Article

Incorporation by Reference in Maritime Arbitration

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I. Introduction

Since the dawn of humanity, the sea has been a source of sustenance, providing food and avenues of trade.[2] The earliest civilizations used the

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2. Rachel Louise Carson, The Sea Around Us 199 (Sweet and Maxwell, London, 1989).

sea as an avenue to search for wealth in the form of spices, minerals, and other natural resources.[3] The search for natural resources and wealth resulted in the establishment of the maritime industry that would continue in some form or another until the present.[4] The long history of maritime industry is dotted with both success and disputes.

In the maritime industry, arbitration has served as a common tool for the settlement of disputes for several decades.[5] In the past, the large amount of informal personal contact, the limited number of people, and the concentration of the shipping industry in New York led to an atmosphere conducive to the amicable resolution of disputes.[6] Presently, the shipping industry is no longer made up of a small number of people or concentrated in one country.[7] This results in a loss of the close personal contact that facilitated arbitration in the past.[8] These changes in the shipping industry led to the immediate consultation of lawyers as a necessity when problems arise, and the continued presence of lawyers through the resolution of those problems.[9]

Despite any changes, maritime arbitration remains a popular way to resolve maritime disputes that arise, in part because of the often-lower costs involved and the ability to mould the process to the needs of the parties involved.[10]

This paper discusses the formal requirements of a valid arbitration and therefore an enforceable arbitral award arising out of the interplay between two well established and celebrated contract forms found in the maritime industry—the bill of lading and the charter party. Charter parties facilitate world trade, have a broad international scope and are numerous- making them remarkable contracts.[11] They are also a major source of maritime arbitration.[12] Bills of lading are discussed in greater detail in section 4 of this paper.

The premise upon which this paper is based is that one cannot be

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3. *Id.* at 200.

4. *Id.* at 199-212.

5. Patrick Martin, *Why is Arbitration Getting Much Too Legalistic? Can the Old Method be revived?* 8th Int'l Cong. Mar. Arb. 1 (1987).

6. *Id.* at 3.

7. *Id.* at 6.

8. *Id.*

9. Robert Force & Anthony J. Mavronicolas, *Two Models of Maritime Dispute Resolution: Litigation and Arbitration*, 65 TUL. L. REV. 1461, 1467 (1991).

10. Michael Marks Cohen, *A New Yorker Looks at London Maritime Arbitration*, Lloyd's Mar. & Com. L.Q. 57 (1986) (arbitration in maritime disputes is "on average 60 to 70% cheaper than litigating judgments in courts").

11. William Tetley, *Good faith in contract: particularly in the contracts of arbitration and chartering*, 35 J. MAR. L. & COM. 561 (2004).

12. Martin Davies, *Litigation fights back: Avoiding the Effect of Arbitration Clauses in Charterparty Bills of Lading*, 35 J. MAR. L. & COM. 617, 618 (2004).

required to arbitrate a dispute based on an arbitration agreement which the disputing party has not sanctioned, or even seen. In this paper, two questions are primarily raised. The first of which involves the formal obligations required in order to prove parties' intention to arbitrate in case of an arbitration agreement incorporated from a charter party into a bill of lading. In the even the formal obligations are met, the issue then arises as to whether the extant law is sufficient to determine when parties intended to arbitrate and when they did not?

In the course of discussion of these two primary questions, this paper will describe the rise of maritime arbitration and its importance in the maritime industry. The formal requirements for an arbitration to take place and the law relating to incorporation of arbitration contracts are then discussed. The paper then applies the extant law on arbitration and incorporation by reference to the bill of lading as a standard form of contract. Following a review of the various decisions given by the US and UK courts on this issue, conclusions and normative suggestions, if any, are provided.

II. THE ORIGIN OF MARITIME ARBITRATION

The foundations of maritime law may be traced to primary sources—the *lex maritima* on one hand and national statutes and international conventions on the other. The *lex maritima* developed as part of the *lex mercatoria* and evolved primarily from the Roles of Oleron of the 12th century.[13] There are traces of its existence, however, as far back as the Rhodian law of the 8th or 9th century B.C. Attachment, maritime liens and general average are examples of the *lex maritima*, which continue to exist even today as *jus commune*.[14]

Second, the common forms, terms, and practices of the shipping industry, particularly with respect to carriage of goods by sea under bills of lading and the hire of ships and their services under charter parties, are international examples of accepted general maritime law.[15]

A. THE *Lex Mercatoria*

The *jus commune* is a law common to a whole jurisdiction or more than one jurisdiction.[16] It is composed of broad, general principles and is

13. William Tetley, *The General Maritime Law - The Lex Maritima*, 20 SYRACUSE J. INT'L L. & COM. 105, 107 (1994).

14. "The common or public law or right, as opposed to a law or right established for special purposes", BLACK'S LAW DICTIONARY (8th ed. 2004).

15. William Tetley, *The Evolution of the Law Merchant: Our Common Heritage* 12 J. MAR. L. & COM. 1 (1980).

16. William Tetley, *Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified) (Part I)*, 3 UNIF. L. REV. 1 (1999).

usually unwritten at first and then often codified. The *lex mercatoria* is also a *jus commune*, just as is the *lex maritima*, which latter is known as the "general maritime law" today.

It has been argued that the *lex mercatoria* developed over centuries of trade, particularly in countries around the Mediterranean Sea, and has come to represent our current-day principles of law.[17] Now, the realm of the *lex mercatoria* encompasses a number of areas of law that have been demarcated and compartmentalized through codification. Two such areas are arbitration and general maritime law.[18] Therefore, it is submitted, the basic principles of the two areas of law would essentially be similar, if not the same. Principles of natural justice, fair play and equity are found common to both regimes.[19]

Thus, the origins of maritime law and arbitration, which can be traced back to pre-Christian times, have the same basis. However, over centuries of practice, new theories and global circumstances have emerged, the most recent being the phenomenon of globalization. Therefore, there arises a need for such regimes that have lasted this long, to be able to adapt themselves to the constantly changing commercial scenario. In present times, arbitration in the maritime industry is effected by arbitration clauses within the contract, not unlike other industries.

B. Get it in Writing

The United Nations Conference on International Commercial Arbitration: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "New York Convention") requires that all contracting parties to the Convention recognize arbitration agreements in writing. Article II reads thus:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.[20]

This "writing requirement" of an arbitration agreement is peculiar to

17. Lex Mercatoria and Arbitration, 2 (Thomas E. Carbonneau ed., 1998).

18. Leon Trakman, The Law Merchant: The Evolution of Commercial Law 71 (1983).

19. William Tetley, *Maritime Law as a Mixed Legal System (with Particular Reference to the Distinctive Nature of American Maritime Law, Which Benefits from Both its Civil and Common Law Heritages)*, 23 Tul. Mar. L.J. 317, 334 (1999).

20. United Nations Conference on International Commercial Arbitration: Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II, ¶ 1, *opened for signature* June 10, 1958, 21 U.S.T. 2517.

this species of contract.[21] Consider the formal requirements of contract formation: under the Uniform Commercial Code[22] and the Convention on the International Sale of Goods[23] where no such requirement exists. Indeed, oral agreements are upheld in most common law jurisdictions.

Therefore the question arises as to the purpose of Article 7 of the UNCITRAL Model Law. One possible reason is the evidentiary value of the intent of the parties it contains. Parties to a dispute submit themselves before a court of law, which has been duly constituted by the law of the land, with the expectation that justice will be dispensed and that the dispute will be resolved. This has been the very basis of adjudication of private disputes since time immemorial. Arbitration is a significant departure from the traditional adjudicatory process. As mentioned earlier, parties' choice to arbitrate prevents the assertion of their natural rights, in the first instance, to approach a court of law for the dispensation of justice.[24] Instead, parties choose to submit themselves to a 'private court' having the sanction of law. Therefore, the parties' intention to arbitrate must be unequivocal, unambiguous, and without reservation. This formal requirement of having the arbitration agreement in writing "aim[s] both to assess the real will of the parties to submit their disputes to arbitration and to endorse the existence of a valid and efficient arbitration clause as regards third parties."[25]

As mentioned before, a written agreement would hold more evidentiary value than an oral agreement,[26] thereby ensuring that the jurisdic-

21. Thomas H. Oehmke & Joan M. Brovins, *The Arbitration Contract-Making it and Breaking it*, 83 AM. JUR. PROOF OF FACTS 3d 1, § 124 (2005).

22. U.C.C. § 2-202 (2002)(While § 2-202 lays down the parole evidence rule, there is no formal requirement of an agreement to be in writing. It merely states that if an agreement has a written expression in the form of a covenant, etc., that written expression would hold greater evidentiary value as opposed to "any prior agreement or of a contemporaneous oral agreement"); *see also id.* § 2-204(1) ("A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.").

23. United Nations Convention on Contracts for the International Sale of Goods, art. 11, April 11, 1980, 52 Fed. Reg. 6262-02 ("A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.").

24. *Aughton Ltd. V. MF Kent Services Ltd.*, 31 CON. L. REV. 60 (1991) (U.K.).

25. Carlos Aurelio Esplugues, *Validity and Effects of the Incorporation by Reference of Arbitration Agreements in International Maritime Arbitration: Current Situation and Future Trends*, DIRITTO DEL COMMERCIO INTERNAZIONALE (manuscript at 5), *available at* http://ssrn.com/abstract=2063117 (last visited December 26, 2013).

26. *See Bradley v. West Sioux Cmty. Sch. Bd. of Educ.*, 510 N.W.2d 881, 883-884 (Iowa 1994)(quoting *Milholin v. Vorhies*, 320 N.W.2d 552, 554 (Iowa 1982))("[T]he purpose of a statutory writing requirement 'is to prevent a party from being compelled, by oral and perhaps false testimony to be held responsible for a contract [the party] claims [not to have] made.'").

tion of the court in the first instance is not circumvented without the consent and clear intent of disputing parties.

Until recently, litigation was favored over arbitration and "[a]rbitration clauses were routinely struck down as invalid attempts to oust the jurisdiction of the courts."[27] However, post 1995, foreign maritime arbitration agreements began to be recognized.[28]

C. Incorporation by Reference

However, our story of the writing requirement does not end there. While the New York Convention serves as a basis for the recognition of arbitral awards, it does not envisage the reference of an arbitration clause by one agreement to another. On the other hand, we find that such a provision exists in the UNCITRAL Model Law on International Commercial Arbitration.[29]

The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

This principle of incorporation by reference is also echoed in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("Rotterdam Rules"). The Rotterdam Rules state that the provisions of the rules would apply to the arbitration contract between the parties unless the transport document identifies the parties to and date of the charter party and incorporates by specific reference the clause in the charter party that contains the terms of the arbitration agreement.[30]

D. Agreement in Writing - Elsewhere

Here we turn towards another peculiarity of the law relating to arbitration. Not only does a claim for arbitration of a dispute have to be

27. Davies, *supra* note 12, at 617.

28. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995) (reversing the rule that foreign arbitration clauses in bills of lading were invalid because they lessened the carrier's liability in violation of COGSA § 1303(8)).

29. UNCITRAL Model Law on Int'l Commercial Arbitration, art. 7 (1985) (amended 2006).

30. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, art. 76, ¶ 2, December 11, 2008, 2009 A.M.C. 1.

backed by an explicit agreement in writing, such written expression need not be within the contract from which the dispute arises. It is common practice for bills of lading to refer to arbitration clauses present in charter party agreements, thus doing away with the strict interpretation of the "writing requirement."

"Under United States law, a bill of lading can incorporate provisions of a charter party agreement by specific reference to it. Where a bill of lading incorporates terms of an affreightment contract, and the contract contains an arbitration clause, then bills of lading are subject to arbitration."[31] "Where terms of the charter party are . . . expressly incorporated into the bills of lading they are a part of the contract of carriage and are binding upon those making a claim for damages for the breach of that contract . . ."[32] Therefore, persons named on the bill of lading can be brought into the arbitration process where that bill of lading is governed by an affreightment contract, which requires arbitration.

The problem arises when the holder of the bill of lading, while aware of the incorporation, is unaware of the terms and conditions of the arbitration clause contained in the charter party.

E. Statutory Provisions for Incorporation by Reference

Interestingly enough, even though there is no express provision for incorporation by reference in the Federal Arbitration Act, there exists such a provision in the United Kingdom's Arbitration Act, which provides that:

"The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement."[33]

Most countries incorporating the UNCITRAL Model Law have the same provisions. These include Australia[34], Canada[35], Germany[36], India[37], Norway, Russian Federation[38], Singapore, Spain, and within the United States of America: California, Connecticut, Illinois, Louisiana, Oregon, and Texas.

To form a binding agreement to arbitrate, no express reference to arbitration need be made in a given contract if, instead, the contract in-

31. Oehmke & Brovins, *supra* note 21, at § 134.
32. *Son Shipping Co. v. De Fosse & Tanghe*, 199 F.2d 687, 688 (2d Cir. 1952).
33. Arbitration Act, 1996, c. 23, § 6(2) (U.K.).
34. International Arbitration Act, Act No. 136, § 3, ¶ 5 (1974) (Austl.).
35. Commercial Arbitration Act, c. 17 R.S.C., Art. 7, ¶ 2 (1985) (Can.).
36. Arbitral Proceedings Reform Act (1998) (Ger.).
37. Arbitration and Conciliation Act, No. 26 of 1996 (1996) (India).
38. Article 7. 2. of the Arbitration Act, (1993) (Russ.).

corporates by reference arbitration rules or other documents reciting an obligation to arbitrate. The end product of incorporation by reference is to demonstrate an unambiguous intent to arbitrate, rather than litigate, disputes arising out of the aggregated contract. The goal of *incorporation by reference* is to merge one or more prior agreements into one or more contracts in the making so that they become the same. If one of the merged documents provides for arbitration, and it was the intent of the parties to join all agreements into a single, cohesive transaction, then all disputes which arise under any part of any of the merged or incorporated contracts are able to be arbitrated. If it is clear that the parties intended to arbitrate, then the court will compel arbitration under contracts incorporated into each other by reference.[39]

F. The Bill of Lading

The bill of lading is a unique document. It serves a three-fold purpose. One, it serves as a contract of carriage, that the carrier will carry the mentioned goods to a pre-determined location. Two, it serves to describe the condition that that goods were received in. Thirdly, it serves as a document to title.[40]

One of the peculiarities of the bill of lading is also its negotiability. According to Professor Edward Rubin of the Pennsylvania School of Law,

Negotiability is one of the great legal concepts of the Western world, one that has been with us longer than democracy or human rights. It freed us from our atavistic dependence upon jewelry metal as our basic form of money, carried commerce across physical distances and political divides, and transformed banks from warehouses of valuables into financial intermediaries.[41]

Commenting on the importance of negotiable bills of lading as documents of title, the Second Circuit observed:

> [A] negotiable or order bill of lading is a fundamental and vital pillar of international trade and commerce, indispensable to the conduct and financing of business involving the sale and transportation of goods between par-

39. *Herbert A. Huss, M.D., P.C. v. James D. Loftus, M.D., P.C.*, 531 N.Y.S.2d 361 (2d Dep't 1988).

40. The phrase "document of title" includes bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods that it covers. To be a document of title, a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass. *See* UCC § 1-201(15).

41. Edward L. Rubin, *Learning from Lord Mansfield: Toward a Transferability Law for Modern Commercial Practice*, 31 Idaho L. Rev. 775 (1995).

> ties located at a distance from one another. It constitutes acknowledgment by a carrier that it has received the described goods for shipment. It is also a contract of carriage. As a document of title it controls the possession of the goods themselves. . . . It has been said that the bill and the goods become one and the same, with the goods being 'locked up in the bill.'[42]

In practice, the incorporation of the terms of a charter party into a bill of lading, by reference has been well accepted in various jurisdictions.[43] However, the success of each incorporation is highly dependent upon the specificity of the wording used in the bill of lading and the availability of those terms which are deemed to be incorporated into the bill of lading.[44]

Lord Robson, in *Thomas v. Portsea*, a case that will be dealt with in some detail later in this paper, emphasized this virtue of the bill of lading.[45] He opined that in cases of negotiated bills of lading, there would be very few instances where the consignee would know anything about the charter party.[46] Lord Gorell, echoing the sentiments of Lord Robson, observed that bills of lading usually pass "from hand to hand".

Therefore, if a bill of lading passes from one party to another, in the course of commerce, thus passing the title within, the terms of the bill, being a contract also pass. This poses a serious problem as mentioned in the opinion of Lord Robson in *Thomas*. How does the consignee know what he is agreeing to in terms of the resolution of disputes arising from the bill of lading?

This section has been an attempt to describe in some detail, the negotiability of a bill of lading. For the purposes of this paper, this virtue of the said document is somewhat significant. This problem is described and dealt with in detail in the next section of this paper.

G. The Problem

As mentioned earlier, the terms of the Bill of Lading may include a reference to a charter party in which an arbitration clause exists. Let us ponder, for a moment, on the first condition of carriage contained within the Congenbill,[47] which reads as follows:

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42. *Berisford Metals Corp. v. S/S SALVADOR*, 779 F.2d 841, 845 (2d Cir. 1985), *cert. denied*, 476 U.S. 1188 (1986) (citing Allied Chem. Int'l *Corp.* v. Companhia de Navegacao Lloyd Brasileiro, 775 F.2d 476, 478, 481–82 (1985)).

43. Carlos Esplugues Sr., *Validity and Effects of the Incorporation by Reference of Arbitration Agreements in International Maritime Arbitration: Current Situation and Future Trend*, Soc. Sci. Res. Network (May 20, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2063117.

44. N. Gaskell et al., Bills of Lading: Law and Contracts 692-693 (2000).

45. *T.W. Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd.* (The Portsmouth) [1912] A.C. 1.

46. *Incorporation of arbitration clauses into Bills of Lading*, Journal of Business Law (1997).

47. The Congenbill is a popular, widely used and standard form of bill of lading adopted by

> All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause/ Dispute Resolution Clause, are herewith incorporated.

These terms and conditions are found on the reverse of the bill; the face of the bill contains the name of the charter party under which the bill is issued. Therefore, it is clear that persons both issuing as well as accepting the bill of lading agree to subject themselves to the parent charter party. At the time of issuance, it would be probable that the shipper accepting the bill of lading from the carrier would also be privy to the charter party. However, this is not always the case.

Let us consider a situation where the shipper (or owner) of the goods accepts a bill of lading from the carrier. The vessel on which the goods are to be shipped has been chartered by the carrier by virtue of a charter party with the ship-owner. When the goods have been received by the carrier, the Bill is issued. Within the Bill is the reference to the charter party arbitration clause. The shipper may require to see or to examine the parent charter party. At that point of time, it would not be difficult for the carrier to produce the same. However, if the charter party is not produced, a problem of consent would arise whereby the holder of the bill of lading would be required to agree to an arbitration clause which he may not have seen. The same difficulty arises in sale of goods on the high seas. While the goods are in transit, if the bill of lading is negotiated upon, the new holder would be subject to the same terms and conditions as the original holder. And yet, the new holder would have little means to peruse the 'fine print' at the time of negotiation.

Consider the situation in *Hawkspere Shipping Co., Ltd. v. Intamex, S.A.*[48] The bills of lading were prepared by the carrier (who was also, incidentally the ship-owner) and the shipper. The charterer had no role to play. Conversely, the bill of lading holder was not involved with the charter party between the carrier and the charterer. Prior to the dispute, the shipper had never laid eyes on the charter party, or even a copy thereof.

Even if the charter party form is mentioned in the bill of lading, it would not be indicative of whether the arbitration clause in the charter party has a rider clause attached to it. Another complication arises in cases where the charter party referred to has multiple choices of jurisdiction[49]- for example, the NYPE form[50] allows for arbitration in London or

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the Baltic and International Maritime Council (BIMCO), one of the world's largest ship-owner representative associations.

48. *Hawkspere Shipping Co., Ltd. v. Intamex, S.A.*, 330 F.3d 225, 229 (4th Cir. 2003).

49. GENCON and NYPE charter parties are considered here, as they are the best known and most widespread.

50. The NYPE is the New York Produce Exchange Time Charter, a standard form of time charter party, adopted by BIMCO.

New York. The GENCON form takes it a step further making the seat of arbitration London by default, but parties have the autonomy to choose a different seat.[51] While it is standard for charter party forms to provide for an optional choice of venue, it is surprising to note the number of cases where such a choice has not been exercised.

Then there is the question of rider clauses. While most parties would do well to leave the arbitration clauses in charter parties, party autonomy dictates that the parties are allowed to insert clauses of their own, or delete unwanted clauses, or amend clauses as they see fit. Even if the holder of the bill of lading were to know which charter party form was being referred to, he would have no knowledge of whether the arbitration clause in that particular charter party had been amended.

Thus, we come to the central question of this paper. One of the purposes of arbitration, and indeed, alternative dispute resolution in general, is to reduce litigation and the burden of the court system. The bill of lading holder does not usually participate in the formation of, the charter party, neither is he aware of the terms of the charter party. Therefore, should the bill of lading holder be held to the terms of which existence he does not know? In that light, are the provisions of Article 7 (2) of the UNCITRAL Model Law, relating to the incorporation of an arbitral clause by reference, unambiguous enough? Or is there room for improvement?

While we have noted that the practice of incorporation of terms by reference from a charter party to a bill of lading are well accepted, the incorporation of an arbitration clause, which in itself requires that the clause be in writing, is complex and may not always reflect the intention of the parties to arbitrate[52]. Even if parties in dispute were to agree upon the intention to arbitration, the problem of selecting an appropriate forum and choice of law remains in cases where charter parties may have multiple choice for jurisdiction.

The next section deals with the treatment that courts in the United States as well as the United Kingdom have given this question so far.

H. The Treatment

An arbitration clause incorporated by reference must satisfy either one of two conditions:[53]

51. *GENCON Charter Party Clauses – 7-10, available at* http://maritimeknowhow.com/wp-content/uploads/image/Charterparties/CP%20split/C-P%2083-96%20Clause%207-19.pdf.

52. Esplugues, *supra* n. 47.

53. Sir Thomas Edward Scrutton et al., Scrutton on Charterparties and Bills of Lading 79-80 (Stewart C. Boyd, Andrews S. Burrows & David Foxton eds., 20th ed. 1996).

Condition One

The bill should incorporate the referred clause explicitly;

The arbitration clause should be worded so as to make sense in the context of the bill and;

The clause should not conflict with the express terms of the bill

Condition Two

The bill of lading contains general terms of incorporation, not necessarily referring to the arbitration clause explicitly

The arbitration clause referred to makes it obvious that the clause is to govern disputes under the bill as well as the charter.

Having laid down the basic premises, under which courts may recognize parties' intention to arbitrate, lets us now reflect upon the treatment of such a situation by the courts in the United States and the United Kingdom.

I. U.S. COURTS

The Act of 1925, now known as Chapter 1 of the Federal Arbitration Act, has resulted in an enormous reduction in the amount of admiralty litigation. Most charter parties[54] and other maritime contracts now contain compulsory arbitration clauses.[55] The courts are rarely called upon to interpret such contracts except for the purpose of determining whether, in fact, the parties have expressly agreed to submit to arbitration.[56] The powers of the U.S. Courts to review and adjudicate upon arbitration matters are rather limited in compelling the parties to arbitrate. The powers extend only to determine whether there was a valid agreement to arbitrate and whether that agreement was breached.[57]

It seems to be clear from precedents past, that the U.S. courts have favored arbitration even when the parties arbitrating were not the original parties to the arbitration agreement. Most of the litigation concerning this issue turns on whether a bill of lading has sufficiently described the charter party to bind a holder of the bill.[58] This pro-arbitration stand taken by US Courts is evidence by cases such as *MacSteel Int'l USA Corp.*

54. *Matter of A. Halcoussis Shipping Ltd.*,1977 A.M.C. 1658 (S.D.N.Y 1977).

55. Micheal Marks Cohen, *A Venue Problem With the Arbitration Clauses Found in Printed Form Charters,* 7 J. MAR. L. & COM. 541, 541 (1976).

56. *Interocean Shipping v. Nat'l Shipping & Trading Corp.*, 462 F.2d 673, 675-76 (2d Cir. 1972); *In re Kinoshita & Co.*, 287 F.2d 951, 952-53 (2d Cir. 1961); *Superior Shipping Co. v. Tacoma Oriental Line, Inc.*, 274 F. Supp. 25, 27 (S.D.N.Y. 1967); *Sinva, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 253 F. Supp. 359, 364 (S.D.N.Y. 1966).

57. *Newpark Shipbuilding-Pelican Island, Inc. v. Rig Pan Producer*, 261 F. Supp. 2d 756, 758 (S.D. Tex. 2003); *Maria Victoria Naviera S.A. v. Cementos Del Valle S.A.*, 759 F.2d 1027, 1031-32 (2d Cir. 1985).

58. 9 BENEDICT ON ADMIRALTY § 104 (2011).

v. M/V Jag Rani,[59] where the court held that in order that a charter party be incorporated into a bill of lading by reference, the incorporation must be done with language that is specific and unmistakable enough to put the holder on actual or constructive notice of the incorporation. Inquiry notice is not sufficient. This decision was handed down even though the bill of lading was a CONGENBILL intended to be used with charter parties, and even though one of its provisions stated that the arbitration clause of the charter party was incorporated, the bill of lading did not sufficiently identify the charter party when it provided "Freight payable as per Charter-Party dated AS PER RELEVANT.").

Harking back to the third section of this paper, dealing with the negotiability of Bills of Lading, we now turn to a scenario where the holder of a negotiated bill of lading, one who has never laid eyes upon the charter party in question, is now faced with an arbitration proceeding. Consider the case of *Amoco Overseas Co. v. S.T. Avenger*.[60] The plaintiff owner of crude oil brought a suit against defendants, an oil tanker and its owner, to recover for losses it suffered when mechanical failures at sea, prevented the voyage from being completed and required that the cargo be disposed of at a loss. Under 9 U.S.C.S. § 3, defendants renewed a motion for a stay pending determination of the controversy by arbitration. The owner denied that the bill of lading required it to arbitrate.

The owner of the oil had purchased it overseas for sale in the United States. The owner had a contract of affreightment with another company. That contract included an arbitration provision. In order to transport the cargo at issue, the other company negotiated the fixture of the vessel with its owner. This agreement was embodied in a charter party, which also included an arbitration clause. The owner of the oil argued that the bill of lading, which governed the rights between the owner of the oil and the owner of the vessel, incorporated the arbitration requirement from the charter party. The court granted defendants' motion for a stay and held that arbitration was required. Apart from identifying the consignee, the consignor, etc., the bill of lading stated only that the shipment was being carried out under the terms of a contract/charter between two named parties. The court found that, although the charter party had failed to correctly identify the owner by name and the date had been left blank, there was no question as to the identity of the owner of the oil or that the parties intended the terms of the charter party to be incorporated into the bill of lading.

The court then held that:

> [. . .] as a negotiable instrument, the bill of lading passes into the hands of

59. *MacSteel Int'l USA Corp. v. M/V Jag Rani*, 2004 A.M.C. 220 (S.D.N.Y. 2004).

60. *Amoco Overseas Co. v. S.T. Avenger*, 387 F. Supp. 589 (S.D.N.Y. 1975).

> those who have nothing to do with the charter party, and may not be bound to an agreement of whose terms they have no knowledge or even notice. For this same reason the courts which permit incorporation of the charter party terms into the bill of lading require that the charter party be identified specifically enough to give such meaningful notice to the eventual holders of the bill of lading.[61]

This issue was raised again in *State Trading Corp. of India v. Grunstad Shipping Corp. (Belgium) N.V.*[62] where the owner entered into a tanker voyage charter party for the vessel that included a clause providing that any dispute arising from the making, performance, or termination of the charter party was to be arbitrated. The consignee purchased a bill of lading from the charterer. After the vessel sank, the consignee asserted that the arbitration provision of the charter party was incorporated into the bill of lading. The owner argued that it was not, because the bill of lading did not name the parties to the charter party it was attempting to incorporate or state the date or place of its making and, therefore, the incorporation clause was too ambiguous to be given effect. The court ordered the parties to arbitrate their dispute. The court held that the owner could not have been confused regarding which charter party the bill of lading sought to incorporate because the charter party provided that any bill of lading the owner signed was subject to its terms and conditions. Evidence showed that the bill of lading was intended to incorporate the terms of the charter party, and the identity of the charter party was obvious to the parties involved.

Therefore, with respect to the negotiability aspect of a Bill of Lading, it is clear that the U.S. courts will prefer arbitration as long as the identity of the charter party is known to the consignee.[63]

The difficulty arises in situations where the bill of lading identifies a charter party ambiguously. Consider the case of *Misr Ins. Co. v. M.V. Har Sinai.*[64] In this case, the bill of lading provided only that arbitration be held "according to GENCON". Now, the Gencon charter between the charterer and shipper did not contain an arbitration clause but the Gencon charter between the ship-owner and charterer did. It was held that the terms of the bill of lading were not sufficient to incorporate the terms of any charter party. However, in the case of *Continental U.K. Ltd. v. Anagel Confidence Compania Naviera, S.A,*[65] a reference to a charter

61. *Id.* at 593.

62. *State Trading Corp. of India v. Grunstad Shipping Corp.*, 582 F. Supp. 1523, 1525 (S.D.N.Y. 1984).

63. *Cargill Ferrous Int'l v. Sea Phoenix MV*, 325 F.3d 695, 698-699 (5th Cir. 2003) (holding that there was no confusion concerning which charter party was incorporated).

64. *Misr Ins. Co. v. M.V. Har Sinai*, 480 F. Supp. 398, 405-06 (S.D.N.Y. 1979).

65. *Cont'l U.K. Ltd. v. Anagel Confidence Compania Naviera, S.A*, 658 F. Supp. 809, 812 (S.D.N.Y. 1987).

party was made by correct date but by incorrect location. The court held that this was sufficient to incorporate the terms of the charter party and that there was no confusion among the parties as to the intended charter.

Two cases in the Southern District of New York appear to have conflicting rules. In *Midland Tar Distillers, Inc. v. M/T Lotos*,[66] a bill of lading provided that it was "subject to all terms, liberties and conditions of CHARTER PARTY DATE." The bill of lading contained no substantive provisions apart from the incorporation clause, which named the party resisting arbitration and thereby giving it notice. Arbitration was ordered. On the other hand, in *Amoco Oil Co. v. M.T. Mary Ellen*,[67] the name and date of the charter party were not specified. Amoco, the holder of the bill of lading, was named in the bill, knew of the charter party applicable to the voyage and was related to the charterer of the vessel. In these circumstances the court felt that the failure to expressly identify the charter party was intentional. The court refused to order arbitration.

The court also found insignificant the lack of detailed terms in the bill of lading, since the Carriage of Goods by Sea Act was incorporated by its own terms into the bill of lading. Judge Sofaer in his opinion in *The Mary Ellen* case observed that in *The Lotos*, Judge Cannella found "sufficient reference since the bill could only have referred to" the charter party under which the vessel sailed. By contrast he found in the case before him "no evidence indicating either intent or any effort to incorporate the charter party in the bill."[68] If *The Lotos* and *The Mary Ellen* can be distinguished, it is that aside from the form of the documents used, there was a subjective intent to incorporate the charter party in one case but not in the other.

Upon a review of the cases mentioned above, it is clear that U.S. courts would tend to give a wide interpretation in matters of incorporation of charter parties into bills of lading.

J. UK Courts

It is well settled in the United Kingdom that an arbitration clause may be incorporated by reference. In a case involving construction contracts, it was held that an arbitration clause can be incorporated into a contract by reference and it is a question of construction in each case whether that had been done.[69]

66. *Midland Tar Distillers, Inc. v. M/T Lotos*, 362 F. Supp. 1311, 1312 (S.D.N.Y. 1973).

67. *Amoco Oil Co. v. M.T. Mary Ellen*, 529 F. Supp. 227, 229 (S.D.N.Y. 1981).

68. *Id.* at 229-30.

69. *Sec'y of State for Foreign & Commonwealth Affairs v Percy Thomas P'ship; Sec'y of State & Foreign and Commonwealth Affairs v Kier Int'l*, [1998] 65 ConLR 11 [60]-[72]. *See generally*, Clare Ambrose & Karen Maxwell, London Maritime Arbitration, 34-36 (LLP, 2d ed. 2002).

As mentioned earlier, in *T. W. Thomas & Co., Limited v Portsea Steamship Co., Ltd.*,[70] the House of Lords stressed upon the rather specific nature of the arbitration clause and an arbitration clause could not be covered merely by a general passing statement incorporating "terms" and "conditions" of the charter party. It was held that in order to successfully incorporate the arbitration clause, one would have to specify the arbitration clause in the incorporating clause. An example of the same may be found in *The Rena K*[71] where the bill of lading mentioned "all other terms and conditions, clause and exceptions including the Arbitration Clause". In *The Rena K*, arbitration was upheld. In addition, the negotiable nature of the bill of lading poses a serious problem. In *T. W. Thomas & Co., Limited v Portsea Steamship Company Limited*,[72] the House of Lords also mentioned that the purchasers of a bill of lading would be unlikely to be able to see the primary contract.[73] The issue of 'visibility of the secondary contract', that is to say, the incorporated contract is one that will be dealt with later in this section.

A similar rationale was used in *Aughton Ltda. v. MF Kent Services Ltd.*[74] The Court held that an arbitration agreement precludes parties their natural right to seek justice before a court of law, giving rise to the importance of having the arbitration agreement in writing. Further, the Court was of the opinion that a general statement incorporating the terms and conditions of another contract would not necessarily lead the parties to arbitration; thus highlighting the collateral nature of the arbitration agreement. Therefore, there seems to be a general rule that in order to effect arbitration, UK courts require a specific reference to the arbitration clause in the contract being referred to.

In the case of, *Skips A/S Nordheim And Others V. Syrian Petroleum Co. Ltd. and Another*,[75] there seems to be a direct conflict with the rule in *Portsea*. In this case, the charter party provided that, "any disputes arising under this charter shall be settled in London by arbitration", and by clause 44 that is, "all bills of lading issued pursuant to this charter shall incorporate by reference all terms and conditions of this charter including the terms of the arbitration clause . . ."

In the above-mentioned case, a cargo of crude oil was carried on

70. *T.W. Thomas & Co., Ltd. v Portsea Steamship Co., Ltd.*, [1912] A.C. 1 (H.L.).

71. [1979] Q.B. 377 at 377 (Eng.). *See also* JOHN F. WILSON, CARRIAGE OF GOODS BY SEA 242 (7th ed. 2010).

72. *T.W. Thomas & Co., Ltd. v. Portsea Steamship Co.* (The Portsea), [1912] A.C. 1 (Eng.).

73. *Id.* at 4. *See also Fed. Bulk Carriers Inc. v. C. Itoh & Co. Ltd.* (The Federal Bulker), [1988] 1 Lloyd's Rep. 103 (A.C.) at 105 (Eng.); *Skips A/s Nordheim v. Syrian Petroleum Co. Ltd.* (The Varenna) [1984] Q.B. 599 at 604 (Eng.); WILSON, *supra* note 76, at 242; CLARE AMBROSE, KAREN MAXWELL, ANGHARAD PERRY, LONDON MARITIME ARBITRATION 33 (3d ed. 2009).

74. *Aughton Ltda. v. MF Kent Services Ltd.*, [1991] 57 B.L.R. 1.

75. *Skips A/S Nordheim*,[1984] Q.B. at 604. *See also* WILSON *supra* note 71, at 241.

board the chartered vessel on behalf of the shippers for delivery to the consignees under a bill of lading, which stated that "all conditions and exceptions of [the] charter party including the negligence clause are deemed to be incorporated in bill of lading." The bill of lading did not specifically provide for the arbitration of disputes. The vessel was delayed and the ship-owners after unsuccessful attempts to claim demurrage from the charterers brought an action against the shippers and the consignees to claim for the demurrage due. The consignees applied under section 1 of the Arbitration Act 1975 for a stay of the action contending that the bill of lading contained an arbitration clause by incorporation from the charter party that stated that the dispute should be settled by arbitration.

Hobhouse J., refusing the application, held that the reference to "conditions" in the bill of lading referred only to the conditions in the charter party which had to be performed by the consignees on the arrival of the vessel, and that the arbitration clause was not such a condition.

The consignees went on appeal. Sir John Donaldson M.R., Oliver and Watkins L.JJ dismissed the appeal. It was held that by authority and established commercial practice, a provision in a bill of lading incorporating the conditions of a charter party referred to those conditions that were applicable to the carriage and delivery of the goods that in the absence of more specific words than "all conditions and exceptions of . . . charter party," the bill of lading could not be construed as incorporating the arbitration clause of the charter party.[76] This was a surprising judgment in the light of the fact that the charter party specifically mentioned that all bills of lading issued under the charter party must incorporate the terms in the charter party as well as the fact that clause 44 of the charter party contained the words "including the terms of the arbitration clause." As we have seen in the case of *Portsea*, a specific incorporation of the arbitration clause should be enough for courts to order arbitration proceedings. If *Skips A/S Nordheim* and *Portsea* are to be reconciled, it may be consequent to the argument that the House of Lords in *Portsea* envisaged a precedent where the bill of lading and not the charter party, specifically mentions the arbitration clause. In *Skips A/S Norheim* it was the charter party that mentioned the arbitration clause. Even so, the rationale that the incorporation referred only to the conditions applicable to the carriage and delivery of goods really does not hold water. Perhaps the argument of the bill of lading holder not being able to view the charter party prior to entering into the contract for the carriage of goods might have been a stronger one in this case.

Even if the rule in *Thomas v. Portsea* is satisfied, the same difficulty also arises in cases where the Bill of Lading does not adequately make a

76. *Skips A/S Nordheim*,[1984] Q.B. at 600.

clear reference to an identified charterparty. For example, in the case of *Navigazione Alta Italia SpA v Svenske Petroleum AB (The NAI MATTEINI)*,[77] there were multiple consecutive charterparties and sub-charters. A bill of lading was issued which purported to incorporate "all terms, conditions and exceptions contained in the charterparty. . .including arbitration clauses". However, the charter party was not identified. On the arising of a dispute, the question of a valid arbitration agreement was raised. The Queens Bench held, that the bill of lading did not incorporate either arbitration clause. Also, it was not clear to which charter party the bill of lading referred. In both charter parties, however, the arbitration clause provided for "the charter" to nominate an arbitrator and the word "charter" could not be manipulated so as to read "bill of lading holder."[78]

In the case of *Daval Aciers d'Usinor et de Sacilor and Others v. Armare S.R.L., (THE "NERANO")*,[79] the face of the bill of lading set out that the conditions of the charter party (in GENCON form) were incorporated but the reverse set out that the conditions and arbitration clause of the charter party were incorporated. The charter party was between Cargill SA as owners and Korf SA as charterers. The defendant initially indicated that they would serve a defense in the action and did not raise the arbitration issue until nearly a year after the plaintiff had issued their writ. The Court of Appeal dismissing the appeal, held that the provisions of the bill of lading like any other contract's provisions had to be construed by considering them together, not separately, otherwise the parties' intentions would be overlooked. In isolation the front of the bill of lading appeared to exclude the possibility that the arbitration clause was incorporated but the front and back read together were not inconsistent and left no doubt that the clause was incorporated, Although the charter party arbitration clause referred to any dispute between owners and charterers it was nevertheless applicable to the parties to the bill of lading, because their intention to incorporate it into their agreement was specifically expressed.[80] The Court also held that the defendant had not lost the right to stay proceedings. An agreement for an extension of time to serve a defense could not, per se, amount to an agreement to abandon the right to arbitrate because under the erstwhile UK Arbitration Act 1975 S. 1, the right to a stay was not lost unless a step in proceed-

77. *Navigazione Alta Italia SpA v. Svenske Petroleum AB* (The Nai Matteini), [1988] 1 Lloyd's Rep. (Q.B.) 452, 454 (Eng.).

78. *Id.* at 459.

79. *Daval Aciers d'Usinor et de Sacilor v. Armare S.R.L.* (The Nerano), [1996] 1 Lloyd's Rep. 1 (A.C.) at (1) (Eng.).

80. *The Rena K*, [1979] Q.B. at 390.

ings was taken.[81] The plaintiff had adduced no evidence that the defendant's participation in negotiations had given rise to agreement, which might form the basis of waiver or estoppel. The jurisdictional issue simply had not been considered.

In divergence from the rule in The NERANO, the case of *Miramar Maritime Corp. v Holborn Oil Trading (The MIRAMAR)*[82] a bill of lading included a clause which purported to incorporate the terms of a specified charter party. The House of Lord found that there is no rule of construction that the clauses in that charter party which are directly germane to the shipment, carriage or delivery of the goods and impose obligations upon the "charterer" under that designation are presumed to be incorporated in the bill of lading with the substitution of (where there is a cesser clause), or inclusion in (where there is no cesser clause) the designation "charterer, " "consignee of the cargo" or "bill of lading holder." The House of Lords so held on a point of construction of a bill of lading issued pursuant to and in the form annexed to a tanker voyage charter party in the standard form known as "Exxonvoy 1969." The bill of lading purported to incorporate all the terms of the charter (except the rate and payment of freight), including a demurrage clause rendering the charterer's liable for demurrage, and the owners claimed that the demurrage clause thereby incorporated into the bill of lading rendered the consignees of the cargo, as holders of the bill of lading, directly liable for the demurrage incurred.

In *Pride Shipping Corp. v. Chung Hwa Pulp Corp.*[83] the plaintiff's vessel, the *Oinoussin Pride*, carried a cargo of timber from Alabama to Taiwan. The charter party provided, *inter alia*, that the master was to sign bills of lading in conformity with mate's receipts. When the bills were released the plaintiff complained that the amount of cargo evidenced was incorrect. Two substitute bills were subsequently issued containing endorsements not contained in the original bills. These endorsements provided, *inter alia*, that cargo was stowed on deck at receiver's risk, expense and responsibility and that the terms, conditions, provisions and exceptions including the arbitration clause of the charter were incorporated in the bills of lading. During the voyage the vessel encountered a typhoon and a large amount of the timber cargo was washed overboard. The plaintiff proceeded to obtain leave to issue concurrent writs and to serve them out of the jurisdiction, claiming that the effect of the first endorsement of the bills of lading was that the defendants were obliged to indemnify the

81. Arbitration Act, 1975, c. 3 (U.K.).

82. *Miramar Maritime Corp. v. Holborn Oil Trading* (The Miramar), [1984] A.C. 676 (H.L) at 683 (Eng.).

83. *Pride Shipping Corp. v. Chung Hwa Pulp Corp* (The Oinoussin Pride), [1991] 1 Lloyd's Rep. 126 (Q.B.) at 127 (Eng.).

plaintiff against any loss, damage and expense incurred by them as a result of the cargo being loaded on deck. The defendant commenced proceedings in Alabama against the plaintiff who cross-claimed against the stevedores and commenced third party proceedings against the shippers alleging negligent supervision of stowage and wrongful issue of the substitute bill of lading. The plaintiffs applied for a stay of proceedings on the ground, *inter alia*, of the arbitration clause and the defendant issued a summons to set aside the service of the writ out of the jurisdiction.

The Queen's Bench held that there was no evidence that the service of the writ was prohibited or was improperly effected; that the plaintiff made out an arguable case that consideration was given for the substitution of the bills of lading; the express intention of the parties that the arbitration clause be incorporated should be given effect and the words "or shippers or receivers" should be added after the words "between owners and charterers"; the bills of lading were governed by English law and there was jurisdiction to give leave to serve out of the jurisdiction. Although the bills of lading were governed by English law, the natural forum for the determination of issues between the two parties and the stevedores was Alabama; and as the plaintiff's application to stay the Alabama proceedings had been denied, the defendant's application to set aside the service of the writ out of the jurisdiction and the leave to serve it would be granted.

However, in a few cases, the rule in *Portsea* seems to have been distinguished with regard to the inapplicability of arbitration in the absence of a specific reference. One such case is *Excesses Insurance Co. Ltd. v C F Mander*[84] wherein it was held that:

> ". . .subsequent endorsees might never have seen the charter party and in the absence of specific words of incorporation might not appreciate that they had become bound by provision in another contract which precluded them enforcing their rights in the court". In addition the judge stated that general words will suffice when the contracting parties had access, at the time of contracting, to both the charter party and the bill of lading"

Therefore, the exception to *Portsea* would apply only in cases where parties to the bill of lading would have had an opportunity to access the parent charter party and the terms of the bill of lading at the time of entering into the contract. However, this is not possible always. For example, in cases of sale of goods on the high seas or even sale of goods while in transit otherwise, it may not be possible for the buyer of the goods to access the charter party.

However, by and large, we have seen that the rule in *Portsea* is well

84. *Excesses Insurance Co. Ltd. v C F Mander*, [1997] 2 Lloyd's Rep. 119 (Q.B.) at 125 (Eng.).

established. In a departure from the pro-arbitration stand taken in the U.S., the UK courts prefer a stricter interpretation of the wording in the bill of lading, in order to ascertain the intention of the parties to arbitrate.

III. Conclusion

The importance of an arbitration agreement to be in writing cannot be understated. The reasons for the "in-writing" requirement are also justified.

From the general treatment that courts have given to the concept of incorporation of arbitration clauses by reference, from a charter party to a bill of lading, the single threshold that stands out is, not surprisingly, is that of party intention. Courts have adjudicated as to what suffices to show party intention and what does not. In spite of that, holders of bills of lading, not being the original holder continue to be in the dark as to what they may be agreeing to. The rule of *consensus ad idem*[85] is thereby, somewhat lost. Courts in both the UK and the U.S. seem to approach this problem on a case to case basis, therefore lacking predictability. A profound lack of international response to this issue further exacerbates the problem.[86]

While it might be intuitively simpler to just attach a copy of the charter party to the bill of lading, the entire point of the bill of lading being a document to title is rendered irrelevant. Parties may find themselves stretched to provide copies of charter parties in matters regarding sales of goods on the high seas.

Another option could be to extend the rule in *Portsea* to include full arbitration clauses in bills of lading. This, it is argued would certainly lead to less ambiguity when it comes to determining, not only the parties' intention to arbitrate, but also the choice of law and seat of arbitration when the dispute arises out of a bill of lading. The flipside, of course, is that in the case of multiple bills of lading having different arbitration clauses, the carrier would have to reckon with arbitrations in multiple jurisdictions, which essentially arise from the same cause of action. While this would undoubtedly lead to additional costs and burdens on the carrier, the shipper's interests would be better protected.

However, given that there have been considerable unpredictability with regard, not only to the parties' intention to arbitrate, but also the

85. "An agreement of parties to the same thing; a meeting of minds." Black's Law Dictionary (9th ed. 2009). *See also* United Nations Convention on Contracts for the International Sale of Goods, art. XI, Apr. 11, 1980, 1498 U.N.T.S. 3; U.C.C. § 2-204 (2012).

86. In spite of Article 76(2) of the Rotterdam Rules, which is a specific provision for the incorporation of arbitration clauses, there is no definitive solution. *See* United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, art. LXXVI, Sept. 23, 2009, U.N. Doc. A/RES/63/122.

enforceability of arbitral awards arisen out of such cases, it is believed that this may well be a trade-off worth making. Having a specific arbitration clause in the bill of lading would leave no room for contradictions and inconsistencies which have plagued the somewhat vague and ambiguous rules relating to incorporation by reference.

As an alternative to the above suggestion, parties to the bill of lading may continue to agree on the arbitration clause as set out in the parent charter party, provided that the arbitration clause itself (and not just the name of the charter party or a reference to the charter party) is reflected in the bill of lading. This may reduce the "multiple jurisdiction" burden on the shipper in the event of multiple disputes arising out of the same cause of action.

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