first chapter we will examine the validity of the arbitration agreement in general. The basic principles that govern the arbitration agreement and the formal requirements and especially the writing requirement will be presented.

In the second chapter we will focus on the incorporation of the arbitration clause from a charterparty into a bill of lading. In addressing the incorporation issue we will present a detailed analysis of the legal methods adopted by English law and US law, referring to leading cases that have formulated the existing rules.

In the third chapter the importance of identifying the relevant charterparty in the context of the bill of lading will be developed again through a comparative analysis between English and US authorities.

In the fourth chapter, a brief reference to the popular and largely used standard form of bill of lading, the Congebill will be presented.

In the fifth chapter, the rules of the International Conventions on the incorporation issue and their applicability will be mentioned.

Finally, a summary of the courts cases and the conclusions drawn from them will be presented, altogether with a general conclusion and my opinion regarding the incorporation issue.

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1) Arbitration Agreement

Arbitration agreement plays the most critical role to the existence of every arbitration process. Arbitration is a matter of consent thus parties should express their intent to refer any dispute that may arise to arbitration in a clear way by drafting a proper arbitration agreement.

Although there is not a uniform definition of what constitutes an arbitration agreement the following definitions have been adopted.

Article II (1) of the New York Convention refers to an agreement to arbitrate as “an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration”.

Similarly Article 7 (1) of UNCITRAL Model Law provides that “an arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen of which may arise between them in respect of a defined legal relationship, whether contractual or not”.

Basic principles that govern the arbitration clause are the presumptive validity of the arbitration agreement and the separability doctrine.

Presumptive validity

Courts wish to perform the arbitration agreement and for this reason they set a pro – enforcement regime taking the arbitration agreement as valid and accepting only limited grounds for declaring it invalid. As Article II (3) of the NYC states “Each Contracting State shall recognize an agreement in writing.... unless it

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finds that he said agreement is null and void, inoperative or incapable of being performed”.  

Separability doctrine

The arbitration agreement, even though it is included in a main or underlying contract, it is considered an autonomous and separate agreement.

As Lord Diplock states in “Bremer Vulkan v. South India Shipping (1981)” the arbitration clause is “a self – contained contract collateral or ancillary to the substantive contract”.

The separability presumption is provided for by legislation and by arbitration rules. Article 16 (1) of the UNCITRAL Model Law states that “an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause”.

Similarly, LCIA rules provide in Article 23.2 that “an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail (of itself) the non-existence, invalidity or ineffectiveness of the arbitration clause”.

The most important consequences of the separability presumption are the following: 1) the invalidity of the main contract does not affect the validity of the arbitration clause, 2) the invalidity of the arbitration agreement does not impeach the main contract, 3) different substantive laws can apply to arbitration agreement and to the main contract, and 4) different form requirements for main contract and arbitration agreement.

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8 http://www.lcia.org
As a result of the separability doctrine, the illegality of a charterparty contract (if for example, is fraudulently induced or terminated), will not affect the arbitration clause. The arbitrators have jurisdiction to hear and decide the dispute because such claims relate to the main contract and not to the arbitration clause and the invalidity of the charterparty (the main contract) does not render the arbitration agreement invalid.

Formal Requirements

If the arbitration agreement is not valid, then there is no legal basis for arbitration. For this reason many national laws as well as the New York Convention try to set a uniform rule as to the formal requirements for the validity of the arbitration agreement.

Written form

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) sets a uniform international rule that every arbitration agreement should be evidenced “in writing” (Article II (1)). Paragraph 2 defines what “in writing” means. The writing requirement can be met either by an arbitral clause in a contract or a separate arbitration agreement, “signed by the parties” or it can be contained in an exchange of letters or telegrams.

The New York Convention aimed to set a maximum standard in order to avoid the possibility that the Contracting States would impose stricter requirements, for example the arbitration agreement made in a public deed of have a separate signature.

Moreover, pursuant to par. 2 the “in writing” requirement is also satisfied where the arbitration agreement is contained in “an exchange of letters or telegrams” and with this term it is generally accepted that all modern means of communication, such as faxes or e-mails are accepted.\(^\text{(10)}\)

The justification of the writing requirement is that nobody should excluded from his right to have a dispute decided from a court, unless he had evidently agreed to do so.

In practice, courts in order to interpret the writing requirement have dealt with a number of issues and differ on how strictly they will interpret it.

As a general rule, most jurisdictions accept that the contract containing the arbitration clause or the separate arbitration agreement must be signed, but there is no signature requirement for the exchange of documents.

However, other courts follow a more liberal approach accepting as valid arbitration agreements in cases there is a reasonable assessment that the offer to arbitrate was accepted. For example, where there is an oral agreement by telephone between the parties and then the party sends the confirmation contract with the arbitration clause. If the other party performs under the contract it is considered to have accepted the arbitration clause.¹¹

In order to promote a uniform approach according to the interpretation of Articles II and VII of the New York Convention, UNCITRAL suggested that the circumstances described in Article II are not exhaustive and the provisions referred to Article VII should apply not only to arbitral awards but also to arbitration agreements.¹²

Article VII permits the party to apply the more favorable law in the enforcing jurisdiction. This way more arbitration agreements would be declared as valid.

Moreover, article 7 of UNCITRAL Model Law, as amended in 2006 provides two different versions that a country can adopt. Option 1 requires an agreement to be in writing, but there is no signature requirement and even tacitly concluded arbitration agreements may be valid. Furthermore, the writing requirement can be satisfied by an electronic communication “if the information contained therein is accessible” for subsequent reference as par.4 states.

¹² 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.
According to option 2 “an arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or will arise between them in respect of a defined legal relationship, whether contractual or not”. Obviously, there is no writing requirement. As a result, an enforcing court in a country that has adopted this version of Article 7 can accept an oral agreement as valid by applying the “more favorable right” of Article VII (1) of NYC.

Based on all the above, we realise that in practice there is a widespread notion to interpret the writing requirement less rigid and in accordance to nowadays business practice and parties intention to refer their disputes to arbitration.
2) The incorporation of an arbitration clause from a charterparty into a bill of lading

In maritime arbitration most disputes arise on the question whether or not a reference in a bill of lading to a charterparty contract containing an arbitration clause can validly incorporate the arbitration clause and subsequent bind the holder of the bill of lading, who is not an original party to the arbitration agreement. In this case the validity of the arbitration agreement in not clear and different approaches have been followed. In this section we will examine what happens where an arbitration clause is included in a document referred to in the main contractual document (the incorporation by reference) and more specifically whether a bill of lading is capable of incorporating the arbitration clause included in a charterparty.

To address this issue, the formal requirements for a valid incorporation of a charterparty arbitration clause into a bill of lading will be examined. In the following sections the question of what words are considered sufficient for a valid incorporation, the possibility of manipulation of the arbitration clause in order to fit in the bill of lading, the question which out of two contracts controls the incorporation issue will be considered through a comparative analysis of the position taken by UK and US law. Past and more recent leading decisions that affected the creation of the following rules will be presented.

Formal Requirements

The New York Convention does not regulate whether the incorporation by reference satisfies the writing requirement of Article II.

However, the enactment of the Arbitration Act 1996 in UK permits the incorporation of an arbitration agreement by reference but sets out a specific provision. According to article 6 (2) “the reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement”.

As a result of the above rule, we see that under English law, an incorporated arbitration clause in the bill of lading can be valid and binding upon the holder, even though he is not the original party to the agreement.
On the other hand, US courts take the view that arbitration clauses can bind third – parties only in exceptional circumstances. Historically they were reluctant to accept the incorporated arbitration clauses to bind the holders of the bills of lading. That is because parties should only refer to arbitration the disputes that have agreed to. Therefore, in a number of cases courts refused to accept the incorporated arbitration clauses as valid. For example, in “Maroc Fruit Board SA v M/V Vincon” (2012), courts refused to declare valid the incorporated arbitration clause in the bill of lading, because the shipper had not signed the bill of lading. As a result, courts held that the arbitration clause did not satisfy the writing requirement under the New York Convention.

However, this strict approach is inconsistent with the shipping practice. As a result, a more lenient interpretation has been proposed and courts accept as valid the incorporated arbitration clause if the clause refers to disputes arising between the parties to the bill of lading. One leading decision was “The Sky Reefer” (Vimar Seguros y Reaseguros SA v M/V Sky Reefer) (1995), where the arbitration clause on the reverse side of the bill of lading was deemed to be valid and binding upon the endorsee, who neither signed it, nor negotiated the terms.13

Even though most arbitral rules acknowledge the possibility of incorporation by reference they do not contain any rules as to how this incorporation can be valid, leaving the issue to court interpretation.

In determining the issue both UK and US courts dealt with the following matters to decide the validity of the incorporation of a charterparty arbitration clause into a bill of lading.

I) **What words are considered sufficient for a valid incorporation?**

A) **English law**

According to English position the general rule is that only an *express reference* in the bill of lading to the charterparty arbitration clause that will be incorporated constitutes a valid incorporation.

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The express term requirement was first proposed in 1912 in “Thomas & Co. Ltd v. Portsea Steamship Co. Ltd”, which is considered a cornerstone decision since today. The decision made clear that regarding bills of lading, although general words are sufficient to incorporate other terms from a charterparty, such as provisions relating to shipment, carriage and delivery of goods or the payment of the freight, are never sufficient to incorporate an arbitration clause and only special words are apt to incorporate an arbitration clause into a bill of lading.

In the above case the bill of lading contained the following clause: “he or they paying freight for the said goods, with other conditions as per charterparty” and there was also another clause stating that “all other terms and conditions and exceptions of charter to be as per charterparty, including negligence clause”. The House of Lords, upholding the Court of Appeal decision, held that the incorporation clause was not sufficient to incorporate the arbitration clause and the wording of the bill of lading rather than the charterparty is decisive in determining whether the arbitration clause was incorporated or not.  

The express term requirement was followed in a number of subsequent cases where courts decided that phrases in the bill of lading such as “terms, conditions and exceptions as per charterparty” are general and not able to incorporate the arbitration clause contained in the charterparty.

Also, it was made clear that given the fact that arbitration clauses are not in a straightforward way relevant to shipment, carriage and delivery of goods, even words with wider scope of meaning, such as the word “whatsoever” are insufficient to validly incorporate the arbitration clause. That was decided in the “Siboti” case in 2003 where the incorporated clause stated: “all the terms whatsoever of the said charter apply to and govern the rights of the parties concerned in this shipment...”  

Finally, in another case the “Sea Venture” the court again highlighted the need for explicit reference to the arbitration clause for a valid incorporation. The background facts of the case were the following: Two bills of lading were issued, one

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in the Congenbill form and the second as an Ocean bill. The Congenbill provided the following: “All terms and conditions, liberties and exceptions to the Charter Party...including the Law and Arbitration clause are herewith incorporated.” The Ocean bill stated: “This shipment is carried under and pursuant to the terms of the charterparty ...and all the terms whatsoever of the said charter...apply to and govern the rights of the parties.”

After a damage in the cargo in the discharging port occurred the cargo owners commenced court proceedings against the shipowner. The shipowner asked from the courts to stay any action because the bills of lading incorporated by express reference the arbitration clause. The court found that the wording of the Congenbill form was sufficient to incorporate the charterparty clause and therefore the claims arose under this bill of lading should be submitted to arbitration. On the other hand, the court held that the wording "whatsoever" in the Ocean bill of lading was not able to incorporate the arbitration clause and the requirement for explicit reference was not satisfied.  

- Exception to the above rule - The MERAK case

However, in 1960s there was a case that created a great controversy because it deviated from the above rule and accepted as valid the incorporation of a charterparty arbitration clause into a bill of lading, although the incorporation clause contained general words. The case was “The Merak” case. The charterparty included an express reference to the bill of lading: “All bills of lading under this Charterparty shall incorporate this exclusive dispute resolution clause.” Also, the incorporation clause stated: “all the terms, conditions, clauses and exceptions including Clause 30 contained in the said charterparty apply to this Bill of Lading and are deemed to be incorporated herein”.

However, the problem was that “clause 30” was not the arbitration clause and the correct clause was “clause 32”. Despite this print mistake, there was a clear intention of the parties to incorporate the arbitration clause. The logical approach would be that the court would rectify in the bill of lading “clause 30” to “clause 32”

and declare the incorporation valid. Even though the Court of Appeal refused to rectify the incorporation clause for reasons of construction, it accepted the incorporation as valid for two main reasons: Firstly, there was the express word “clause” in the incorporation clause and secondly, the clear reference in the charterparty arbitration clause to disputes “arising under bills of lading”.

To conclude with, we see that the court came to this decision despite the fact that the incorporating words were general worlds. They considered them wide enough to include the arbitration clause. In fact the crucial element was the word "clauses" in the incorporation clause, which was deemed sufficient to incorporate the arbitration clause into the bill of lading and the clear intention of the parties to refer to arbitration also the disputes arising under the bill of lading, as this was indicated in the charterparty.

However, the better view is to see the “Merak case” as an exception and not the rule. Courts considered the facts of the case as unique and of limited application. They continue to require a special treatment for the incorporation of arbitration clauses and the express term requirement remains a prerequisite for a valid incorporation to take place.

- **Flexibility in interpreting the reference to the dispute resolution clause of the charterparty**

Recently, another issue that concerned courts is what happens where the incorporation clause although it sufficiently incorporates the charterparty dispute resolution clause, it refers to a different dispute resolution that that described in the charterparty.

This issue was addressed in *The “CHANNEL RANGER”, [2013], case*, which concerned the carriage of a cargo bulk to Morocco. The charterparty stated: “This Charter Party shall be governed by English Law, and any dispute arising out of or in

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connection with this charter shall be submitted to the exclusive jurisdiction of the High Court of Justice of England and Wales”.

The bill of lading which was issued under the above charterparty stated that “All terms, and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration clause are herewith incorporated”.

As we see there is a discrepancy between the above clauses. The bill of lading incorporated the law and arbitration clause of the charterparty, however no arbitration clause was in the charterparty. The dispute resolution clause in that charterparty, provided for English law and court jurisdiction and not arbitration.

When a dispute arose the defendants argued that the charterparty dispute resolution clause could not be deemed incorporated in this case, as it was not accurately referred to in the bill of lading. However, the court of first instance decided differently. It considered that despite the mistake in the words of incorporation, the parties’ intention was to incorporate the English law and Court jurisdiction clause referred in charterparty and not arbitration. The above decision was upheld by the Court of Appeal which found that the incorporation words in the bill of lading must be considered as a whole in context. The reference to arbitration could not render the incorporation invalid but was read as providing for litigation.

Obviously, we discern a more flexible and practical approach from the courts regarding the degree of specificity in the reference to the dispute resolution clause of the charterparty. As the court of Appeal stated: to refuse to remedy an evident mistake in the bill of lading “is a very old-fashioned and outdated approach to interpretation.”

B) US Law

US courts follow a totally different approach regarding the incorporation of a charterparty arbitration clause into the bill of lading. They treat arbitration clauses in the same way as any other charterparty provision. As a result of this approach, it is well established that the explicit reference to the arbitration clause is not necessary. General words of incorporation can validly incorporate a charterparty arbitration clause.

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clause, provided that the incorporation clause is wide enough to show the intention of incorporation and will alert the holder of the bill of lading for this incorporation.

For example, in the “Continental UK Ltd v Anagel Confidence Compania Naviera” case, the wording in the incorporation clause “all terms, conditions and exceptions of the charterparty” was held sufficient to incorporate the arbitration clause.\(^{21}\)

The above position is in line both with the application of Act 1925 in US, which favours arbitration over litigation, and with the shipping practice. Given the fact that arbitration clauses are found in charterparties, holders of the bills of lading are considered experienced enough to expect such clauses.\(^{22}\)

The key difference between English and US jurisdiction lies on the fact that US law does not treat arbitration clauses different from other charterparty provisions. Carriers should only show their intention to incorporate the charterparty arbitration clause using words with the widest possible meaning in order to cover all the charterparty terms, including the arbitration clause as well. No extra care in needed in finding explicit words for incorporation to take place. As a result from this approach, one would think that the incorporation of charterparty arbitration clauses is more easily according to US jurisdiction and therefore holders are exposed to unfavourable charterparty provisions. However, this is not the case, as it will be explained below the further rules of incorporation offer to the holders of bills of lading sufficient grounds to challenge the applicability of the incorporated charterparty arbitration clause.

II. Manipulation of the incorporated charterparty arbitration clause

A) English Law

Given the fact that English law requires the explicit reference of the charterparty arbitration clause in the bill of lading for a valid incorporation to take


place, the question of manipulation arises only after that. That means that only where the charterparty arbitration clause is expressly referred to in the incorporation clause, then verbal manipulation is possible. That was illustrated in the “Nerano” case in 1996, where although the charterparty arbitration clause provided to cover the disputes between the original parties, the court decided that the express reference of the clause in the bill of lading showed the clear intention of the parties to refer also the disputes arising under the bill of lading to arbitration. As a result, the clause was manipulated to cover also the disputes arising under the bill of lading.

To conclude with, according to English approach verbal manipulation is possible provided that there is an express reference of the arbitration clause in the bill of lading.  

B) US Law

US courts in order to decide the incorporation of an arbitration clause into the context of the bill of lading, they focus on the wording of the charterparty arbitration clause. To this end, they separate the arbitration clauses as broad and narrow. The latter can never be manipulated, neither adapted in order to cover also the disputes arising under the bill of lading. Therefore, a charterparty arbitration clause providing to cover disputes between the owner and the charterer is considered as a narrow arbitration clause and will not bind the holder of the bill of lading, despite the specific reference to arbitration in the incorporation clause. On the other hand, an arbitration clause referring to disputes under “this contract” will be manipulated in order to fit in the context of the bill of lading and therefore bind the holders. That was decided in the “Steel Warehouse Co. v. Abalone Shipping Ltd”, which stated that “all disputes arising out of this contract shall be referred to

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The above wording was considered broad enough to bind also the holders of the bill of lading.²⁴

Obviously, under US law the focus lies on the language of the incorporated charterparty arbitration clause. A narrow arbitration clause will not be incorporated, despite the specific reference to arbitration in the incorporation clause, whereas broad arbitration clauses will bind the holders of the bill of lading as well.²⁵

III. Which contract controls the incorporation?

In dealing with the incorporation of charterparty arbitration clauses another issue that has concerned courts in a number of cases is whether the charterparty or the bill of lading is the dominant contract that controls the incorporation.

A) English Law

According to English law, the courts concluded that since these two contracts are different and separate, the focus should be given on the incorporation contract. As a result, the bill of lading is the basis for determining the incorporation and the operative words of incorporation are to be found in the incorporation clause and not in the charterparty clause.²⁶

The “Varenna” case [1983] is considered the first decision which emphasized that the wording of the incorporation clause is crucial in determining whether there is a valid incorporation or not.²⁷

B) US Law

The position adopted by US courts on the matter is dependent upon the holder’s position. More specifically, if the holder of the bill of lading is also the charterer of the charterparty referred to, or has a close connection with the

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charterer (such as agency, alter ego, subsidiary) then the focus will be on the charterparty and the intention of the original parties will be examined. If this is not the case, the English approach is followed and the bill of lading is the basic contract to determine the incorporation of the charteparty clause.  

3) Identifying the relevant charterparty in the bill of lading

The second important issue that concerns courts worldwide is whether it is essential for the incorporation to be valid that the charterparty, whose arbitration clause it is sought to be incorporated, be identified in the bill of lading. In this chapter we will discuss the position adopted by English and US law on the issue.

A) English law

Usually standard forms of bills of lading, such as the Congenbill identify the associated charterparty with a clear mention of it on the body of the bill of lading. The phrase “freight payable as per charterparty dated…. (space left blank)” on the face of the bill of lading clearly identifies the charterparty.29

However, there are cases where no charterparty is identified on the bill of lading. That happens because parties may not know the incorporated charterparty and they left blank the incorporation clause.

In this case, according to English law where there is only one possible charterparty it is assessed that this one applies to the bill of lading and the incorporation is valid.

The case is more complicated where there are more than one charterparties. The court will decide which charterparty will be incorporated based on the wording of the bill of lading, the intention of the parties and the specific facts of the case.

As a general rule it is considered that the head – charter is incorporated, because the head – charter is the only charter to which the shipowner, who issues the bill of lading, is a party. That was decided in 1976 in the “San Nicholas” case. In this case the charterparty date, whose terms were to be incorporated, and the names of the parties were left blank in the incorporation clause. The court held that the parties’ omission to fill in the blanks in the incorporation clause does not render the incorporation clause invalid. It found that where there is one head - charter it should deemed that this was the one being incorporated.30

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However, if the head charterparty is a time-charter and we have also one voyage sub-charterparty, the last one is considered to be incorporated in the bill of lading. That was decided in the “SLS Everest” case in 1981. The background facts were the following: Two charterparties were issued, one time charter, which was the head charter and one voyage sub-charter. The bill of lading stated “Freight and other conditions as per ….. including the exoneration clause”. The blank was not filled in. Where a dispute arose, the Court of Appeal decided that the terms of the voyage charter were incorporated into the bill of lading because the terms of a time charterparty are, by their nature inapposite for incorporation.31

A departure from the above general rules can only happen where there are unusual facts that require a different approach. That happened in a recent case “The Vinson” (2005) where three charterparties were issued, one head time charterparty, one sub – time charterparty and a contract of affreightment. The court decided that in this specific case the terms of the sub – time charterparty were most appropriate for incorporation and decided that the sub – time charterparty would be incorporated, despite the general rule established in “The San Nicholas” case. The court tried to interpret the intention of the original parties and find the most appropriate charterparty for incorporation.

We see that courts will deviate from the general rules where the specific facts require a different treatment. The main purpose is to give the incorporation clause a commercially sensible meaning.32

Finally, in the “Wadi Sudr” (2009), which concerned a vessel which was time-chartered, sub – time – chartered and voyage sub – sub – chartered, the court applying the general rules established in the “San Nicholas” and the “SLS Everest” held that the voyage charter was the incorporated charterparty, as this was by its nature appropriate for incorporation, despite the hierarchy between the charterparties.33

In all the above cases there was not any identification of a charterparty in the bill of lading and the courts tried to identify it based on the above general rules.

Relying on the general presumption, which presented above that in the absence of an identification of the relevant charterparty and between one voyage charter and one time charter, the former is considered to be incorporated, in another case parties tried to challenge the incorporation as not valid, even though there was a clear identification on the face of the bill of lading of the incorporated charterparty. The bill of lading, issued under the Congenbill form, stated “Freight payable as per CHARTERPARTY DATED 11/04/13”. That charterparty was a time charter between the owners and the charterers. There was also a voyage charter. The cargo owners challenged the incorporation and argued that a time charter could not be incorporated into a bill of lading and therefore the terms of the voyage charter should apply to the bill of lading. Their argument was that the word “freight” in the incorporation clause refers to voyage charter, whereas a time charter provides for payment of hire.

The court declined their argument and hold that there was a clear and indisputable incorporation of the terms of the time charter into the bill of lading.  

Based on all the above, we realise that under English law, the identification of the relevant charterparty in the bill of lading is not a requirement for a valid incorporation to take place.

B) The position under US Law

On the other hand, courts in United States deem the identification of the relevant charterparty as a prerequisite for a valid incorporation. Incorporation clauses must “make an adequate and clear reference to an identifiable charterparty in unmistakable language”. That was decided in a number of cases, such as the “Hawkspere Shipping Co., Ltd. v. Intamex, S.A. & Anr” (2003), where the bills of lading, although they provided to be used under charterparties, they did not mention the governing charterparty. The court of Appeals held that when the spaces

in the bills of lading are left blank there is not a valid incorporation of a charterparty clause because it cannot be evidenced who is the relevant charterparty. They decided that the charterparty must be identified in the bill of lading, at least, by date.\footnote{Goldby Miriam (2007), INTEGRATION OF CHARTERPARTY ARBITRATION CLAUSES INTO BILLS OF LADING: RECENT DEVELOPMENTS, Denning Law Journal, Vol 19, p 177}

The above strict requirement that US courts follow may be beneficial for the holders for two main reasons. First of all, it reduces the injustice of binding the holders with charterparty terms they are not able to know. Secondly, the requirement for clear identification of the relevant charterparty on the body of the bill of lading will eliminate the disputes between the carrier and the holder as to which charterparty is incorporated and the holder of the bill of lading will know from the beginning the carrier’s intention to incorporate a charterparty.

However, shipowners may be in a disadvantageous position as they will not be able to treat the holders of the bill of lading on the same terms as their charterparties and consequently be able to submit to arbitration any dispute that will arise under the bill of lading.

US courts deviate from the above strict requirement only in exceptional circumstances. Only where there is certainty as to which charterparty is intended to be incorporated and the holder of the bill of lading in not a stranger to the charterparty contract, US courts will accept the incorporation as valid, despite the lack of identification of the relevant charterparty in the bill of lading. I will present shortly these two conditions.

First of all, certainty as to which charterparty is intended to be incorporated exists where the holder is also the sub – charterer and the shipper, as this happened in “Cargill Ferrous International v Sea Phoenix” case. The Court held in favour of incorporation, despite the fact that the incorporation clause did not specify the charterparty, as it was made clear that the holder was sure that the voyage charterparty was intended to be incorporated.

Secondly, regarding the question when the holder is considered as not a stranger to the charterparty, the following have been suggested. Where the holder of the bill of lading is also the charterer of the relevant charterparty that is sought to
be incorporated it is deemed that incorporation can take place. Also, where the holder has close relationship with the charterer (such as agency) this can lead to the incorporation of the charterparty arbitration clause into the bill of lading, despite the lack of identification of the charterparty.\(^3^7\)

The position followed by US courts is also met in other leading court jurisdictions, such as China, where the courts will not consider as valid the incorporation of a charterparty arbitration clause into a bill of lading where no charterparty is identified in the bill of lading.\(^3^8\)

**General comment regarding the identification issue.**

To summarise, we see that under English law the relevant charterparty does not need to be identified in the bill of lading for a valid incorporation. On the other hand, US courts will not consider the incorporation valid where no charterparty is identified on the body of the bill of lading.

We realise that the different court approaches do not promote uniformity of law and increase the uncertainty on the incorporation issue. Also, different court approaches increase the forum shopping and expose parties to a greater risk.

I strongly believe that in order to avoid this risk and promote uniformity parties should always identify with clarity the relevant charterparty on the bill of lading before issuing it. This practice will protect the holders who will know from the beginning the carrier’s intention to incorporate a charterparty.

In favor of the identification are also the Rotterdam Rules, which in Article 76 (2) require the charterparty to be identified.\(^3^9\) However, since not many Contracting States have ratified the Rotterdam Rules, the lack of uniformity on this issue continues to exist.

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4) The Congenbill form of bills of lading

In order to promote uniformity and certainty in the incorporation issue international organizations such as the Baltic and International Maritime Council (BIMCO) have drafted standard forms of bills of lading, which validly incorporate the charterparty arbitration clause. An example of this form is the Congenbill bill of lading, which clearly informs the holder of the bill of lading which charterparty terms will be incorporated. Indeed, the extensive use of the Congenbill form which was first introduced in 1978 and was then revised in 1994, 2000, 2007 and recently in 2016 facilitated the sufficient incorporation of charterparty arbitration clauses into bills of lading.

The new 2016 form of Congenbill deals with the incorporation of charterparty terms as follows: on page 1 the bill of lading it is stated “Freight payable as per CHARTER PARTY dated [BLANK]” and on page 2, at first clause the bill of lading states: “All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause. Dispute Resolution Clause, are herewith incorporated”.

The drafters of the Congenbill form having in mind that the holders of the bill of lading rely on the wording of the incorporation clause, as the only guidance as to which charterparty terms will be incorporated, tried to prepare a clause that will sufficiently import all the relevant charterparty provisions. The above clause has been found sufficient to validly incorporate all the relevant charterparty clauses into the bill of lading, including the law and arbitration clauses.\(^{40}\)

It was on this wording that the Court of Appeal upheld an anti-suit injunction preventing the cargo interests from commencing proceedings in Morocco in the Channel Ranger case, which presented above.\(^ {41}\)

The Congenbill form is widely used and accepted in the UK and in many other jurisdictions. More and more shipowners rely on this form, in order to ensure that


charterparty arbitration clauses will be properly incorporated in the bill of lading and nobody will challenge the validity of the incorporation.
5) International Conventions’s position on the issue

There are four main International Conventions regulating the law regarding to Bills of Lading: The Hague Rules, which adopted in 1924, the Hague-Visby Rules, the Hamburg Rules in 1978 and the Rotterdam Rules, adopted in 2008. Even though the Hague Rules and its successor, the Hague-Visby Rules are recognized and adopted by a large number of Contracting States, they do not regulate the validity of forum selection clauses in bills of lading. For this reason, Contracting States cannot rely on these two Conventions to find a uniform approach on the matter. sel 175

To this end, the Hamburg Rules tried to address the issue and indicate in which cases the holders of the bills of lading will be bound from a charterparty arbitration clause.

In fact, article 22 (2) of Hamburg Rules, states “Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith”. 42

The above rule is in line with the UK rule, which requires an explicit reference to the charterparty arbitration clause for a valid incorporation. However, the limited acceptance of the Hamburg Rules has not helped the harmonization process.

Given the fact that the Hamburg Rules did not meet with great acceptance, preparations for a new convention had started. The Draft Convention, known as the Rotterdam Rules was approved in 2008. Again, an effort to set uniform rules taking into account the development of electronic transport documents was made. Article 76 par. (2) states that where a charterparty contains an arbitration clause, a transport document that it is issued under such a contract can incorporate the arbitration clause, provided that: a) the document identifies the parties to and the date of the charterparty or other contract and b) it incorporates by specific reference


We can see that the requirements for a valid incorporation under the Rotterdam Rules are a combination of the UK and US approaches as these were analysed above. In fact, the Rotterdam Rules set two conditions for a valid incorporation to take place: firstly, they require the identification of the relevant charterparty (this rule is also set by US authorities) and second they demand the explicit reference to the arbitration agreement in the bill of lading (rule that set by the UK courts).

In my opinion the above rule is clear and eliminates the ambiguities on the incorporation issue. However, the fact that only two states have ratified the Convention since today is not a welcome sign for its application.
6) Summary of cases’ analysis

To conclude with, based on all the above, we see that English and American courts address the issue of effective incorporation differently. In fact, they follow diametrically opposing views regarding the degree of specificity needed in the bill of lading reference for a valid incorporation of a charterparty arbitration clause into a bill of lading.

Under English law, for a valid incorporation to take place, the arbitration clause from a charterparty should be referred in the bill of lading by explicit reference. All the UK cases, except the Merak which was an exception, show that general words of incorporation are not apt to incorporate an arbitration clause. If an explicit reference takes place, then verbal manipulation of the charterparty arbitration clause in order to fit in the bill of lading context is possible. Furthermore, the validity of the incorporation or not must be examined from the wording of the incorporation clause in the bill of lading. That is rational because the bill of lading is the document that both parties to a dispute have usually had sight and not the charterparty. Courts, applying general law, may manipulate the express terms requirement under general laws in order to give effect to the bill of lading.

Also, after the Channel Ranger decision we see a more flexible approach in the interpretation of incorporation rules. From now on, the holder of the bill of lading should be aware that the reference in the bill of lading to the incorporation of one form of dispute resolution clause, it may be interpreted to refer to another type of dispute resolution clause in the charterparty.44

Finally, it should be noted that the explicit reference to the charterparty arbitration clause is in all cases a prerequisite for a valid incorporation and English law does not depart from this rule, even in cases where it is evident that the holder knows the terms of the incorporated charterparty (when he is for example also the charterer of the incorporated charterparty).

We see that the strict approach followed by the UK courts aims to protect the holders of the bill of lading. The express terms requirement obliges the original

parties to the arbitration clause to clearly inform the holders for the existence of the arbitration clause, which will be incorporated in the bill of lading and therefore bind the holders as well.

On the other hand according to US authorities, arbitration clauses are viewed just as any other charterparty terms. As a result, there is no need for explicit reference for a valid incorporation to take place and general words are able to incorporate the arbitration clause, provided that they demonstrate the intention of the parties to do so. This intention is achieved when the holder of the bill of lading has actual or constructive notice of the charterparty’s incorporation. What is more, US courts pay a lot of attention to the language of the incorporated charterparty arbitration clause, categorizing the arbitration clauses as broad and narrow. A narrow arbitration clause, which covers only disputes between the original parties of the charterparty, will not be incorporated, despite the specific reference to arbitration in the incorporation clause in the bill of lading, whereas broad arbitration clauses will bind the holders of the bill of lading as well.

Regarding the second important issue, whether it is essential or not for a valid incorporation to take place to identify the relevant charterparty in the bill of lading, the outcome of the above analysis again showed two different approaches. Under English law a more lenient approach is followed, according to which the absent of the identification of the associated charterparty in the bill of lading will not render the incorporation invalid. The courts will examine the circumstances of the specific case and try to interpret the parties’ intention. Also, the use of standard forms of bills of lading, such as the CONGENBILL, indicates the intention of the parties to incorporate the charterparty terms.

On the contrary, this flexible approach does not apply to US courts, which, except for exceptional circumstances, they will not consider as valid the incorporation of a charterparty arbitration clause into a bill of lading where no charterparty is identified in the bill of lading.

To conclude with, it is evident that a charterparty arbitration clause can be brought into the bill of lading by appropriate reference. However, the prerequisites for this incorporation to be valid differ a lot between different jurisdictions.
7) Conclusion/ My opinion

Obviously, the issue of valid incorporation of a charterparty arbitration clause into a bill of lading remains a controversial one, especially because there are divergent opinions among different jurisdictions regarding what constitutes a valid incorporation and there is not a uniform regulation.

To this day, there is not harmonization regarding the issue. Even though the increasing use of specific forms of bill of lading such as the CONGENBILL, has helped to promote uniformity and to eliminate the ambiguities in the incorporation issue, it is not considered enough. The issue is left to court interpretation and as we saw above different approaches are followed. This legal diversity among jurisdictions increases choice - of - law and forum shopping. Additionally, parties are exposed to delays, different court proceedings and further costs. All these, do not favour maritime arbitration as a safe alternative dispute resolution. Undoubtedly there is a pressing need to have a binding and balance universal regime that will regulate what constitutes a valid incorporation.

The Rotterdam Rules tried to provide certainty in the issue by setting the prerequisites for a valid incorporation in article Article 76 par. (2). However, even though they set clear rules of what constitutes a valid incorporation it is not expected that will solve the problem, given the fact that only two countries have ratified them.

It remains to be seen whether a new convention will address the issue with clarity and will set uniform rules, which will not leave space for confusion regarding the validity of the incorporation of a charterparty arbitration clause into a bill of lading.

In my opinion, I believe that the incorporation clause in the bill of lading should be clearly drafted, in a way that any potential transferee can tell just by looking at the bill of lading terms that any disputes in connection with it must be referred to arbitration and no uncertainty should arise as to whether the incorporation is valid. Also, the identification of the relevant charterparty should be a condition, since it promotes certainty and ensures which charterparty is sought to be incorporated. Of course courts should always decide each case by taking into
account the business common sense and the commercial purpose of the incorporation clause.
Bibliography

- Regulations

- Books
- Articles


