

INCORPORATION OF CHARTERPARTY
ARBITRATION CLAUSES INTO BILLS OF LADING:
RECENT DEVELOPMENTS

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ABSTRACT

This article looks at two recent court decisions and one recent arbitral award which help to clarify the position of English Law with regard to incorporation of charterparty arbitration clauses into bills of lading. It starts by giving a brief overview of past decisions of the English Courts on this issue. It proceeds to consider recent developments and to draw conclusions therefrom.

Most bills of lading contain jurisdiction clauses providing that parties are to resolve any disputes arising in connection with the contract of carriage contained in the bill through litigation in the courts. Where a bill of lading is issued under a charterparty, however, and where it expressly incorporates the charterparty's arbitration clause into its terms, the parties to the contract of carriage contained in the bill of lading, including any transferees of the bill, may be obliged to refer their disputes to arbitration.

Wilson notes that “[a] strict *contra proferentem* approach has been adopted towards [attempts to incorporate charterparty arbitration clauses into bills of lading] since, while arbitration clauses are common in charterparties, they are rarely found in bills of lading.”¹ Three conditions must be met in order for a charterparty arbitration clause to be successfully incorporated into the bill of lading.

First of all, “the operative words of incorporation must be found in the bill of lading itself”.² Secondly such words must be suitable to describe the charterparty clause that is being incorporated.³ Finally, the incorporated

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¹ J F Wilson *Carriage of Goods by Sea*, 2004, 5th ed, Pearson Longman, 239. The same commentator notes that growing criticism is being levelled at the use of incorporation clauses, particularly when they are used against an indorsee of a bill of lading who rarely has any knowledge of the charterparty terms. *Ibid*, 241. Regarding this see also C Ambrose and K Maxwell *London Maritime Arbitration*, 2002, 2nd ed, LLP, London, 32-33.

² *The Varenna* [1983] 2 Lloyds Rep 592, 594.

³ *The Emmanuel Colocotronis (No 2)* [1982] 1 Lloyds Rep 286, 289. Arbitration clauses need to be specifically referred to as they are regarded as ancillary to the main

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clause must be consistent with the terms of the bill of lading, and in the event of conflict, the provisions of the bill of lading will prevail.⁴

OPERATIVE WORDS OF INCORPORATION: PREVAILING ISSUES

A question which lacks a completely clear answer is whether the arbitration clause on a charterparty may be incorporated into a bill of lading through general words of incorporation, i.e. without being specifically referred to. This issue is a thorny one, particularly in view of the fact that transferees of negotiable bills of lading, who are not the original parties to the contract of carriage, may not be aware that by accepting the bill of lading they are also agreeing to refer any disputes that may arise in connection with it to arbitration. It would seem that it is only fair to potential subsequent holders of the bill that specific reference should be made to the arbitration clause in the bill of lading for it to be incorporated.⁵

Historically, the decision which may be viewed as raising questions in this regard, is the Court of Appeal's decision in *The Merak*,⁶ a decision of the 1960s. In this case, the bill of lading stated specifically that it was issued "as per Charter dated 21st April 1961" and the incorporation clause that was the object of contention read as follows: "[a]ll the terms, conditions, clauses and exceptions including Clause 30 contained in the said charter party apply to this Bill of Lading and are deemed to be incorporated herein." The problem was that not Clause 30 but Clause 32 of the charterparty was the arbitration clause. The reference to Clause 30 was clearly an error as that clause gave liberty to the shipowners to substitute a vessel, if one were named, on due

purpose of a contract of carriage. See Wilson, 2004, 240 and Ambrose and Maxwell, 2002, 33.

⁴ See for example *Hamilton v Mackie* (1889) 5 TLR 677.

⁵ This is desirable for three reasons which were set forth by Sir John Megaw in *Aughton Ltd v M F Kent Services Ltd*, (1991) 57 Build L R 1 and cited by P Todd 'Incorporation of Arbitration Clauses into Bills of Lading' (1997) *Journal of Business Law* 331, 337: "First, an arbitration agreement may preclude the parties to it from bringing a dispute before a court of law. Secondly, an arbitration agreement has to be 'a written agreement'. Thirdly, the arbitration clause differs from other types of clause because it constitutes a 'self-contained contract collateral or ancillary to' the substantive contract. On the second point, Sir John emphasised that the object of the writing requirement was to ensure that nobody is to be deprived of his right to have a dispute decided by a court of law, unless he has consciously and deliberately agreed that it should be so. In Sir John's view, if an oral agreement would not suffice it must follow that an agreement depending, in any essential part, on inference will not suffice either."

⁶ [1964] 2 Lloyd's Rep 527.

notice to the charterers and it would have had no bearing once the ship had commenced loading. However, Lord Justice Sellers held that:

“[i]n my opinion, if ‘including Clause 30’ is struck out, the remaining clause is quite adequate and effective to make Clause 32, the arbitration clause in the charter-party, ‘deemed to be incorporated’ into the bill of lading. Among the various clauses in the charter-party which can be regarded as relevant to the bill of lading is Clause 32, which in terms (sic) stipulates for arbitration ‘Any dispute arising out of this Charter or any Bill of Lading issued hereunder . . .’”⁷

This case must be contrasted with all other court decisions concerning general words of incorporation.⁸ Most of these decisions⁹ were considered in *The Varenna*¹⁰ where the Court of Appeal held that the use of general words of incorporation referring to the “terms” and/or “conditions” of a charterparty, in a bill of lading were (and had for years been) construed in the restrictive way. That is, such general words of incorporation were capable of incorporating such conditions and exceptions as were appropriate to the carriage and delivery of goods, and did not as a matter of construction extend to a collateral term such as an arbitration clause even if that clause was expressed in terms which were capable of referring to the bill of lading. This case was different from *The Merak* in that the clause in the charterparty itself did not refer to the bill of lading, and stated merely “any dispute arising under this charter shall be settled in London by arbitration. . . .”. More importantly, the incorporation clause in the bill of lading was not as widely worded and referred merely to “all conditions and exceptions of which charterparty”.¹¹ Oliver LJ observed that while the incorporating words in *The Merak* were general words, they were as wide as they could possibly be, referring to “all the terms, conditions, clauses and exceptions . . . contained in the

⁷ Ibid at 531.

⁸ See Todd, 1997, 348: “*The Merak* alone stands in the way of the general conclusion that arbitration clauses, whatever their wording, can be incorporated only by explicit words in the bill of lading. All other contrary statements are no more than dicta (since only in *The Merak* was the arbitration clause actually incorporated).” The same commentator (ibid) rightly maintains that the case should be restricted to its own facts.

⁹ In particular *T W Thomas & Co Ltd v Portsea SS Co Ltd (The Portsmouth)* [1912] AC 1.

¹⁰ *Skips A/S Nordheim v Syrian Petroleum Co. Ltd (The Varenna)* [1983] 2 Lloyds Rep 592.

¹¹ [1983] 2 Lloyds Rep 592.

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charterparty”, and therefore of such strength and width that they could not, in the absence of some strong indication to the contrary, be cut down or restricted. They were thus interpreted to the effect that all the clauses of the charterparty were to be applied, subject only to the test of consistency, a test clearly passed by the arbitration clause contained in the charterparty in question.

Two relevant cases were decided in the 1990s. In *The Nerano*,¹² the Court of Appeal confirmed the decision of Brandon J in *The Rena K*¹³ and reversed a trend not to allow manipulation of the arbitration clause in the charterparty to fit the bill of lading,¹⁴ by saying that such clause was deemed incorporated in spite of the fact that it read as follows “... should any dispute arise between the owners and charterers the matter in dispute shall be determined in London... according to the Arbitration Act.” Though the reference to “charterers” was inappropriate, the court held that the intention of the parties to incorporate the arbitration clause was clear from the wording of the incorporation clause, which provided “[a]ll terms and conditions, liberties, exceptions and arbitration clause of the Charter Party, dated as overleaf, are herewith incorporated.”

In *Excess Insurance Co v Mander*,¹⁵ an insurance case concerning the question whether an incorporation clause providing “[a]ll terms, clauses, conditions and warranties as original and to follow original settlements and/or agreements of the Reassureds in all respects” successfully incorporated an XOL Treaty arbitration clause into a retrocession, Colman J confirmed that general words of incorporation were insufficient to incorporate an arbitration clause. He did not treat the wording of the arbitration clause as important in deciding this matter.

Both these cases emphasise the importance of the wording of the incorporation clause itself, rather than that of the arbitration clause which it is sought to incorporate. This is reasonable as it is the contents of the incorporation clause that transferees of the bill of lading can reasonably be expected to be aware of.

The decision in *The Nerano* was confirmed in *The Delos*¹⁶ which concerned a CONGENBILL¹⁷ bill of lading, a popular standard bill of lading form which will be discussed further below.

¹² [1996] 1 Lloyds Rep 1.

¹³ [1978] 1 Lloyds Rep 545.

¹⁴ See *Owners of the Annefield v Owners of Cargo Lately Laden on Board the Annefield (The Annefield)* [1971] 1 Lloyds Rep 1 and *The Nia Matteini* [1988] 1 Lloyds Rep 452.

¹⁵ [1997] 2 Lloyds Rep 119.

¹⁶ [2001] 1 Lloyds Rep. 703.

RECENT DECISIONS AND THE CONGENBILL

The CONGENBILL standard form bill of lading is probably the most widely used bill of lading in general tramp shipping today,¹⁸ and the wording of its terms was revised in 1994 in conjunction with the revision of the GENCON¹⁹ standard charterparty form, with which it was mainly intended to be used.²⁰ The main reason for the revision was to ensure that the Standard Law and Arbitration Clause which forms part of the GENCON charterparty form was successfully incorporated into the bill of lading. Account was taken of the decisions of the English Courts discussed above in drafting the new incorporation clause for the 1994 edition of the CONGENBILL, and as a result it was decided that specific reference should be made in this clause to the arbitration clause contained in the Charterparty. The use of the 1994 edition of the CONGENBILL standard form was strongly advised when the ship carrying the goods was chartered under GENCON terms, to ensure that the arbitration clause in the Charterparty applied.²¹

The face of the 1994 edition of the CONGENBILL²² is headed “Bill of Lading: To be used with charterparties”. Clause 1 of the Conditions of Carriage on the reverse side of the bill reads as follows “[a]ll terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.”²³ So, for the first time, in a general printed widely-used standard bill of lading form, the parties would be agreeing to refer their disputes to the arbitration venue designated in the charterparty.²⁴ The introduction of such an incorporation clause in a *standard* bill of lading form is important, because standard

¹⁷ CONGENBILL is the code name which refers to standard bill of lading for general tramp shipping drafted by the Baltic and International Maritime Council (BIMCO).

¹⁸ See

<http://www.bimco.dk/Corporate%20Area/Documents/Document%20samples/Bill%20of%20Ladings/CONGENBILL.aspx> consulted 10th November 2006.

¹⁹ GENCON is the codename for BIMCO’s Uniform General Charter.

²⁰ “The CONGENBILL was, when first issued, mainly intended to be used with the GENCON Charter but could also be used with other charter parties. However, considering the extensive use of the CONGENBILL together with the GENCON Charter it is obviously very important that the two forms are aligned so that all the necessary clauses of the GENCON Charter are suitable incorporated into the Bill of Lading.” See *ibid*.

²¹ See *ibid*.

²² Available at http://www.bimco.dk/upload/congenbill_1994.pdf.

²³ The clause is therefore very similar to that which was the subject of the decision in *The Nerano*.

²⁴ See M Moon ‘New Opportunities for Maritime Arbitration and Arbitrators’, [\(2004\) 70 Arbitration 274](#).

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contract terms are an important indication of mercantile practice.²⁵ Furthermore, the standardisation of terms ensures users' familiarity with them and makes it harder to argue that they were not aware of their contents. Therefore, the inclusion of an incorporation clause referring specifically to an arbitration clause within a standard form introduces a considerable amount of certainty and predictability in the relations between the parties to the contract of carriage contained in the bill of lading as regards dispute resolution matters.

Accordingly, in the 2003 decision, *Epsilon Rosa*,²⁶ the Court of Appeal held 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.”

Another decision concerning a bill of lading in the CONGENBILL form was *The Vinson*,²⁷ a Queen's Bench decision which applied *The San Nicholas*,²⁸ a Court of Appeal decision from the seventies. The question at

²⁵ HJ Berman and C Kaufman, 'The Law of International Commercial Transactions (*Lex Mercatoria*)' (1978) 19 *Harvard International Law Journal* 221, 222-223 explain that today the international trade community “continues to develop present day mercantile law... through their contract practices and the common understandings on which they are based, and also through regulations of self-governing trade associations and through decisions of arbitration tribunals to which their disputes are submitted. These contract practices, understandings, regulations and decisions constitute a body of customary law which is the foundation on which national and international commercial legislation has been and continues to be built.” See also P Devlin 'The Relation between Commercial Law and Commercial Practice' (1951) 14 *Modern Law Review* 249, 252 “The written contract which so largely destroyed custom has placed in the hands of business men a substitute for it.”

²⁶ [2003] 2 Lloyds Rep 509, 515 paragraph 26.

²⁷ *Quark Ltd v Chiquita Unifrutti Japan Ltd and Ors (The Vinson)* QBD (Com Ct) (Andrew Smith J) 26 April 2005 (2005) 677 LMLN 1 (otherwise unreported).

²⁸ [1976] 1 Lloyds Rep 8. In this case, the gaps in the bill of lading incorporation clause, which were supposed to be filled in with the date of the charterparty whose terms were being incorporated, and the names of the parties thereto, were left blank. In his judgement Lord Denning held as follows: “It seems to me plain that the shipment was carried under and pursuant to terms of the head charter. The blanks were left because the master and the other people in Recife did not know its date and

issue in *The Vinson* was whether an arbitration clause was incorporated despite the fact that the charterparty wherein it was contained was not identified. It was held by Smith J that the courts would interpret a provision such as clause 1 of the conditions of carriage in the CONGENBILL form as evincing an intention to incorporate terms notwithstanding that the charterparty which contained the arbitration clause referred to was not identified. He added that the courts were reluctant to conclude that, despite the parties' apparent intention to incorporate charterparty terms, the bill of lading was so ambiguous as to be void, or that the attempt to incorporate charterparty terms failed on the ground that the incorporation clause was too uncertain, although the court might be driven to one of those conclusions.

It therefore does not appear that, under English Law, identification of the specific charterparty whose terms it is sought to incorporate into the bill of lading is essential to the incorporation being valid.²⁹ However it is important to note that one of the reasons why the court reached this conclusion in *The Vinson* was the use of the CONGENBILL standard form, which "reinforced the argument that the parties intended to incorporate provisions from a

the parties to it so as to be able to fill them in. The head charter was the only charter to which the shipowners were parties: and they must, in the bill of lading, be taken to be referring to that head charter. I find myself in agreement with the statement in Scrutton on Charterparties, (18th ed (1974)), at p 63: '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 charterparty' and the omission does not demonstrate an intent to negative the incorporation.'

²⁹ Cf the situation in the United States. See for example *Hawkspere Shipping Co Ltd v Intamex SA & Anr (The Fidelity)* US Court of Appeals (4th Circuit) (Niemeyer, Michael and King Ct JJ) 27 May 2003, 330 F.3d 225, where the bills of lading in question stated that they were 'to be used with charter-parties', but the spaces provided for insertion of the date of the governing charterparty had been left blank. King J noted, *ibid*, 233-234 that 'Courts consistently hold that attempts to incorporate a charterparty into a bill of lading are ineffective when the spaces in the bill that would have identified the charterparty are left blank. . . . Decisions in which courts have found a proper incorporation are those in which the charterparty was identified in the bill of lading, at the least, by date. [citation: *Steel Warehouse*, 141 F 3d at 237]. Identification is particularly important when, as here, there are multiple charter agreements between the same parties simultaneously. In this case, the date of the charterparty was not included in the bills of lading. In fact, the bills contained no reference whatsoever to the relevant, April 28, 2000, charterparty, and [defendants] were provided no effective notice of the charterparty's terms. Under the circumstances, we cannot say that there was a successful incorporation of that document's terms.'

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charterparty or other contract that they so described.”³⁰ Furthermore, the circumstances of the case were such that the court was able to identify with reasonable certainty which among three possible charterparty agreements which the shipowners had entered into was being referred to.³¹ Circumstances may well arise where the charterparty which it is sought to incorporate is not identifiable despite the court’s best efforts. Nevertheless, the *The Vinson* does emphasise the courts’ general willingness to apply incorporation clauses in bills of lading. In doing so, they appear to take into account the practical context within which the mercantile community operates – scrupulously filling in blanks in standard forms may not be viewed as an essential part of business, but the use of a standard form containing a charterparty incorporation clause is considered a clear indication of the parties’ intention to incorporate charterparty terms.

Following *The Vinson*, a dispute concerning a bill of lading incorporating a charterparty arbitration clause was resolved in an arbitral award published in the August 2nd 2006 issue of the Lloyds Maritime Law Newsletter (LMLN).³² The dispute concerned a cargo of bagged rice carried under bills of lading which incorporated an identified charterparty, including the Law and Arbitration clause, which in turn provided for English law to apply and for “any dispute arising out of this charterparty” to be referred to arbitration in London.

The cargo receivers “initiated proceedings in the Federal High Court of Nigeria, claiming damages for alleged loss of and/or damage to their cargo. Subsequently they agreed to a stay of those proceedings, and advanced their claims by way of counterclaim in the arbitration. The owners said that the Nigerian proceedings had been issued and pursued in breach of the charter arbitration clause incorporated into the bills of lading, and that in consequence the owners suffered loss in the shape of lawyers’ fees and disbursements. . . . The receivers said that their claims could not be readily referred to arbitration under the charter since they were not party to the charter. They maintained

³⁰ (2005) 677 LMLN 1. A standard form was also used in *The San Nicholas* [1976] 1 Lloyds Rep 8 (n 26).

³¹ This was true also of *The San Nicholas* [1976] 1 Lloyds Rep 8 (n 26), where the shipowner was party only to the head charter, leading the court to conclude that this was the one being incorporated.

³² London Arbitration 11/06, (2006) 697 LMLN (otherwise unreported). The London Maritime Arbitrators Association (LMAA) does not itself publish the awards made by LMAA arbitrators. However, arbitrators occasionally send copies of awards which they think may be of interest (excluding information regarding the parties’ identities and other sensitive details), to the editor of the Lloyds Maritime Law Newsletter. Publication is usually in an edited form. No further details regarding this particular award were publicly available.

that because their claims arose specifically under the bills of lading, they were thus properly the subject of court proceedings.” The arbitrators held that the owners’ claim for damages for breach of the arbitration agreement was well founded. The incorporation into the bills of lading of the charterparty arbitration clause could not have been clearer and it did not matter that they were not a party to the charter. They were party to the bills of lading contracts which clearly incorporated the charterparty arbitration clause.

This award is particularly important since it seems to confirm that it is the wording of the incorporation clause and not the wording of the charterparty arbitration clause that is central to the issue. Unfortunately the published award does not specify whether the CONGENBILL form was being used. Neither does it contain the exact wording of the clause in the bill of lading which purported to incorporate the terms of the charterparty, including the arbitration clause. The LMLN report does specify, however, that the incorporation clause in question specifically mentioned the charterparty arbitration clause. It appears to have done so in much the same way as the CONGENBILL incorporation clause does. One can certainly conclude, from the published details, that if the incorporation clause in the bill of lading is clearly drafted, such that any potential transferee can tell just by looking at the bill of lading’s terms that any disputes in connection with it must be referred to arbitration, no uncertainties should arise as to whether the incorporation was valid.

COMMENTS AND CONCLUSIONS

From the above discussion, the conclusion may safely be drawn that in spite of the decision in *The Merak*, the better view is that specific mention must be made of the arbitration clause in the incorporation clause in the bill of lading in order for it to be validly incorporated therein, and that general words of incorporation are not sufficient to incorporate it.

This would seem to be confirmed also by recent developments in the area of harmonisation of the law of carriage of goods. In its draft Convention on the Carriage of Goods [wholly or partly] [by sea], the current draft of which is contained in document A/CN.9/WG.III/WP.56, the United Nations Commission on International Trade Law (UNCITRAL) requires specific reference to the charterparty arbitration clause in order for incorporation to take place. Draft Article 83 provides as follows:

“If a negotiable transport document or a negotiable transport record has been issued the arbitration clause or agreement must be contained in the document or record or expressly incorporated therein by reference. When a charterparty

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contains a provision that disputes arising thereunder must be referred to arbitration and a negotiable transport document or a negotiable electronic transport record issued pursuant to the charterparty does not contain *a special annotation providing that such provision is binding upon the holder*,³³ the carrier may not invoke such provision as against a holder having acquired the negotiable transport document or negotiable electronic transport record in good faith.”

UNCITRAL was set up by the United Nations General Assembly to further the progressive harmonization and unification of the law of international trade.³⁴ The contents of its instruments can be considered to be a good indication of international consensus regarding issues of international trade law. It is submitted that not only does the position taken in draft Article 83 reflect the current state of English law, discussed above, but also makes practical sense, as explicit reference to the charterparty arbitration clause in the bill of lading incorporation clause is essential for ensuring that at the time of accepting the documents, transferees of the bill of lading are aware that they may have to settle any dispute arising in connection with the carriage contract it contains through arbitration.

Following the decision in *The Vinson*, it may also be concluded that, under English Law it is not essential that the charterparty whose arbitration clause it is sought to incorporate be identified in the bill of lading, for valid incorporation to take place. While, for the purposes of certainty, it is still advisable to identify the charterparty being referred to in the bill of lading, the English Courts are likely to consider the use of a standard bill of lading form containing an incorporation clause, such as the CONGENBILL, as a clear indication of the parties’ intention to incorporate charterparty terms into the bill of lading, even if the charterparty in question is not identified.

³³ Emphasis added.

³⁴ See General Assembly Resolution 2205 (XXI) of 17 December 1966.