Arbitration Clause in a Bill of Lading: Binding Effect to Third Parties

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Abstract

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

The bill of lading is a very significant instrument for the carriage of goods by sea. The bill of lading contract can become the source of many disputes due to its nature, according to which it be transferred to third parties after its issuance. It is common practice to include an arbitration clause in the terms and conditions of the contract. The main dispute relating to the existence of the arbitration clause in the bill of lading is whether or not the new holder of the bill of lading is obliged to enforce the arbitration clause, especially when a charter-party arbitration clause has been incorporated into the bill of lading.

This dissertation, discusses certain elements of the bill of lading history, the general categorization, as well as an extensive analysis of its functions. There is, also, a brief reference to the history of arbitration, followed by an analysis about the validity of the arbitration clause, the doctrine of separability principle and the authority that has the judicial power to decide over the validity of the clause. In the subsequent chapter, the matter of the transfer of the contractual rights of the bill of lading is developed. Emphasis is given to the English Law perspective with reference to cases that applied the COGSA 1992. The fourth chapter is dedicated to the incorporation of a charter-party arbitration clause into the bill of lading under different legislative tools. In the end, the CONGENBILL standard form of bill of lading is addressed thoroughly.

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Contents

Introduction

In the shipping industry, specifically in the carriage of goods by sea, is common for the contracting parties of the transport documents that are bills of lading and charter-parties, to prefer arbitration over litigation. Arbitration is an alternative dispute resolution method which structures a private system of justice. The parties have the ability to choose the substantive and procedural set of rules. The choice of law or form of dispute resolution is a benefit of great importance pursuant to the international nature of the disputes between parties whom legal framework was different. This flexibility, also, is of utmost importance among transnational parties as the procedure that is followed can "flow" easier, with more speed and under confidential procedures. The parties are quite autonomous to resolve the possible disputes in connection with their agreement. The problems originate from involvement of third parties becoming the holders of the bill of lading. The subsequent holder of the bill of lading has not been the original party who negotiated the rules and applicable laws of the arbitration. Questions like what is the extent and when a third party holder of the bill of lading is bound by clauses and agreements made among the original parties are thoroughly addressed below with references to landmark decisions, statutes and international conventions which rule these subjects, such as United States law, English law, Carriage of goods by Sea Act 1992, Hague rules, Hague-Visby rules, Hamburg rules and the Rotterdam rules.

Furthermore, the situation is more complex when the arbitration clause has been incorporated into a bill of lading from a charter-party and the holder of the bill of lading might not be aware of the context of the charter-party. In the event of incorporation, the identification of the parties and the validity of the arbitration clause have been two challenging issues. Noted that the incorporation of the charter-party arbitration clause is acknowledged, there is not a description of the proper wording for a successful and valid incorporation. Efforts of harmonization have been in progress but not completely successful. That is the main reason that the courts decisions together with the arbitral awards which dealt with these subjects are considered prominent and of great significance to the shipping industry.

Chapter 1: Bill of Lading

Short history of the bill of lading

The practice of issuing bills of lading established around the sixteenth century. It was most commonly used when the country of Spain was involved, either when the port of departure was located there or when the owner of the cargo was Spaniard.[1]The bill of lading, in the beginning, contained information regarding the conditions of the cargo delivered by the vessel. By the nineteenth century several legislative tools have been created in order to handle and deal successfully with all the arising disputes. Louis XIV and the Marine Ordinances had a huge impact on the newly commercial practice by enacting the rule that the master should answer "for all the goods laded aboard his ship, which he shall be obliged to deliver according to the bills of lading". The following years, huge debate began about the person who should be considered liable for any damages or losses on the cargo and recently about the impact of the terms of the bill of lading to third parties due to the nature of the bill to be transferred to new holders.

Basic distinctions of the bills of lading

General categorization

The bill of lading is included in the contracts of affreightment. Contract of affreightment refers to the document that verifies the arrangement of the shipowner or his agent for carrying goods by sea or offering the appropriate vessel for this reason. Carriage of goods is part of international trade concerned with the transfer of goods from the port of shipment to the port of destination. The contracts regulate the rights and obligations of the involved parties, namely the carrier and the shipper. Common law, statutes and international conventions are the legal framework of the contracts of carriage. Contracts of affreightment are categorized in two forms: bill of lading and charterparty. Bill of lading is a legal document issued by a ship-owner or carrier to a shipper of product. It is a document issued by a shipowner or carrier to a shipper of goods. In the next section it will be analyzed its functions and its significance to the commercial world. The definition of a charterparty as it is stated in Halsbury's Laws: "a contract whereby an entire vessel or some principal part of her may be used or employed by the charterer for a voyage or series of voyages or for a period of time". [2] A charterparty cannot constitute either a document of title of goods or a receipt of goods but it can implement a contract of carriage of goods. The Hague Rules exclude the charterparty from the range of its appliance. [3]

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[1] Daniel E. Murray, 'History and Development of the Bill of Lading' (1983) 37 U Miami L Rev 689

[2] John F. Wilson, *Carriage of goods by sea*, (7th, Pearson Addison Welsey 2010), p.3

[3] *Halsbury's Laws of England*, 5th edn vol.7, 2008: *Carriage and Carriers* (LexisNexis Butterworths 2008), para. 208

Negotiable and non-negotiable

The terms “negotiable” and “non-negotiable” are usually used to distinguish the bills of lading on the basis of its transferability while their name can lead to a misunderstanding as they are legally inaccurate. “Negotiable” bill of lading is not negotiable strictus sensus but its transfer represents the transfer of the possession of the goods. The fact that it is “negotiable” does not provide the right or the freedom to endorse and deliver a title with certain rights and obligations but the title as a whole. A clear instruction is provided to deliver the products to the holder of the original bill of lading which manifests the control and title of the cargo.[4] A “non-negotiable” bill of lading means that it cannot transfer the title by endorsement or delivery.[5] The receiver or buyer or their agent can claim the cargo by confirming their identity because their name is fixed and stated in this type of bill of lading. [6]

Arbitration clauses contained in the bill of lading or incorporated into the bill of lading

The arbitration clauses often found in the bill of lading can be categorized into two types: the ones that the arbitration clause is expressly contained in the bill of lading and the ones that it is incorporated from a charterparty. The first type is an express notice of the arbitration clause provided by the bill of lading. The clause is included among the other terms and conditions to the body of the transport document therefore the certainty of the awareness of the non original party. The new holder’s argument of not being properly informed of the arbitration clause should be deemed unacceptable, as it is expressly provided.[7] On the other hand, the second type can be quite complicated. Under such circumstances, many issues arise about whether or not the incorporation of the arbitration clause has occurred. Several cases have established certain views on the subject in order to clarify the issue.

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[4] Richard Aikens; Richard Lord; Michael D. Bools; Michael Bolding; Kian Sing Toh; Miriam Goldby, *Bills of lading* (3rd, Routledge, 2021), p26

[5] *Kum v Wah Tat Bank* [1971] 1 Lloyd’s Rep. 439, 445

[6] See supra note 10

[7] Ling Li, 'Binding Effect of Arbitration Clauses on Holders of Bills of Lading as Nonoriginal Parties and a Potential Uniform Approach through Comparative Analysis' (2012) 37 Tul Mar LJ 107

Functions of the Bills of Lading

The bill of lading performs three main functions. These functions developed during the nineteenth century[8] , "organically" by the commercial custom and practices, as it was not designed to embody them when it was first used as a legal tool. The bill of lading is:

i) A receipt for the products. In the beginning of the eleventh century the shipping trade started to evolve and grow remarkably in the Mediterranean Sea. During that time, the merchants travelled with their products across the ports and if any record of the goods needed it would be accomplished by the ship's register, observed and verified by the ship's mate in an informal way. As the trade continued to expand significantly with the foundation of valid and trusted posts and agents, the traders could no longer follow and be in charge of their goods, thus the demand for a valid receipt of the cargo, delivered by each ship. This receipt named as bill of lading. The Bill of Lading was firstly regarded as a receipt of the cargo shipped on around fourteenth century. The term bill is defined as the written or printed description of the cost of the products delivered and the term lade refers to the cargo that has been or is going to load onto the ship for its delivery. The bill of lading is a transport document serving as a clear evidence of the cargo shipped and its special characteristics hence the importance to third parties, namely the insurer of the cargo or the one that is in charge of the delivery of the goods in the port of destination. It is an evidence of quantity. The nature of the relation between the carrier and such third parties needs to be defined especially regarding the extent of the binding nature of this relation within the context of the agreement. Different jurisdictions and legal frameworks cope with this issue. It has been defined by the Hague Rules that the bill of lading is a prima facie evidence and it has been clarified by the Hague Visby Rules that the bill of lading is an indisputable evidence vis-a-vis third parties. In the common law jurisdictions, in the vast majority of the cases, the carrier cannot prove or assert a right against the bill of lading vis-à-vis third party holder.[9]

ii) An evidence of contract of carriage or it may embody the contract of carriage. It is a piece of evidence for the contract of carriage and the terms and conditions of the agreement are included in some cases. During the sixteenth century the bill of lading initiated that service. Until then it was only performing as a receipt of the goods. However, through the years, the vast growth of the shipping trade triggered many disputes in the sector of the carriage of goods by sea between the carrier and the parties relating to the cargo. It was imperative for the conflict resolution to contain terms and conditions in order to determine the rights and obligations of the involved parties. In 1882 Lord Selborne in *Glyn Mills Co v East and West India Dock Co* stated "The primary office and purpose of a bill of lading, although merchantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner." In 1951 in *The Ardennes* case Lord Goddard mentioned that the bill of lading itself might not be the contract among the contracting parties though the terms and conditions of the contract can be proved by the bill of lading. Nowadays, it is common the bill of lading not to contain the

[8] Paul Todd, *Bills of Lading and Bankers\' Documentary Credits* (4th, Informa, Routledge 2013), ch.10 §1

[9] Frank Stevens, 'Third Party Rights under Bills of Lading' (2012) 4 EJCCL 54

agreement of the carriage which might have additional terms and conditions, which are settled even when the cargo has already been on board or the ship has already left the port. When, for instance, a new party becomes the holder of the bill of lading, he might not be informed of the content of the contract as it is not part of the bill of lading, hence being unaware of important clauses which impact the course of any possible disputes.[10]

iii) A document of title of the goods, because the holder of the bill of lading can lay claim to the delivery of the cargo. The third function has been widely accepted since the nineteenth century by the practice of the merchants and has become part of the legislature as a statute law as well as case law. "The is not a symbol of representing the goods, but the delivery of the key gives the transferee a power over the goods which he had not before, and at the same time is an emphatic declaration that the transferor intends no longer to meddle with the goods". [11]This exclusive right of its holder permits to become a transferable document of title. That specific characteristic is of great and direct importance to the commercial transactions as it enables the use of it by the third parties. The shipper and the carrier have clarified their rights and obligations, which have been recorded to the contract, hence the irrelevance of a document of title. This is the case, in which the cargo is safely delivered to the port of destination, unharmed and in the condition that is described to the bill of lading. According to that, the holder of the bill of lading does not have to deal with any legal issues. However, several complications arise from the execution of the contract, such as damage or loss, making it obligatory for the holder of the bill of lading to raise claims. The traditional problems taking place in relevant situations are the applicable law, the competent court, and the legal basis of the claims as contractual or non-contractual. One of the most controversial issues is the lawful rights and obligations of the third party holder of the bill of lading. Particular emphasis is placed on the right of the carrier, or its extent, to bring an action against the third party holder on the legal basis of the contractual clauses, such as jurisdiction or arbitration clauses, which were agreed and signed by the original parties.[12]

[10] Ibid
[11] Pollock and Wright, *Possession in the Common Law* (1888), p.68
[12] Ibid

Chapter 2: Arbitration Clause

A short analysis of the historical background

Arbitration was originally an informal process which enhanced the international trade to flourish. In the beginning, two merchants, when a dispute arose regarding the price or the quality or the quantity of the products, would appoint a third party to render a decision which would be both binding and enforced by the parties.[13] There was no legal basis which would bound the parties or would provide for the parties a legal tool in order to enforce them to abide by the decision but the fair trading practices obliged the contracting parties to do so. This scheme of "private justice" which seemed to have a proper functioning[14], through the years, could no longer bypass the national legislation and rely on the moral values and knowledge of the arbitrators and the willingness of the parties to obey to the judgment of a party with no legal authority. The states interfered and proceed to the ruling of the arbitration by establishing national rules of procedure at first and later on international ones. The international treaties and conventions created the links which connected the national laws to one another and solved the problems of enforcing the rendered award to foreign jurisdictions in which another state does not have the authority. [15] The contracting parties have the freedom and the right to agree to that form of dispute resolution, which constitutes aspect of the freedom of contract.[16] Furthermore, arbitration has been more preferable than litigation due to the various benefits offered.

The validity of the arbitration agreement

The validity of the arbitration clause is defined by the putative law of the arbitration clause. Validity of the arbitration agreement has a dual nature, namely the formal and the material validity. By section 5 of the 1996 Act the arbitration agreement must be in writing. The necessity of the writing prerequisite of the arbitration agreement is fulfilled when the clause is in writing regardless of being signed by the contracting parties, when there is interaction between the parties in writing such as e-mails or faxes and when there is proof of evidence of the aforementioned facts. It has been obvious under English law that the incorporation by reference outweighs the way is expressed the incorporation of the arbitration clause. For instance, in the *Nerarno* case that specific reference to the incorporation of the charter party arbitration clause is binding even to the subsequent holder of the bill and it is irrelevant that the agreement was conducted between the owner and the charterer. The holder argued that the reference was not efficient enough and should

[13]Nigel Blackaby; Constantine Partasides; Alan Redfern; Martin Hunter, *Redfern and Hunter on International Arbitration*, (6th,Oxford University Press,2015), par. 1.13
[14] Ibid, par. 1.15
[15] Ibid, par. 1.17
[16] Lisa Beth Chessin, 'The Applicability of an Arbitration Clause Contained in a Bill of Lading to Third Parties: Steel Warehouse Co. v. Abalone Shipping Ltd.' (1999) 23 Tul Mar LJ 575

not be treated as the writing prerequisite is satisfied because the holder has not participated to formation of the clause. The court overruled this argument given that the reference was esteemed as "in writing", thus arbitration is considered as mandatory road to solve any arising disputes. As will be recalled, under US law the wording of the incorporation is taken into consideration along with the reference. Bills of lading include or prove the contract of carriage for the delivery of the cargo. The legal framework which governs the rights, obligations and liabilities related to the contracts is a combination of different set of international and national legislation. The desirable percentage of harmonization has not been achieved yet, though many states are contracting members of international conventions. Two basic legal tools are The Hague Rules of 1924 and The Hague-Visby Rules of 1968, which were an updated version of the former, have been adopted by many countries around the world. In *The Hollandia* article 3 (8) of The Hague-Visby Rules has been analyzed and raised concern about its impact to the arbitration clause.[17] According to that decision and article 3(8), the clause, which provided that the Dutch law should govern the agreement and any dispute will fall under the jurisdiction of the courts of Amsterdam, was considered invalid. The rationale behind this decision, as the House of Lords has justified, is that the forum selection clause served the defendants' interest as the amount of limitation for the carriers had a higher threshold by the Hague-Visby Rules than under the Dutch law, which have ratified and is in effect the Hague Rules. The court declined the implementation of that forum selection clause and indirectly the appliance of the Hague Rules which would compensate the claimants with a much lower amount for the damages and losses of the cargo and applied the Hague-Visby Rules under the jurisdiction of the English courts. The significance of *The Hollandia d*ecision relating to the arbitration clause inserted in the bill of lading can be reflected by answering of whether or not article 3(8) of the Hague-Visby Rules can overrule all kinds of foreign forum selection clauses adding as component to them even the arbitration clauses contained in bills of lading as well because of their nature to transfer jurisdiction to foreign courts or tribunals. The ruling of the court has been explained thoroughly given the justification behind the overriding of that foreign forum selection clause; it is therefore beyond any dispute an analysis of the possible decision of the court under this chosen forum. The outcome of *The Hollandia* case can be mirrored in the cases in which the foreign forum selection clause can lead to a more restricted amount of liability than the one permitted by the Hague-Visby Rules.

The examination of the validity of the arbitration clause has a prominent role in the course of the court proceedings. Under the Arbitration Act of 1996, in particular section 9(4), the English court can grant permission to stay the proceedings against the arbitration agreement, but this claim can be denied if the arbitration agreement is proved to be "null and void, inoperative or incapable of being performed". The arbitration clause can be described as null and void on the grounds of public policy. The term public policy refers to a set of rules and settled principles which have a mandatory nature and the courts or tribunals ore obliged to follow in the event a provision of the agreement opposes the context of public policy. Further debate is provoked about the impact of the combination and the interrelation between the

[17] Dr. Melis Ozdel, Enforcement Of Arbitration Clauses In Bills Of Lading: Where Are We Now?* (2016), Kluver law

statutory force of the Hague-Visby Rules and a null and void arbitration agreement to the court proceeding. When the arbitration agreement is null and void, should the court proceedings continue in spite of the possibility Article 3(8) of the Hague-Visby rules is infringed by the legislation at the seat of the arbitration or should the enforcement of a more fair legal framework, such the one contained in the Hague-Visby Rules, considered more crucial to the case than the anticipated respect and enforce to the mandatory rules at the seat of the defined tribunal? Under English law, where the New York Convention is applied, by which there is the necessity to execute an arbitration agreement, the ruling of halting the court proceedings should be limited and in accordance to the facts of the case. As a result, it is safe to assume that the justification of *The Hollandia* upholding, whilst the intention of Lord Diplock to affect not only the foreign forum selection clauses but also the arbitration clauses of the bills of lading, should not be extended to the arbitration agreements included in the bills of lading. [18]

The Hague Rules and its updated version the Hague-Visby Rules do not address the issue of validity of the foreign forum selection clauses and subsequently of the arbitration clauses in the bills of lading. Nonetheless, the Hamburg Rules in 1978 made an effort to regulate this subject - matter. Under Article 22 par.2 of the Hamburg Rules when an arbitration clause is included in a charter-party and the bill of lading is issued due to the charter-party without making any explicit reference to the arbitration clause of the latter in order to be enforced to the third party holder of the bill, the carrier cannot commence the arbitration proceedings against the third party holder. Necessary prerequisite that satisfies the aforementioned rule is the good faith of the holder at the time of the transfer of the bill. In essence, the validity of the inserted arbitration clause into the bill of lading is assured by unambiguous express of the incorporation. The Hamburg Rules have been declared into force in 1992 and since their creation only 25 states until recently have adopted them. Therefore, their influence to the international maritime trade is moderated contrary to the Hague and the Hague- Visby Rules which have been implemented by many countries. It is not surprising the absence of desirable harmonization and a unilateral approach to the specific issue.

The Rotterdam Rules, which is a revised and updated version of the Hamburg Rules, proposed modifications of the already existing treaties pursuant to the wide use of the transport documents of carriage of goods by sea in electronic form. By the Rotterdam Rules is allowed the issuance of a bill of lading which contains an arbitration clause that has been incorporated by a charter-party. Two requirements should be satisfied to ensure the validity and enforcement of the incorporated arbitration clause. The first requirement is that the contract of affreightment should embody information that provides the date and clear and unambiguous identification of the contracting parties of the contract of carriage. The second and final requirement specifies the nature of the wording. The incorporation can only esteemed as successful and binding upon the contracting parties only when it is completed by explicit reference to the provision of the charter-party or other contract of carriage that determines specifically the terms of the agreement about the arbitration procedure. Although, the two prerequisites of clear identification of the charter-party and the specified reference to

[18] ibid

the arbitration clause of the charter-party inserted into the bill of lading, do not lead to any misunderstandings or thoughts of doubts about the exact meaning of the given article about arbitration, as long as the states do not proceed to the ratification of the Convention, it cannot be enforced that simpler rule, which can crystallize and secure a verified method for incorporation of the arbitration agreements.[19]

The doctrine of separability

The arbitration agreement is presumed as a separate and autonomous agreement. The doctrine of seperability of the arbitration clause is essentially the idea that the arbitration agreement is a separate, distinct agreement from the underlying main contract between the parties. The same concept applies even when the arbitration agreement is forming part of the main contract and included in a clause. That doctrine answers to different names under different jurisdictions without bearing any changes in its essence and operation. For example, in USA it is called severability and in Germany and France autonomy (*l'autonomie de la clause compromissoire)*. Separability assures that in the event that the main contract, which is the reason for the arbitration agreement, is considered null and void, the agreement to arbitrate or the clause will not be terminated as invalid but will survive the termination of the main contract. In the *Heyman v Darwins Ltd* [1942] Lord MacMillan stated that "It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract." The doctrine of separability is highly important because when the arbitrators rule the underlying contract as void, the party who loses by the enforcement of that award may conclude that the arbitration agreement is void, too, so the party is not bound by it. Under English law, the concept was acceptable by the case law before it becomes part of the legislation (art.7 of the Arbitration Act 1996). One problem of invalidity of the contract which affects the validity of the arbitration clause is related to the legal capacity of the parties. It is considered unlawful to enter a contract without having the contractual capacity to do so.[20]

Which authority has the power to examine and decide whether the arbitration clause is valid and enforceable

The kompetenz - kompetenz principle, which allocates the arbitral tribunal the ability to examine and resolve the question of its jurisdiction over the case without the interference of the national courts, is well established all over the world. Although, the arbitral tribunal has the authority to decide over the existence of its jurisdiction, the national courts are invested the right to challenge that jurisdiction indirectly by challenging the outcome of the arbitral procedure, namely the arbitration award. According to the English Arbitration Act 1996 the national courts of the state where the arbitral tribunal is located can question the jurisdiction of the tribunal and the Article V (1) (a) of the New York Convention 1958 the courts of the state enforcing the

[19] ibid

[20] *Tobler Case (1933) 59 Entscheidungen des Schweizerischen Bundesgerichts 1, 177*, Swiss Federal Court

arbitration award can challenge and ultimately do not consent to the enforcement of it with the reasoning that the arbitration agreement that has brought the arbitration proceedings has been invalid and not legally binding upon the contracting parties. Despite the wide acceptance and appliance of the kompetenz - kompetenz principle, the national courts have the authority to interfere and decide on the jurisdiction of the arbitral tribunal before reaching the arbitration award. By section 9 (4) of the English Arbitration Act 1996 the defendant can raise the objection of lack of jurisdiction of the national court in which the proceeding has been brought on the grounds that there is a valid and binding, hence enforceable, arbitration agreement. The national court, following the evaluation of the objection can grant a stay of the court proceedings, but if the arbitration agreement is deemed null and void then the dispute will be under the jurisdiction of the national courts. Moreover, a party might sought to gain interim relief in order to help the arbitration proceedings by ordering the protection of the property rights which are endangered by the dispute (section 44 of the Act 1996) and when the party aims to enforce the arbitration agreement and the counterparty proceed and took a legal action in a foreign court by overriding the arbitration agreement, the court can grant an anti-suit injunction which will act as an impediment and prohibit a party to bring the dispute to litigation regardless of the fact that the arbitration proceedings has not been commenced[21].

The legal framework which governs the evaluation of the validity of the arbitration agreement is the one described as the applicable law in the arbitration agreement. It is worth mentioning the fact that governing law of the arbitration agreement does not necessary coincides with the governing law of the contract of carriage. The contracting parties are capable of to either imply or expressly determine the applying legal framework of the contract of carriage, which subsequently defines the governing law of the arbitration agreement given the lack of a different selected legal framework for arbitration. Most of the times, it is explicitly stated the selected applicable law for the arbitration proceedings. However, when, for example, the seat of arbitration is set in London it can be considered only as an indication of applying the English law to the arbitration proceedings due to the ambiguous character of this reference[22]. In other words, the choice of law principle is available and respected in both agreements, even when two different legal regimes should apply. Each legal system does not determine the "public policy" legal term equally with the others states. The differentiation in the treatment of the validity of the arbitration agreement has the ability to alter the outcome of the national courts' or the arbitral tribunals' decision relating to the possible nullity of the arbitration clause. The risk of parallel litigation and arbitration proceedings by commencing the procedures to the national courts and the arbitral tribunals accordingly has not been eliminated. At this point another crucial question that needs to be answered is about recognizing the court which has the authority to decide about the validity of the arbitration agreement.

The national courts have the judicial power to decide about the validity of the arbitration agreement. When the national courts belong to a state which is a member

[21] AES Ust-Kamenogorsk Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 35

[22] XL Insurance Limited v. Owens Corning [2000] 2 Lloyd's Rep 500, C v. D [2008] 1 Lloyd's Rep 239 (CA), Sulamerica CIA Nacional de Seguros SA and others v. Enesa Engenharia SA and others [2012] EWCA Civ 638.

of the European Union or the European Free Trade Association, it has been crystallized that the European regulations about the jurisdiction and the enforcement of the decisions of the courts in cases with commercial and civil nature do not imposed on the arbitration agreements. The European regulations applied on the jurisdiction of the national courts and the enforcement of their decisions cannot be executed on arbitration, due to the divergence of both of the proceedings' nature. Based upon the outcome of the cases examined by the European Court of Justice, under the paragraph 107 of the Heidelberg Report, it is demonstrated the significance of the nature of the essence of the proceedings when the main issue refers to whether or not there is jurisdiction of the arbitral tribunal.

When the national courts decide the lex fori governing the arbitration agreement, the rationale of this decision stands on the conflict of law rules of the state. In accordance with the 1996 Act, the arbitral tribunal is able to choose the appliance of the conflict of law rules which deems that they are proper. But, the tribunal is restricted by any indication or explicit statement of applying a specific legislation to the arbitration agreement. As it was mentioned, it is common practice to consider that the governing law at the seat of the arbitration procedure can also govern the arbitration agreement.

Chapter 3: The transfer of the contractual rights under the bill of lading

Rights to suit under COGSA Act 1992

According to the Act 1992 s.2 par. 1, c "all rights of suit under the contract of carriage are transferred and delivered" to the holder of the shipping document. The meaning of "rights of suit" has been clarified by two cases. In the East West Corp case [2003] was mentioned that it refers to all the rights arise under the contract. In the Sea master case has been commented that not only the contractual rights are transferred but also the rights provided by the arbitration clause contained in the original bill of lading without claiming otherwise.[23] As a result, *Arab Bank,* the subsequent holder of the bill of lading after the transfer, is bound by the arbitration clause even though the bank was not one of the contracting parties of the original bill of lading. The *Sea Master* case gives rise to concerns to the shipping industry because bills of lading are used as security in the market, hence their significance to the financial world. Mr. Justice Popplewell commented on the doctrine of separability and its appliance in the case leads to the assumption that the rights and obligations of the arbitration agreement embodied in the bill of lading shall not fall within the scope of application of Carriage of Goods by Sea Act 1992. On the contrary, the rights and obligations of the parties depending on the bill of lading should be exercised following the Carriage of Goods by Sea Act 1992. This decision contradicts The *Ythan* decision in 2006 on the relation between the Carriage of Goods by Sea Act 1992 and the arbitration agreement. Aiken J claimed that any intermediate holder of the bill of lading has the obligation to arbitration if he is hold liable under the bill of lading according to s.3 of the Act 1992 or initiate the procedure for a claim of his own against the owner.

The mere fact of the transfer of the contractual rights and obligations established by the bill of lading when the contract of affreightment is transferred to another holder, activates the discussion about the possible binding effect of the arbitration to the third party holder of the bill, namely the consignee, endorsee or bearer. Under COGSA 1992, section 5(2) the lawful holder of the bill has obtained all rights of suit due to the transfer of the bill. The "holder" of the bill is interpreted as either the endorsee or the consignee, depending on the facts, but it is essential to be in the possession of the bill in order to be deemed the rightful holders. By English law, the consignees or endorsees have the ability to supersede to all rights and obligations which originate from the bill of lading. It is therefore anticipated, bearing in mind the aforementioned lawful practice, for the carrier to be able to enforce the arbitration clause even to the third party holder of the bill of lading. The lawful holders of the bill of lading, when the bill is transferred to a third party, succeed to all rights of suit and liabilities according to section 3(1) of Carriage of Goods by Sea Act 1992. An equal effect is observed even to the consignees who succeed to the rights and obligations of the shipper.

The *Nerarno* decision has the position of strong evidence because even though the holder of the bill was absent from the negotiation of the terms and not the original

[23] Antony Rogers, Jason Chuah, Martin Dockray, *Cases and materials on the carriage of goods by sea* (5th, Routledge, 2020), p.324

signatory, the charterparty arbitration clause was treated as an operative and capable of being enforced term.

Enforcement to third party holders of the bill fo lading

The enforcement of arbitration clauses contained in bills of lading against third parties under any situation would lead to an unfair imposition. In the event of transference of a bill of lading, the assignee has the capacity to access all terms included in the bill of lading and recognizes the existence of an arbitration clause. Under such circumstances, it is hard to challenge the binding effect of the arbitration clause to third parties. However, in the case incorporation of a charterparty arbitration clause into the bill of lading, it is highly likely the holder of the bill might not be aware of that fact and the subsequent lack of litigation authority.

In the *Mahkutai* [24] it is illustrated the eagerness of the courts to enforce the bill of lading terms to third parties as an overall strategy to the issue, based upon the general benefit of the commercial practices. Although, the arising issue was the enforcement of the exclusive jurisdiction clause to a party by the third party who was not the contracting party to the clause, the ruling of the court, as it was in favour of the extension of the binding nature of the clause to third parties, entertained concerns about the necessity of applying the same approach even to the arbitration clause contained in the bill of lading.[25] Lord Goff specifically commented handily "Though these solutions [ie devices to overcome the doctrine of privity] are now perceived to be generally effective for their purpose, their technical nature is all too apparent; and the time may well come when, in an appropriate case it will fall to be considered whether the Courts should take what may legitimately be perceived to be the final, perhaps inevitable step in this development, and recognise in these cases a fully fledged exception to the doctrine of privity, thus escaping from all the technicalities with which Courts are now faced in English law."

Given that more than 80% of the international trade is transferred by sea[26], maritime business has a prominent place. Arbitration has been a well established and broadly widespread practice, in particular in the commercial world, included the maritime sector. It is a common method to insert an arbitration clause in the terms of the contracts of carriage by sea. This alternative form of dispute resolution provides the parties with the necessary flexibility in order to solve their problems with a less time-consuming and costly procedure.

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[24] All Answers ltd, 'The Mahkutai - 1996' (Lawteacher.net, February 2022) <https://www.lawteacher.net/cases/the-mahkutai.php?vref=1> accessed 6 February 2022

[25] Bradley Harle Giles, 'Some Concerns Arising from the Enforcement of Arbitration Clauses in Bills of Lading' (1999) 14 MLAANZ Journal 5

[26] See https://unctad.org/topic/transport-and-trade-logistics/review-of-maritime-transport, accessed 5 January 2021

Chapter 4: The incorporation of a charter-party arbitration clause into a bill of lading

Efficient reference of the incorporation

The incorporation of an arbitration clause into a bill of lading should be efficiently contacted and in detail in order to become a provision of it. The charterer and the shipowner aim, most of the times, to secure that their rights and obligations against any holder of the bill of lading will remain the same. This can be achieved either by printing a bill of lading containing all the terms and conditions of the charterparty as its own or , the usual one, by incorporating into the bill of lading the necessary clauses. There are many cases through the years which illustrated the lack of precise referencing to the charterparty clauses and the need for interpretation of those clauses, give that the holder of the bill of lading has not negotiated and agreed to the charterparty because he was not the original contracting party, so it is sometimes dubious whether the holder is bound by the clause as an indorsee or not. In the Energy Transport, Ltd v M V San Sebastian the holder of the bill of lading was bound and compelled to arbitrate as there was a specific implementation by applying a language which crystallized the incorporation. On the other hand, in the Continental UK. Ltd. v Anagel Confidence Compania Naviera, S.A., the same court ruled differently. The rationale behind the rejection of the cargo owner's petition was that the holder of bill of lading was not a party of the charterparty and the arbitration clause determine the parties bound by it, namely the owners and the charterers.

A landmark decision was in 1960 by the Court of Appeal about the Merak case. Following the facts of the case, all the clauses terms and conditions of the charterparty were incorporated into the bill of lading "including Clause 30". But the arbitration clause was numbered 32 and the aforementioned numbering was an obvious mistake as its subject was irrelevant to the bill of lading. Lord Justice Sellers mentioned that even if the specific clause was not listed, it can be easily considered that the wording "all terms and conditions and clauses" include the clause about arbitration. But the court does not have the jurisdiction to correct even a simple and easily understood mistake. The phrase "arising under bills of lading" deemed as a sufficient reference to the arbitration clause.[27] Whilst the Merak decision, it is most commonly accepted that the arbitration clause of the charterparty should efficiently be incorporated in the bill of lading by sufficient and not general phrasing in order to achieving the binding effect. In the Varenna decision, the Court of Appeal deemed that the words "terms and conditions" is quite general compared to the arbitration clause of the charterparty, which specified that "any dispute arising under this charter shall be settled in London by arbitration....", and it is not possible to construe that the arbitration clause is becoming a valid clause of the bill of lading. [28] Moreover, Sir John Donaldson M.R.

[27] Goldby Miriam (2007), Incorporation Of Charterparty Arbitration Clauses Into Bills Of Lading: Recent Developments, Denning Law Journal, Vol 19

[28] Michael Wagener, 'Legal Certainty and the Incorporation of Charterparty Arbitration Clauses in Bills of Lading' (2009) 40 J Mar L & Com 115

added the point that there is no agreement between the shipowner and the charterparty but the contracting parties of the bill of lading itself should be the ones who agree the incorporation. A decision that used as a reinforcement argument was the TW'Thomas and Co v Portsea Steamship in 1912 which rendered the decision that general wording of incorporation was inadequate. Although, the Thomas and Co v. Portsea Steamship Ltd decision has been over rendered over a hundred years ago, it still has great impact on the judiciary developments.[29] A description test was developed regulating the wording of incorporation. General phrases of incorporation are not effective enough to incorporate the arbitration clause which has been formed to deal with any challenges arising under the charterparty. The courts have accepted that *prima facie* provisions completely germane to the matters of the bill of lading, such as shipment, carriage, discharge and delivery of cargo, can be incorporated. These are matters which are dealt with by the shippers and the consignees and relate to the function of the bill of lading as contract of carriage. [30] Despite being clauses of the incorporated charterparty, arbitration clauses are not deemed as germane to the bill of lading as a contract of carriage. What is permitted for an incorporation of an arbitration clause is specific wording. Emphasis needs to be given to the recent *Channel Ranger* decision in 2013. According to the actual facts the "law and arbitration clause" of the charterparty was incorporated into the bill of lading. However, there was a reference for exclusive jurisdiction of the English court for any arising dispute but no reference for an agreement about arbitration. The clauses of the bill of lading contradicted the ones of the charterparty. The Court of Appeal and Lord Beatson LJ affirmed the decision of the first instance court and Lord Males J's decision that it is included in the bill of lading clause which instructs to apply a petition to the English court for all the dispute. As a result, it is obvious that under common law specific and not general words are needed as the arbitration and jurisdiction clauses considered ancillary provisions and not germane to the bill of lading as a contract of carriage. Sometimes, even the specific words cannot overcome the language mistakes.

Under international regimes

Under the Hamburg Rules, it is necessary the bill of lading to contain a provision regarding the existing arbitration clause so as to bind the holder. Article 22 par. 2 mentions that "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 charterparty 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". Pursuant to the Hamburg Rules, two factors have a key role to the recognition of the binding of the incorporated arbitration clause: the annotation and the subsequent good faith of the new holder. The first one is that the bill of lading should include an annotation of the incorporation of the arbitration clause, in other words a special comment on the incorporation, otherwise the new holder would be deemed as acting in good faith and

[29] See supra note 17
[30] TW'Thomas and Co v Portsea Steamship [1912] AC 1

was not aware of the existence of the clause. Therefore, the carrier cannot impose arbitration to the new holder of the bill of lading.

The Hague and the Hague-Visby rules have not ratified any rule for that controversial issue. The Rome I Regulation and Rome Convention do not govern the arbitration agreement, which is considered a separate contract according to the doctrine of separability.

Under U.S. Law

In the United States, the holder of the bill of lading is obligated to enforce the arbitration clause, if three prerequisites are fulfilled. These three requirements demonstrate an adequate intention of the holder to be bound and have been specified by the courts and not by a statute. First of all, the incorporation should be comprehensive and explicit. An actual or constructive notice should be given for the holder in order to verify that he is familiar and consents with the provisions of the bill of lading. It is, also, important to give further notice to the parties of the arbitration clause, whether they are referred only the original parties that have signed the transport document or it is wider the scope of application so as third parties to be included. In Steel Warehouse Co. v Abalone Shipping Ltd., according to the United States Court of Appeals for the Fifth Circuit, stated that the wording of the arbitration clause "all disputes from time to time arising out of this contract shall ... be referred to final arbitration," was not restrictive and covered third parties as well. When the arbitration clause of the charterparty is not mentioned in the bill of lading and is invoked for disputes arisen “under this charterparty”, then it is highly unlikely to consider a third party bound by this clause. Lastly, the foreign forum selection clause implemented in the arbitration clause is valid because Carriage of Goods by Sea Act creates the principles of liability and does not prescribe the procedure of enforcing that liability.[31] Under the U.S. legal system it is difficult and confusing the system of the three criteria while it is accepted that the fact that someone is becoming holder of the bill of lading automatically becomes the subject of all the rights and obligations that originated from the document. The bill of lading is usually a form which is filled with the required information. In the event there is a particular space in the form which is directed to illustrate the incorporation of an arbitration clause, it should be clearly and explicitly noted, though the restrictive use of language for the clause cannot bind the third party.[32]

Under English Law

[31] See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533, 1995 AMC 1817, 1820-21 (1995)

[32]Otto Wolff Handelsgesellschaft v. Sheridan Transportation. Co.5 800 F. Supp. 1353, 1992 AMC 2646 (E.D. Va. 1992)

On the contrary, under the English legal system the binding effect of the arbitration clause remains intact and the holder of the bill of lading has to follow the arbitration proceedings when an effective implementation of the clause takes place. It has been well established under English law a strict rule of sufficient and precise wording of reference for the incorporation of the charterparty.[33] The Habas Sinai decision has been explicitly stated that the arbitration clause must be incorporated directly in the bill of lading The judge held that "there should be no lack of clarity in respect of what is to be incorporated" due to i) the lack of germane relevance of the arbitration clause to the subject matter of the bill of lading as a contract of carriage, ii) the nature of the arbitration clause as an ancillary provision, iii) the need for notifying the subsequent holder of the bill of lading of the existence of the arbitration agreement within the charterparty and iv) the need to rely on the law. This way, under English law, the original parties are indirectly obliged to inform the non-original holder for this clause so as the holder to be protected. In 2018, in the light of The Sea Master case the holder of the bill of lading, the bank, had the right of suit according to section 2 of The Carriage of Goods by Sea Act 1992. The Court of Appeal decided that as long as the contract contains a clause for arbitration and this clause covers a broad scope of disputes having phrases such as “arising out of or in connection with” the contract, then, using the “reasonable expectation of businessmen”, all arising disputes among the ship owners and the parties having interest upon the cargo, such as disputes about the right of suit and liabilities under the principal contract included in or evidenced by the bill of lading, will be subject to arbitration.[34]

In general, it should be noted that there are three requirements that should be fulfilled in order to have effectively incorporated the charterparty arbitration clause into the bill of lading.[35] The first requirement Donaldson MR: “What the shipowner agreed with the charterers, whether in the charterparty or otherwise, is wholly irrelevant, save in so far as the whole or part of any agreement has become part of the bill of lading contract. Such incorporation cannot be achieved by agreement between the owners and charterers. It can only be achieved by the agreement of the parties to the bill o lading contract and thus the operative words of incorporation must be found in the bill of lading itself.” It has been stated in *The Varenna [1983]*[36] contradicted the ruling of Staughton J in *the Emmanuel Colocotronis (No 2) [1982]*[37] . Explicit and effective wording of the incorporation of the charterparty into the bill is certainly more essential and vital than trying to discover evidence of the intention of the contracting parties, because the court is not entitled and obliged to delve into the exact clauses that the parties strived for incorporating. Secondly, the other issue which should be handled is the “description issue”.[38] It has been disputed by the courts in various cases through the years the approach of the wording, but it is undoubted the need for an effective use of suitable word in order to enforce the charterparty clauses to a third party holder bill of lading. This has been clearly depicted by a number of cases regarding to liens for charterparty freight, for dead freight, for demuragge but most of

[33] The Federal Bulker [1989] 1 Lloyd’s Rep 103, p.105 CA, Bingham Lj
[34] *Sea Master Shipping Inc v. Arab Bank (Switzerland) Ltd (The Sea Master)* [2018]
[35] See supra note 4, p. 247
[36] The Varenna [1983] Lloyd’s Rep 592 at p. 594
[37] The Emmanuel Colocotronis (No 2) [1982] Lloyd’s Rep.286 at p. 293
[38] Ibid p.289

all to the incorporation of a charterparty arbitration clause into a bill of lading. Bearing in mind the consencus view that the arbitration clauses are ancillary to the main purpose of the contract of affreightment, in *Siboti v BP France* "all terms whatsoever" did not explicitly mentioned the ancillary arbitration clause, as the general word of "whatsoever" cannot include ancillary terms to the context of the bill of lading. The last requirement is about the "consistency issue"[39], meaning that the terms incorporated into the bill of lading should be in accord with the terms of the bill of lading. In the light of *the Hamilton v Mackie* decision this issue was faced by interpreting the arbitration clause provided in the charterparty which stated that "all disputes arising under this charterparty shall be referred to arbitration". As a result, the disputes arising under the bill of lading would not fall under the arbitration clause.

Identification of the parties

The ship-owner has the right to commence arbitration proceedings for any claims about the cargo under the bill of lading.[40] In *Otto Wolff Handelsgesellschaft mbH v Sheridan Transportation Co. 1992*[41] the court analyzed the issue of encompassing a third party to the arbitration clause owing to the efficient utility of specific language. The plaintiff, a German corporation, brought the claim to the United States District Court against the defendant, the owner of the vessel, for damage on the cargo. The defendant filed a motion in which he stated that the plaintiff was bound by the arbitration clause contained in the charterparty. In order to clarify this issue, the Court segmented the dispute into two questions. The first question was whether or not the bill of lading sufficiently incorporated the charterparty and the second one following a positive answer to the first question, if the arbitration agreement has been efficiently and unambiguously incorporated into the bill of lading in order to be enforced to the consignee. It was held that the arbitration clause could not be enforced to other parties than the "owner" or the "charterer" because the clause explicitly referred to the specific parties, hence the unbinding effect to third parties who in that case is the consignee.

In *Nissho Iwai Corporation v. M/V Thalia* the owners were not bound by the incorporated arbitration clause in the bill of lading. The arbitration clause contained in the sub-charter could be applied on "owners and charterers", though the identity of the word "owner" was ruled that it referred to the time charter and not the original ship-owner.

On the other hand, in the *Trade Arbed v. M/V Kandalaksha* after subsequent chartering the court had to rule whether or not the arbitration clause could be enforced on the subsequent charterers. Given that both the sub-charter and the sub-sub-charter have engaged to the charters under the same terms, it was deemed appropriate to consider that the "charterer" in both contracts of carriage alluded to either the sub-charter or the sub-sub-charter. However, as the owner and the head charterer have agreed on different terms from the sub-charterers, the ship-owner could not raise arbitration proceedings against the sub-charterers.

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[39] ibid

[40] Terence Coghlin; Michael Wilford, *Time Charters*, (6th, Informa, 2008) chapter 29

[41] 800 F. Supp. 1353, 1992 AMC 2646 (E.D. Va. 1992)

In the *Pacific Lumber and Shipping Co. Inc. v. Star Shipping A/S* contracts of adhesion the arbitration clause establishing jurisdiction of the Arbitration Act of 1950 in London the owner or the charterer did not negotiate the "London arbitration clause" with the shippers. Not only did the shippers not discuss the arbitration clause but they also gained access to the completed form of the bill of lading only when the vessel, Star Clipper, sailed from Coos Bay. It was impossible therefore for them to erase or even argue the terms of the arbitration. Thus, the insertion of the 'London arbitration clause' was deemed invalid by the court and was not enforced to the shippers of the vessel.

Third parties have not the capacity to negotiate or even discuss a charterparty arbitration clause incorporated into a bill of lading. The impeachment of its validity is based on the argument that the absence of the third party during the negotiation might be considered unfair towards the third party. The bill of lading and the inserted arbitration clause by the charterparty are esteemed as ancillary to the main contract of carriage and as contracts of adhesion.

In the Steel Warehouse, the three steps analysis of the courts in order to determine whether or not a third party is bound by the charter party inserted in the bill of lading.[42] The first step is to answer the question if the incorporation of the clause has been actually and clearly taken place by giving an actual or constructive notice of it. The second step is to ascertain the range of persons obligated to apply the incorporated arbitration clause. If the list is restrictive, only the owners and the charterers can be bound. Otherwise, the clause will govern even third parties if the phrasing of the clause can be characterized as broad. The third and last step of the analysis is about the foreign forum shopping in the arbitration agreement. According to s. 3(8) of the Carriage of Goods by Sea Act, it was forbidden and indicated as violation of the law a foreign judicial forum. But, this violation was crystallized and well rooted until 1995 and the *Vimae Seguros Y Reaseguros, S.A. v. M/V Sky Reefer,* ruled that the foreign forum selection clause in an arbitration agreement contained in a bill of lading did not infringe COGSA.[43]

The *Midland Tar Distillers, Inc. v. M/T Lotos* decision high lightens the key issue of the incorporation of the arbitration into the bill of lading. The claimant supported the view that the cargo suffered damage owing to the shipper's inappropriate loading, stowage, handling and discharge of the goods. The court had to provide a ruling for the two following issues. First of all, the main issue was whether or not the arbitration clause of the charterparty had effectively incorporated by reference into the bill of lading and subsequently, if the answer was positive to the first issue, whether the third party, namely the consignee, would be affected and obliged to enforce the arbitration clause. Under the United States Court for the Southern District of New York, it was decided that the holder of the bill of lading would be bound if there was an actual or constructive notice of the incorporation of the clause into the bill.[44] Following the positive response to the basic issue, the court ascertained whether "an agreement to arbitrate all 'disputes... arising out of this charter' binds not only the original parties,

[42] Lisa Beth Chessin, The applicability of an arbitration clause contained in a bill of lading to third parties: steel warehouse co. v abalone shipping ltd. 1999

[43] ibid

[44] ibid

but also all those who subsequently consent to be bound by its terms." The court determined that the charter party as a whole, included the arbitration clause were efficiently incorporated into the terms of the bill because the provisions about the incorporation were detailed enough and embodied thoroughly the rights and obligation of the contracting parties, hence the avoidance of misinterpretation. In particular it was provided that the cargo was “subject to all the terms, liberties and conditions of charter party date….” On the contrary, in *Compare, e.g., United States v. Cia. Naviera Continental, S.A.* the incorporation of the charter party into the bill of lading was deemed inadequate enough to establish the incorporation as the standard incorporation clause lacked of identification of the date as it was missing, thus the plaintiff was not noticed of it. Judge Motley in *Coastal States Trading, Inc. v. Zenith Navigation S.A.* specifically noticed the unambiguous reference to the incorporation by the use of the right phrasing “freight per charter party” and by the cautious use of language “all conditions and exceptions of the charter party being considered embodied in this bill of lading”.

5) The CONGENBILL standard form of bill of lading: recent cases

Since 1978, when the CONGENBILL was drafted for the first time, it has been reviewed four times through the years, specifically in 1994, in 2000, in 2007 and finally in 2016. The latest edition of CONGENBILLS[45] is the CONGENBILL 2016[46], in which it was efficiently developed a form of explicit incorporation of all the charter-party provisions, including the one about arbitration, into the bill of lading. The second and probably the reverse side of the CONGENBILL contain the conditions of carriage. The very first term states, without letting any doubt or dispute to arise[47], that the forum selection or arbitration or other selected dispute resolution clause is incorporated into the bill of lading. In addition to this, in the first page of the CONGENBILL the parties have to complete the blanks about the identification of the charter-party and the blank about the date of the charter-party.[48]

It is undisputable that the introduction of the CONGENBILL form has instituted a general form of bill which is expected to implement the agreement of the contracting parties about arbitration or other form of dispute resolution. In 2003 the Court of Appeal at the Epsilon Rosa case justified its decision by mentioning that "the particular concern about the incorporation of arbitration clauses is met by the CONGENBILL form which expressly says that it incorporates all terms of the charter-party 'including the law and arbitration clause.' Parties involved in transactions such as these will be aware that contracts of this kind do commonly contain dispute resolution machinery and often provide for arbitration in some neutral forum." This form constitutes a standard form of bill of lading which implies the introduction and establishment of a new commercial practice (lex mercatoria).[49] The newly introduced mercantile practice standardized the terms of the bills which were easily acknowledged by the contracting parties. The latter have become familiarized to those terms, so as to consider certain the knowledge and acceptance of the incorporation of the arbitration clause of the charter-party into the bill of lading.

The San Nicholas case two important gaps did not display the information needed. The first gap required information about the date of the incorporated charterparty and the second about the identities of the contracting parties. The foundation of Lord Denning‘s decision was the analysis found in Scrutton on Carterparties: 'A general reference will normally be construed as relating to the head charter, since this is the contract to which the shipowner, who issues the bill of lading, is a party.... It not infrequently happens that, when a printed form of bill of lading provides for the incorporation of the 'charterparty dated ', the parties omit to fill in the blank. It is submitted that the effect is the same as if the reference were merely to 'the

[45] CONGENBILL is an abbreviation of the standard form of charter-party bills of lading for general cargo, established by the Baltic and International Maritime Council (BIMCO).

[46] https://www.bimco.org/contracts-and-clauses/bimco-contracts/congenbill-2016

[47] https://www.shippingandfreightresource.com/wp-content/uploads/2019/02/BIMCO-ConGenBill.pdf

[48] “Freight payable as per charter party dated”

[49] HJ Berman and C Kaufman, 'The Law of International Commercial Transactions (Lex Mercatoria)' (1978) 19 Harvard International Law Journal 221, 222-223

charterparty' and the omission does not demonstrate an intent to negative the incorporation."[50]

In *The Vinson* case, the CONGENBILL form did not contain evidence of identification of the charter-party, hence the challenge of the proper incorporation of the arbitration clause into the bill. Judge Smith J. held that the issuance of the CONGENBILL form by the contracting parties should imply their intention to incorporate the provisions of the charter-party into the bill in spite of the absence of identification of the charter-party which contained these provisions. The prospective of reaching the conclusions that the incorporation of the charter-party clauses failed owing to the high uncertainty of the incorporation clause or the lack of identification or specification of the charter-party date caused the formation of an unclear bill of lading that had to be characterized as null and void, notwithstanding the willingness of the parties for incorporation, was avoided due to the hesitance of the courts. In the light of *Vinson* decision and as it was mentioned above, under English law, the validity of the incorporation of the charter-party does not require the identification of the charter-party whose clauses is inserted in the bill of lading. It is essential to bear in mind that in the aforementioned decision the fact that the form of bill of lading was a CONGENBILL which is a standard form of bill of lading and the arbitration clause is anticipated to be included in the form as the first condition of the reverse page, "reinforced the argument that the parties intended to incorporate provisions from a charter-party or other contract that they so described". Moreover, the court reached that decision as they took into consideration two further factors. Firstly, the identification of the charter-party under incorporation could be easily conducted pursuant to the given facts. Secondly, the apparent emphasis and willingness of the court to identify the charter-party and verify the validity of the incorporated clauses into the bill of lading, illustrates the embrace and the strengthening of the use of the standard form as a mercantile practice.

In 2006, a noteworthy arbitral award was published by the Lloyds Maritime Law Newsletter. The incorporated charter-party clauses included a clause that specifically stated that in the event the parties have a claim they should initiate arbitration proceedings in London and the applying law should be the English law. Nonetheless, the receivers initiated the proceedings in a civil court, namely the Federal High Court of Nigeria, claiming the damages of the cargo. The owners counter claim that the Nigerian court did have the jurisdiction for that claim because of the arbitration clause. The receivers contradicted this argument by manifesting that as long as they were contracting parties to the charter – party, they were not bound by that clause. Finally, the arbitrations upheld that the arbitral tribunal has the judicial power to decide over any arising dispute from the bill of lading. The rationale of that award stood on two factors. The incorporation of the charter-party into the bill of lading did not create any ambiguity as it was explicitly mentioned and the incorporated arbitration clause can be enforced on the receiver regardless of the fact that they were parties to the charter. [51]

[50] Miriam Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (2007) 19 Denning LJ 171

[51] ibid

Conclusions

It is an undisputable fact that the transfer of the bill of lading to a third party can generate numerous problems, in particular when the contract contains an arbitration clause. The question of whether or not the new holder of the bill of lading is bound by the arbitration clause each time has been answered based upon a detailed analysis of the facts by the courts or the arbitral tribunals.

The applicability of the arbitration clause against a third party holder of the bill of lading has been quite dubious, even in the cases of a standard form of bill of lading such as the CONGENBILL, can become the source of disputes. The importance of an explicit express of the incorporation of the charter-party arbitration clause into the bill of lading can contribute and promote a successful and efficient incorporation which will bind the parties to follow and enforce the arbitration proceedings.

A common practice to deal with controversial issues which involve parties form different jurisdictions is to establish and apply a legislative framework that is adopted and ratified by these parties, namely treaties or conventions. Despite of the many efforts towards harmonization, the subject-matter of the binding effect of the arbitration clause to the holder of the bill of lading when the holder has not been an original party and subsequently not participated in the negotiation of the clause, has not been clarified. However, as it was noted, the Rotterdam Rules contain an article about the valid incorporation of an arbitration clause into a bill of lading, but the Rules have been adopted and been in effect only by a small number of states.

I strongly believe that the bill of lading, in the case of the existence of an arbitration clause, should use explicit and apparent expression of the arbitration clause. Even when the arbitration clause is incorporated from a charter-party into a bill of lading, the unambiguous wording of the incorporation can promote the validity and the binding effect to everyone and create no dispute relating to this subject. It is safe to suggest that transfer of the bill of lading to a new holder cannot cause revocation of the binding effect of the arbitration clause to the contracting parties of the bill of lading, given that the facts of each case do not suggest otherwise.

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