The enforceability of arbitration clause in a bill of lading in case of its transfer

Dissertation for the LLM Program in Transnational and European Commercial Law and Alternative Disputes Resolution

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**Prologue**

The reason for choosing this subject as a theme of a dissertation was the realization of the significance for the trading by sea of the arbitration clause in a bill of lading and of the consequences of the commitment or not of the new owner to turn to arbitration after the transfer of this document.

The fact that the new owner was absent at the moment of negotiations concerning the provisions and at the conclusion of the clause obliging to arbitrate any disputes may give him/her the basis to challenge the clause and eliminate it by judicial way. On the other hand, the other contracting party must feel secure that even if the bill of lading is transferred, the agreement to arbitrate will be respected since it might be one of the reasons he/she agreed to conclude any contracts at the first place.
Acknowledgements

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Abstract

The structure of the dissertation shall be as follows, with the reference to any legislation, international or national if applicable:

Introduction and Summary

Expression of thanks to supervising professor and other professors involved in the whole process of writing and

1) Introductory presentation in brief of the system of the bill of lading, the arbitration clause and the consequences of the application of this clause.

2) Description of the process of the transfer of the bill of lading and the impact on the buyer and the seller’s obligations in case of dispute over the matters covered by the provision of arbitration.

3) Listing of the legislation (if any) applicable in cases of challenging of arbitration clause and the possible outcome from the proceedings

4) Critical examination of the pros and cons of the prevailing of the opinion that the arbitration clause is applicable for any holder of the bill of lading or of the opposite one

5) Analysis of any arbitration cases published where the arbitral tribunal rules on the objections of the applicability of the arbitration clause against/by the new holder of the bill of lading

6) Analysis of any national Greek courts decisions concerning the application or not of the arbitration clause in case of transfer of the document containing it

7) Analysis of annulment of arbitration decisions on the basis of the absence of the commitment of the new bill of lading owner to apply provisions concerning arbitration
8) Comparative conclusion of the judgments of arbitral tribunals and national courts and analysis of the observations

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10) Author’s own opinion based on the combination of the litigation and theory thesis, expressing the estimation of possibility of the obligation to turn to arbitration for disputes deriving from bill of lading to be fulfilled or not and the tendency if it is foreseeable
**Table of abbreviations and acronyms**

ΕΝΔ : Επιθεώρηση Ναυτικού Δικαίου, Maritime Law Review  
Εφ.Πειρ. : Εφετείο Πειραιώς, Court of Appeals of Piraeus  
Πολ.Πρωτ.Πειρ. : Πολιτικό Πρωτοδικείο Πειραιώς, Civil Court of First Instance of Piraeus

AAA: American Arbitration Association  
CC: Civil Code  
CCP: Code of Civil Procedure  
CIETAC: China International Economic and Trade Arbitration Commission  
ICC: International Chamber of Commerce  
LCIA: London Court of International Arbitration  
NAI: Netherlands Arbitration Institute  
UNCITRAL: United Nations Commission on International Trade Law  
WIPO: World Intellectual Property Organization
This table does not claim to contain a complete list of all disputes. Recognizing that many disputes are either solved or kept private within the confidentiality obligations of the courts and have never been reported, the author has included only those disputes, the information on which has been published or otherwise made publicly available.
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For the bill of lading

International legislation
The Harter Act, 1893
The Hague Rules, 1924
The Visby Rules, 1963
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Carriage of Goods by Sea Act, 1971
The Hamburg Rules, 1978
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National legislation

The Law 2107/1992
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International legislation

American Arbitration Association International Arbitration Rules, 2006 (revised and adopted)
Arbitration Institution of the Stockholm Chamber of Commerce Arbitration Rules, 2007
CIETAC Arbitration Rules, 2005 (revised and adopted)
ICC Arbitration Rules, 1998
LCIA Arbitration Rules (London), 1998
NAI Arbitration Rules, 1998
New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards
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The Civil Code
**Introduction**

**The bill of lading**

**Historical background**

Historically the bill of lading emerged from the need to reassure both sides of the transactions of the transportation of the goods by the sea. On the one side were the merchants who loaded on board their products and would not be present during the voyage by the sea. On the other side were the carriers or shipowners who issued the written security to the former and would demand the payment upon the completion of the transfer since merchants’ correspondents possessed copies of the receipts. The period when the “police de chargement” or “bill of lading” was introduced, can be placed in 14th century whereas in 16th century it was already broadly used. Another milestone was the negotiability of this instrument by adding the endorsement to make it transferable and thus the disposal of goods at will to a potential buyer while they were still travelling by sea. Following that, in the 19th century the bill of lading became also a proof of the carriage contract. The last aspect of its development is the attempt to create a functional and widely recognized electronic bill of lading.

The bill of lading initially rarely contained any clauses, but for the phrases like “the accidents of navigations excepted” in order to express the rights of the parties when the journey was not successful. However, in late 19th century the numerous actions seeking recovery of loss or damage to cargo during the sea transfer changed the situation. The shipowners and other carriers of goods by sea, based on the freedom of contract principles of Common Law and Civil Law countries, included in their bills of lading exculpatory clauses, thus exonerating themselves from the above mentioned liabilities. And in case a legal ruling established any such liability, they simply added another clause in the bill of lading to obtain immunity to it in the future disputes.

**International Rules concerning the bill of lading**

In absence of international harmonization on the choice of rules applicable to the bill of lading, there is an urgent need to become familiarized with the most commonly used ones. There is, for instance, the US Act which still applies the Hague Rules to all the shipments, the UK Act which has incorporated the Hague-Visby Rules, like Greece and many other European Union Member States and other States giving effect

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2 Legal aspects of electronic bill of lading on maritime transportation a comparative analysis based on international practice [..], Sallem Sameer Khasawneh, ΕΚΠΑ - Σχολή Νομικών, Οικονομικών και Πολιτικών Επιστημών - Τμήμα Νομικής, Αθήνα : [χ. ί.] 2010, pp.10-12
to Hamburg Rules in their national legislations. Another important point is that the bill of lading may contain a choice of law clause making, through the national law provisions, any one of the above mentioned rules applicable for the particular contract or may have to follow the one the national legislation has made mandatorily applicable for this type of document.

Until 1978 the main subjects regulated by International Rules relating to the bills of lading were concerning the liability of the shipowner or carrier for the damage or loss of the goods while transferring and the lists of the exemptions of their liability (article IV of Hague Rules unchanged up to 1968). The attempts to harmonize the law governing the bills of lading can be briefly summarized in six decisive moments, which are listed below lighting only those interesting facts concerning the issues of this paper since detailed presentation of these international instruments is not within its scope.

1) The Harter Act of the United States, 1893

The Harter Act concerned inserted in the bills of lading clauses relieving from the liability, apart from the allowed exemptions like the acts of God or likewise situations, or lessening or avoiding the obligations of shipowner, carrier, master or agent of the vessel etc. in relation to the loss or damage of the cargo. These clauses were considered unlawful and rendered null and void (sections 1 and 2 of the Harter Act). Its provisions still apply to carriage of goods, before loading and after discharge as well as carriage between U.S. ports in case the United States Carriage of Goods by Sea Act, 1963, which introduced the Hague Rules in the national legislation, is not expressly referred to in the bill of lading.

2) The United States Carriage of Goods by Sea Act, 1963

In accordance with the provisions of the Act, the Hague Rules are made applicable to all foreign trade shipments, to or from the ports of the United States (paragraph 1300, Article 28, Title 46 of the Act).

3) The Hague Rules, 1924

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7 http://www.law.cornell.edu/uscode/html/uscode46a/usc_sec_46a_00001300----000-.html
The Hague Rules intended to unify rules relating to the bills of lading contracts on an international level. It provided the basic data which should be inserted in the bill of lading issued on demand by the carrier in article 3, paragraph 3, subparagraphs (a) to (c). These were the identification marks of the goods (subparagraph (a)) and the number of packages or pieces, or the quantity or weight (subparagraph (b)), both as they have been furnished in writing by the shipper before the beginning of the loading and the apparent order and condition of the goods as checked by the carrier (subparagraph (c)). The carrier certainly is not obliged to certify none of the above mentioned if he or his master or agent suspects reasonably inaccuracy in the given data by the shipper or if there were no reasonable means of checking the goods (article 3, paragraph 3, last point). Following, the bill of lading was pronounced as prima facie evidence of the receipt by the carrier of the cargo as it was identified and described in it (article 3, paragraph 4). In addition, the Rules introduced in paragraph 7 of article 3 the “shipped bill of lading” and its precedent document as a plain receipt of goods issued by the carrier to the shipper before the loading on the ship and provided not only the replacement of the latter by the former but even a transformation of the plain receipt into shipped bill of lading by the means of noting the name of ship/ships, the date of shipment if only it contained the data of paragraph 3. This plain receipt is also known in the practice as “received for shipment bill of lading” but was not referred us such in the Rules in order for the Rules to be accepted and ratified by as many as possible countries, including those which did not recognize such type of document in their national legislations. In paragraph 8 of Article 3, the exculpatory clauses exceeding the listed exemptions in Article 4, are also named “null and void and on no effect”.

An interesting reference to the surrender of carrier’s rights in Article 5, which “shall be embodied in the bill of lading […]” may be interpreted as the choice to avoid litigation. Moreover, a carrier, master or agent of the carrier and a shipper are given the liberty to conclude special agreement, non – negotiable as document, in any terms as to the particular goods, given that it is not contrary to “public policy, care or diligence of his servants or agents” and no bill of lading is issued, as is stated in Article 6, could also refer to trial denial.  

4) The Visby Rules, 1963

In paragraph 2 of Article 1 of the Rules is inserted a protection of the third party acting in good faith when obtaining the bill of lading from the admission of proof that the goods were not received in condition and with the characteristics as described in the transferred to them document. These provisions, along with the Hague Rules articles are made applicable irrespective of the law governing the bill of lading and of the nationality of the ship and the contracting parties or other interested person if “the

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8 http://www.admiraltylawguide.com/conven/haguerules1924.html
port of loading, of discharge or one of the optional ports of discharge is situated in a Contracting State” according to Article 5 of the Visby Rules, replacing the Article 10 of the Hague Rules\(^9\).


The Brussels Protocol, which came in force in 1977, contributed to the two previous international documents, creating the Hague/Visby Rules in 1968. In Article 5 of the Brussels Protocol the obligatory applicability was softened one of the two possible situations: bills of lading were issued in a contracting State, the contract stated that it would be governed by these Rules or “legislation of any State giving effect to them”. In parallel, Article 6 allowed the contracting States to apply the Rules to any bill of lading if they choose to act so. The sole reference to arbitration can be found in Article 8 of the Brussels Protocol and is concerning state to state disputes about interpretation or application of the Convention\(^{10}\).

The Hague/Visby Rules maintain the provisions of the Article 3 in the Hague Rules concerning the issuance and clauses in bills of lading, incorporate the amendments made by the Brussels Protocol concerning the Article 5 and make no further reference to arbitration of any kind\(^{11}\).

6) Carriage of Goods by Sea Act, 1971

The Carriage of Goods by Sea Act incorporated the Hague Rules amended by the Brussels Protocol and introduced those changes to the United Kingdom legal order. The application scope covers any ship when the port of shipment is placed in United Kingdom and the contract is contained or evidenced by a bill of lading or a non-negotiable receipt\(^{12}\).

7) Carriage of Goods by Sea Act, 1992

Replacing the Bill of Lading Act, 1885, it allowed the initially concluded contract between shipper and carrier to be indorsed or transferred to a third party,


\(^{10}\) Bills of Lading Law – International Rules of Law Relating to Bills of Lading, W. E. Astle, see above, pp.30-34


\(^{12}\) Bills of Lading Law – International Rules of Law Relating to Bills of Lading, W. E. Astle, see above, pp. 44-48
which became then the “lawful holder” of the bill of lading and obtained the rights to suit (sections 2 (5) and 2(1) of the Act).13

8) The Hamburg Rules, 1978

The working group of International Shipping Legislation of UNCITRAL completed a study of bills of lading, introducing among principles and rules governing this document the applicable law and forum, including arbitration.14 The first reference to arbitration clause in a bill of lading in International Convention on the carriage of goods by sea can be found in Hamburg Rules, Part V, entitled Claims and Actions, in Article 22. The parties were free to subject future or existing disputes between them arising from the issues under the Hamburg Rules to arbitration, provided that the agreement was in writing and included in the bill of lading (paragraphs 1 and 6 of Article 22). In case the arbitration agreement was concluded but incorporated only in the charter – party and the bill of lading contained simply a reference, the holder acting in good faith would not be bound in absence of proof of specific words existing in the bill of lading (paragraph 2 of Article 22). Moreover, the claimant has two options as to the place of the arbitration proceedings, either a State which fulfills one of the following criteria: a) principal place of business or, in its absence, the habitual residence of the defendant, b) where the contract was made and the defendant’s place of business, branch or agency is situated, through which the contract was concluded or c) where the port of loading or discharge is allocated ( Article 22, paragraph 3, subparagraph (a), sections i, ii, iii ) or “any place designated […] in the arbitration clause or agreement” (subparagraph (b) of paragraph 3, Article 22). Last but not the least, the arbitrator or arbitral tribunal is expected to apply the Convention’s rules (paragraph 4 of Article 22) along with the fact that provisions of subparagraphs 3 and 4 “are deemed to be part” of the arbitration clause or agreement and the inconsistency with them is null and void (paragraph 5 of Article 22).

The innovative provisions in these Rules concerned also the attempt to give a definition of the bill of lading in Article 1 as:

"a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of

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14 Bills of Lading Law – International Rules of Law Relating to Bills of Lading, W. E. Astle, see above, pg.49
15 http://www.admiraltylaw.com/statutes/hamburg.html
17 http://www.admiraltylaw.com/statutes/hamburg.html
the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking through the wording of which will be examined later on for its suitability and completion, and the contents of the bill of lading in Articles 1 and 15 of the Rules. Furthermore, the wording from a mild “shall” becomes compulsory “must” for the carrier when the shipper demands the issuance of the bill of lading in Article 14, paragraph 1. The rest two paragraphs of Article 14 have to do with signing of the bill of lading, in paragraph 2 the carrier is bound not only by his/her signature but also when the signature is placed by the master of the ship carrying the goods or another person but with explicit authorization for that while in paragraph 3 the electronic signature is valid if it is in consistency with the law of the State of issuance of the bill of lading.

In accordance to Article 5 paragraph 1 and Article 10, both contractual carrier and actual carrier are liable for any loss to the goods while they were in the charge of the cargo. Instead of the exemptions listing, Hamburg Rules demand proof of all the reasonable measures been taken by the carrier, his servants and agents in order to “avoid the occurrence and consequences of the loss”.

Although Hamburg Rules came into force on 1 November 1992, it has been ratified by only 34 States and signed by another 21 States, the ratifiers being mostly land-locked states with some exemptions like Morocco and Chili, whereas to the signatories belong large states with maritime interests such as Germany, France, Singapore, Scandinavian Countries, Brazil and the United States. Countries like Greece and Japan, with the most impressive amount of commercially oriented marine fleet, did not sign the Convention.

9) The Rotterdam Rules, 2008

This UNCITRAL Convention is open to signings and ratifications since 2009, with 23 signatories States, among them Greece, France and the United States, and only two ratifications, by Spain and Togo, in 2011 and 2012 respectfully. Given that in order for the Convention to enter into force yet 18 ratifications are needed, the following presentation is more of informative substance nevertheless useful for future references.

18 http://www.admiraltylaw.com/statutes/hamburg.html
21 Shipping Law, Simon Baughen, see above, pp. 131, 137-138, 159-160
The ambitious equivalence of the conventional paper documentation with the electronic documentation can be seen already from the definitions in Article 1 paragraph 10, of the holder as a person possessing a negotiable transfer document or to whom a negotiable electronic transport record has been issued or transferred, subparagraphs (a) and (b) respectfully, and from Articles 8-10, 35, 38, 47 etc.\(^2\). Moreover, the negotiable electronic transport record transfer is actually the transfer of its exclusive control whereas it may be as well non-negotiable (Article 1, paragraphs 18-22).

The whole Chapter 15, in its Articles 75 to 78, is dedicated to the arbitration and its applicability is pending on the opting in of the Contracting State under Article 91 of the Convention (Article 78). The arbitration agreement may be concluded between the parties prior or after a dispute has occurred in accordance with Articles 75, paragraph 1 and 77. The claimant may choose in addition to the already existing places in Hamburg rules from, listed in paragraph 2, subparagraph (b) of Article 75, the place of receipt (point ii) or the place of delivery (point iii) agreed in the contract of carriage. The designated in the agreement place of arbitration is binding for the parties only when the agreement is included in a volume contract where their names and addresses are clearly stated and is individually negotiated (Article 75, paragraph 3, subparagraph (a)) or contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the agreement (paragraph 3, subparagraph (b)). In order for the place of arbitration to be binding on third parties, it must be allocated in one of the listed places in the Article 75, paragraph 2, subparagraph (b) and if all the other requirements in subparagraphs (b) to (d) of paragraph 4, Article 75 are also met. Namely if the transport document or electronic transport record contains the arbitration agreement; there is a timely and adequate notice of the place of arbitration to the person to be bound and the applicable law permits him/her to be bound by the arbitration agreement. It must be noted that any inconsistency with the above analyzed paragraphs 1 to 4 of the Article 75 in terms of arbitration agreement makes them void\(^2\). Lastly, in Article 76, paragraph 2, when the charter-party or other contract is excluded from the application of the Convention, the transport document or electronic record must identify the parties and the date of contract conclusion (subparagraph (a)) and incorporate by specific reference the clause of the above mentioned contract containing the arbitration clause (subparagraph (b)).

**National approach to the bill of lading**

The bill of lading is a legal document, issued to the shipper, upon his/her demand, by the carrier or the shipowner or on their behalf and which certifies that the goods


\(^2\) Shipping Law, Simon Baughen, see above, pp159-160
have been loaded on the ship. Thus the bill of lading fulfills the first and the oldest of its functions, that of the receipt. It has also the function of a contract concluded between the carrier and the shipper, stating that the goods are to be transferred to a certain port or ports, following the specific route, at the given time and any other point the parties agreed upon when concluding their contract of transportation by sea. The third function of the bill of lading is that of the document of title, relatively previously obtained character allowing the shipper to transfer the goods by simply endorsing to their buyer the bill of lading.

Under Greek legislation the bill of lading is governed by the Law 2107/1992 which incorporated the Hague-Visby Rules ratified by the Greece and are applicable for the international transfer contracts. Another legal instrument is the Code of Private Maritime Law (CPML), more specifically the Chapter 6, dedicated to the bill of lading in its articles 168-173 along with some other articles in other Chapters of the CPML, which are applicable for national transportations. If in addition to that the bill of lading was issued “to order” then the articles 76 section e and 80 paragraph 2 of the legislative decree 17.7/13.8.1923 “about the special provisions on limited liability companies” as well as the article 17 of the Law 5325/1932 “bill of exchange and note to order” shall be applied pro rata with the allowance of the articles 170, paragraph 3 and 171 paragraph 1, point (b) of the CPML. These two national legal provisions may be applied also to the bill of lading on international transfer, but only when in the Greek Law is applicable in accordance to the Rules of private international law.

For the Greek courts to recognize the validity of the bill of lading there is no need for the both parties to put their signatures. The carrier’s or authorized by him person’s signature in the bill of lading is enough in order for the document to become binding for the both sides, even if the shipper has not signed. This of course is the consequence of his actions, since he/she accepted or endorsed the bill of lading or if it was used by him in court in order to invoke the arbitration proceedings as was ruled in several cases in both Multimembered First Instance Court of Piraeus, decisions numbers 8/1985 and 375/1991 and Court of Appeal of Piraeus, decision number 189/1991. The bill of lading in accordance with article 168 of CPML is issued in only one prototype, which is given to the shipper and a simple, non-negotiable copy of it for the captain of the ship.

Due to the modern systems of transportation, where the enormous ships have to be fully loaded in order to cover by the freight rates the high price of the petroleum they are consuming during one way trip, it is possible that the shipper delivers the goods to the carrier well before they are actually loaded on the ship. In this case, the carrier or his agent issues a document testifying the facts, and which is called “received for shipment bill of lading” but in Greek legal system it is only recognized as temporary

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25 Ναυτικό Δίκαιο, Τόμος Δεύτερος, Ναύλωση – Θαλάσσια μεταφορά πραγμάτων, Αλίκη Κιάντου-Παμπούκη, εκδ. Σάκκουλα, Αθήνα – Θεσσαλονίκη, 2007, pp. 374-375
26 ENA: (Επιθεώρηση Ναυτικού Δικαίου) Maritime Law Review,
acknowledgment of receipt (article 108, point 2 of CPML). When the goods are finally placed on the ship, the shipper requests either the issuance of the bill of lading simultaneously handling the above receipt (article 125, point 4 of CPML) or the transformation of the receipt into a bill of lading in accordance with the provisions of the incorporated in the Greek legislation article 3 paragraph 7 of the Hague – Visby Rules.27

The three functions of the bill of lading are recognized by the Greek legal order, however regarding the form of the document of title, the CPML allows the shipper to choose among the nominative bill of lading and a “to order” bill of lading which can be transferred by endorsement. The “to order” means that the party to which the goods are to be delivered, in other words the consignee, is identified on the bill of lading by its name in the phrase “to order of -consignee name- or assigns”28. The alternative kind of “to order” where the consignee name is not referred, the “bearer” bill of lading is not accepted by the Greek CPML article 169.

In compare with the Greek national provisions, another closely related to maritime law country’s legislation regulating the bill of lading demands the specific reference in the text of the bill of lading to be made to the number of the copies of prototype bill of lading issued, usually four. This is for the occasion that the carrier surrenders the cargo to any of the bearers of the bill of lading and therefore the rest of them have annulled document and no claims against the carrier. Additionally, the of the bill of lading in the United Kingdom theoretical approach fulfills 4 different functions, a) as a receipt, b) as a document transferring constructive possession, c) as a document of title and d) as a potentially transferable carriage contract ( as the United Kingdom Carriage of Goods by Sea Act, 1992 allowed)29.

The arbitration clause

Historical background

The arbitration is much older than the bill of lading. Arising from the need of merchants to privately resolve their disputes by fellow merchants, as was found in the Oxyrhynchus Papyri from 427 AD, this alternative dispute resolution form was used throughout all the great civilizations of the ancient world, Greek, Sumerians and Roman. In Roman law the arbitration agreement was admissible as a side of principle of freedom of contract30. A thesis which the Greek Constitution and Code of Civil

27 Αλίκη Κιάντου-Παμπούκη, Ναυτικό Δίκαιο, Τόμος Δεύτερος, Ναύλωση – Θαλάσσια μεταφορά προμήθειων, see above, pg. 377-378
28 Simon Baughen, Shipping Law, see above, pp lxvii, 6-7
29 Simon Baughen, Shipping Law, see above, pp 6-8
30 International Commercial and Marine Arbitration, Georgios I. Zekos, see below, pp 9-11
Procedure and Civil Code are preserving by recognizing the right to arbitrate and regulating the arbitration as the expression of the freedom of the parties. An evidence for that is the arbitration taking place in Greece under English Arbitration Act 1950 and being regarded as valid by the Supreme Court 830/1972, since the principles of equality and equal opportunity were respected\textsuperscript{31}.

The carrying out of transactions in the commercial maritime sector is characterized by speed and large amounts at stake in case of dispute. The need for quick and discreet disputes resolution by individuals who enjoy the trust of both parties led to the turning in the case of bill of lading to arbitration. The result was the establishment of the arbitration clause which is either enclosed in the bill of lading or incorporated in charterparty bill.

The arbitration clause usually is enclosed in the bill of lading, but is treated as a separate contract and maintains its validity even if the bill of lading itself is not valid or is annulled later on.

\textit{International Rules concerning the arbitration clause}

The provisions relating to the judgment of the validity of an arbitration clause may be found in both national and international legislations. On international level, it may be agreed by the parties that the previously presented Hague –Visby, Hamburg or Rotterdam Rules are to govern the arbitration clause concerning the substantive law. Since all three International Rules have been analyzed previously in the Chapter “International Rules concerning the bill of lading”, the respectful articles may be simply listed below as follows:

a) Hague – Visby Rules
   Articles 5, 6 and 8, paragraph 3 of the Convention are related to the arbitration clause in general
b) Hamburg Rules
   Article 22 of the Convention is referring specifically to arbitration
c) Rotterdam Rules
   Chapter 15 of the Convention is dedicated to arbitration and namely the articles 75 to 78

On the other side of the coin, the law governing the procedural part, the UNCITRAL Arbitration Rules are most often preferred by the parties in ad hoc arbitration or even in an institutional arbitration if the institution is allowing the choice, like the Arbitration Institution of the Stockholm Chamber of Commerce (SCC Institution) Arbitration Rules (article 2, point 2, Appendix I (see below, reference \textsuperscript{33})) and the Swiss Chambers of Commerce International Arbitration Rules (article 1,

\textsuperscript{31} International Commercial and Marine Arbitration, Georgios I. Zekos, see below, pp 312-313
paragraph 3\textsuperscript{32}) or even the modification made in writing of lex arbitri, like in American Arbitration Association (AAA) International Arbitration Rules (article 1, paragraph 1 (see below, reference 30)). In case the institutional rules are strict on this subject, the arbitral tribunal shall apply the procedural rules of international institution such as the ICC (International Chamber of Commerce), the SCC Institution (Institution of Stockholm Chamber of Commerce), the CIETAC (China International Economic and Trade Arbitration Commission) Arbitration Rules, the LCIA (London Court of International Arbitration), and the NAI (Netherlands Arbitration Institute). Exempt for the first and the second institutions, the rest two allow the parties in their arbitration clause to refer only to the rules without necessarily submitting their differences to the institution itself. These provisions may be found in the following articles: for the ICC Arbitration Rules in article 1, paragraph 1\textsuperscript{33}, for the SCC Institution Arbitration Rules in article 1\textsuperscript{34} and for the CIETAC Arbitration Rules in article 2, with the option to submit to base of CIETAC in Beijing or to one of its two integral parts (paragraphs 2 to 8 of article 2)\textsuperscript{35}. Moreover, the arbitration may be performed for the AAA International Arbitration Rules under the Rules or by the International Centre for Dispute Resolution or the American Arbitration Association, (article 1, paragraph 1\textsuperscript{36}), for the LCIA Arbitration Rules, by the Court of the LCIA or simply under LCIA Rules (the introductory paragraph\textsuperscript{37}), and for the NAI Arbitration Rules, “binding advice by the NAI or in accordance with the NAI Rules\textsuperscript{38}” (article 3, paragraph 1). There are also some international arbitration rules whose scope of application is expanded on both national and international or even specific regional arbitration. These are the below listed international rules:

a) the SCC Institute Arbitral Rules (article 2, point 1 of the Appendix I\textsuperscript{39}), where the Institute administers both domestic and international arbitrations,

b) the CIETAC Arbitration Rules, which in article 3 state that, apart from international or foreign-related disputes (paragraph 1) and domestic disputes (paragraph 3), the “Court of Arbitration of the China Chamber of International Commerce”, as the CIETAC is currently called, accepts disputes related to the Hong Kong and the Macao Special Administrative Regions as well as the Taiwan Region (paragraph 2)\textsuperscript{40}

c) the ICC Arbitration Rules, in article 1, paragraph 1, last sentence, do cite that the Rules govern both of international and “not of an international character\textsuperscript{41}” business

\textsuperscript{32} International Commercial Law, Source Materials, Willem J. H. Wiggers (edit), Wolters Kluwer, Netherlands, 2007\textsuperscript{2}, pg 119

\textsuperscript{33} International Commercial Law, Source Materials, Willem J. H. Wiggers (edit), see above, pg 15

\textsuperscript{34} International Commercial Law, Source Materials, Willem J. H. Wiggers (edit), see above, pg 108

\textsuperscript{35} International Commercial Law, Source Materials, Willem J. H. Wiggers (edit), see above, pg 130

\textsuperscript{36} International Commercial Law, Source Materials, Willem J. H. Wiggers (edit), see above, pg 73

\textsuperscript{37} International Commercial Law, Source Materials, Willem J. H. Wiggers (edit), see above, pg 59

\textsuperscript{38} International Commercial Law, Source Materials, Willem J. H. Wiggers (edit), see above, pp 89-90

\textsuperscript{39} International Commercial Law, Source Materials, Willem J. H. Wiggers (edit), see above, pg 115

\textsuperscript{40} International Commercial Law, Source Materials, Willem J. H. Wiggers (edit), see above, pg 130

\textsuperscript{41} International Commercial Law, Source Materials, Willem J. H. Wiggers (edit), see above, pg 15
disputes arbitration, provided that there is a provision in arbitration agreement empowering the International Court of Arbitration.

The listing would be incomplete if there was not a short reference to the WIPO (World Intellectual Property Organization) Rules, with the scope of their application being limited to contractual or non-contractual disputes arising from Intellectual Property issues.\(^2^{42}\)

Almost all the previously presented international arbitration rules have provisions for the challenging of the validity of the arbitration agreement or arbitration clause before the arbitral tribunal proceeds with the facts of the dispute by one of the parties and the arbitral tribunal is given such a jurisdiction. Furthermore, the arbitration agreement is treated as independent contract so that it is not affected by the contract of which it is part, like the bill of lading, if the latter in found by the arbitral tribunal to be non-existing, invalid or ineffective (for instance in article 21 of UNCITRAL Arbitration Rules, in article 15 of the AAA Arbitration Rules, and in article 23 of the LCIA).\(^2^{43}\)

However, sometimes the doubtful counterparty prefers to ask from the national court to rule on that matter. This behavior might have two explanations: the party challenging the arbitration clause is the holder of the bill of lading and as far as he/she was neither present nor participated in negotiations preceding the conclusion of the arbitration agreement, this third party does not wish to be bound by the obligation to arbitrate and prefers to litigate. Another explanation is the fact that one party prefers to go to litigation because he/she predicts with great certainty the negative outcome of the dispute resolution and needs to obtain a sort of saying “immunity” in the country of the enforceability of the arbitral award. To put it in other words, the court of that country by recognizing the invalidity or non-existence of the undesirable clause creates precedent therefore even if the counterparty obtains an arbitral award, it will be unenforceable in the country with the already existing judicial decision.

The well-known and widely used New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards refers, in article V, paragraph 1, subparagraph (a), to refusal of recognition and enforcement of the arbitral award on the basis of either the incapacity of the parties to the arbitration agreement under the law applicable to them or the invalidity of the said agreement under the law it is subject by the will of the parties or by the lex loci of the country where the award was made. The same reasoning of parties under some incapacity for recognition of invalidity of the arbitration clause can be seen in Greek national legislation.


\(^2^{43}\) International Commercial Law, Source Materials, Willem J. H. Wiggers (edit), see above, pp 147-158

\(^44\) International Commercial Law, Source Materials, Willem J. H. Wiggers (edit), see above, pg. 51

\(^45\) International Commercial Law, Source Materials, Willem J. H. Wiggers (edit), see above, pg 76

\(^46\) International Commercial Law, Source Materials, Willem J. H. Wiggers (edit), see above, pg 65

\(^46\) http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf
A legally non-binding international document which nevertheless has a significant role in the creation of national arbitration laws in the UNCITRAL Model Law on International Commercial Arbitration, adopted by the United Nations in 1985. Since then, many national legislators have used the provisions giving the arbitration agreement definition or explaining the meaning of the “in writing” obligatory conclusion of the arbitration agreement, even electronic communication is involved, in article 7 (option I), paragraphs 1 and 2-4 respectfully\(^7\) as the Model Law was amended in 2006. The provisions in the old article 7\(^8\), paragraph 2 may be seen today still in the article 869, paragraph 1 of the Greek Civil Procedures Code, with the innovation found in the last sentence citing that the absence of the written document is healed if the parties wish agreed upon the arbitration clause appear to arbitrators and take part in the arbitration proceedings.

### National legislation in relation to the arbitration clause

In accordance to the provisions of applicable law and international orde public combined with the article 28, paragraph 1, section a’ of the Greek Constitution, arbitration clause is the expression of the private will of the parties\(^9\). The clause written on the body of the bill of lading is binding its bearer who obtains his/her rights of it. The applicable rules for the arbitration clause may be the Hague – Visby Rules or the Hamburg Rules, allowing only in exceptional cases the review of legality of the clause\(^10\).

In Greek Code of Civil Procedure (CCP) the arbitration clause is introduced in the seventh book, in articles 867 to 903. It is notable that article 869 paragraph 2 enables the parties to challenge arbitration agreement for defects in their will, based on the rules of the substantive law and particularly the Greek Civil Code (CC), despite the fact that it is actually a procedural agreement between the parties\(^11\). Therefore, the court may examine, before the commencement of the arbitration, the claims that the concluded arbitration agreement is invalid due to an error (article 140 etc. of Civil Code), a fraud (article 147 etc. of CC) or a threat (article 150 etc. of CC)\(^12\). Nevertheless, the above mentioned reasons for annulment of an arbitration agreement

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\(^8\) International Commercial Law, Source Materials, Willem J. H. Wiggers (edit), see above, pg 163

\(^9\) Το Δίκαιο της Θαλάσσιας Φορτωτικής, Ιωάννης Π. Μάρκου, εκδ. Αντωνίου Ν. Σάκκουλα, Αθήνα – Κομοτηνή, 2004, pp. 187-190

\(^10\) Το Δίκαιο της Θαλάσσιας Φορτωτικής, see above, pg.198, pp. 202-203

\(^11\) Ακύρωση διαιτητικών αποφάσεων : δογματική θεμελίωση των λόγων ακυρώσεως που αφορούν στη συμφωνία περί διαιτησίας και στο διαιτητικό δικαστήριο ( Συμβολή στην ερμηνεία των άρθρων 872-875, 877-879, 883-885 και 897 αριθμ. 1-4 ΚπολΔ), Κάπης, Αθανάσιος Γ, Σάκκουλας, Θεσσαλονίκη, 19892, pp 61-70, 84-87

\(^12\) Ακύρωση διαιτητικών αποφάσεων : δογματική θεμελίωση των λόγων ακυρώσεως που αφορούν στη συμφωνία περί διαιτησίας και στο διαιτητικό δικαστήριο ( Συμβολή στην ερμηνεία των άρθρων 872-875, 877-879, 883-885 και 897 αριθμ. 1-4 ΚπολΔ), Κάπης, Αθανάσιος Γ, see above, pp 156-157
may be proposed only by the party which was erred, deceived or threatened so as to consent to the conclusion of agreement and is inapplicable for the third party, holder of the bill of lading. There is the possibility of the termination of the agreement to arbitrate for serious ground, like poverty of one of litigants and thus his/her inability to advance the costs of the arbitration or the legal costs, even if the condition was caused by the fault of the party asking for termination. It might be based on the opinion that such action may be asked from the court because of the unbearable continuation of the arbitration proceedings by analogical application of articles 766 and 770 or 700 of the Civil Code, or on the opinion of Habscheid, that the party which is not guaranteed effective judicial protection by the arbitration may terminate the agreement. The latter is more closely related to the procedural character of the arbitration agreement, but whichever opinion is followed, the courts rarely agree to the termination for serious ground. This position is easily understood if one considers the possibility of these proceedings to be used as a solution for the party wishing to avoid the arbitration.

The arbitration might be agreed by the parties as ad hoc or as an institutional arbitration. The former may be conducted under the provisions of national law like article 867 etc. of the Greek Code of Civil Procedure or under UNCITRAL Arbitration Rules and the parties’ choice of rules for the procedural issues and place of arbitration, whereas the latter will be governed by the procedural rules of international arbitration institutions such as the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), and the London Court of International Arbitration (LCIA) and proceedings taking place usually in the seat of the institution. In any case, if an arbitration clause is challenged in Greek court, more specifically the Court of Appeal of Piraeus, the judges will have to make a ruling whichever kind of arbitration did the contracting parties choose.

The last resort for the holder of the bill of lading, if he/she was unaware of the invalidity of the arbitration clause before the issuance of the award, is the cancellation in the Greek Court of the arbitral award on the basis of the invalidity of the arbitration agreement. The proceeding shall be held before the Court of Appeal of Piraeus, which has the authority to nullify the arbitral award on the grounds of the provisions in the CCP articles 867 etc.

53 Akύρωση διαιτητικών αποφάσεων : δογματική θεμελίωση των λόγων ακυρώσεως που αφορούν στη συμφωνία περί διαιτησίας και στο διαιτητικό δικαστήριο ( Συμβολή στην ερμηνεία των άρθρων 872-875, 877-879, 883-885 και 897 αριθμ. 1-4 ΚπολΔ), Καΐσης, Αθανάσιος Γ, see above, pp 158-162
55 Akύρωση διαιτητικών αποφάσεων : δογματική θεμελίωση των λόγων ακυρώσεως που αφορούν στη συμφωνία περί διαιτησίας και στο διαιτητικό δικαστήριο ( Συμβολή στην ερμηνεία των άρθρων 872-875, 877-879, 883-885 και 897 αριθμ. 1-4 ΚπολΔ), Καΐσης, Αθανάσιος Γ, see above, pp. 58-59
The consequences of the application of the arbitration clause enclosed in the bill of lading

The primal outcome of the activation of the arbitration clause will be the initiation of the arbitration proceedings by the arbitrator or arbitral tribunal, the jurisdiction and the powers of which spring from the arbitration agreement. Additionally, the recourse to arbitration gives both parties the right to object to the submission to any national court of arbitrable dispute by one of the parties in accordance with the articles 263 b, 264 and 870 of CCP. The applicable law or lex arbitri shall be the one chosen and agreed upon by the parties or in absence of such an agreement the arbitrator/arbitral tribunal will decide on the issue before proceeding by choosing the most appropriate. The final arbitral award will be binding for the counterparties and the party wishing to enforce the arbitral award may do so in any country applying the New York Convention or having relevant provisions in its national legislation.

Part One

The transfer of the bill of lading

The bill of lading is a negotiable document therefore it may be either transferred or indorsed to a new holder by the shipper. By this action the third party, which might be as well the consignee, a bank or the buyer of the goods still in the sea, becomes the lawful owner of the cargo described in the bill of lading and has the right to suit and be sued by the other party to the contract.

The transfer of the obligation to arbitrate any disputes arising from the bill of lading

The arbitration clause might be part of the bill of lading or might be inserted in the charterparty and binding the holder of the bill of lading because of the adequate reference to it as have ruled both Greek and foreign national courts. Exempt for the situation in which the arbitration clause is recognized by the court or the arbitral tribunal to be void or non-existing, in case a dispute resolution covered by this arbitration agreement arises among the parties, independently of they are at that moment the same as when signing the agreement or other, are bound to use arbitration instead of litigation.

56 Ακύρωση διαιτητικών αποφάσεων : δογματική θεμελίωση των λόγων ακυρώσεως που αφορούν στη συμφωνία περί διαιτησίας και στο διαιτητικό δικαστήριο (Συμβολή στην ερμηνεία των άρθρων 872-875, 877-879, 883-885 και 897 αρίθμ. 1-4 ΚπολΔ), Καϊσης, Αθανάσιος Γ., see above, pp. 70-71
57 Ακύρωση διαιτητικών αποφάσεων : δογματική θεμελίωση των λόγων ακυρώσεως που αφορούν στη συμφωνία περί διαιτησίας και στο διαιτητικό δικαστήριο (Συμβολή στην ερμηνεία των άρθρων 872-875, 877-879, 883-885 και 897 αρίθμ. 1-4 ΚπολΔ), Αθανάσιος Γ. Καϊσης, see above, pp. 79-84
The challenging of the arbitration clause in a bill of lading

a) The proceeding

The Multimembered First Instance Court of Piraeus, Maritime Section, will receive the petition of the holder of the bill of lading to examine the arbitration clause and to annul it as invalid or recognize its non-existence and therefore its unenforceability. There is also a possibility when one party has asked the court for its legal protection for the issues which have arisen from the bill of lading and another party is expressing its objection to the litigation, claiming that there is a valid arbitration agreement covering the dispute. In any case, the court will examine the disputed clause, in the former as a main trial and in the latter as a preliminary issue. The procedural requirements are outside the scope of this paper, so a very short and not in depth listing of them shall follow.

Only after the cover of the legal costs of the court (as the prerequisite for the acceptance of the dispute) and the convincing, according to law, presentation of the legalization of parties, the court shall decide on its jurisdiction to judge over the arbitration clause. To begin with, the judges will look at the documentation presented by the both parties, the one seeking the annulment and the other supporting the maintenance and enforcement of arbitration agreement. The parties must have presented any relevant documents for the confirmation of the existence of the bill of lading and the arbitration clause in it or in a charterparty with any clause referred to it in the bill of lading, and the legitimacy of the holder in order for the court to proceed with the main questions concerning the validity of the clause. Applying the provisions in articles 867 etc. of CCP, the judges will step by step come to conclusion over its enforceability.

b) The outcome of the challenging

The court shall decide on the question concerning the arbitration clause in a final judgment binding the parties to the proceedings of its challenging. Therefore, if the arbitration clause is found to be valid, the objection to its party shall be obliged to undergo the arbitration and be bound by its arbitral award. On the other hand, of the court decides that the arbitration clause is of no effect due to its invalidity or non-existence, the party may refer the dispute to national court and the counterparty will not be able to enforce the clause.

c) Benefits and drawbacks of the prevailing view

It must be noted that in accordance to the court rulings, the majority of which have recognized the validity of the arbitration clause in a bill of lading or in a reference to charterparty bill of lading, the holder of bill of lading (including or referring to such clause) has little chance to avoid arbitration proceedings. Only in exceptional situations when the parties concluding arbitration agreement did not cover the lawful requirements for the creation of a legally binding contract or if the court believes that
the reference to the arbitration clause, absent from bill of lading and incorporated in the charterparty, was not in accordance with their consistent jurisprudence and exposed the third party in good faith obtaining the bill of lading to unexpected obligations.

**Part Two**

*Foreign arbitration cases and court decisions*

*a) the objections of the applicability of the arbitration clause against/by the new holder of the bill of lading*

One of the most often objections by the new holder of the bill of lading is his/her title containing only general words and absence of specification in reference to the charter – party’s arbitration clause. The case law was formulated mainly by three cases in the United Kingdom: Russell v. Nieman (1864), Hamilton & Sons v. Mackie and Co. (1889) and T.W. Thomas and Co., Ltd v. Portsea Steamship Co., Ltd. (1912). In the first one the reference to “conditions” of the carter party was not accepted as referring to the arbitration clause therefore the bill of lading was not subject to arbitration. In the second asked for the conditions should be read as consistent with the bill of lading in order to be regarded as binding even if were only enclosed in the charter party, not referring to simply “disputes under this charter”. In the last one demanded that the incorporation clause to be “directly germane” to the contract contained in the bill of lading.

*Domestic arbitration cases and court decisions concerning the application or not of the arbitration clause in case of transfer of the document containing it*

The Plenary Supreme Court decision 236/1966 referred to explicit and sharp reference in order for the charterparty arbitration clause to be binding for the holder of the bill of lading. Other court rulings followed the same line, adding to the characterization the specific character of the reference.

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59 Αλίκη Κιάντου-Παμπούκη, Ναυτικό Δίκαιο, Τόμος Δεύτερος, Ναύλωση – Θαλάσσια μεταφορά πραγμάτων, see above, pg. 599-600 and there reference 28

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Author’s own opinion based on the combination of the litigation and theory thesis, expressing the estimation of possibility of the obligation to turn to arbitration for disputes deriving from bill of lading to be fulfilled or not and the tendency if it is foreseeable

Following the above analysis, the bill of lading clause is binding disrespectfully of its transfer to a new holder.

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