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Incorporation of arbitration clauses in bills of lading: the saga continues

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This paper in effect continues where David Martin-Clark's paper delivered at ICMA XV in 2004 left off[1]. The issues raised are of continuing importance today with shipowners and charterers seeking to rely on arbitration clauses from underlying charterparties relating to the goods carried and consignees and their insurers seeking to argue that they are not bound by them and that the jurisdiction of local courts at the place of discharge has not been effectively ousted. Frequently the underlying issue is that the local courts at the place of discharge will apply the Hamburg Rules (or in due course the Rotterdam Rules) in relation to the shipowner's liability for cargo damage whereas the limitations and exclusions available to the shipowner under the relevant charterparty will afford the shipowner greater protection and an arbitration tribunal (or court) seized of the dispute will not be bound to apply the Hamburg or Rotterdam Rules[2].

This gives rise to conflicts of jurisdiction and much preliminary procedural skirmishing. As well as the issue of construction of the relevant agreements themselves, there is also the question as to how far the English courts (or an English arbitration tribunal) can or should issue anti-suit injunctions in these circumstances in aid of the arbitration (or exclusive jurisdiction) agreement. If an injunction is issued, what impact will the injunction have on consignees and their insurers.

David Martin-Clark's explanation of the story in the English courts ended with the 2003 decision of Gross J in **Siboti K/S v BP France S.A**.[3] That case involved consideration of whether an exclusive jurisdiction clause (rather than an arbitration clause) was incorporated into a bill of lading. The judge reviewed the decisions of the previous century from **T.W. Thomas & Co. Ltd. v Portsea Steamship Company Limited**[4] to the recently decided **"Epsilon Rosa"**[5] and in his paper Mr Martin-Clark set out the following propositions as representing the state of the law:

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[1] Incorporation of Charterparty Clauses into Bills of Lading: The Ebb and Flow in English Law over the last 100 Years

[2] For a detailed treatment of this subject see: Özdel, Bills of Lading Incorporating Charterparties, 2015 and Baatz, Should third parties be bound by arbitration clauses in bills of lading? [2015] LMCLQ 001-154

[3] [2003] 2 Lloyd's Rep. 364

[4] [1912] AC 1

[5] Welex AG v Rosa Maritime Ltd [2003] 2 Lloyd's Rep 509

1 The starting point is the contract contained in or evidenced by the bill of lading; it is that contract which the court must construe – see **The "Federal Bulker"**[6]

2 Does the enquiry end with the bill of lading contract? There is Court of Appeal authority for the proposition that unless the wording in the bill of lading is of a sufficient width so as prima facie to incorporate the provision of the charterparty under consideration, it is irrelevant and unnecessary to construe the charterparty. That stage is never reached; the enquiry begins and ends with the bill of lading – **The "Varenna"**[7], **The "Federal Bulker**".

3 It appears to follow that, where general wording of incorporation in the bill of lading is insufficient to incorporate an ancillary clause in the charterparty, such as an arbitration clause, then the wording of the charterparty clause in question and whether or not it contains an explicit reference to the bill of lading, are irrelevant.

4 It may be that the authorities do not all speak with one voice. Observations of all three members of the Court of Appeal in **The "Merak"**[8] appear to suggest that the charterparty arbitration clause was incorporated in the bill of lading on the basis, inter alia, that the arbitration clause itself contained an explicit reference to the bill of lading.

5 By contrast, in **The "Federal Bulker"**, Bingham LJ (as he then was) explained and distinguished **The "Merak"** on the basis of the incorporation wording in the bills of lading. The word "clauses" included in **The "Merak"** bill of lading wording was sufficient to incorporate the arbitration clause, whereas the word "terms" found in **The "Federal Bulker"** bill of lading was insufficient to do so in the light of the authority in **Thomas v. Portsea**.

6 When can the provisions of the charterparty be taken into account? Charterparty clauses ancillary or collateral to the subject-matter of the bill of lading will only be incorporated into the bill of lading by explicit reference, either in the bill or in the charterparty – see **The "Annefield"**[9] and **The "Federal Bulker"**. Whether there is, in any particular case, such an "explicit reference", must be a matter of construction of the contract in question.

7 What is the relevance to the bill of lading contract of charterparty clauses as to the intended form and content of bills of lading to be issued thereunder? Such clauses are irrelevant to the contract

[6] Federal Bulk Carriers Inc v C. Itoh & Co. Ltd [1989] 1 Lloyd's Rep 103

[7] Skips A/S Nordheim v Syrian Petroleum Co. Ltd and Petrofina S.A. [1984] Q.B. 599.

[8] [1964] 2 Lloyd's Rep. 527

[9] [1971] 1 Lloyd's Rep 1.

constituted by the bills of lading themselves – see **The "Merak", The "Varenna"** and **The "Federal Bulker"**. Such clauses have certainly not been treated as furnishing the "explicit reference", as discussed in **The "Annefield"**, to the ancillary clause which it is sought to incorporate into the bill of lading.

In short, a charterparty clause dealing with the intended form or content of bills of lading to be issued thereunder either (a) added nothing to the argument for incorporation, because the wording in the bill of lading followed the wording of the clause, or (b) told against the argument for incorporation, because the difference between the wordings disclosed an intention by the parties to the bill of lading contract not to give effect to the intention of the parties to the charterparty.

8 The *incorporation* of terms is to be distinguished from mere *notice* of terms; the fact that the holder of a bill of lading has notice of terms in a charterparty does not mean that those terms are incorporated in the bill of lading – **The "Varenna".** Further, it is terms, not intentions that are incorporated – **The "Varenna"** per Oliver LJ.

9 General words of incorporation will incorporate into the bill of lading only those provisions of the charterparty which are directly germane to the shipment, carriage and delivery of the goods. Provisions of the charterparty which are ancillary - rather than directly germane - to the subject matter of the bill of lading, will not be incorporated by general words of incorporation in the bill of lading.

a. General words of incorporation are to be distinguished from wording making a specific reference to a particular charterparty provision (for example, a charterparty arbitration clause). Accordingly, even comparatively wide wording, such as "all terms, conditions and exceptions as per charterparty" constitute "general words of incorporation" for these purposes

b. Arbitration clauses are ancillary in this sense.

c. Jurisdiction clauses, like arbitration clauses, are ancillary to the subject matter of a bill of lading. There is no good reason for distinguishing between arbitration and jurisdiction clauses in this regard.

10 Even when the wording of a bill of lading is prima facie of sufficient width to incorporate the charterparty clause in question, such incorporation may be defeated if undue manipulation is required. That said, the intention of the parties is paramount. Accordingly, while the purported incorporation of certain charterparty clauses may prove ineffective on the ground of linguistic inapplicability alone (for example, charterparty arbitration clause wordings such as

> "any disputes arising out of the conditions of this charter" as in **Thomas v. Portsea**) where the intention to incorporate a particular charterparty clause is clear, difficulties of manipulation may be overcome (as in **The "Nerano"**[10]) where the wording of incorporation made explicit reference to an otherwise inapplicable charterparty arbitration clause).

Mr Martin-Clark ended by saying that it remained to be seen if the principles set out in **The "Siboti"** would provide the shipping industry and its legal advisers with sufficient precision to enable them to settle differences that arose "without the need to trouble the courts further on this topic". Now we have the benefit of 10 years of hindsight The courts have not avoided being troubled by litigants on questions of incorporation by reference, even if not all the decisions directly concern bills of lading. There has also been further guidance on construction of contractual provisions generally, on the extent to which "manipulation" may be permissible, and there have been cases which have tested the willingness and ability of the English courts (and arbitration tribunals) to issue anti-suit injunctions in support of arbitration and exclusive jurisdiction agreements.

One or two contracts?

In **The Athena (No.2)**[11]**.** an appeal from a London arbitration award, the case turned on the incorporation of an arbitration clause from another insurance contract between the same parties, Langley J concluded that general words of incorporation might serve to incorporate an arbitration clause. He rejected a submission that the strict rule in **Thomas v Portsea** might also apply to one-contract situations, that is cases where either:

- A and B make a contract in which they incorporate standard terms, or
- A and B make a contract incorporating terms previously agreed between A and B in another contract or contracts to which they were both parties.

The judge recognized however that there were "*exceptional two-contract cases... in which some express reference to arbitration or perhaps provision of the relevant clause is also required".*

These exceptional, "two-contract" cases involve the situation where either:

- A and B make a contract incorporating terms agreed between A (or B) and C, or
- A and B make a contract incorporating terms agreed between C and D.

As examples of the two-contract case Langley J identified in particular:

[10] Daval Aciers d'Usinor et de Sacilor v Armare SrL [1996] 1 Lloyd's Rep. 1.

[11] Sea Trade Maritime Corp. v Hellenic Mutual War Risks Association (Bermuda) Limited [2006] EWHC 2530.

- reinsurance contracts which might incorporate by reference terms of the underlying insurance,
- construction contracts which might incorporate by reference terms of main contracts into sub-contracts, and
- bills of lading which might incorporate terms by reference to charterparties.

In the case of bills of lading the judge referred to the judgement of Bingham LJ in **The "Federal Bunker"** with which he agreed:

> "In principle, English law accepts incorporation of standard terms by the use of general words and, I would add, particularly so when the terms are readily available and the question arises in the context of dealings between established players in a well-known market. The principle, as the dictum makes clear, does not distinguish between a term which is an arbitration clause and one which addresses other issues. In contrast, and for the very reason that it concerns other parties, a "stricter rule" is applied in charterparty/bills of lading cases. The reason given is that the other party may have no knowledge nor ready means of knowledge of the relevant terms. Further, as the authorities illustrate, the terms of an arbitration clause may require adjustment if they are to be made to apply to the parties to a different contract. The language of Bingham LJ would not encourage any extension of the stricter rule, a sentiment with which I would respectfully agree."

In **Habas Sinai Ve Tibi Gazlar Isthisal Endustri AS v Sometal SAL**[12] Clarke J (as he then was) applied the reasoning of Langley J in **The "Athena" No 2.** In this case Habas, a Turkish company, applied to the court to set aside an interim final award of an LCIA tribunal on jurisdiction and costs.

The underlying contract contained some terms and then incorporated other terms by a general reference to terms in previous contracts: "All the rest will be the same as our previous contract." The key issue was whether these general words incorporated a London arbitration clause when there had been 14 previous contracts between the parties, some but not all of which expressly incorporated a London arbitration clause.

Although more than one contract was involved in a literal sense, Clarke J treated the situation as a "one-contract" case and held that the general words used were sufficient to incorporate the arbitration clause from the antecedent contracts. In other words it was not necessary for there to have been an express and specific reference to the arbitration clause itself.

Both these cases are supportive of arbitration as a form of dispute resolution:

> "The comment made in **Thomas v Portsea** that clear words are needed to oust the jurisdiction of the courts is over 100 years old and different factors are now relevant. The courts actively support

[12] [2010]EWHC 29

alternative dispute resolution and there is no reason to treat an arbitration clause differently from any other clause of the contract."[13]

Bills of lading: service out and anti-suit injunctions

It is now established that the English courts may not issue ant-suit injunctions against parties who have previously launched proceedings in the courts of another Member State of the European Economic Area ("EEA") even if the proceedings apparently breach an arbitration agreement: **The "Front Comor"; The "Wadi Sudr"**. This does not however hamper the English courts from issuing anti-suit injunctions with respect to proceedings in other courts outside the EEA. Two cases since 2004 illustrate the differences between the EEA and non-EEA situation.

The Kallang (No 2)[14]

This action arose out of the arrest of the vessel "Kallang" (the "vessel") at Dakar in Senegal between 11 and 24 March 2005. The vessel was chartered by the claimants, Kallang Shipping Co SA (the "Owners"), to Brobulk Ltd on an NYPE form dated 1 February 2005 for a trip from Montevideo to Dakar. The charterparty contained a London arbitration clause. On that same day, the vessel was sub-chartered on a Gencon form, which also contained a London arbitration clause although in slightly different terms.

The second defendant, Comptoir Commercial Mandiaye Ndiaye ("CCMN") was the receiver of a cargo of bagged rice carried on board the vessel and discharged at Dakar between 3 and 11 March 2005. The first defendant AXA Assurances Senegal ("AXA Senegal") was the insurer of the cargo. The face of the bills of lading stated: "Freight payable as per Charter Party dated Feb/01/2005", and on the reverse of the bills there was a provision that: "All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated."

While the cargo was being discharged on 8 March 2005, the defendants alleged that some of the cargo was lost or damaged. AXA Senegal demanded a bank guarantee from the Owners in the sum of FCFA 30,500,000, equivalent to €46,496.95. AXA Senegal asserted that the arbitration clause in the charterparty did not apply to it because it was not a party to that contract. The Owners' P&I Club (the American Club) refused the demand for a guarantee. It offered to provide a letter of undertaking on usual Club terms, subject to London arbitration as had been agreed. Instead of giving any response, on 11 March 2005, CCMN applied to the Dakar court for payment of the sum of FCFA 25 million, failing which the vessel was to be arrested. As no payment was

[13] A and K Tweedale: (2010) 76 Arbitration 4
[14] Kallang Shipping S.A. Panama v Axa Assurances Senegal [2008] EWHC 2761

made, the vessel was arrested on 11 March. She finished discharge that same day.

On 16 March 2005 the Owners were granted an interim anti-suit injunction on the basis that they had a good arguable case that the claim in Senegal was a substantive claim; hence it went beyond obtaining reasonable security for the arbitration claim. The vessel was released from arrest on 24 March on the defendants accepting a "competent court or tribunal" letter of undertaking in the amount of FCFA 25 million. The defendants subsequently applied to discharge the anti-suit injunction but their application was rejected by Gloster J on 7 November 2006. The injunction was then allowed to lapse on the defendants' undertaking to pursue their claim only by way of London arbitration. In the event, the defendants took no steps in their arbitration against the Owners apart from appointing an arbitrator.

On the trial of the Owners' claims against CCMN and AXA Senegal relating to the breach of the London arbitration clause, the Owners contended that CCMN was in breach of the express obligation to submit all disputes to London arbitration and/or an implied term that no party would conduct itself in such a way as would frustrate the London arbitration clause. The Owners further alleged that AXA Senegal wrongfully induced or procured or conspired with CCMN to breach its contract. As against CCMN, the Owners sought only costs as relief. As against AXA Senegal, the Owners claimed damages amounting to US$160,436.65 and € 9,574.12. Most of the damages were for loss of hire for 11 and a half days while the vessel was under arrest after completion of discharge and for bunkers consumed and port charges incurred during that period.

The defendants denied that there was any implied term as contended for by the Owners, and denied that there was any breach of the express terms of the London arbitration clause. They asserted that the arrest was merely a conservatory arrest for security. They asserted that at all times AXA Senegal was acting on behalf of and under direct instructions from CCMN.

The main live issues that arose for decision were as follows: (1) Was an arbitration clause incorporated into the bills of lading, and if so which? (2) What, if any, terms are to be implied into arbitration clause in the bills of lading? (3) Was the arrest order obtained in Dakar merely security in support of the claim, or was it a substantive claim? (4) Were the arrest and the demand for security being used as a means of forcing the owners to relinquish the London arbitration clause? (5) In the light of those findings, was there a breach of the express or implied terms of the arbitration clause? (6) What role did AXA Senegal play? Was it merely acting on behalf of CCMN or was it the driving force in its own right? (7) What knowledge did AXA Senegal have of the arbitration clause and its incorporation into the bill of lading contracts? (8) Did AXA Senegal cause or procure CCMN so to act and was its conduct such as to amount to a wrongful inducement or procurement of any breach of the express or implied terms of the arbitration clause? (9) Did AXA Senegal unlawfully conspire with CCMN to injure the owners? (10) Damages.

The court found the following:

- The bills of lading expressly provided that all terms and conditions, liberties and exceptions of the charterparty dated 1 February 2005 "including the Law and Arbitration Clauses" were incorporated. On general principle, as a result of the express identification of the arbitration clause, that would be sufficient to incorporate a charterparty arbitration clause, even if it required a degree of manipulation. The complication was there were two charterparties dated 1 February 2005; both had an English arbitration clause but in slightly different terms. The bills of lading also provided that freight was payable as per the charterparty, which was naturally a reference to the voyage charter under which freight (as opposed to hire) was payable. Further the terms of the voyage charter were more naturally germane to a bill of lading. The judge decided that the intention was to incorporate the terms of the voyage charter, including its arbitration clause, into the bill of lading contracts.
- It was unnecessary to imply any term of the kind contended for (that no party would conduct itself in such a way as would frustrate the London arbitration clause). The bills of lading contained an express agreement, binding on all holders including the receivers, that all disputes were to be referred to arbitration in London and were to be decided in accordance with English law and practice. If one party sought to use a foreign arrest for ulterior purposes, i.e. tried to obtain security for proceedings in another jurisdiction or to force the other party to give up its right to arbitrate disputes. That would be a direct and straightforward breach of the arbitration clause.
- The arrest itself was clearly a conservatory arrest for security. The reference in the arrest order to payment was a word-processing error. The order obtained was a normal order for security of payment. Nonetheless, the case against AXA Senegal went much further than just the nature and terms of the arrest itself.
- The arrest order only permitted the release of the vessel on provision of a bank guarantee. In practice, as AXA Senegal intended and the American Club were well aware, unless AXA Senegal was prepared to make it clear that it would accept a first class bank guarantee in support of London arbitration, this would require the production of a Senegal bank guarantee which would answer to a Senegal judgment and which would take some considerable time to obtain. Without agreement, the court would not accept a foreign bank guarantee. Even if the guarantee was expressed in terms of "competent jurisdiction", the result would be that the Owners were forced to litigate the claim in Senegal. The judge concluded that this was not some accidental result; AXA Senegal's intention had been to use the arrest as a means of forcing Senegalese jurisdiction. It was only the intervention of the English court which prevented this result from being achieved.

- The conduct of CCMN through AXA Senegal went well beyond seeking security for its claims in the London arbitration. By seeking to use the arrest as a means of achieving Senegalese jurisdiction, the judge decided that it was in breach of the express terms of the arbitration clause.
- AXA Senegal was the driving force in arresting the vessel and using the arrest as a means of forcing Senegalese jurisdiction. It was not taking instructions from CCMN or even consulting with it – nothing had been disclosed by either defendant that any such communication took place. AXA Senegal was exercising its rights under the cargo insurance policy to take control of claims handling even prior to settlement of the insurance claim. Its motives were found to be twofold. First, it did not like having cargo claims decided in London arbitration. Second, its chances of effecting a substantial recovery would be much greater if the Hamburg Rules were applied, as they would be by a Dakar court, rather than the terms of the bills of lading, especially the FIOS clause, and the Hague-Visby Rules which would be applied by London arbitrators applying English law.
- Another issue was whether AXA Senegal knew that the bills of lading purported to incorporate a charterparty arbitration clause. The judge decided that once AXA Senegal had been provided with the working copy of the charterparty, it was almost certain that it knew of the binding London arbitration clause. If it was in any serious doubt, it could have checked with Voest-Alpine, the shippers and sellers to CCMN.
- In deciding the question of wrongful inducement or procurement of any breach of the express or implied terms of the arbitration clause, the judge referred to the House of Lords' judgment in **OBG Ltd v Allan**[15]. It established that, in order for a tortious claim for wrongful inducement or procurement of breach of contract to succeed, it must be established that the defendant (1) knew that he was inducing a breach of contract; and (2) intended to do so. The judge's findings showed that AXA Senegal plainly had sufficient knowledge as from the afternoon of 15 March, and therefore it was only a fair inference on the facts and in the absence of any proper evidence from AXA Senegal, that it was determined to try and avoid the arbitration clause. As to intention, it was clear that Axa Senegal was determined, if it could, to use the arrest as a means of forcing the owners to give up the right to have any dispute arbitrated and to accept Senegalese jurisdiction. The judge held that AXA Senegal's conduct, knowledge and intent was such as to make it liable for the accessory tort of procuring CCMN's breach of the contract to arbitrate all disputes in London.
- The judge was not satisfied that there had been any conspiracy involving CCMN. There was no evidence that AXA Senegal had consulted with CCMN. Given the Owners' case as to AXA Senegal's conduct, it would be somewhat inconsistent to contend that CCMN was party to any conspiracy.

[15] [2008] 1 AC 1

- Damages of US$130,350 were awarded to the Owners against AXA Senegal, representing some ten days charter hire and related expenses.

The "Wadi Sudr"[16]

In the EEA the powers of the English Court to compel parties to adhere to their agreements to submit disputes to London arbitration have been significantly undermined[17]. After the decision of the ECJ in **The "Front Comor"**[18], prohibiting the English Court from issuing an anti-suit injunction where proceedings are threatened or started in another EEA Member State in breach of an arbitration clause. More recently, the decision of the Court of Appeal in **The "Wadi Sudr"** has further limited the protection afforded to London arbitration. [19]

The vessel "Wadi Sudr" sustained damage during a voyage from Indonesia to El Ferrol, Spain, while laden with 64,000 metric tonnes of coal. The cargo was delivered short of destination at Carboneras in south east Spain. The bills of lading incorporated the terms of "the relevant charterparty". Both the head time charter and the sub-voyage charter provided that disputes should be referred to arbitration in London and subject to English law.

Cargo receivers, Endesa, commenced proceedings on the merits before the Court in Almeria, Spain. In an effort to prevent the Spanish Court from accepting jurisdiction in this matter, owners commenced proceedings before the Commercial Court in London seeking a declaration that the arbitration clause was validly incorporated into the bills, a declaration of non-liability and an anti-suit injunction restraining Endesa from proceeding with a claim in Spain.

The Almeria Court issued a decision stating that, as a matter of Spanish law, no arbitration clause was incorporated from any charterparty into the bill of lading and that Spanish law applied to the dispute. However, it agreed to stay the Spanish proceedings pending a decision by the English Commercial Court as to whether it was competent to hear the action in London and would accept jurisdiction.

At first instance, Gloster J was compelled to dismiss owners' application for an anti-suit injunction in light of the ECJ's ruling in **The Front Comor**,. However,

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[16] National Navigation Co v Endesa Generacion SA (Wadi Sudr) [2009] EWCA Civ 1397

[17] See now further

[18] Allianz SpA v West Tankers Inc, ECJ case no C-185/07 (2009) and the discussion in Merkin & Flannery Arbitration Act 1996 at 190ff

[19] Contrary to original expectations the position has not been improved by the new EU Regulation 1215/2012/EU which replaced EU 2001/44 effective from January 2015

she concluded that owners were entitled to a declaration that the dispute was subject to English law and London arbitration, on the grounds that the London arbitration clause in the voyage charter was validly incorporated into the bills. The Spanish judgment was a "Regulation Judgment" within the Brussels Regulation[20], but in the Judge's view the English Court was not bound to recognise it. This was because the English proceedings concerned arbitration and were outside the Regulation – arbitration being specifically excluded from the Regulation by Article 1(2)(d). She also held that it would be contrary to English public policy to recognise a judgment by the Court of another EU Member State if obtained in breach of an arbitration agreement that was valid by the proper law of that agreement. To give effect to that judgment would result in the United Kingdom being in breach of its obligations under the New York Convention, which imposed duties on contracting states to recognise arbitration agreements.

The Court of Appeal reversed the first instance decision on the recognition and public policy points. The Court of Appeal's conclusion was that the Spanish judgment *was* required to be recognised in England, as that judgment was within the scope of the Brussels Regulation. Article 33(1) of the Regulation imposes a duty on Member States to recognise the judgments given in other Member States. The Spanish judgment was therefore to be recognised, no matter that the proceedings before the English Court were excluded from the Brussels Regulation and notwithstanding the New York Convention. Accordingly, the English Court was duty bound to recognise the Spanish judgment.

The decision of the Court of Appeal erodes the power of the English Court, faced with competing proceedings in the EEA, to protect arbitration as the contractually agreed forum to resolve contractual disputes. The decision also shows the problems of reconciling a party's right to uphold an agreement to arbitrate, the obligation to recognise arbitration agreements under the New York Convention and the obligation to recognise judgments of Courts in other EU Member States.

The fact that the new Brussels Regulation has made no practical attempt to address this situation, despite an obvious opportunity to do so, may be symptomatic of an anti-arbitration attitude on the part of the EU, something which has also been evident in the recent opposition of the EU Commission in negotiations over the North Atlantic Free Trade Treaty.

In practical terms if a party wishing to abide by an arbitration agreement wishes to prevent the effect of the arbitration agreement being frustrated by the other party initiating proceedings in a court in another EEA Member State, then an urgent application to the English Court may be necessary to ensure that the English court is "first seized" and can make a declaration that the arbitration clause is validly incorporated into the contract and that the dispute

[20] Regulation EU 2001/44

should be referred to arbitration, before the Court in the other Member State makes a ruling.

It is however suggested that the need for a court action to be started simply to block other courts in other countries from interfering with the operation of a London arbitration clause is an unsatisfactory state of affairs.

More on manipulation

In **YM Mars Tankers Ltd v Shield Petroleum (Nigeria) Ltd**[21] the bill of lading was on the Congenbill form and used the standard wording incorporating the "law and arbitration clause" of the charterparty. The relevant clause in the charterparty provided that disputes involving sums less than US$50,000 were to go to arbitration in accordance with the LMAA small claims procedure, but disputes involving a sum in excess of that were to be subject to the jurisdiction of the English court. Gloster J rejected the submission that the bill of lading did not, on its true construction, provide for the jurisdiction of the English court over a claim for an amount in excess of US$50,000. She stated that "it would be un-commercial to suggest that, simply because the 'law and litigation clause' in the Head Charterparty provides that the arbitration should be limited to disputes below a certain level, that somehow meant that only the arbitration provision should be carved out for the purpose of the bill of lading." She also stated that it would be "absurd" to suggest that, once the claim threshold is exceeded, no jurisdictional provisions are incorporated.

No incorporation

The "Lucky Lady"[22] may be mentioned in passing as a case where the court found the wording of a bill of lading insufficient to incorporate an arbitration clause in a sub-charter of the carrying vessel. In this case Navig8 was disponent owner of a vessel sub time chartererd to Pacific International Line on Shelltime 4 form. PIL was the seller of a cargo of palm oil to Al Riyadh delivered in apparently damaged condition in Jordan. The sub-charter was governed by English law with London arbitration. The bill of lading under which the goods were carried provided:

> "*This shipment is carried under and pursuant to the terms of the charter dated 07 March 2008 at Kuala Kumpar between Navig8 as owners and PIL as charterers…The contract of carriage evidenced by this bill of lading is between the shipper, consignee and/or owner of the cargo and the owner or demise charterer of the vessel named herein to carry the cargo described above.*"

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[21] [2012] EWHC 2652 (Comm)

[22] Navig8 Pte Ltd v Al Riyadh Co for Vegetable Oil Industry [2013] EWHC 328

The bills also incorporated *"all conditions, liberties and exceptions whatsoever"* of the subcharter.

The case reported concerned an application by Naviga8 to serve out of the jurisdiction a claim for declaratory relief to try to exclude the possibility that it might be found liable in Jordanian proceedings. Navig8 argued that that they were not party to the contract in the bill of lading, that they were not bailees of the cargo and that they were under no liability to Al Riyadh under the bill of lading.

The court found that the bills of lading were subject to English law under which Navig8 would have been protected from liability. At an earlier stage in the rather tortuous proceedings however (in an unreported decision referred to in the later judgement), Hamblen J dismissed an application for an anti-suit injunction on the basis that Navig8's case that the arbitration clause of the sub-charter had been effectively incorporated in the bill of lading was "hopeless", a conclusion with which Andrew Smith J in the reported decision agreed.

Ironically the Jordanian court at first instance found that the bills of lading had incorporated the arbitration agreement from the subcharter. Although this decision was apparently appealed, the result is unknown but the case illustrates the problems which may result for the different approaches of different courts to the question of incorporation. It is not only the approach of the English courts which may be relevant, even where the long reach of the anti-suit injunction is available.

And more manipulation

Caresse Navigation Ltd v Zurich Assurances MAROC and others (The "Channel Ranger")[23] concerned an appeal by cargo insurers against an interim anti-suit injunction made by Males J restraining the prosecution in the Moroccan courts of a claim for damage to cargo. The cargo was shipped under a bill of lading on the "Congenbill 1994" form on board mv "Channel Ranger" for carriage from Rotterdam to Nador in Morocco. Males J granted the injunction because he had previously decided that the bill of lading incorporated an English law and exclusive jurisdiction clause referred to in the charterparty. The Court of Appeal dismissed the appeal and approved the reasoning adopted by Males J in deciding that the exclusive jurisdiction clause had been incorporated.

The bill of lading evidenced or contained a contract of carriage between Glencore the shipper, and the owners Caresse. Clause 1 of the printed conditions of carriage provided:

[23] [2014] EWCA 1366 (CA)

"*All terms, and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration clause are herewith incorporated*"

The fundamental question was whether, in the circumstances of the case, these words had the effect of incorporating the English law and exclusive jurisdiction clause referred to in the charterparty.

A box on the front page of the form of the bill of lading contained a typed clause using materially the same words as clause 1 of the printed conditions to express the scope of the incorporation. It stated:

"*Freight payable as per Charter Party. All terms, conditions, liberties and exemptions including the law and arbitration clause, are herewith incorporated*"

Another box on the front page of the bill of lading identified the charterparty as "dated 06.01.2011". Clause 2 of the printed terms was a General Paramount clause, providing for the Hague-Visby Rules to apply to the bill of lading contract.

The charterparty in question was a voyage charter in the form of an email fixture recap dated 6 January 2011 which set out the main terms and concluded:

"*… otherwise as per proforma C/P Glencore/Eitzen latest C/P dated 14 January 2009 (see attached) logically amended as per main terms agreed".*

The Glencore/Eitzen charterparty was on the Americanised Welsh Coal Charter ("AmWelsh") form 1979, clause 5 of which provided:

"*This Charter Party shall be governed by English Law, and any dispute arising out of or in connection with this charter shall be submitted to the exclusive jurisdiction of the High Court of Justice of England and Wales.*"

The cargo having been apparently received in damaged condition, the consignee and the other cargo interests commenced proceedings in Morocco.

The judge decided that the voyage charter in the fixture recap incorporated clause 5 of the Glencore/Eitzen charterparty. He concluded that the effect of the bill of lading, and in particular the printed clause and the typed clause, was to incorporate the English proper law and exclusive English jurisdiction clause in clause 5 of the Glencore/Eitzen charterparty into the bill of lading.

In granting the anti-suit injunction, Males J held that at least in some circumstances, a reference to 'arbitration' in the bill of lading might properly be read as providing for court jurisdiction. The Court of Appeal held that it was in this case appropriate to correct a mistaken reference to arbitration by

construing the bill of lading to have intended a reference to the clause of the charterparty which subjected disputes to the exclusive jurisdiction of the English courts.

The judge's reasoning (as summarized in the Court of Appeal) was the following:

> (1) There is a particular need for clarity and certainty in the rules governing the incorporation of charterparty clauses into bills of lading because of the negotiable nature of bills of lading and the fact that they may come into the hands of parties who are not aware of the terms of the charterparty: **The "Federal Bulker"** and **The "Siboti".**
>
> (2) General words of incorporation in a bill of lading (however wide) will not be effective to incorporate an arbitration or jurisdiction clause because such clauses are "ancillary" to the main contract to which they relate: **The "Siboti"**.
>
> (3) A specific reference to an arbitration or jurisdiction clause in a bill of lading will be effective. In such a case, it does not matter that the wording of the clause in the charterparty may require some degree of manipulation to make it applicable to the bill of lading: **The "Delos"**[24].
>
> (4) The question whether, when referring to "arbitration", the parties clearly meant "jurisdiction", is "essentially one of construction rather than incorporation". Although the question "can be posed by asking whether the jurisdiction clause in the charterparty is incorporated into the bill of lading, the real question is what the parties should reasonably be understood to have meant by the words 'law and arbitration clause', which plainly contemplate the incorporation of at least one kind of ancillary clause. That is a question to be answered objectively, having regard to the background circumstances, which include the fact that the charterparty does not contain an arbitration clause, but does contain a law and jurisdiction clause".
>
> (5) Special rules to the effect that ancillary clauses will not be incorporated unless specific words are used are of comparatively little weight in deciding whether specific words which are accepted to be effective to incorporate at least one kind of ancillary clause (an arbitration clause) can properly be read as extending also to another kind of ancillary clause.
>
> (6) The submission on behalf of the cargo interests that there was no reason to suppose that the parties had made a mistake in referring to "arbitration" rather than "jurisdiction" was rejected.

[24] [2001] 1 Lloyd's Rep 2703

(7) The only clause in the charterparty to which the parties could have intended their words to refer was the law and jurisdiction clause. Accordingly, it was "a more natural construction of the bill of lading to read it as referring to that clause, rather than to read it as referring to an arbitration clause in the charterparty 'if any'". The judge saw no basis for adding the words "if any" into the bill of lading when the original parties to that contract (Glencore and Caresse) knew, or must be taken to have known, that the charterparty contained no arbitration clause, because that would render the specific incorporating words empty of content.

(8) It followed that the principle stated by Lord Hoffmann in **Chartbrook Ltd v Persimmon Homes Ltd**[25] applied to the case. This was because it was (a) "clear that something has gone wrong with the language" and (b) it is clear "what a reasonable person would have understood the parties to have meant".

(9) Provided the clause in the charterparty was one which was usual in the trade and can be identified as the one which the parties to the bill of lading contract clearly had in mind when referring to the charterparty, this conclusion did not run counter to the particular need for clarity and certainty in this context (see (1) above) because:

(a) A consignee would be bound by whatever terms the original parties to the bill of lading had agreed by the reference to the charterparty arbitration clause although it would not know, for example, the seat of the arbitration and whether the tribunal was to be a sole arbitrator or a panel without reference to the charterparty; and
(b) The consignee would know from the specific words in the bill of lading that the incorporation extended to at least some ancillary clauses concerned with choice of law and dispute resolution and was not confined to terms which were "germane to the shipment, carriage and delivery of the goods"

(10) It followed from (9) that "the consignee was equally bound by a clause in the charterparty which could be identified as the clause which the parties to the bill of lading contract clearly had in mind when referring to the charterparty "law and arbitration clause", at any rate provided that (as here) the clause in question was one that was usual in the trade", and the judge so concluded.

In argument both before Males J and the Court of Appeal the appellant relied on:

(1) the ordinary and natural meaning of the words of the reference in the bill of lading to the "law and arbitration clause", which it was

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[25] [2009]UKHL 38.

submitted was plainly a reference to an agreement to arbitrate and not to one submitting disputes to the exclusive jurisdiction of a particular national court.

(2) the principle that general words of incorporation in the bill of lading do not suffice to incorporate *ancillary terms* of the charterparty. In this context it was argued that the interests of commercial certainty are paramount, particularly where what is at issue is the meaning of a standard term in a widely used form of bill of lading.

(3) precedent

(4) inconsistency of the jurisdiction clause in the charterparty and the express terms of the bill of lading,

(5) the presumption against surplusage in commercial contracts, and

(6) the decision in **The Merak**.

The Court of Appeal rejected these arguments essentially for the same reasons as underpinned Males J's first instance decision. Particular attention was paid to distinguishing arguments based on the Court of Appeal decision in **The Merak** that it was not possible to read the words of a bill of lading in "a way which seeks to correct what was said to be an obvious mistake in it". The Court suggested that **The Merak** would probably not be followed if decided today. Beatson LJ in delivering the unanimous judgment of the Court of Appeal said:

> "*In my view, [the appellant] is not assisted by The Merak. In concluding that the court is not entitled to remedy an obvious mistake, Davies and Russell LJJ took what to modern eyes is a very old-fashioned and outdated approach to interpretation. The case was described as "an unusual case" by Bingham LJ in The Federal Bulker. In The Merak Davies LJ, but not the other two members of the court, considered that it was important that the plaintiffs, who it happened were both the charterer and the shipper, were themselves parties to the charter. Sir Guenter Treitel's explanation of the case is inconsistent with [the appellant's] submission based on it. Sir Guenter stated that the unusual feature in the case was that the parties "had plainly intended to incorporate the charterparty arbitration clause and would have succeeded in doing so but for their 'slip of drafting', and that, "in these special circumstances, the Court of Appeal took account of the fact that there had been such a slip and gave effect to the evident intention of the original parties to the bill, even though the court was not able to correct the error by rectifying the bill"... [H]ad The Merak been decided today, in the light of Chartbrook and other decisions of the House of Lords and the Supreme Court on the construction of contracts, it is very likely that the approach of Sellers LJ in his dissenting judgment would have prevailed. Sellers LJ recognised the negotiable nature of the bill of lading and the fact that*

it may be acquired by a party with no knowledge of the charterparty. Despite this, he stated that:

> *"...[T]he bill of lading clause can properly be read by substituting '32' for '30'...on two grounds. Anyone reading the charterparty, as the bill of lading holder would have to do, would know that the arbitration clause was intended, and I cannot see why the court should shut its eyes to the obvious on some technical ground of construction. A practical, not an abstract, construction is called for."*