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**Incorporation of Arbitration Clauses
under a Charterparty and a Bill of Lading:
English and Chinese Law Perspectives**

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1. INTRODUCTION

1.1 Background and Object

In commercial maritime law, “the contract of affreightment” and “marine insurance” may be the most important and difficult subjects.¹ As far as the contract of affreightment is concerned, the difficulties derive from the existence of two entirely different forms of contracts, a charterparty and a bill of lading.² In order to explore commercial maritime law, one key question is to research the interrelationship between the charterparty and the bill of lading.

The object of this thesis is to examine the interrelationship between a charterparty and a bill of lading under the contract of affreightment, particularly, the incorporation of the arbitration clause under the charterparty and the bill of lading, because the charterparty is linked with the bill through incorporation clauses.

1.1.1 Contract of Affreightment

The contract of affreightment is a generic term used in respect of all contracts of carriage of goods by sea.³ More specifically, “when a shipowner, or person having for the time being as against the shipowner the right to make such an agreement, agrees to carry goods by sea, or to furnish a ship for the purpose of so carrying goods, in return for a sum of money to be paid to him, such a contract is called a contract of affreightment (or a contract for the carriage of goods by sea).”⁴ In other words, a

¹ NJJ Gaskell, C Debattista and R. J. Swatton, *Chorley and Giles’ Shipping Law*, Eighth Edition, London: Pitman Publishing, 1987, at p.165.

² *Ibid.*

³ Stephen Girvin, *Carriage of Goods by Sea*, Second edition, Oxford: University Press, 2011, at p.20 (1.41); See also, *Cook Island Shipping Co. Ltd. v. Colson Builders Ltd.* [1975] 1 NZLR 422, 440 (Mahon J).

⁴ Sir Bernard Eder *et al.* *Scrutton on Charterparties and Bills of Lading*, Twenty-Second Edition, London: Sweet & Maxwell, 2011, at p.1. See also *ibid.* Stephen Girvin, at p. 20; *Hansson v. Hamel & Horley Ltd* [1921] 6 LILR 432 (CA), 433 (Barkes LJ).

contract of affreightment and a contract for the carriage of goods by sea are virtually synonymous.

1.1.2 Charterparty and Bill of Lading

The two forms of the contract of affreightment are embodied in the charterparty and the bill of lading respectively.⁵ The charterparty is also called the charter of affreightment.⁶ As a matter of fact, it is a contract of affreightment in and of itself, including three main types: voyage, time and demise charterparty.⁷ The bill of lading, in the traditional sense, is not regarded as the contract of carriage of goods by sea, but is only evidence of the contract.⁸ Hence, the bill of lading is customarily referred to as “evidence of the contract of carriage”. In practice, the position of the bill of lading is relatively complex. Because the process of issuing a bill of lading is a part of the process of performance of the contract of carriage of goods by sea, the bill might serve as an alternative position. To be clear, the bill of lading should be subject to the original carriage of goods contract, but it happens that the content of the performance

⁵ *Supra*, note 1, at p.174.

⁶ Bryan A. Garner *et al.* *Black's Law Dictionary*, Eight Edition, West Group, 2004, at p. 708. The term “charterparty” or “charter” derives from the medieval Latin *carta partita*, meaning an instrument written in duplicate on a single sheet and then divided by indented edges so that each part fitted the other (whence the term “indenture”) and is now used only for this particular kind of shipping document. The first use given in the N.E.D. is in 1539. The phrase “*charter de freight ou endenture*” is used as early as 1375. See also *supra*, note 4, Sir Bernard Eder *et al.* at p.5. A charterparty is in fact a contract of affreightment.

⁷ *Supra*, note 4, Sir Bernard Eder *et al.* at pp.5-6. Demise charterparty is also called bareboat charterparty. Under a demise charterparty, a charterer is for all practical purposes as a temporary owner of the ship. If the demise charterer then contracts with a third party for the carriage of goods, the actual owner of the ship will have no responsibility under that contract. See also, *supra*, note 1, at p.174. Therefore, the interrelationship between a charterparty and a bill of lading actually reflects the relation under the voyage / time charterparty and the bill of lading.

⁸ John F. Wilson, *Carriage of Goods by Sea*, Seventh Edition, England: Pearson Education Limited, 2010, at p.129. See also, *Crooks v. Allan* [1879] 5 OBD 38 at p.40; *Sewell v Brudick* [1884] 10 App Cas 74 at p.105.

is revised in accordance with the actual situation. In this way, at times the bill of lading is not merely the evidence of the contract.

On the one hand, where a charterer holds a bill of lading, the charterparty may be varied by the bill of lading, even though the substance of the contract of affreightment is to be looked for in the charterparty.⁹ Under this circumstance, firstly, the bill of lading is not the evidence of the carriage of goods contract; secondly, the charterparty and the bill of lading are not separate; rather they are incorporated one into the other, because the shipowner and the charterer under the charterparty are equally the carrier and the shipper. Finally, the bill of lading to some extent is the supplemental contract of charterparty or amendments between the shipowner (carrier)¹⁰ and the charterer. On the other hand, where the bill of lading is in the hands of a third party beyond the charterer, the shipowner or their agents in transit, the *bona fide* third party will subconsciously treat the bill of lading as the governing instrument for the carriage of goods. In this situation, the bill of lading should be deemed to be the contract between the shipowner (carrier) and the holder which can be varied, but the revision is not relevant to the charterparty.

1.1.3 Carriage of Goods Contract and Charterparty

What needs to be examined in detail is the relationship between the bill of lading and carriage of goods by sea on the one hand; and between carriage of goods and the charterparty on the other. In the foregoing discussion, it is stated that the bill of lading is issued under the charterparty, but the bill of lading rather than the charterparty serves as evidence of the contract of carriage of goods by sea. The carriage of goods by sea is a contractual matter and the contract of carriage, in essence governs the

⁹ *Supra*, note 4, Sir Bernard Eder *et al.* at p.94. See also, *Davidson v. Bisset* [1878] 5 Rettie 709.

¹⁰ In normal circumstances the shipowner would be regarded as the carrier, despite the existence of the charterparty, he remains responsible for the management of the ship and the master signs any bills which are issued as his agent. See *supra*, note 8, John F. Wilson, at p.244.

liability regime as between the carrier and the shipper.¹¹ In this contract, the parties are the carrier and the shipper, and the subject matter is the goods itself. Correspondingly, “when the shipowner contracts to place at the disposal of another, the employment of the whole ship on a given voyage or voyages or for a given period of time, the contract is almost always contained in a document called a charterparty.”¹² In the charterparty, the parties are the shipowner and the charterer, and the subject matter is the vessel rather than the goods itself. Again, even though the nature and function of the two contracts are distinctive, the two contracts are incorporated into the contract of affreightment. In this way, they are linked. The shipowner or the charterer under the charterparty will be involved in the two contracts in the different positions, namely as the carrier under the contract of carriage of goods by sea, but perform the similar responsibilities under the two contracts. Thanks to this complicated relation, the parties under the charterparty attempt to maintain the uniformity and consistency of the contents of two contracts. In order to give effect to the purpose, an effective approach is dependent on incorporation clauses.

It is important to note that according to the structure of the Maritime Code of the People’s Republic of China (hereinafter referred to as the Maritime Code),¹³ the voyage charterparty is considered to be a carriage of goods contract, while the time charterparty is regarded as a contract of affreightment. Furthermore, the carriage of goods contract and the contract of affreightment are irrelevant to one another. For this reason, judicial decisions relating to incorporating arbitration clauses give rise to some issues which will be discussed in the following several chapters.

¹¹ Proshanto K. Mukherjee, *Maritime Legislation*, Malmo: WMU Publications, 2002, at p.200.

¹² *Supra.* note 4, Sir Bernard Eder *et al.* at p.94.

¹³ See Maritime Code of the People’s Republic of China, 1992.

1.2 Delimitation

As mentioned above, the interrelationship between the charterparty and the bill of lading is complicated. In light of the requisite length of this thesis, it is impossible to examine all issues relating to the interrelationship and it is therefore primarily confined to incorporation clauses with the focus on incorporation of charterparty arbitration clauses into the bill of lading without delving into the incorporation of the remainder of charterparty clauses and the terms of the bill of lading incorporated into the charterparty. Nevertheless, fundamental issues pertaining to incorporation clauses will also be identified in order to deeply understand the incorporating arbitration clause.

1.3 Method

The research methodology employed in this thesis is a combination of the dogmatic approach examining several legal issues with regard to incorporation clauses and the comparative approach examining the development of the interpretation of incorporating arbitration clauses in English law and comparing the same with Chinese judicial decisions to arrive at possible suggestions aimed at uniformity in this matter.

1.4 Structure

In the first chapter, several legal issues relating to incorporation clauses will be introduced which give a general description of the object of the thesis. To begin with, from this writer's perspective, the principal reason for incorporation clauses being established in practice is explored; subsequently, four formalities regarding incorporation clauses are introduced. But the fundamental four formalities cannot be applied under an incorporation of a charterparty arbitration clause due to the features of arbitration. Naturally, the features of arbitration clauses are taken into consideration as the third issue.

The second chapter will concentrate on English case law. At the beginning, the fundamental three requirements regarding the application of incorporation clauses are provided generally. The section is emphasized in connection with the arguable issues regarding incorporation of arbitration clauses: one is an “identified charterparty” issue; another is the “verbal manipulation” rule. In the end, there is a brief comment of the writer.

The third chapter focuses on Chinese judicial decisions so as to disclose the attitude towards incorporating arbitration clauses in legal practice. Prior to the statement, there is a short history of Chinese maritime legislation provided to assist with the readers’ knowledge and understanding of the Chinese legal system and Chinese judicial decisions. After that, the time charterparty as a particular issue under the Maritime Code is emphasized through case law. Subsequently, the judicial interpretations of the Supreme People’s Court of the People’s Republic of China (hereinafter referred to as the Supreme Court) combined with relevant cases are provided giving a detailed account of Chinese requirements in relation to the application of the incorporation of voyage charterparty arbitration clauses. In the end, there is a short comment on Chinese cases.

In the fourth chapter, some propositions are raised based on the earlier discussions under English law and Chinese law. The purpose is to find out solutions under Chinese maritime legislation. The final chapter is a summary and conclusion of the whole thesis combined with the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (hereinafter referred to as the Rotterdam Rules) .

2 BASIC LEGAL ISSUES PERTAINING TO INCORPORATION CLAUSES

2.1 Background of Incorporation Clauses

Incorporation clauses between a charterparty and a bill of lading have been debated over 100 years under English law.¹⁴ This reflects the significance of the clauses to the shipowner and the charterer under the charterparty,¹⁵ which is to a large extent to do with identity of the carrier.

On the one hand, the bill of lading is normally issued by the master or agents of the shipowner even if the vessel was leased under the charterparty.¹⁶ Where the bill of lading is in the hands of the charterer or his agent, in most situations, the legal relationship between the charterer and the shipowner is based on the terms and conditions of the charterparty, as opposed to the bill of lading held by the charterer¹⁷, except for stipulating under the charterparty that it can be supplanted by the subsequent bill of lading.¹⁸ By contrast, where the bill of lading is in the hands of a third party, disputes between such a third party and a shipowner will be resolved in accordance with the terms and conditions of the bill of lading. Under such circumstances, similar degrees of cargo damage may result in different

¹⁴ It is difficult to find the oldest case. But in terms of general incorporation clauses, one of the oldest cases is *Smidt v. Tiden* ([1874] L.R.9 QB 446). In this case, a issued bill of lading stated that freight was to be paid as per charterparty; see also Lars Gerspacher, “The Ambiguous Incorporation of Charterparties into Bills of Lading under English Law: a Case of Too Many Cooks?”, *Journal of International Maritime Law*, Volume 12, 2006, at p.193. Another old case as to an incorporating arbitration clause is *Hamilton v. Mackie* ([1889] 5 T.L.R.677) regarding a charterparty clause which is sought to be incorporated. It must be examined to see whether it makes sense in the context of the bill of lading; see also *supra*, note 4, Sir Bernard Eder *et al.* at p.96.

¹⁵ Because a shipper or a bill of lading holder in most situations merely delivers the bill issued by a carrier, the content of incorporation clauses is decided by the parties to a charterparty.

¹⁶ *Supra*, note 8, John F. Wilson, at p.243.

¹⁷ If the charterer merely provides a service to the importer and subsequently buys the good in transit, the legal relation between the charterer and the shipowner will depend on the contract of carriage of goods by sea through the bill of lading. See also, *supra*, note 1, at p.264; *Calcutta S.S.Co. Ltd. v. Andrew Weir & Co.* [1910] I K.B. 759.

¹⁸ *Supra*, note 8, John F. Wilson, at p.243. See also *The Jocelyne* [1977] 2 Lloyd’s Rep 121.

responsibilities of the shipowner owing to the different clauses of the charterparty and the bill of lading, which is determined by the identity of the holder. Accordingly, the shipowner needs to secure the consistency of the risk that relates to cargo damage. In addition, the shipowner is entitled to exercise contractual liens through charterparty incorporation clauses, which is to a large extent to protect his interests¹⁹.

On the other hand, it is also critical to secure consistency through incorporation clauses from the charterer's perspective, because even though the charterer usually attempts to use a demise clause²⁰ or an identity of carrier clause²¹ in the bill of lading to avoid responsibilities and obligations of the carrier, the risks are not entirely avoidable in practice. For example, in *The Starsin* case, Lord Bingham contended that if a shipper or a transferee of a bill of lading can easily to decide who is the carrier depending on the face of the bill, both a demise clause and an identity of carrier on the reverse should not be applicable.²² It follows that the charterer would like to secure consistency of the charterparty and the bill of lading contracts through a simple approach which is the use of incorporation clauses.

¹⁹ Shipowner's liens are also possessory liens over goods carried for charges incurred in carrying them at common law or by express contractual agreement. In terms of possessory liens at common law, the shipowner will have a lien for (i) recovery of freight due on delivery of cargo;(ii) general average contributions; and (iii) expenses incurred by the shipowner or master in protecting and preserving the goods. Except for the above liens, the parties to the contract can create other liens over cargos carried. But a contractual lien may be exercised against a third party unless the bill of lading contains a clause which incorporates the charterparty clause. See *supra*, note 3, Stephen Girvin, at pp.454-456.

²⁰ A typical demise clause stipulates that "[I]f the ship is not owned or chartered by demise to the company or line by whom this bill of lading is issued (as may be the case notwithstanding anything which appears to the contrary) the bills of lading shall take effect as a contract with the owner or demise charterer, as the case may be, as principal made through the agency of the said company or line who act as agents only and shall be under no personal liability whatsoever in respect thereof". See also *supra*, note 8, John F. Wilson, at p. 246.

²¹ For example, according to Clause 17 of the Conlinbill 1978, it is provided that "[T]he contract evidenced by this bill of lading is between the Merchant and the Owner of the vessel named herein and it is, therefore, agreed that the said shipowner alone shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of Carriage".

²² *The Starsin* [2003] I Lloyd's Rep. at p. 578.

In summary, it is uncertain as to who acts as the carrier, the shipowner or the charterer, and which contract they would apply, the charterparty or the bill of lading. The incorporation clauses provide an opportunity for the shipowner and the charterer to anticipate and balance the risk. Also, it appears that “the words of incorporation were designed to give the shipowners a lien on the cargo for freight or demurrage”²³. As a consequence, it has been inevitable that incorporation clauses have been enforceable for over 100 years.

2.2 Formality of Incorporation Clauses

The wording of incorporation clauses has been evolving over the past 100 years. In general, it would be categorized through four formalities:

- I. Freight and all other conditions as per charter--- the narrowest expression;
- II. All conditions and exceptions;
- III. All the terms provisions and exceptions; and
- IV. All terms, conditions, clauses and exceptions--- the widest expression.²⁴

It is difficult to find a recent case stipulating the first three categories. This is because the courts provide the strict rule to uphold incorporation clauses, and parties have a tendency to stipulate a wide provision to secure the application of incorporation clauses.

The updated provision, however, cannot guarantee the application of an incorporating arbitration clause owing to the uniqueness of arbitration. Even though there is no requirement for an express reference relating to an incorporating arbitration clause by

²³ *Partenreederei M/S 'Heidelberg' and Vega Reederei Friedrich Dauber v. Grosvenor Grain and Feed Co. Ltd. And Union Nationale des Cooperatives Agricoles de Cereales and Assurances Mutuelles Agricoles (The Heidelberg)* [1994] 2 Lloyd's Rep. 287.

²⁴ *Supra*, note 4, Sir Bernard Eder *et al.* at p.100.

courts in some jurisdictions, such as Canada, Hong Kong, Bermuda, Switzerland and the United States, the general words of the bill of lading do not match for English, Singapore and New South Wales courts.²⁵ In this situation, while the general provisions of the bill of lading are becoming outdated, a number of standard forms with regard to the charterparty and the corresponding bill of lading have been revised gradually. For example, the well-established Congenbill 78 which cannot only be used with Gencon, but also be used with other charterparties, states that “[A]ll terms and conditions, liberties and exceptions of the Charter Party dated as overleaf, are herewith incorporated”²⁶ in which the arbitration clauses are not involved.²⁷ Since 1994, both Gencon and Congenbill have been revised to provide an arbitration agreement. In order to be consistent with Gencon 1994 with specific words, Congenbill 1994 stipulates that “[A]ll terms and conditions, liberties and exceptions of the Charter Party dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.”²⁸ Furthermore, nowadays, Cementvoybill 2006,²⁹ Bimchemvoybill 2008,³⁰ Heavyliftvoybill,³¹ all provide that “Dispute Resolution Clauses” are incorporated.

²⁵ David Joseph Q.C. *Jurisdiction and Arbitration Agreements and their Enforcement*, Second Edition, London: Sweet & Maxwell, 2010, at pp.161-162.

²⁶ http://maritimeknowhow.com/wp-content/uploads/2012/08/congenbill_model.pdf.

²⁷ Actually, Gencon 1976 does not even contain an dispute solution clause. See https://www.bimco.org/en/Chartering/Documents/Voyage_Charter_Parties/Withdrawn_Forms/~/media/Chartering/Document_Samples/Withdrawn/Sample_Copy_GENCON_76.ashx

²⁸ https://www.bimco.org/en/Chartering/Documents/Bills_of_Lading/Withdrawn_Forms/~/media/Chartering/Document_Samples/Withdrawn/Sample_Copy_CONGENBILL_94.ashx.

²⁹ https://www.bimco.org/en/Chartering/Documents/Bills_of_Lading/~/media/Chartering/Document_Samples/Bill_of_Ladings/Sample_Copy_CEMENTVOYBILL_2006.ashx.

³⁰ https://www.bimco.org/en/Chartering/Documents/Bills_of_Lading/~/media/Chartering/Document_Samples/Bill_of_Ladings/Sample_Copy_BIMCHEMVOYBILL_2008.ashx.

³¹ https://www.bimco.org/Chartering/Documents/Bills_of_Lading/~/media/Chartering/Document_Samples/Bill_of_Ladings/Sample_Copy_HEAVYLIFTVOYBILL.ashx.

As seen above, the formality of the incorporating arbitration clause is relatively stringent, even though the specific words of the incorporating arbitration clause are not taken into consideration by some courts. In order to discern the reason why the arbitration agreement is requested by a higher requirement, the particular features of arbitration in comparison with general clauses will be discussed in the following sections of the thesis.

2.3 The Features of Arbitration Clauses

Shipping disputes are frequently referred to arbitration.³² Also, charterparties offer the subject of maritime arbitrations.³³ It is therefore inevitable that incorporation clauses in the bill of lading are relevant to an arbitration clause.³⁴ The application of an arbitration clause is the crucial stage for the contesting parties, because choosing a favorable clause of jurisdiction or arbitration means taking the initiative for a trial. More specifically, “once jurisdiction is established, competent lawyers generally ought to be in a much better position to predict the outcome of the dispute and the terms on which it can be disposed of satisfactorily by agreement”.³⁵ Hence, parties to a charterparty and a bill of lading must give weight to choice of arbitration and attempt to devise a proper dispute resolution clause.³⁶

³² *Supra*, note 1, at p.165. See also M. Mustill, S. Boyd, *Commercial Arbitration* (1982).

³³ Martin Davis, “ Litigation Fights Back: Avoiding the Effect of Arbitration Clauses in Charterparty Bills of Lading”, *Journal of International Maritime Law*, October,2004, at p.618.

³⁴ As a matter of fact, contracting parties are entitled to establish an arbitration and jurisdiction clause. But an arbitration clause under a charterparty is the most frequent option in practice. As a result, an incorporating arbitration clause is widely discussed rather than a jurisdiction clause.

³⁵ *Supra*, note 25, at p. 3.

³⁶ Because the majority of maritime disputes refer to arbitration as the dispute resolution clause without particular reference to London Arbitration, New York Arbitration or others, an incorporation of dispute resolution clauses usually refers to the incorporating arbitration clause. In this thesis, therefore arbitration is mentioned without reference to any specific jurisdiction.

However, a charterparty arbitration clause is in essence the consequence of negotiation between a shipowner and a charterer representing their will. Therefore it follows that no matter who is the carrier under a charterparty bill of lading, there is the intention to incorporate such an arbitration clause into the bill. By contrast, the bill of lading holder who does not participate in the negotiation of an arbitration agreement has a natural tendency to suspect that the arbitration clause is against his own interests. Consequently, the interpretation and validity of such an incorporating arbitration clause will cause intense controversy as a result of both parties fighting for a favorable dispute resolution clause, even though the clause is explicit. In this part, the features of arbitration agreements will be explored in order to recognize the distinction from other incorporation clauses.

2.3.1 Separability of Arbitration Clauses³⁷

The concept of separability means that “the arbitration clause in a contract is considered to be separate from the main contract of which it forms a part and, as such, survives the termination of that contract”.³⁸ In other words, when it comes to an arbitration agreement, it is always severable in comparison with other terms and conditions without reference to the mode of the arbitration agreement, an independent contract, a rider or a clause in a contract. As such, the principle in practice is accepted by both English and Chinese law. It follows that in a contract, a variant of separability is “to understand certain contractual terms as ‘ancillary’ to the contract”.³⁹ For example, in *The Harbour v. Kansa* case, the court held that an arbitration agreement

³⁷ It is also called the principle of severability. In the Arbitration Act 1996 of the UK, Section 7 uses separability. In the Arbitration Law of P.R.C. Article 19 also provides the principle of severability.

³⁸ Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, Fifth Edition, Oxford University Press, 2009, at p.117(2.89).

³⁹ Adrian Briggs, *Agreements on Jurisdiction and Choice of Law*, Oxford University Press, 2008, at p.71(3.20).

was a separate and collateral contract and that the alleged illegality of the reinsurance did not affect the validity of the arbitration agreement.⁴⁰

As a result, as far as incorporation clauses are concerned, where the clauses in charterparties embrace an arbitration clause, it is necessary to distinguish it from other general terms and conditions, such as carriage, delivery of cargo and payment of freight. This is why the foregoing formality of incorporation clauses cannot extend to an arbitration clause under English law. Also, it determines the higher and stricter principle of an incorporating arbitration clause in comparison with general incorporation clauses. The relevant case law and explanation will be discussed in the following two chapters.

2.3.2 Validity of Arbitration Agreements

As stated above, an arbitration agreement in a charterparty is an ancillary or collateral term, as opposed to other terms. Therefore, a particular approach needs to be taken to examine the application and validity of an incorporating arbitration clause in the context of charterparty clauses incorporated into the bill of lading. To be exact, such an incorporating arbitration clause is subject to the provisions of the relevant arbitration law which determines its application and validity. On the ground that the formal validity of an arbitration agreement is proximate and is the most arguable on the incorporating arbitration issue, only this formal requirement will be discussed.⁴¹

⁴⁰ *Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Co. Ltd.* (*Harbour v. Kansa*) (1993) 1 Lloyd's Rep. 455; see also *Fiona Trust & Holding Corporation and Others v. Privalov and Others* (2007) 2 Lloyd's Rep. 267 CA.

⁴¹ In principle, "formal validity—the need for writing", "a defined legal relationship" and "a subject-matter capable of settlement by arbitration" are the standards by which the validity of an arbitration agreement can be determined. But the closest standard pertaining to incorporation clauses is the first one. Therefore, the other two issues will not be discussed. See also *supra*, note 38, at p.89-95.

The formal validity requires that an arbitration agreement be signed in writing.⁴² According to The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the New York Convention)⁴³, the term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.⁴⁴ Subsequently, with the development of communications, letters or telegrams were supplanted by telex and fax and now by email.⁴⁵ Consequently, Article 7(3). Option 1 under the UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as UNCITRAL Model Law) stipulates that “[A]n agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means”.⁴⁶ In the updated requirement, writing in “any form” can conclude the arbitration agreement. However, the wide range of writing forms give rise to different explanations in domestic law of state parties to the convention, leading to inconsistent judicial decisions.

In summary, the writing format is required to ensure the validity of an arbitration agreement. The purpose is to examine and guarantee whether the parties have a real intention or will to carry out the arbitration agreement. Thanks to this formal requirement, the specific words with regard to an incorporating arbitration clause are stressed by both English and Chinese courts.

⁴² *Supra*, note 38, at p.89 (2.13).

⁴³ China and the UK are both contracting parties to the New York Convention, 1958.

⁴⁴ The New York Convention, Article II (2).

⁴⁵ *Supra*, note 38, at p.90 (2.16).

⁴⁶ China and the UK are both subscribe to the UNCITRAL Model Law. Option 1 Article 7(3). UNCITRAL Model Law (1985) with amendments as adopted in 2006.

2.3.3 Judicial Sovereignty

In comparison with litigation, the main advantages⁴⁷ of arbitration are “neutrality” and “enforceability”.⁴⁸ However, in this writer’s opinion, the main advantages mirror exactly the disadvantage during the course of the application of an incorporating arbitration clause. The legal foundation of enforceable awards is that neutral arbitration is irrelevant to judicial sovereignty, which is a friendly “non-governmental organization” to hear cases. In other words, choosing arbitration means discarding judicial sovereignty in a state. In this way, after a case has been heard by a court rather than a tribunal of an arbitration agreement, the court’s decision may be affected by the doctrine of judicial sovereignty, even though the counterparty contends the application of arbitration agreement. Particularly, when one of the parties is an international identity and the location of arbitration is outside the state, the debate is intense. Once the court upholds the validity of an arbitration agreement, it throws away the judicial sovereignty in its own country. In this situation, the court may examine the arbitration agreement more carefully and strictly. However, the presumptive opinion is difficult to be proven in practice through case law, on the ground that there is little possibility for courts to recognize the reason for denying the international arbitration.

From the forgoing introduction of the features of arbitration, it can be concluded that the interpretation and validity of an incorporating arbitration clause are full of

⁴⁷ Other advantages include flexibility, confidentiality, additional powers of arbitrators and continuity of role. See also, *supra*, note 38, at pp.33-34.

⁴⁸ *Supra*, note 38, at p.31 (1.89). “Neutrality” means that international arbitration gives the parties an opportunity to choose a neutral place for the resolution of their dispute and to choose a neutral tribunal. “Enforcement” means that an international arbitration, if carried through to the end, leads to a decision which is enforceable against the losing party not only in the place where it is made but also internationally, under the provisions of such treaties as the New York Convention. However, the enforcement of a judicial decision is usually confined to the territory of a state. Or it can be enforced among particular countries according to the two-sided agreement.

complexities. In the following two chapters, the issues will be discussed further through a number of judicial decisions in English and Chinese law.

3. APPLICATION OF INCORPORATION OF ARBITRATION CLAUSES IN THE UK⁴⁹

In essence, the requirements of an incorporating arbitration clause under the charterparty are embraced in the requirements of incorporation clauses under English law. In this chapter, requirements of incorporation clauses will be introduced in advance prior to the intensive research regarding an incorporating arbitration clause through case law.

3.1 Requirements of Incorporation Clauses

As far as incorporation clauses are concerned, they are part of the terms and conditions of the bill of lading prior to determining whether the application of such clauses is upheld. Hence, their interpretation in essence observes the principles of the contract law. However, the complexity and popularity of disputes arising out of this issue engender numerous cases, so that the relevant requirements are different from general principles of interpretation under contract law. Nowadays, such requirements have been recognized commonly in English law as discussed below.

3.1.1 Effective Words

The requirement of effective words emphasises that incorporation clauses of a charterparty should be stipulated in the bill of lading *per se*,⁵⁰ because the bill of lading holder may not be a party to the charterparty. As Donaldson MR held in *Skips*

⁴⁹ Even though an act of Parliament is the source of law under English law and the Arbitration Act 1996 should be applied, English judges merely follow the legal principles and do not stress the statute law in comparison with Chinese judges. Hence, the provisions of the Arbitration Act are not discussed in this section.

⁵⁰ *Supra*, note 8, John F. Wilson, at p.248; see also, *supra*, note 3, Stephen Girvin, at p.188 (12.19).

A/S Nordheim v. Syrian Petroleum Co (The Varenna) “[I]t can only be achieved by the agreement of the parties to the bill of lading contract and thus the operative words of incorporation must be found in the bill of lading itself”.⁵¹ Wordings for this requirement should be divided into general words and specific words. In the context of general words, incorporation clauses are only limited to those terms of the charterparty which are germane to the shipment, the receipt, carriage, or delivery of the cargo or the payment of freight⁵²; in the context of specific words, the irrelevant terms, if any, can be relevant for giving effect to an incorporation.⁵³ The latter is involved primarily in an incorporation arbitration clause.

3.1.2 Description

The requirement of description is relevant for exploring the question of whether the terms of the charterparty incorporated into the bill of lading make sense in the context of the bill. If incorporation clauses do not make sense they would be rejected.⁵⁴ A typical example is in relation to an incorporating arbitration clause which is deemed to be an ancillary clause. If there is no particular and explicit description in the bill of lading, such a clause would be regarded as making no sense.⁵⁵ In *the Varenna* and *Siboti v. BP France*, several courts held that collateral terms such as an arbitration clause were inadequate to be incorporated into the bill of lading in the context of the general description.⁵⁶ In terms of the question of the degree of description, in *The Merak*, the court held that “a specific reference in the bill to the charterparty clause

⁵¹ *Skips A/S Nordheim v. Syrian Petroleum Co (The Varenna)* [1984] 1 QB 599 (CA), at 615-616.

⁵² *TW Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd* [1912] A.C. 1 (HL); see also *the Merak* [1965] P. 223 (CA); *the Annefield* [1971] P.168 (CA).

⁵³ *Supra*, note 4, Sir Bernard Eder *et al.* at p.96.

⁵⁴ *Supra*, note 3, Stephen Girvin, at p.189 (12.20); see also, *supra*, note 4, Sir Bernard Eder *et al.* at p.96.

⁵⁵ *Supra*, note 8, John F. Wilson, at p.249. Also, when it comes to be ancillary concerning an arbitration clause, it will be discussed detail in the following text.

⁵⁶ *Skips A/S Nordheim v. Syrian Petroleum Co (The Varenna)* [1984] 1 QB 599 (CA), at 597 and *Siboti K/S v. BP France SA.* [2003] EWHC 1278 (Comm); [2003] 2 Lloyd’s Rep 364.

would, of course, suffice as would, for example, a mere reference to ‘Clause 35’, even though such reference would provide the holder of the bill with no information as to the content of that clause”.⁵⁷ The significance of the particular description is obvious. In addition, such a requirement in a way overlaps the effective words; thus they can both be examined at the same time, because the way of the expression in the bill of lading, general words or specific words, impact not only on the effective issue, but also on the description matter.

3.1.3 Consistency

The requirement of consistency states that charterparty incorporation clauses must be consistent with the remaining terms of the bill of lading.⁵⁸ Such incorporation clauses will be denied in the absence of consistency with the bill of lading.⁵⁹ Furthermore, once incorporation clauses conflict with the terms of the bill of lading, the latter must prevail.⁶⁰ In *The Miramar*, the shipowner attempted to rely on an incorporation clause to claim demurrage against the holder of the bill on the ground of the bankruptcy of the charterer. Even though the incorporation clause articulated that the terms of the charterparty were incorporated into the bill of lading verbatim, the argument of the shipowner was rejected by the court, because the corresponding

⁵⁷ *The Merak* [1964] 2 Lloyd’s Rep 527.

⁵⁸ *Supra*, note 3, Stephen Girvin, at p.190 (12.21); see also, *supra*, note 4, Sir Bernard Eder *et al.* at p.97. *Supra*, note 8, John F Wilson, at p.249. Also, one of the oldest case law mentioned such the principle was in *Hamilton & Co. v. Mackie & Sons* ([1889] 5 TLR 677). Lord Esher MR held “... if it was found that any of the conditions of the charterparty on being so read were inconsistent with the bill of lading they were insensible, and must be disregarded”.

⁵⁹ See *Agrosin Pte Ltd v. Highway Shipping Co. Ltd. (The Mata K)* [1998] 2 Lloyd’s Rep 614, 620-1 (Clarke J); *Aktieselskabet Ocean v. Harding & Sons Ltd* [1928] 2 KB 371 (CA), 384 (Scrutton LJ); *Hogarth Shipping Co.Ltd. v. Blyth Greene Jourdain & Co. Ltd.* [1917] 2 KB 514 (CA), 549 (Swinfen Eady LJ); *Serraino & Sons v. Campbell* [1891] 1 QB 283 (CA), 301 (Kay LJ); *Gardner & Sons v. Trechmann* [1884] 15 QBD 154 (CA), 157 (Brett MR).

⁶⁰ *Supra*, note 3, Stephen Girvin, at p.190 (12.21).

incorporation clause provided that the charterer must pay demurrage, it is apparent that there is no charterer in the bill of lading.⁶¹

In summary, the above-mentioned requirements are instructive of this criterion of incorporation clauses. The complexity and development of such clauses are, however, uncertain and unexpected. As Gross J. commented in *Siboti K/S v. BP France SA*, “[T]hey (principles) are not to be treated as statutes. In every case, the Court is seeking to ascertain the intention of the parties and, then construing the language, it is necessary to have regard to the individual context and commercial background.”⁶² The requirements should in practice be applied according to the specific facts of a case. Furthermore, as far as an incorporating arbitration clause is concerned, the requirement must be more difficult to construct. In the following section, the specificity of such an arbitration clause will be ascertained through a series of cases.

3.2 Authorities of Specific Words

In terms of an incorporating arbitration clause, as stated above, it is a unanimous requirement that “specific words” meet the effective words requirement. One of the oldest leading case relating to “specific words” is a decision of the House of Lords in *Thomas v. Portsea*.⁶³

In this case, the charterparty provided that “[A]ny dispute or claim arising out of any of the conditions of this charterparty shall be adjusted at the port where it occurs, and

⁶¹ *Miramar Maritime Corp v. Holborn Oil Trading Ltd. (The Miramar)* [1984] 1 AC 676.

⁶² *Siboti K/S v. BP France SA*. [2003] EWHC 1278 (Comm); [2003] 2 Lloyd’s Rep 364 at.36.

⁶³ *TW Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd* [1912] AC 1 (HL). See also David Martin-Clark, “*Incorporation of Charterparty Clauses into Bills of Lading the Ebb and Flow in English Law over the Last 100 Years*”, the Conference of the International Congress of Maritime Arbitrations (ICMA XV) in London on 26-30, April. http://www.ukpandi.com/fileadmin/uploads/uk-pi/legal/30%20Martin-Clark_D.pdf , last visited on 20 March, 2013.

same shall be settled by arbitration”. In the bill of lading, there were two places involving incorporation clauses: one was in the body of the bill appearing as “he or they paying freight for the said goods, with other conditions as per chart party...”; another was in the margin stipulating “Deck load at shipper’s risk, and all other terms and conditions and exceptions of charter to be as per charter party, including negligence clause”. The House of Lords held that neither clause was sufficiently specific to incorporate the charterparty arbitration clause into the bill of lading. Especially, Lord Atkinson propounded a persuasive principle to interpret the application of an incorporating arbitration clause adopted by the court which reads as follows:

When it is sought to introduce into a document like a bill of lading – a negotiable instrument—a clause such as this arbitration clause, not germane to the receipt, carriage, or delivery of the cargo or the payment of freight – the proper subject-matters with which the bill of lading is conversant this should be done by distinct and specific words and not by such general words as those written in the margin of the bill of lading in this case.⁶⁴

Later, “specific words” recognized commonly⁶⁵ serves as a preliminary requirement to examine the application of arbitration clauses and has been applied repeatedly in the past 100 years. By contrast, the “general words” standard of incorporating arbitration clause has been rejected by courts. In recent cases, apposite “specific words” of incorporating arbitration clauses have been upheld by courts. They include *The Delos*,⁶⁶ *The Epsilon Rosa*,⁶⁷ *The Skier Star*,⁶⁸ *The Duden*⁶⁹ and *The Kallang*

⁶⁴ *TW Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd* [1912] AC 1 (HL).

⁶⁵ In this case, germaneness, consistency, insensibleness, inapplicability and modification were all involved. See also, *supra*, note 63, David Martin-Clark.

⁶⁶ *The Delos*, [2001] 1 Lloyd’s Rep. 703. In this case, there are two bills of lading. One of them is approved on the ground of “specific words”; another one is rejected, because there is only general words---“whatsoever” in the bill of lading.

(No 2)⁷⁰. Among these cases, the incorporation of a charterparty arbitration clause based on “specific words” has been approved by all courts.⁷¹ Correspondingly, from the earlier *Njegos* and *The Varenna* to the recent *The Siboti*, the incorporating arbitration clause has been overruled due to the use of general words, such as “all conditions” and “all terms”.⁷²

It is debatable whether *The Merak* represents an exception to the “general words” rule, where the incorporation clause is valid without express reference to the arbitration clause in a bill of lading.⁷³ This writer is of the opinion that there are no absolute general words in the bill of lading. On the contrary, the clause is similar to specific words. The reason is as follows.

In *The Merak*⁷⁴, the bill of lading contained the clause that “[A]ll the terms, conditions, clauses and exceptions including Clause 30 contained in the said charterparty apply to this bill of lading and are deemed to be incorporated herein.” Clause 10 of the charterparty stipulated that the bill of lading should incorporate “all terms, conditions, clauses (including Clause 32) and exceptions as per this Charter.” Clause 32 of the charterparty provided that “[A]ny dispute arising out of this Charter or any Bill of

⁶⁷ *Welex AG v. Rosa Maritime Ltd. (The Epsilon Rosa)*, [2003] 2 Lloyd’s Rep 509.

⁶⁸ *Verity Shipping SA and Another v. NV Norexa and Others (The Skier Star)*, [2008] 1 Lloyd’s Rep. 652.

⁶⁹ *Sotrade Denizcilik Sanayi VE Ticaret AS v. Amadou LO and Others (The Duden)*, [2009] 1 Lloyd’s Rep. 145.

⁷⁰ *Kallang Shipping SA Panama v. Axa Assurances Senegal and Another (The Kallang (No 2))*, [2009] 1 Lloyd’s Rep. 145.

⁷¹ Sandra Lielbarde, “A Comparison of the UK and US Approaches to the Incorporation of A Charterparty Arbitration Clause into Bills of Lading”, *the Journal of International Maritime Law*, Volume 17, 2011, at p.296.

⁷² *The Njegos* [1935] Vol.53 LIL.Rept 286; *Skips A/S Nordheim v. Syrian Petroleum Co (The Varenna)* [1983] 2 Lloyd’s Rep 592, [1984] 1 QB 599 (CA), at 615-616; *Siboti K/S v. BP France SA*. [2003] EWHC 1278 (Comm); [2003] 2 Lloyd’s Rep 364.

⁷³ *Supra*, note 71, at p.296.

⁷⁴ *The Merak* [1965] P. 223 (CA).

Lading issued hereunder shall be referred to arbitration.” In effect, Clause 30 of the charterparty mentioned in the bill of lading was not germane to the bill. Because Clause 30 of an old standard charterparty before 1956 was an arbitration clause, in a new standard, Clause 30 was moved into Clause 32. In this case, parties chose to use the new standard form. In this way, Clause 30 in the bill of lading was a slip or editorial error. In accordance with the description of the bill, Clause 32 of the charterparty, which was an arbitration clause, was incorporated into the bill, which was not ambiguous. By contrary, it was clear to point out the exact Clause 30 in the charterparty. Even though Clause 30 was not an arbitration clause, the written fault could be manipulated and replaced by Clause 32 in the context of pursuing the parties’ intention. As a result, *The Merak* was not an exception to the “general words” rule.

In summary, a “specific words” rule, as a fundamental requirement to decide the application of an incorporating arbitration clause, has been recognized without a doubt under English case law.

3.3 Arguable Issues

As mentioned earlier, even though the fundamental three requirements of the application of incorporation clauses are not at issue in theory, the question has not been settled thoroughly in practice. There are two major issues discussed below.

3.3.1 Identification of Charterparty

It is ambiguous as to which charterparty can be identified in the context of the absence of the date and parties’ names in a bill of lading. This happens frequently in practice. Because shipping trade is usually in connection with a string of charterparties and different parties. Even if the incorporation of a charterparty arbitration clause in a bill of lading is explicitly provided, it is not enforceable in the

event of an identified charterparty. In this section, the writer makes a conclusion relating to the approach to identifying a charterparty, subject to several leading cases.

3.3.1.1 Head Voyage Charterparty

A general rule of identification is to apply to the head charterparty, which is submitted in *The San Nicholas*⁷⁵. This case is in relation to a string of voyage charterparties. The shipowner rented out the vessel *San Nicholas* to Athelqueen under a head charterparty providing that English law was to apply. On the same day, Athelqueen sub-chartered the vessel to the second charterer under the same terms and conditions as the head charterparty. Later, the second charterer sub-chartered the vessel again on the same day. But the third charterparty stipulated that the governing law was the law of the flag of the vessel, namely Liberia. A bill of lading issued by the master of the vessel provided that “[T]he terms of the Charter shall apply”, but the charterparty’s date and the parties’ name were left blank. After the dispute arose, the question of identification of the charterparty was brought to the Court of Appeal. Lord Denning MR held as follows:

...It seems to me plain that the shipment was carried under and pursuant to the terms of the head charter... the head charter was the only charter to which the shipowners were parties: and they must, in the bill of lading, be taken to be referring to that head charter. I find myself in agreement with the statement in *Scrutton on Charterparties* (18th ed (1974)), at p.63:

A general reference will normally be construed as relating to the head charter, since this is the contract to which the shipowner, who issues the bill of lading, is a party....⁷⁶

⁷⁵ *Pacific Molasses Co and United Molasses Trading Co. v. Entre Rios Compania Naviera SA (The San Nicholas)* [1976] 1 Lloyd’s Rep 8 (CA (Civ Div)).

⁷⁶ *Pacific Molasses Co and United Molasses Trading Co. v. Entre Rios Compania Naviera SA (The San Nicholas)* [1976] 1 Lloyd’s Rep 8 (CA (Civ Div)).

Subsequently, such a general rule, namely the application of a head charterparty in the context of a string of charterparties has been approved under English case law. *The Sevonia Team*⁷⁷ and *The Nai Matteini*⁷⁸ both invoke *The San Nicholas* to recognize the head charterparty as the identified charterparty in the bill of lading.

Apart from it, the head voyage charterparty is prioritized in the case of the conflict between time and voyage charterparties. In *The SLS Everest*,⁷⁹ the shipowner as the second defendant let the vessel *SLS Everest* to *Drumplace Ltd* under a time charterparty. Subsequently, *Drumplace Ltd* voyage chartered the vessel to the claimant. The bill of lading issued by the master on behalf of the shipowner stated that “[F]reight and other conditions as per___ including the exoneration clause.” The cargo was lost after the vessel sank. The claimant brought the case to court.

The significant issue was in relation to the question of unidentified charterparty. The Court of Appeal held that even though the time charterparty was the head charterparty, the voyage charterparty was in fact incorporated into the bill of lading, because the word “freight” could only have referred to a voyage charterparty rather than to a time charterparty.

In this writer’s opinion, based on the above-mentioned cases, the principle should be that the head voyage charterparty serves as the identified charterparty, regardless of whether there are a string voyage charterparties or whether there is a head time charterparty. But whether a general rule relating to the priority of the head

⁷⁷ *K/S A/S Seateam & Co. v. Iraq National Oil Co. and Others (The Sevonia Team)* [1983] 2 Lloyd’s Rep. 640.

⁷⁸ *Navigazione Alta Italia SpA v. Svenska Petroleum AB (the Nai Matteini)* [1988] 1 Lloyd’s Rep. 452.

⁷⁹ *Bangladesh Chemical Industries Corporation v. Henry Stephens Shipping Co. Ltd. and Tex-Dilan Shipping Co. Ltd. (The SLS Everest)* [1981] 2 Lloyd’s Rep 389.

charterparty established in *The San Nicholas* is followed all the time is an issue discussed in the following section.

3.3.1.2 String of Time Charterparties

Even though *The SLS Everest* has established the priority of the voyage charterparty between time and voyage charterparties pursuant to the special word --“freight”, it does not mean that “freight” in the bill of lading must give effect to void an arbitration clause under a time charterparty. For example, in the event of a string of time charterparties, “freight” does not play an important role in deciding an identified charterparty issue.

In *The Vinson*,⁸⁰ on 1 December 1999 Quark as the shipowner entered into a pool arrangement managed by *Eco Shipping Ltd.* Clause 3 of the pool agreement provided that any vessel entering the pool would be time-chartered to *Eco Shipping Ltd.* In accordance with the provisions of an Ecotime 1999 charterparty in an attached form, in the event of conflict between the pool agreement and the Ecotime 1999 charterparty, the pool agreement was to prevail. On the same day, Quark let the vessel *Vinson* to *Eco Shipping Ltd.* on the terms of the Ecotime 1999 charterparty. Both the pool agreement and the Ecotime 1999 charterparty contained a New York arbitration agreement.

Later, *Eco Shipping Ltd.* let the vessel *Vinson* to *Sunline* on the terms of the Baltime form which contained a London arbitration agreement. *Sunline* entered into a contract of affeighting with the shippers *Laysun*. Quark as carrier signed Congenbill. Under the Congenbill, the clause stated “[F]reight payable as per Charter-Party dated___”. In

⁸⁰ *Quark Ltd. v. Chiquita Unifrutti Japan Ltd. and Others (The Vinson)*, QBD (Com Ct), (2005) 677 Lloyd’s Maritime Law Newsletter 1, 26 April 2005.

the end, the consignee claimed for cargo damage in London arbitration in accordance with the Baltime form.

In this case, the judges did not negate the arbitration agreement under the time charterparty on the ground of the special word--- “freight” only used under the voyage charterparty. On the contrary, the judges did not fall into a “freight” issue. The focus of judges was to ascertain whether the head charterparty should prevail. The court held that there was an inclination under English law to be in favour of the incorporation clauses of the head charterparty, but this inclination did not represent a rule that should be invariably applied. Because the head time charterparty served as a part of the pool arrangement, its particular clauses could not properly be incorporated into the bills of lading. Accordingly, the court rendered a decision that the Baltime charterparty was the most appropriate one to be incorporated into the bill of lading.

In conclusion, in terms of the identified charterparty issue, no uniform rule seems to be established thoroughly. But several basic standards can be taken into consideration in practice. First of all, the head voyage charterparty is to prevail; Secondly, the voyage charterparty prevails over the time charterparty; thirdly, the head charterparty should be put into priority relying on the particular circumstances. It should be emphasized that the forgoing standards are not invariable, and that the specific fact in a case should play a more important role in identifying a charterparty.

3.3.2 Verbal Manipulation Regarding Consistency

Verbal manipulation which is another common issue has been debatable in the past half century since *The Merak*. Lord Russell opined that “... clauses which are directly germane to shipment, carriage and delivery may be incorporated by general words of incorporation though the fact that they are found in a charterparty may involve a

degree of verbal manipulation to fit exactly a bill of lading...⁸¹ This case may be the first case to render a pronouncement on “verbal manipulation” officially. Afterwards, both Lord Denning MR in *The Annefield*⁸² and Lord Brandon in *The Rena K*⁸³ followed and affirmed the notion of “verbal manipulation”.

3.3.2.1 Affirmation

In *The Annefield*, Lord Denning MR emphasized that “verbal manipulation” was merely applied to clauses which were germane to the subject matter of the bill of lading. “But if the clause is one which is not directly germane, it should not be incorporated into the bill of lading contract unless it is done explicitly in clear words either in the bill of lading or in the charterparty.”⁸⁴ As a consequence, he held that the words “any disputes under this contract” in the charterparty merely meant “under this charterparty” rather than expanding on the bill of lading, and that an arbitration clause under the charterparty was not sufficient to be brought into the bill of lading.

It is interesting that *The Rena K* referred to the same rule of verbal manipulation, but the consequence was opposite to *The Annefield*. The bill of lading in *The Rena K* contained “[A]ll terms, conditions and exceptions, including the Arbitration Clause... of the Charter-Party dated London 13 April 1978.” The arbitration clause in the charterparty stated that “[A]ny disputes which may arise under this charter to be settled by arbitration in London.” On the basis of the facts, Lord Brandon held that the addition of the words “including the Arbitration Clause” in the bills of lading meant that the parties to the bill intended the provisions of the arbitration clause in the charterparty to apply to disputes arising from the bill of lading. “Accordingly, he was prepared to give effect to that intention, even though some ‘manipulation’ of the

⁸¹ *The Merak* [1964] 2 Lloyd’s Rep. 527.

⁸² *The Annefield* [1971] 1 Lloyd’s Rep. 1 at p. 4.

⁸³ *The Rena K* [1978] 1 Lloyd’s Rep. 545.

⁸⁴ *The Annefield* [1971] 1 Lloyd’s Rep. 1 at p. 4.

wording of the charterparty arbitration clause would be required to give effect to that intention.⁸⁵

Naturally, even though some judges accept a “verbal manipulation” rule, the degree of recognition among judges is divergent, which results in opposite decisions in the context of similar facts.

3.3.2.2 Questioned Manipulation

Even though a “verbal manipulation” rule is approved by leading case law, the authorities have been challenged by subsequent cases. One of the most influential cases is *The Miramar*. Based on the issue of “verbal manipulation” emphasized in this case although it is irrelevant to the incorporation of an arbitration clause, the case is important.

In *The Miramar*, the bill of lading contained incorporation clauses. The shipowner sought to invoke such clauses to claim demurrage to the bill of lading holder, after the charterer went bankrupt. Pursuant to the incorporation clauses in the bill of lading, the incorporated clause in the charterparty stated that “charterer shall pay demurrage”. However, the shipowner expected to adjust the word “charterer” to “consignee” through a “verbal manipulation” rule. This legal argument was disapproved. Lord Diplock held that-

(to pay an unknown and wholly unpredictable sum for demurrage) I venture to assert that no business man who had not taken leave of his senses would intentionally enter into a contract which exposed him to a potential liability of this kind; and this, in itself, I find to be an overwhelming reason for not indulging in verbal manipulation of actual contractual words used in the

⁸⁵ *Supra*, note 63, David Martin-Clark.

charterparty so as to give them this effect when they are treated as incorporated in the bill of lading.⁸⁶

Lord Devlin stressed that-

As more important that this House should take this opportunity of stating unequivocally that, where in a bill of lading there is included a clause which purports to incorporate the terms of a specified charterparty, there is not any rule of construction that clauses in the charterparty which are directly germane to the shipment, carriage or delivery of 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 in no cesser clause), the designation “charterer”, “consignee of the cargo” or “bill of lading holder”.⁸⁷

It can be seen that this case discards “verbal manipulation” as a conclusive rule and invokes business value as a standard to decide whether a “verbal manipulation” rule should be applied. This case gave effect to more complex situations in the following years.

3.3.2.3 Denial

In comparison with a polite denial of the “verbal manipulation” rule in *The Miramar*, *The Nai Matteini* makes a clear conclusion that a “manipulation” rule is not acceptable anymore.

⁸⁶ *Miramar Maritime Corp v. Holborn Oil Trading Ltd. (The Miramar)* [1984] 2 Lloyd’s Rep. 132.

⁸⁷ *Miramar Maritime Corp v. Holborn Oil Trading Ltd. (The Miramar)* [1984] 2 Lloyd’s Rep. 129.

In *The Nai Matteini*⁸⁸, the bill of lading stated “all terms, conditions and exceptions (including but not limited to ... Arbitration Clauses) contained in which charterparty...” The charterparty clause provided that “any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the City of London.” Even though an “Arbitration Clause” was expressed explicitly in the bill of lading, the court did not recognize the application of the charterparty arbitration clause based on the fact that the charterparty arbitration clause merely referred to “this charter”, but did not embrace “the bill of lading”. In terms of a “manipulation” issue, Lord Gatehouse strongly suggested that “manipulation” was no longer permissible in light of *The Miramar* decision and refused to follow *The Rena K*, believing that it was no longer good law.

In comparison with *The Miramar* which did not involve an arbitration clause, *The Nai Matteini* thoroughly and completely denies a “verbal manipulation” rule on the application of an incorporating arbitration clause. But the question is whether *The Nai Matteini*, replacing *The Rena K*, becomes good law.

3.3.2.4 Affirmation Again

The issue of “verbal manipulation” is still open to examination after *The Nai Matteini*. English judges in entering a new phrase maintain an inclination to affirm the application of a “verbal manipulation” rule without any doubt.

In *The Oinoussin Pride*⁸⁹, a “manipulation” rule was approved against *The Nai Matteini*. In this case, an incorporation clause of the bill of lading stated that “[A]ll terms, conditions, provisions and exceptions including the Arbitration Clause of the

⁸⁸ *Navigazione Alta Italia SpA v. Svenska Petroleum AB (The Nai Matteini)* [1988] 1 Lloyd’s Rep. 452.

⁸⁹ *Pride Shipping Corporation v. Chung Hwa Pulp Corporation & Another (The Oinoussin Pride)* [1991] 1 Lloyd’s Rep. 126.

relevant charterparty dated May 11, 1988...”. Clause 17 of the charterparty provided for any dispute between owners and charterers to be referred to three persons in London. Lord Webster opined that -

Effect should be given to the expressed intention of the parties to the bills of lading namely to incorporate the arbitration clause and it was not only practical but necessary to do so by adding to Clause 17 of charterparty to the words “or shippers or receivers” after the words “between owners and charterers” in order to give effect to that expressed intention.

Lord Webster regarded *The Rena K* as authority and quoted the passage of Lord Brandon where he stated that “...if it is necessary, as it obviously is, to manipulate or adapt part of wording of that clause (including the arbitration clause) in order to give effect to that intention, then I am clearly of the opinion that this should be done.”⁹⁰ As the above analysis, it is apparent that *The Rena K* prevails over *The Nai Matteini*.

Five years later, *The Nerano* which had similar facts as *The Rena K* and *The Nai Matteini* strongly supported *The Rena K* against both *The Miramar* and *The Nai Matteini* again. The court rendered a judgement that “by identifying and specifying the charterparty arbitration clause, it was clear that the parties to the bill of lading contract did intend and agree to arbitration so that, to give force to the intention and agreement, the words in the clause had to be read and construed as applying to those parties.”⁹¹ Later, the “manipulation” rule was vindicated in *The Delos*⁹² and *The Siboti K/S v. BP France SA*⁹³ as well.

⁹⁰ *Pride Shipping Corporation v. Chung Hwa Pulp Corporation & Another (The Oinoussin Pride)* [1991] 1 Lloyd’s Rep.126 at p.130.

⁹¹ *Daval Aciers d’Usinor et de Sacilor & Others v. Armare SRL (The Nerano)* [1996] 1 Lloyd’s Rep.1 at p.2 (CA).

⁹² *The Delos*, [2001] 1 Lloyd’s Rep. 703.

⁹³ *Siboti K/S v. BP France SA*. [2003] EWHC 1278 (Comm); [2003] 2 Lloyd’s Rep 364

It turns out that *The Nai Matteini* is not good law and has been discarded. A “verbal manipulation” approach is recognized and well-established pertaining to the application of the incorporating arbitration clause. However, it is notable that the intention of a “verbal manipulation” rule is to pursue the parties’ will. Once the consequence of a “verbal manipulation” rule is inconsistent with the parties’ will clearly, a “manipulation” rule should be discarded as in *The Miramar*. In addition, the degree of the application of a “verbal manipulation” rule is dependent on the recognition of judges and the specific facts of a case. Different recognitions and facts are bound to engender different decisions, although the same principle is applied, as *The Annefield* and *The Rena K* illustrate.

3.4 Comment

The view of this writer is summarized through the following observation in a series of leading cases:

First of all, the fundamental three requirements are clear for addressing the application of incorporation clauses. They are “effective words”, “description” and “consistency” respectively.

Secondly, in terms of the application of the three requirements, the consistent opinion on “effective words” is to avail of “specific words” in the case of an incorporating arbitration clause; an identified charterparty issue under the “expression” requirement is complicated as summarized above; a “verbal manipulation” rule under the “consistency” requirement has been affirmative even though the degree of the application is arguable among judges.

Finally, because a bill of lading usually involves different identified parties, such as a shipowner, a charterer, a sub-charterer, a shipper and a consignee, similar

incorporation clauses might bring about different decisions. But English judges devote themselves to pursue justice and fairness combined with the parties' intention and surrounding circumstances. For example, in *The Miramar*, there is no denying that the decision is fair, where the judges did not follow the "verbal manipulation" rule. Nevertheless, the *obiter dictum* which attempts to overrule such a rule is inconclusive.

4. APPLICATION OF INCORPORATING ARBITRATION CLAUSES IN CHINESE JUDICIAL DECISIONS

4.1 Status Quo Maritime Legislation

4.1.1 A Brief History

It is rather interesting that the history of Chinese maritime legislation is relatively short-lived compared with 18,000 kilometers of the mainland coastline of China, the first formal Maritime Code was promulgated on 7th November, 1992⁹⁴. Before 1992, as a result of the lack of maritime legislation, administrative documents, which were known as the Red Title Documents, which could be changed according to political and social demands, in essence served as "maritime law" in legal practice.⁹⁵ Apart from administrative rules, maritime disputes were applied to the principles of civil law at random. During a period of 40 years (from 1949 till 1992), the only

⁹⁴ In Chinese history, the first maritime law named "Shipping Law" as one independent chapter was codified into the Draft of Commercial Law of Qing Dynasty in 1909. Before it was enacted and entered into force, Qing Dynasty was destroyed. After the Nanjing National Government was established, the Maritime Law of Republic of China was promulgated on 30 December, 1929 and entered into force on 1 January, 1931. After the People's Republic of China was established in 1949, the Central Government abolished the entire legal system built by the Nanjing National Government. From 1951, the Central Government of P.R.C. organized a special group to draft the Maritime Law. However, the Maritime Code was not promulgated and entered into force till 1992 due to some special historical reasons. See, Hui Zhu, "The Development of Maritime Law in 100 year", *Journal of Guangzhou Maritime College*, Vol, 18, No.4, December 2010, at pp. 40-41.

⁹⁵ KX Li and CWM Ingram, *Maritime Law and Policy in China*, London: Cavendish Publishing Limited, 2002, at p.2.

achievement in the maritime domain was the establishment of five Maritime Courts, at Dalian, Tianjin, Qingdao, Shanghai and Guangzhou, on 28th November, 1984.⁹⁶

After the enactment of the Maritime Code on 7th November, 1992, the Chinese maritime framework began to be developed gradually. Along with the implementation of maritime legislation, the Maritime Procedure Law of the People's Republic of China, the Marine environment Protection Law of the People's Republic of China and other relevant maritime law and regulations⁹⁷ were enacted subsequently, which constitute the preliminary maritime legislation with many gaps and defects. On the one hand, most of the gaps in maritime legislation are rooted in the maritime legislative system and sources of maritime law. An obvious example is that the significant part, almost 90% of the provisions of the Maritime Code are derived from international conventions or referenced to other countries' legislation, by those who established the law based on the accumulation of maritime business practices. In the Maritime Code, the chapter on the carriage of goods by sea in essence incorporates the Hague/Visby Rules and the Hamburg Rules. The legal issues that are not embraced by international Rules are also left blank. To be more precise, where international conventions stipulate explicit provisions and interpretations as to legal issues, the Maritime Code can correspondingly figure out the issue very well. In contrast, where some issues left blank by conventions need to be tackled and resolved by domestic law, the Maritime Code does not make up for the gaps.

On the other hand, the defects of maritime legislation are mainly caused by the legislative approach, which make direct references without a deep understanding of maritime legal terminology, and language barriers. Once again, in the Maritime Code,

⁹⁶ Currently, there are 10 Maritime Courts in China. The 5 courts mentioned and the other 5 are the Beihai, Haikou, Ningbo, Wuhan and Xiamen Maritime Courts.

⁹⁷ For instance, the Ship Registration Regulations on 2 June, 1994; the Provisions Concerning Limitation of Liability for Small and Coastal Ships on 15 November, 1993.

there are certain provisions of international conventions incorporated, which are somewhat inconsistent with the normal meaning in legal English due to the translation. For example, after voyage and time charterparties were translated into Chinese legal terms, they were divided into two separate regimes: the voyage charterparty is deemed to be the contract of carriage of goods by sea on the one hand; the time charterparty is considered to be the contract of affreightment on the other. Meanwhile, the voyage charterparty under the contract of carriage of goods and the time charterparty under the contract of affreightment are entirely irrelevant in accordance with the structure of the Maritime Code.⁹⁸ The consequence directly gives rise to erroneous recognition in cases dealing with incorporating arbitration clauses. There is further elaboration in the judicial decisions.

In recent years, with the intention to improve the incomplete Maritime Code, Chinese legal experts have submitted a motion to the Chinese government relating to amendments to the Maritime Code. The deputies of the National People's Congress during the course of meetings have also provided relevant motions.⁹⁹ However, the procedure of approval is still tardy. Till now the amendment of the Maritime Code remains in question.

4.1.2 Application of Maritime Code

As explained above, there are some gaps and defects in maritime legislation. In this way, maritime disputes need to seek resolution by reference to relevant laws. Also, because the Maritime Code is considered to be a specific law in the civil commercial

⁹⁸ See the Maritime Code of P.R.C.

⁹⁹ Huixing, Liang, An Advice Relating to the Amendment of the Maritime Code, http://blog.sina.com.cn/s/blog_6ab965d001010fsj.html, last visited on 25, February, 2013; also see the Completion of The First Draft of Amendment of the Maritime Code, http://www.legaldaily.com.cn/index/content/2010-05/28/content_2158232.htm last visited on 25, February, 2013.

regime,¹⁰⁰ it is a natural approach for it to be subject to other civil commercial legislation. In legal practice, Chinese judges frequently refer to civil laws or other commercial laws, such as the Contract Law. The nature of the maritime law, however, determines that fairness and justice in the maritime domain cannot be found through other legislation. Because on the one hand, the civil commercial law *per se* in China is not complete leading to difficulties in finding the relevant rules to match the maritime law; and on the other hand, the maritime law is fraught with special legal principles compared with the general civil commercial law. For example, there is no integrated system to protect a third party in the Chinese civil legal system, unlike the Contracts (Rights of Third Parties) Act 1999 of the UK. Where the terms of a charterparty are incorporated into a bill of lading, and a third party holds the bill, the privity of contract is broken. At issue is whether the right of the *bona fide* third party is protected as a priority, or the particularity of the maritime regime should be considered prior to the right of the third party; in other words, whether the function of improving the transfer of the bill of lading should prevail over protecting the bill of lading holder. Such an issue is outside the scope of any general law. Consequently, the general law cannot catch all maritime issues.

Where the general law cannot remedy maritime issues, the judicial interpretation and the direction of Chinese judges will play a crucial role. In order to explain this point, it is necessary to understand the Chinese legal system. China is a civil law country, as opposed to the common law in the UK. For this reason, the Chinese Code is the single source of law and Chinese judges are not vested with the power of making law or of interpreting legislation. By contrast, English law derives from legislation and

¹⁰⁰ In China, the Civil Code and the Commercial Code are left blank till now. The majority of scholars hold that China should adopt the legal system of uniformity in both the civil law and the commercial law, where others think that the civil law and the commercial law should be independent respectively. Without considering the different opinions in theory; in practice, where a specific law in the civil commercial regime is short of legal principles to resolve issues, the principles under the general law will be applicable. For example, the Contract Law, as opposed to the Maritime Code, is a general law.

judge-made law. The judicial role is to interpret legislation and to develop law.¹⁰¹ In theory, Chinese judges are extremely dependent on statute law. Where statute law provides the relevant principles and the approach on a legal issue, it is comparatively straightforward to make a judicial decision, but not otherwise.

However, in practice the situation is relatively complicated. In the view of this writer, the discretion of Chinese judges to some extent is stronger than that of English judges. A large number of leading cases and relevant legal principles in a developed legal system such as in the UK constitute the sources of judicial decisions. Unless the judges' opinions are adequate to establish a new legal principle, it is difficult to overrule the old one. For instance, after "verbal manipulation" was disapproved by *The Nai Matteini* for a short time, the traditional and authoritative principle prevailed again. On the Chinese aspect, the incomplete maritime legislation with few legal principles has left stronger discretionary powers to Chinese judges causing multiple recognitions and interpretations in relation to incorporating arbitration clauses. Where there are insufficient provisions or legal rules to follow, some Chinese judges might make a decision, subject to their own discretion. Relevant examples are *He De (Group) Co. Ltd. v. Cherry Valley Shipping Co. Ltd.*¹⁰² and *Chongqing Xinpei Food Co. Ltd. v. Strength Shipping Corporation, Liberia*¹⁰³; these cases are discussed later in this chapter. Nevertheless, in recent years in order to avoid multiple and separate recognitions in judicial decisions, judges of the Supreme Court have articulated several principles through responses to individual cases. Such responses are deemed

¹⁰¹ Steve Wilson, Rebecca Mitchell, Tony Storey and Natalie Wortley, *English Legal System*, Second Edition, Oxford University Press, 2009, at p.8.

¹⁰² *He De (Group) Co. Ltd. v. Cherry Valley Shipping Co. Ltd.*

¹⁰³ *Chongqing Xinpei Food Co. Ltd. v. Strength Shipping Corporation, Liberia*, [2006] M.S.T.Z.D. No.26.

to be judicial interpretations as a source of law to instruct courts in future cases,¹⁰⁴ even though these cases can also be subject to the direction of Chinese judges.

In conclusion, on the one hand the maritime legislation is developing even though there are gaps regarding many legal issues; on the other hand, judicial interpretations of the Supreme Court are seeking to make up for the gaps, even though judges of lower courts can still make decisions according to their discretion. In the following context, three main aspects will be discussed: firstly, the recognition relating to a time charterparty giving rise to erroneous conclusions in Chinese judicial decisions; secondly, judicial interpretations of the Supreme Court unifying and clarifying some legal issues pertaining to incorporation of arbitration clauses in China; and finally, certain recognitions based on the directions of judges giving effect to more stringent standards in connection with an arbitration agreement in legal practice.

4.2 Denial Regarding Time Charterparties

4.2.1 Judicial Decisions and Interpretation of the Supreme Court

As stated earlier, a time charterparty in China is not considered to be a contract of carriage of goods by sea. According to the structure of the Maritime Code, a voyage charterparty, as the special provisions indicate, is subsumed in Section 7 of Chapter 4, namely Contracts of Carriage of Goods by Sea¹⁰⁵. In contrast, a time charterparty is

¹⁰⁴ As mentioned earlier, China is a civil law country dependent on statute law. But in practice, statute law cannot be amended according to the latest situation. Therefore, the judicial interpretation of the Supreme Court becomes a source of law. However, many scholars question the legality of such an interpretation. Because Article 42 of the Legislation Law of the People's Republic of China provides that the power to interpret a national law shall be vested in the Standing Committee of the National People's Congress. The Supreme Court is not entitled to interpret law. However, the opposite opinion is that the Standing Committee of the National People's Congress has the authority to interpret vague and ambiguous provisions, whereas the Supreme Court has the power to interpret the application of the provisions. It does not matter which opinion is correct in China, the judicial interpretation of the Supreme Court is regarded to be valid all the time.

¹⁰⁵ See the Maritime Code of P.R.C.

codified into Section 2 of Chapter 6, namely charterparties. The prevailing view of Chinese judges and scholars is that a contract of carriage of goods by sea and a charterparty are absolutely distinct legal issues. The features and concept of the voyage charterparty are in effect consistent with the nature of the contract of carriage of goods by sea rather than renting a vessel. Equally, the voyage charterparty means the contract of carriage of goods by sea. By contrast, the aim of the time charterparty is to rent a vessel for a fixed time. Accordingly, the content is irrelevant to the contract of carriage of goods. Equally, it is also irrelevant to the bill of lading.¹⁰⁶ On the basis of the preceding assertion, the judges and scholars opine that the application and validity of an incorporating arbitration clause under a time charterparty should be rejected. The two leading cases and the judicial interpretations are set out as follows.

4.2.1.1 *Shengzhen Cereals Group Co. Ltd. v. Future E.N.E*

*Shengzhen Cereals Group Co. Ltd. v. Future E.N.E.*¹⁰⁷ involved a dispute over cargo damage. The facts were that *Bunge S.A.* time chartered the vessel *M/V Alpha Future* owned by the defendant *Future E.N.E.* to *Noble Grain Pte Limited* with the New York Produce Exchange Charter on 24 March, 2004. The duration of the contract was a one time-charter trip from East Coast South America to Far East. Clauses 17 and 19 of the time charterparty provided respectively that “[A]ll disputes arising out of this contract shall be arbitrated at London.” and “the governing law is English Law”. An agent on behalf of the master of the vessel *M/V Alpha Future* issued a Congenbill 1994 to the shipper *Noble Grain Pte Limited*. The face of the Congenbill stipulated that the bill was “to be used with the charter-parties” and “for conditions of carriage see overleaf”. On the reverse side the Congenbill provided that “[A]ll of the terms, conditions,

¹⁰⁶ Xiwu Huang, the Validity of Arbitration Clause in the Contract of Carriage of Goods by Sea (*Tianjin Iron&Steel Group Co., Ltd., Tianjin Branch, PICC v. Niagara Maritime S.A.*), <http://bmla.chinalawinfo.com/newlaw2002/slc/slc.asp?db=fnl&gid=118315807>, last visited on 18, February, 2013.

¹⁰⁷ *Shenzhen Cereal Group Co. Ltd. v. Future E.N.E.* (2004) Q.H.F.H.S.C.Z. No. 245.

liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.” The bill also marked “freight prepaid as per CHARTER-PARTY dated 24/03/04”. Because the claimant *Shengzhen Cereals Group Co. Ltd.* as the bill of lading holder delivering the cargo in the destination port (Qingdao) found cargo damage, it sued the shipowner in the Qingdao Maritime Court.

The defendant shipowner *Future E.N.E.*, based on the New York Produce Exchange Charter signed by *Bunge S.A.* and *Noble Grain Pte Limited*, claimed that a charterparty incorporation clause provided a London arbitration agreement under the bill of lading. Therefore, the Qingdao Maritime Court had no jurisdiction on this case. Apart from the defence, the shipowner *Future E.N.E.* brought the case to London arbitration.

The Qingdao Maritime Court held that according to Articles 4 and 16 of the Arbitration Law¹⁰⁸, the defendant shipowner merely submitted the time charterparty and did not provide the contract of carriage of goods by sea containing the arbitration clause. Meanwhile, it also did not submit a separate arbitration agreement in writing. Its argument based on the incorporating arbitration clause was rejected. The explicit viewpoints in the judicial decision are as follows:

Firstly, when it comes to the question of the incorporation clause, the court opined that all clauses of the time charterparty were not incorporated into the bill of lading. One ground was that the contract of carriage of goods by sea evidenced by the bill of lading was definitely different from the time charterparty. All terms and conditions under the time charterparty merely focused on the rented vessel and certain clauses

¹⁰⁸ Article 4 of the Arbitration Law provides that “the parties adopting arbitration to resolve the dispute shall conclude an arbitration agreement voluntarily”. Article 16 stipulates that “an arbitration agreement shall include the arbitration clauses provided in the contract and any other written form of agreement concluded before or after the disputes providing for submission to arbitration”.

pertaining to the carriage of goods were also relevant to the rented vessel, which did not mirror the features of the contract of carriage of goods by sea. In the event that the incorporation clause was admissible, the legal issue between the bill of lading holder and the carrier would become a charterparty matter rather than a carriage of goods matter. Under these circumstances, the incorporation clause contravened the provisions of the bill of lading under Chinese law.

In addition, time charterparty clauses incorporated into the bill of lading were inconsistent with the provisions of the Maritime Code. Pursuant to Article 44 of the Maritime Code¹⁰⁹, it was invalid if the clauses of the bill of lading contravened the provisions of contracts of carriage of goods by sea (Chapter 4). Furthermore, there was a certain specific provision with regard to the voyage charterparty in Chapter 4, which was Article 95 stipulating that “if the clauses of the voyage charterparty are incorporated into the bill of lading, the relevant clauses of the voyage charterparty shall apply”. Accordingly, the specific provision regarding the voyage charterparty provided that incorporation clauses belonged to the genre of a “specific provision” in the Maritime Code. The application of incorporation clauses must rely on the exact provision. At present, there is no provision stipulating the application of the time charterparty incorporation clauses so that an incorporation clause could be invalid.

Secondly, in terms of the incorporation of the arbitration clause, the court held that the arbitration clause of the time charterparty was not incorporated into the bill of lading. The grounds were that the purpose and scope of the arbitration clause under the time charterparty were to dispose of the dispute in connection with the rental of the vessel, instead of the dispute arising out of the contract of carriage of goods by sea. Even though an arbitration clause was separate, beyond the contract, such a clause was

¹⁰⁹ Article 44 of the Maritime Code stipulates that “any stipulation in a contract of carriage of goods by sea or a bill of lading or other similar documents evidencing such a contract that derogates from the provision of this Chapter (Chapter 4—contracts of carriage of goods by sea) shall be null and void”.

dependent on the surrounding circumstances. In this case, the time charterparty arbitration clause was to address the dispute arising from the time charterparty. Once it was permissible under the bill of lading, the scope of disputes resolved by arbitration would expand to carriage of goods by sea, which was outside the domain of the time charterparty. Therefore, the arbitration clause could not be adopted certainly.

Finally, the bill of lading involved in this case was a Congenbill providing on the front of the bill the notation “freight prepaid as per CHARTER PARTY dated 24/03/04”. It was sufficient to prove that the incorporating arbitration clause did not refer to the time charterparty. Because it was well-known that “freight” was only used in a voyage charterparty, as opposed to “hire” used in a time charterparty, it should have another voyage charterparty between parties. However, the defendant only submitted the time charterparty rather than the alternative voyage charterparty. The argument of the defendant was thus rejected.

The foregoing case only represented the opinions of the Qingdao Maritime Court, but it in essence reflected the prevailing trend and views in relation to time charterparty arbitration clauses incorporated into bills of lading. For a long time it was unshakeable. This case was published in 2004. From 2004 to 2011, there was no judicial decision of the Supreme Court to affirm the above-mentioned decision. In this way, the opposite opinion supporting the validity of an incorporating arbitration clause under a time charterparty was in existence all the time. However, after the following judicial decision is promulgated, the controversy in Chinese practice should and will come to an end.

4.2.1.2 Conclusive Judicial Decision and Interpretation

*Tianjin Iron & Steel Group Co., Ltd., Tianjin Branch, PICC v. Niagara Maritime S.A.*¹¹⁰ was decided by the Supreme Court in 2011 with a powerful and authoritative effect. In this case, the defendant *Niagara Maritime S.A.* and *Vale International SA* concluded a time charterparty on 12 January, 2009 under which *Niagara Maritime S.A.* leased the vessel out *Jiayun* to *Vale International SA* for the carriage of goods. The charterparty provided -- “[A]ll disputes arising from this time charterparty shall be submitted to London Maritime Arbitration Committee and be governed by English Law”. On 7 June, 2009, the *Jiayun* shipped iron ore to China from Brazil. The two claimants were respectively *Tianjin Iron & Steel Group Co. Ltd.* as the consignee and *Tianjin Branch, PICC* as the underwriter. The master of the *Jiayun* issued a Congenbill 1994. The front and reverse side of the Congenbill both provided that the bill was “to be used with charterparties”. In addition, Clause 1 of the reverse side stipulated that “[A]ll of the terms, conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated”. On 22 July, 2009, the *Jiayun* collided with another vessel in Singapore. The two claimants brought proceedings in the Tianjin Maritime Court claiming salvage. During the course of the defence, the defendant *Niagara S.A.* argued that the bill of lading and the time charterparty constituted the contract of affreightment together and the arbitration clause under the time charterparty had been incorporated into the bill of lading. The Tianjin Maritime Court therefore had no jurisdiction.

This case was litigated in the Tianjin Maritime Court as a first instance court, the Tianjin Higher Court as the court at the next level and the Supreme Court as the final court for rendering the decision. There was consensus among all three courts rejecting the defendant’s argument and concluded that the Tianjin Maritime Court had

¹¹⁰ *Tianjin Iron & Steel Group Co., Ltd., Tianjin Branch, PICC v. Niagara Maritime S.A.*, [2011] M.S.T.Z.No. 12.

jurisdiction in the case.¹¹¹ Even though the consequences in the different judicial decisions were consistent, the grounds were divergent.

The Tianjin Maritime Court held that there is no express arbitration clause incorporated in the face of the bill of lading, even though on the face the bill stated that the charterparty incorporation clauses and on the reverse side the bill provided for the incorporating arbitration clause. As a consequence, the reverse side clause of the bill relating to the incorporating arbitration clause was invalid. In addition, the arbitration agreement between the shipowner *Niagara Maritime S.A.* and the charterer *Vale International SA* was to resolve the dispute in connection with the charterparty, which was irrelevant to the dispute arising from the carriage of goods by sea. It was not therefore binding on the two claimants: the bill of lading holder and the underwriter.

The Tianjin Higher Court denied the validity of the incorporating arbitration clause simply based on the fact that the front of the bill of lading did not express the names of the parties and the date of the charterparty, even though it mentioned “to be used with charterparty”. In addition, the reverse side arbitration clause, as a standard form,

¹¹¹ The procedure for such a case is very special. Strictly speaking, the decisions of the Tianjin Higher Court and the Supreme Court are merely the responses to the incorporation of the arbitration clause rather than judicial decisions. In China, it is a specific approach used to resolve some complicated and influential cases. More specifically, as far as the case is concerned, according to Article 1 of the Notice of the Supreme Court in Relation to the Relevant Issues on Disposal of the International Arbitration and Arbitration Items (F.F. [1995] No.18), “in an international maritime case, if parties reach an arbitration clause in a contract or conclude an arbitration agreement, if the court holds that the arbitration clause or agreement is null and void, or the ambiguity of the content to carry out, the court shall submit the decision to the local Higher Court before the court hears the case. If the Higher Court agrees on the decision of the lower court, it shall continue to submit the decision to the Supreme Court for the final opinion”. In such a case, the procedure is step by step in accordance with the foregoing provision. After the Supreme Court makes a final decision, the decision on the interpretation constitutes the source of law in the Chinese legal system. Afterwards, similar cases must follow the decision.

could not bind the bill of lading holder, because it did not stipulate the same expressly on the front of the bill.

The Supreme Court was in favour of the two courts' opinions. In the meantime, Judge Xiwu Huang summarized several opinions, which played a leading instructive role for future decisions. First of all, in terms of the interpretation of the contract, the learned judge was of the opinion that the time charterparty clauses incorporated into the bill of lading could not arrive at the aim and function of the incorporation. The intention of the time charterparty was to lease the vessel, as opposed to the carriage of goods of the voyage charterparty. In the context of a voyage charterparty, the bill of lading and the voyage charterparty were in co-existence in the same voyage. The voyage charterparty *per se* was the contract of carriage of goods by sea. In order to secure consistency of the right and the obligation, the carrier incorporated the voyage charterparty clauses into the bill of lading. Afterwards, the bill of lading holder was bound by the voyage charterparty through the incorporation clause. In contrast, the time charterparty was not in relation to the carriage of goods by sea. Even if the incorporation clause in the bill of lading was adaptable, such a clause was beyond the legal issues regarding the carriage of goods, which was meaningless. Apart from it, the incorporation of the arbitration clause was outside the scope of the arbitration under the time charterparty.¹¹²

On the other hand, Judge Huang also adopted Article 95 of the Maritime Code to stress that the incorporation clause under the voyage charterparty was allowed by law. In terms of the time charterparty, the law was left blank. Because the application of the incorporation clause involved a third party, the lack of any privity of contract depended on the specific provisions. Currently, there are no specific provisions in

¹¹² In terms of such an opinion, it is consistent with the decision of the Qingdao Maritime court in the *Shenzhen Cereal Group Co. Ltd. v. Future E.N.E.*

relation to the time charterparty under Chinese law. Consequently, the Maritime Code did not favour the incorporation clause.

In the end, the learned Chinese judge thought that even if it was easy to approve the application of incorporation clauses under English law, the time charterparty incorporation clauses would have been disapproved by English courts. In other words, he was of the opinion that there was a consensus on the time charterparty incorporation clauses under both English law and Chinese law.

4.2.2 Comment

It is easy to make a conclusion from the two preceding cases that Chinese judges hold a different view of recognition of the time charterparty, as opposed to the real meaning. The different recognition in a way derives from the ambiguous translation. After all, the entire Chinese maritime law system is imported. The different understanding gives rise to a direct consequence, which is to deny the application of time charterparty incorporation clauses regardless of general clauses or the arbitration agreement. In this section, this writer has no intention to comment on the correctness of the consequences of judicial decisions, and discussion only addresses the question of whether judges' opinions are persuasive and conclusive.

4.2.2.1 Erroneous Recognition

From the judges' opinions, it is apparent that the recognition of Chinese judges is inconsistent with the actual meaning of a time charterparty in the regime of Chinese maritime law. Without a doubt, a voyage charterparty, a time charterparty and the contract of carriage of goods by sea all fall into the contract of affreightment. However, in China while it is erroneous to treat the voyage charterparty *per se* as the contract of carriage of goods by sea, it is arguable that the voyage charterparty has been excluded from the ambit of the contract of affreightment. According to the

opinions of Chinese judges, the function of the voyage charterparty is to transport cargo. Therefore, it should be regarded as the contract of carriage of goods by sea. By contrast, the purpose of the time charterparty is to rent or lease the vessel for transportation. It should thus be deemed to be a contract of affreightment. But one common example can be used to refute the Chinese judges' opinion. In a F.O.B. contract¹¹³, if a seller and buyer conclude a sale contract to ship cargo five times in five months, the buyer is in charge of the shipment. During the course of the contract, it is a possibility for the buyer to sign a voyage charterparty or a time charterparty depending on the consideration of the buyer. On the assumption that the Chinese judges' opinion is valid, it would mean that the only approach for securing the application of the incorporating arbitration clause is to enter into a voyage charterparty between the F.O.B. buyer and the shipowner; otherwise it is invalid. In this way, it is apparent that the consequence tends to be inconclusive and non-persuasive, because it is enforceable that the F.O.B. buyer might conclude a time charterparty with the shipowner according to its own situation.

4.2.2.2 Inconclusive Applicable Law

In the case of the Maritime Code, Article 95 repeats judicial decisions negating the application of time charterparty incorporation clauses. Even in *Shenzhen Cereals Group Co. Ltd. v. Future E.N.E.*, the Qingdao Maritime Court held that Article 95 was a "specific provision" to determine whether or not the time charterparty incorporation clauses were valid. According to the court's opinion, the bill of lading clauses are invalid if such clauses violate Article 44¹¹⁴ of the Maritime Code. Furthermore, Article 95 as a "specific provision" stipulates the application of incorporation clauses under the voyage charterparty rather than under the time charterparty. As a result, if incorporation clauses are provided in a time charterparty,

¹¹³ F.O.B. means Free on Board under International Commercial Terms 2010.

¹¹⁴ *Shenzhen Cereal Group Co. Ltd. v. Future E.N.E.* (2004) Q.H.F.H.S.C.Z. No. 245. See also Article 44 of the Maritime Code of P.R.C., *supra* note 109.

such clauses are against Article 44 which is null and void. The ground is thus inconclusive.

On the one hand, the question is raised as to which provision in the Maritime Code is violated by incorporation clauses of a time charterparty. Chinese judges have held that if there is no specific provision in the Maritime Code stipulating that incorporation clauses under a time charterparty can be applied, a time charterparty incorporation clauses are bound to contravene the law. However, a fundamental legal principle is overlooked by judges. The “null and void” aspect of the clause must observe and follow the law. If the clause of a contract is not covered by voidable provisions under Chinese law, it is not sufficient to deny the validity of such a clause. On the other hand, the “absence of legal prohibition means freedom” is a legal principle in civil commercial law. Even though the incorporation clause involves privity of contract, such an incorporation clause has been provided before the bill of lading is in the hands of a third party. If a third party has the intention to accept the bill, it can be deduced that he breaks the privity of contract automatically. In this situation, the court has a tendency to violate the freedom of the contract of parties. Also, it is not beneficial to the transfer of a bill of lading. Therefore, on a question of law, this writer thinks there are no adequate legal arguments or relevant law to overrule the validity of incorporation clauses under the time charterparty.

4.2.2.3 Misunderstanding Regarding English Case Law

It is notable that the *dictum* of Judge Huang makes reference to English case law in order to make an authoritative decision. Unfortunately, Chinese judges do not explore the features of a time charterparty and research English case law with regard to time charterparty incorporation clauses carefully, so it is a misunderstanding that time charterparty incorporation clauses are not recognized under English case law. In *The*

Vinson,¹¹⁵ apparently, English judges were in favour of the incorporating arbitration clause under a time charterparty.

In conclusion, whether an arbitration clause of the time charterparty should be prohibited is not only an issue of fact, but also a question of law. In terms of the question of fact, Chinese judges erroneously recognize the features of the time charterparty; in terms of the question of law, the relevant provisions (Articles 44 and 95) in the Maritime Code should not be applied. As a consequence, no matter whether the consequences of the judicial decisions are correct, the grounds are arguable and inconclusive. Nevertheless, till now the application of both an incorporating arbitration clause and general incorporation clauses in the time charterparty field have been absolutely rejected.

4.3 Application Regarding Voyage Charterparties

4.3.1 Affirmation Regarding General Incorporation Clauses

Article 95 of the Maritime Code, which provides “if the clauses of the voyage charterparty are incorporated into the bill of lading, the relevant clauses of the voyage charterparty shall be applied”,¹¹⁶ is different from the three requirements formed in English jurisprudence. In legal practice, judicial decisions usually quote Article 95 as the legal ground for approving incorporation clauses.

In *Hongkong Hongsheng Shipping Ltd. v. Jiuquan Iron & Steel (Group) Co. Ltd.*,¹¹⁷ *Hongkong Hongsheng Shipping Ltd.* as carrier issued a bill of lading stipulating on the face of the bill that the Congenbill 1994 was “to be used with charterparties. All of the

¹¹⁵ *Quark Ltd. v. Chiquita Unifrutti Japan Ltd. and Others (The Vinson)*, QBD (Com Ct), (2005) 677 Lloyd’s Maritime Law Newsletter 1, 26 April 2005.

¹¹⁶ Article 95 of the Maritime Code of P.R.C.

¹¹⁷ *Hongkong Hongsheng Shipping Ltd. v. Jiuquan Iron & Steel (Group) Co. Ltd.* [2006] H.H.F.S.C.Z.D.613.

terms and conditions of charterparties are incorporated. Freight payment as per charterparty.” Later, *Jiuquan Iron & Steel (Group) Co. Ltd.* as a consignee prepared for delivering the goods in the destination port. But *Hongkong Hongsheng Shipping Ltd.* refused to offer the goods on the ground that the freight and demurrage were due. Subsequently, *Hongkong Hongsheng Shipping Ltd.* brought the case into the Shanghai Maritime Court. The court recognized the application of incorporation clauses in the bill of lading in accordance with Article 95, even though there was no explicit parties’ names and the voyage charterparty date in the bill of lading.

In another case--- *Hebei Branch, PICC v. China Shipping Development Co. Ltd.*,¹¹⁸ the Tianjin Maritime Court, like the Shanghai Maritime Court, approved the application of voyage charterparty incorporation clauses in the bill of lading in accordance with Article 95.

It can be seen that the application of voyage charterparty incorporation clauses is recognized commonly, in the event that the wording of incorporation in the bill of lading is express.

4.3.2 Strictness Regarding Incorporating Arbitration Clause

In comparison with the relaxed standard for general incorporation clauses, courts are extremely stringent in terms of arbitration clauses, because there is a consensus among judges in that an arbitration agreement, as a collateral clause, cannot be covered by Article 95. In maritime legislation, an issue of the application of the incorporating arbitration clause has been left blank. However, as mentioned earlier, in practice the judicial interpretations of the Supreme Court give effect to a series of legal principles for deciding whether an arbitration clause of the charterparty is valid if it is incorporated in a bill of lading. The consequence of separate interpretations is

¹¹⁸ *Hebei Branch, PICC v. China Shipping Development Co. Ltd.* [2005] J.H.F.S.C.Z.D.141.

the same, which tends to restrict the application of the incorporating arbitration clause.¹¹⁹ Until now, the three interpretations of the Supreme Court are the most authoritative. The following is a summary of the judicial interpretations.

4.3.2.1 Description on the Face

The first interpretation is that the incorporation clause should be written on the face of the bill of lading rather than on the reverse side. This requirement is established in the *Chongqing Xinpei Food Co. Ltd. v. Strength Shipping Corporation, Liberia*.¹²⁰ In this case, the claimant (appellee), *Chongqing Xinpei Food Co. Ltd.*, held a bill of lading issued by the agent on behalf of the master of the vessel *Oinoussian Strength* belonging to the defendant (appellant), *Strength Shipping Corporation, Liberia*. On the face of the bill of lading, it was provided that “bill of lading to be used with charterparties”, “charterparty dated 30 March, 2004” and “for conditions of carriage see overleaf”. On the reverse, it was stated that “[A]ll terms and condition, liberties and exceptions of the Charter Party, dated as overleaf, including the law and arbitration clause, are herewith incorporated”.

¹¹⁹ In fact, an old interpretation of the Supreme Court was in favour of the validity of the incorporating arbitration clause. In the F.H. [1995] No.135, the decision of the Supreme Court on the *Fujian Productive Material Group Co. Ltd. v. Golden Pigeon Shipping Co. Ltd.* case was that although *Fujian Productive Material Group Co. Ltd.* was not a party to the charterparty or the contract of carriage of goods by sea, the bill of lading issued by the carrier, which was incorporated into the charterparty arbitration clause was upheld. The judge expressed clearly that he would like to accept the incorporating arbitration clause. It was therefore binding on the carrier and the holder of the bill of lading. This is the single interpretation of the Supreme court allowing the application of the incorporating arbitration clause until now. However, the facts and surrounding circumstances were not disclosed by the Supreme Court. Also, it is an old decision in comparison with the short history of maritime law in China. In the writer’s view, even if the interpretation is still in force, in practice it has been replaced by the latest interpretations.

¹²⁰ *Chongqing Xinpei Food Co. Ltd. v. Strength Shipping Corporation, Liberia*, [2006] M.S.T.Z.D. No.26. In this case, the Wuhan Maritime Court was the court of first instance, the Hubei Higher Court was the appeal court. According to Article 1 of the Notice of the Supreme Court in Relation to the Relevant Issues on Disposal of the International Arbitration and Arbitrational Items (F.F. [1995] No.18), the Hubei Higher Court submitted the decision to the Supreme Court. See also, *supra*, note 111.

The first trial court, the Wuhan Maritime Court held that the shipowner, *Granax S.A.* and *Cargill International S.A.* concluded a voyage charterparty on 30, March, 2004 containing an arbitration clause. Such an arbitration clause was incorporated effectively into the bill of lading, which was held and accepted by *Chongqing Xinpei Food Co. Ltd.* For this reason, such a clause was binding on *Chongqing Xinpei Food Co. Ltd.* Nevertheless, the voyage charterparty was concluded in Switzerland. According to Chinese law, the prerequisite of the voyage charterparty constituting effective evidence was to be proved by the local notary public office. *Strength Shipping Corporation, Liberia*, however, submitted a British notary document to prove the validity of the voyage charterparty rather than a Swiss notary document, which conflicted with Chinese law. Accordingly, the claim of authenticity of the voyage charterparty was rejected. Furthermore, the authenticity of the arbitration clause under the charterparty was disapproved.

It is notable that the Supreme Court upheld the Wuhan Maritime Court decision, but overruled the opinion on effective incorporation. The Supreme Court stated that the incorporating arbitration clause was stipulated on the reverse of the bill of lading instead of on the face. In this way, such a clause was not considered to be incorporated into the bill of lading.

4.3.2.2 Express Incorporating Arbitration Clause on the Face

The second interpretation is established in the *Dalian Branch, Ping An Property & Casualty Insurance Company of China Ltd. v. COSCO Shipping Co.,Ltd. and Guangzhou Ocean Shipping Co.,Ltd.*,¹²¹ which stipulated that the bill of lading on the

¹²¹ *Dalian Branch, Ping An Property & Casualty Insurance Company of China Ltd. v. COSCO Shipping Co.,Ltd. and Guangzhou Ocean Shipping Co.,Ltd.* [2006] M.S.T.Z.No. 49. In this case, the Wuhan Maritime Court was the court of first instance. According to Article 1 of the Notice of the Supreme Court in Relation to the Relevant Issues on Disposal of the International Arbitration and Arbitrational Items (F.F. [1995] No.18), after the Wuhan Maritime Court made a decision, the decision

face must provide expressly that the charterparty arbitration clause was incorporated into the bill of lading. The general incorporation clauses on the front of the bill of lading could not bring about the effective incorporating arbitration clause.

The facts of the case was that the defendant *COSCO Shipping Co., Ltd.* and the charterer (shipper) *ICEC Limited Gibraltar* concluded a voyage charterparty (Gencon Charterparty) on 19 April, 2004 stipulating that the vessel *SongShan* owned by *COSCO Shipping Co., Ltd.* and operated by *Guangzhou Ocean Shipping Co., Ltd.* shipped sulfur from Qatar to Nantong Port in China. The arbitration clause was subsumed in Article 66 under the voyage charterparty. The Gencon Charterparty bill of lading issued by Bery Maritime as the agent of the master was Congenbill edition 1994. On the face the Congenbill provided “[A]ll terms, conditions and exceptions of charterparty on 19 April, 2004 are incorporated into the bill”. In addition, Clause 1 of the reverse stated “[A]ll terms and conditions of the charterparty marked on the front face, including exceptions, governing law and arbitration clause, are herewith all incorporated into the bill”. After the *SongShan* arrived at the discharge of port, the consignee found out that the goods were polluted in transit. Afterwards, the claimant *Dalian Branch, Ping An Property & Casualty Insurance Company of China Ltd.* compensated the consignee’s damage according to the marine insurance contract, and then became subrogated. When the claimant contended subrogation in the Wuhan Maritime Court, the two defendants requested a stay of proceedings on the basis of the incorporating arbitration clause.

The Wuhan Maritime Court held that the bill of lading should be marked on the face with an express incorporating arbitration clause, in the event that such a clause was binding on the bill of lading holder. Because there was no incorporating arbitration

was submitted to the Hubei Higher court, and then the Hubei Higher court requested instruction from the Supreme Court. See also, *supra*, note 111.

clause on the face of the bill, the arbitration clause on the reverse could not be applied. Accordingly, the court had jurisdiction over this case.

Subsequently, the Wuhan Maritime Court submitted the case to the Hubei Higher Court in accordance with Article 1 of the Notice of the Supreme Court in Relation to the Relevant Issues on Disposal of the International Arbitration and Arbitrational Items (F.F. [1995] No.18)¹²². The Hubei Higher Court agreed with the decision of the Wuhan Maritime Court. The major four grounds which were different from those of the lower court were set out.

First of all, an incorporating arbitration clause was unfair to the claimant. Obviously, where the shipper and the carrier reached the contract of carriage of goods, the shipper did not contemplate the arbitration clause, because it would transfer the bill of lading to a third party. Such a clause was therefore merely favorable to the carrier against the third party. Secondly, Article 95 of the Maritime Code¹²³ worked in favour of the validity of incorporation clause; however, whether an incorporating arbitration clause could be subject to it was not clear. Thirdly, it was unfair for the bill of lading holder to recognize the arbitration clause drafted by the carrier, unless a clear and explicit statement was on the face. Finally, it was improper to impose the incorporating arbitration clause on the underwriter. It is rather interesting that, other than the preceding grounds, another important reason was listed individually, which was to prevent the loss of state capital. Because both the claimant and the defendant were Chinese state-companies, the court opined that it would bring about the loss of state interest, once two Chinese state-companies sought to resolve their dispute through international arbitration.

¹²² See *supra*, note 111.

¹²³ Article 95 of the Maritime Code provides that “if the clauses of the voyage charterparty are incorporated into the bill of lading, the relevant clauses of the voyage charterparty shall apply.”

Again, in accordance with Article 1 of the Notice of the Supreme Court in Relation to the Relevant Issues on Disposal of the International Arbitration and Arbitrational Items (F.F. [1995] No.18), the Hubei Higher Court submitted the foregoing decisions of two courts to the Supreme Court. The decision and the interpretation of the Supreme Court is quite brief. It held that “[A]ll terms, conditions and exceptions of charterparty on 19 April, 2004 are incorporated into the bill”. On the face of the bill there was no express provision for an arbitration clause. The incorporating arbitration clause in a standard form was only stated on the reverse side. Hence, it was null and void.

4.3.2.3 Explicit Parties and Date of Charterparty on the Face

The third interpretation in comparison with the foregoing requirements is more similar to the requirement under English case law, which is that the parties and the date of the incorporated charterparty must be marked on the front of the bill of lading. In *Dongguan Branch, China Pacific Property Insurance Co., Ltd. v. Sunslide Maritime Ltd., Ocean Freighters Ltd. and the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited*¹²⁴, the relevant bill of lading on the front stated that “[A]ll terms (including arbitration clause) conditions as incorporated herein as if fully written, anything to the contrary contained in this bill of lading notwithstanding”. The defendant *Sunslide Maritime Ltd.*, offered a voyage charterparty (Baltimore Form C) on 22 June, 2006, signed by the shipper *Agricore United* and a outsider *Sinotrans (Bermuda) Ltd.* In this charterparty, the arbitration clause was clear and precise. However, the vessel *Pontovremon* involved in the voyage charterparty was owned by the defendant *Sunslide Maritime Ltd.* and operated by *Ocean Freighters Ltd.* The two defendants were both irrelevant to the preceding voyage charterparty. The claimant thus contended the involvement of the other

¹²⁴ *Dongguan Branch, China Pacific Property Insurance Co., Ltd. v. Sunslide Maritime Ltd., Ocean Freighters Ltd. and the United Kingdom Mutual steam Ship Assurance Association (Bermuda) Limited*, [2008] M.S.T.Z.No. 50.

charterparty relating to the vessel *Pontovremon*. In the context of several charterparties, the bill of lading did not show the parties to the charterparty and the date signed. As a result, the voyage charterparty submitted by the defendants could not be incorporated into the bill of lading.

The Supreme Court was in favour of the claimant's contention and held that the bill of lading was the standard form under a charterparty. Although the front of the bill stated that the charterparty arbitration clause was incorporated into the bill, the names of the parties to the charterparty and the date of signature was not expressed clearly. For this reason, the incorporated charterparty could not be identified. Correspondingly, the incorporating arbitration clause was not binding on the parties.

4.3.2.4 Intention of the Holder

Apart from the preceding three interpretations, the fourth requirement is advanced through the *dictum* in the *Tianjin Iron & Steel Group Co., Ltd., Tianjin Branch, PICC v. Niagara Maritime S.A.* of Judge Huang who stated that the fourth rule was that both the incorporated charterparties and the bill of lading should be disclosed to the bill of lading holder.¹²⁵ In other words, after the bill of lading holder should have known the dispute resolution clause under the charterparty, there was an intention to accept the bill of lading.

4.3.2.5 Discretion of Judges

In addition to the preceding three interpretations and one *dictum* of the Supreme Court, other principles derive from the discretion of judges.¹²⁶

¹²⁵ *Supra*, note 106.

¹²⁶ As a matter of fact, because the two judicial decisions were not submitted to the Higher Court and the Supreme Court, they violated the procedural law leading to the invalidity. However, the grounds in the two judicial decisions show the common attitude towards an incorporating arbitration clause among Chinese judges. See also, *supra*, note 111.

This first principle was established in *He De (Group) Co. Ltd. v. Cherry Valley Shipping Co. Ltd.*¹²⁷ The Guangzhou Maritime Court held that an arbitration clause incorporated into a bill of lading is merely an *ad hoc* arbitration between a shipowner and a charterer. Such an incorporating arbitration clause did not provide how the bill of lading holder could appoint an arbitrator, which gives rise to be unenforceable in practice. The Guangdong Higher Court, as an appeal court, approved the principle.

Another principle is in relation to knowledge of the bill of lading holder. As mentioned above, the fourth requirement is that the incorporated charterparty should be disclosed to the bill of lading holder. But this requirement does not mention as to whether the bill of lading holder accepts the bill of lading represents that he has known the incorporating arbitration clause. Therefore, in legal practice, this requirement maintains a stricter standard among judicial decisions. For instance, in the *Chongqing Xinpei Food Co. Ltd. v. Strength Shipping Corporation, Liberia*, where the Hubei Higher Court submitted the opinions to the Supreme Court, there was one opinion which stressed that the bill of lading holder did not accept the arbitration clause expressly. Therefore, the arbitration clause was not binding on the holder. According to this principle, the party who claimed the application of the incorporating arbitration clause should bear the burden of proof with regard to the express acceptance of the bill of lading holder.

Apparently, even though the two principles do not constitute formal interpretations on the ground of the procedural defect, there is no exception to denying the validity of an incorporating arbitration clause.

¹²⁷ *He De (Group) Co. Ltd. v. Cherry Valley Shipping Co. Ltd.* (the Guangzhou Maritime Court on 20 September, 2000. The appeal court was the Guangdong Higher Court.); see also Lixin Han, Jinle Zhang and Jun Yan, “ A Study on the Validity of Incorporating Arbitration Clauses in Charterparties into Bills of Lading Under Chinese Law”, *Journal of International Maritime Law*, Volume 17, 2011, at p.230.

4.3.3 Comment

There is a broad consensus among judicial interpretations of the Supreme Court and judicial decisions of lower courts that an incorporating arbitration clause should be null and void without reference to explicit wordings. Even though certain interpretations, such as, the requirement of parties' names and the charterparty's date in the bill of lading, is consistent with English law, others are inconsistent. For instance, it is not emphasized under English law that the explicit arbitration clause must be provided on the face of the bill of lading, but Chinese law requires that an incorporating arbitration clause must be expressed on the face of the bill of lading.

According to the *dictum* and the specific background of cases, this writer is of the opinion that there are two main reasons with regard to stricter requirements in China. The first reason is to seek to protect the Chinese party. There is a general awareness that the location of arbitration is an international forum and the governing law is foreign law against a Chinese party. Furthermore, the application of international arbitration is deemed to discard judicial sovereignty. Another reason is that stated in *Dalian Branch, Ping An Property & Casualty Insurance Company of China Ltd. v. COSCO Shipping Co.,Ltd. and Guangzhou Ocean Shipping Co. Ltd.*¹²⁸ Where two parties in the same case are both Chinese companies; and especially, where they are Chinese state-companies, there is no doubt that choosing international arbitration will result in the loss of state capital. In Chinese courts, the loss of state capital is a sensitive argument used by two parties. As a consequence, in this writer's view, Chinese judges have a tendency to reject the application of an incorporating arbitration clause in order to protect the Chinese party and avoid the loss of state capital.

¹²⁸ See *Dalian Branch, Ping An Property & Casualty Insurance Company of China Ltd. v. COSCO Shipping Co.,Ltd. and Guangzhou Ocean Shipping Co.,Ltd.* [2006] M.S.T.Z.No. 49.

5. PROPOSITIONS REGARDING APPLICATION OF INCORPORATING ARBITRATION CLAUSE IN CHINA

5.1 English law as Example

There is no doubt that English case law is well-established through a large number of cases as mentioned. As a matter of fact, it is well-known that English law has sophisticated maritime case law and a high reputation in the maritime field. It is even the foundation of the maritime domain around the world, and London is the centre of arbitration and litigation for resolving disputes. Furthermore, currently, harmonization and unification of transnational commercial maritime law are strongly advocated by legal scholars.¹²⁹ Chinese maritime legislation as a developing regime should thus learn from English law rather than distancing itself from the centre of shipping law. As far as the incorporating arbitration clause is concerned, there are three aspects in which Chinese legislation can be improved turning to English case law.

The first aspect is that Chinese maritime legislation should clarify and unify some basic legal terms according to English law, such as the time charterparty and the contract of affreightment. As stated in earlier chapters, the meanings of some legal terms under Chinese law are different from the real meaning in English, which leads to erroneous understanding of the time charterparty incorporation clauses. In order to link with the world maritime domain, Chinese maritime legislation needs to approve the application of the time charterparty incorporation clauses.

¹²⁹ Fan Wei, *The Measurement of Damages in Carriage of Goods by Sea—A Comparative Study of English and Chinese Law With a View to Possible Revisions of The Chinese Maritime Code and Other Legislation*, England: University of Exeter, 2008, at p.68. See also, M.F.Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea* (1995) 26 JMLC at pp. 553, 556-559; M.A.Clarke, *The Transport of Goods in Europe: Patterns and Problems of Uniform Law* (1999) LMCLQ at p. 36,39; Myburgh, P. *Uniformity or Unilateralism in the Law of Carriage of Goods by Sea* (2000) 31 VUWLR 355.

The second aspect is that Chinese courts should correct the recognition in relation to the international arbitration and litigation and be aware of the fact that international arbitration and litigation are good options for parties in maritime disputes. Even though Chinese courts are entitled to hear a case to decide a forum, it is not advocated that an international forum be excluded on the basis of protecting domestic interests. China's growing economy ought to be in line with the high reputation of judicial efficiency and integrity. In the event that Chinese judicial decisions have a tendency to deny the application of the incorporating arbitration clause, international companies will worry about a fair judicial decision in China. In this way, there is a possibility that foreign companies will reduce cooperation with their Chinese counter-parts, which is not favorable for developing international trade in China. Chinese courts should prioritize fairness and justice instead of domestic interests.

The third aspect is in relation to the requirements of application. As seen from above, both English and Chinese cases focus highly on whether or not an incorporating arbitration clause is explicit and is recognized by two parties according to the features of an arbitration agreement. However, the interpretations of Chinese courts seem to be too stringent in not giving adequate recognition to arbitration agreements in comparison with English courts. For example, in *Dalian Branch, Ping An Property & Casualty Insurance Company of China Ltd. v. COSCO Shipping Co.,Ltd. and Guangzhou Ocean Shipping Co.,Ltd.*, the face of the bill of lading provided "to be used with charterparty" and the charterparty's date; the reverse side stated expressly, "[A]ll terms and conditions of the charterparty marked on the front face, including exceptions, governing law and arbitration clause, are herewith all incorporated into the bill". It was apparent that the charterparty arbitration clause was explicitly incorporated into the bill of lading. Yet, according to the judicial interpretation of the Supreme Court, it was not adequate, unless the face was also marked with the arbitration clause. This writer is of the opinion that English cases have made several

proper requirements with regard to the application of an incorporating arbitration clause for more than 100 years, which is sufficient for use in Chinese maritime practice. More importantly, English requirements and principles are more persuasive compared with harsh Chinese approaches. Therefore, effective words, description and consistency, should be incorporated into Chinese law. In addition to the fundamental three requirements, some specific standards, such as “verbal manipulation”, should be applied simultaneously.

It cannot be denied that English law is not perfect. For example, the identified charterparty issue is still open to discussion. Also, the Chinese legal system is different from the English legal system and needs to establish specific requirements combined with Chinese characteristics. For instance, English law does not emphasize the applicable law because the source of law is a combination of statute law and judge-made law. By contrast, China is a statute law country and relevant provisions of law are needed to negate the application of an incorporating arbitration clause. Therefore, where English law is regarded as an example, Chinese legislation ought to delve into some solutions for unresolved issues according to the surrounding circumstances. Nevertheless, the goal of such solutions is to examine whether the incorporating arbitration clause is compatible with three fundamental requirements. In the next section, several solutions will be explored while it is difficult to ensure whether an incorporating arbitration clause is explicit.

5.2 Solution under Chinese Maritime Legislation

Prior to discussing the solution, it is necessary to clarify that Article 95 of the Maritime Code cannot be regarded as the applicable law to deny the application and validity of an incorporating arbitration clause. Even though this provision only refers to the application of incorporation clauses, it does not exclude the application of the arbitration clause and does not deny the validity of the arbitration. Article 95 is thus

not relevant to the application and validity of the arbitration clause. Currently, there is no direct provision relating to the application of the arbitration clause. Hence, whether an incorporating arbitration clause of a charterparty is valid and applied only in connection with the two normal elements in China, namely, the question of fact and law. As far as the solution is concerned, the scope of discussion is restricted to disputes arising from ambiguous issues, because such issues pose the real question of whether or not an incorporating arbitration clause can be applied.

5.2.1 Question of Fact

As mentioned above, whereas the arguable fact among parties to the bill of lading is frequently relevant to the issue of an ambiguous incorporating arbitration clause, the object here is to explore how the ambiguity is to be resolved. The ambiguous clause should be addressed by using the rules of contract interpretation. Furthermore, there is no fundamental difference between interpretation of maritime contracts and interpretation of any other kind of contracts.¹³⁰ The following discussion contains the basic legal principles of the law of contract.

In addition, prior to researching ambiguous clauses, it is necessary to understand the concept of ambiguity. In *Black's Law Dictionary*, the definition of ambiguity is relatively simple, which is “an uncertainty of meaning or intention, as in a contractual term or statutory provision.”¹³¹ In practice, there are many similar explanations English judges have made, and one of them is by Priestley J.A. in *Burns Philip Hardwar Ltd. v. Howard China Pty Ltd.*, which is that words are ambiguous if they have:

¹³⁰ Lord Staughton, “Interpretation of Maritime Contracts”, *Journal of Maritime Law and Commerce*, Vol. 26, No.2, April, 1995, at p. 259.

¹³¹ *Supra*, note 6, at p. 249.

... two or more plausible meanings when the context of the document is taken into account in the light of any knowledge any ordinary intelligent reader of the document would bring to the meaning of it.¹³²

Determining ambiguity may be subjective and dependent on a person's understanding of what the clause purports to express.

5.2.1.1 Charterparty Signed Carrier

The paramount requirement pertaining to the application of the clause should be the intention of the parties to a contract. In disputes regarding incorporating arbitration clauses, regardless of the position of the two parties, a shipowner, a shipper, a consignee or even an underwriter, the fundamental legal relationship based on the bill of lading contract is the relationship between the carrier and the bill of lading holder. The subject matter of the contract is the cargo. Accordingly, there are two possible approaches to the determination of the applicable charterparty. One approach is to identify the charterparty closest to the cargo, namely which charterparty is directly relevant to the cargo. Another approach is to identify the carrier's charterparty, namely, which charterparty is signed by the carrier. The latter approach is compatible with the nature of incorporation clauses. It is emphasized repeatedly above that there is consensus between a shipowner and a charterer regarding incorporation clauses. No matter who is the carrier, the shipowner or the charterer, the intention is to apply the signed charterparty rather than others. Once the holder accepts the bill of lading, he is entitled to identify the carrier and the corresponding charterparty. In the case of negligence of the holder, he has neither the right nor obligation to identify the charterparty. Inevitably, the holder is liable for the negligence.

¹³² *Burns Philip Hardwar Ltd. v. Howard China Pty Ltd.* [1987] 8 N.S.W.L.R.642. See also, Kim Lewison, " *The Interpretation of Contracts*", London: Sweet & Maxwell, 2007, at pp.299-300. And, *supra* note 11, at pp.91-93, where other cases are cited in support of this explanation of ambiguity.

It is noteworthy that Lord Denning MR in *The San Nicholas* held “[T]he head charterparty was the only one to which the defendants were party.”¹³³ Hence the conclusion is that the head charterparty in a string ought to be identified. The opinion of Denning MR is premised on the charterparty signed by the carrier. On the ground that in a string of voyage charterparties, there is in effect no exception that the shipowner is the carrier, the head charterparty signed by the carrier is regarded as the properly identified charterparty.

5.2.1.2 Intention of Parties

Where a charterparty is signed by the carrier and a third party becomes the holder of the bill of lading, the real intention of the parties must be determined regarding the application of the arbitration clause. For example, in *The SLS Everest*,¹³⁴ the claimant voyage chartered with *Drumplace Ltd.* which entered into a time charterparty with the shipowner. The master on behalf of the shipowner signed a bill of lading to the claimant. The bill of lading stated that “Freight and other conditions as per ____ including the exoneration clause.” In this situation, according to the first solution, the time charterparty ought to be regarded as the identified charterparty on the ground that the shipowner is the carrier. But it is evident from the entire facts, that the claimant signed a voyage charterparty and held a bill of lading stating “freight” rather than “hire”. According to common sense, what the arbitration clause of the voyage charterparty attempts to incorporate into the bill of lading is compatible with the real intention of the parties. In this way, the first solution makes no sense.

On the assumption that the claimant is a single holder of a bill of lading with “freight” and is not one of the parties to a voyage charterparty in *The SLS Everest*, the incorporated charterparty should have been identified through the carrier rather than

¹³³ *The San Nicholas* [1976] 1 Lloyd’s Rep 8 (CA (Civ Div)).

¹³⁴ *The SLS Everest* [1981] 2 Lloyd’s Rep 389.

the “freight”. As mentioned earlier, certain voyage bills, such as Congenbill, used commonly is not restricted in a voyage charterparty. At times they are also used in a time charterparty. Under these circumstances, the obligation of the holder to identify the proper charterparty should be stressed. In the event that the bill of lading holder proves that the carrier does not perform the obligation to disclose the incorporated charterparty, the carrier should take responsibility for the consequences.

5.2.1.3 *Contra Proferentem*

The basic concept of the *contra proferentem* rule is where there is a doubt about the meaning of a contract, the words will be construed against the person who put them forward.¹³⁵ Such a legal principle is approved by both English law and Chinese law¹³⁶. It is not always clear in incorporation clauses as to who is regarded as the provider of the contract. One party to the bill of lading, namely, the carrier, is clear; another party who is the bill of lading holder is unidentified and it could be the shipper, the consignee or the underwriter. Where the dispute involves the carrier and the consignee or the underwriter, it is obvious that the carrier should be deemed to be the provider, because the consignee is not a party to the incorporated charterparty and also does not participate in the negotiation of the bill of lading. By contrast, where the dispute arises from the carrier and the shipper, it is uncertain whether the carrier is the provider, because the shipper who might be one party to the contract of goods by sea is entitled to refer to the clause in the bill of lading. Under such a circumstance, the approach to identifying the provider should rely on the surrounding circumstances. The shipper is even regarded as the provider, in the event that he is predominant in the contract.

¹³⁵ *Supra*, note 131, Kim Lewison, at p.260.

¹³⁶ See Article 41 of Contract Law of P.R.C. The general interpretation should be applicable in the context of the disputes for a standard form. In the event of that there are two or more interpretations as to a standard form, the interpretation should be against the provider.

5.2.1.4 Summary

There is no priority among the preceding solutions. Which solution should be applied is dependent on the specific situation. However, in a particular situation, the application of different solutions might give rise to controversy. Or, there is no best solution to be chosen. Once this happens, the simplest way would be to make use of common sense. After a normal person reads the entire bill of lading carefully, the first viewpoint will be the most proper interpretation.

5.2.2 Question of Law¹³⁷

In effect, the interpretation of the issue of fact emanates from the legal principles and embraces the applicable law. But the question of law here is to explore the provisions of the arbitration law. More exactly, in the event that the incorporating arbitration clause is identified and explicit, whether such a clause is valid under the arbitration law is the issue.

In terms of the form of an arbitration agreement, China is a party to the New York Convention and the UNCITRAL Model Law. The basic provisions and rules in domestic legislation are consistent with the international conventions. Article 16.1 of the Arbitration Law of the People's Republic of China (hereinafter referred to as the Arbitration Law) enacted on 1 September, 1995 provides that "an arbitration agreement shall include the arbitration clauses provided in the contract and any other

¹³⁷ Under English law, maritime arbitration is governed by the Arbitration Act 1996. According to Section 6(2) of the Arbitration Act 1996, it is stated that "The reference in an agreement to a written form of arbitration clause or to a document obtaining an arbitration clause constitutes an arbitration agreement if the reference is such as to make the clause part of the agreement." it is a broad standard to embrace the incorporation of industry-standard terms as well as terms from one contract into another. There is no statutory requirement that there be express reference to the arbitration agreement when industry-standard terms are incorporated.(see *supra*, note 25, at p.154) But in English case law, legislation is not highly emphasized. By contrast, legislation is absolutely important for Chinese judges. Therefore, only the question of law under Chinese law is discussed.

written form of agreement...”¹³⁸ Subsequently, Article 1 of the Interpretation of the Supreme Court Concerning Some Issues on the Application of the Arbitration Law (hereinafter referred to as the Interpretation of the Arbitration Law) enacted on 8 September,2006 stipulates the explicit content of “any other written form” under Article 16.1, which embraces “written contract, letters, data and telegram (including telex, telegram, fax message, electronic data exchange and email).” Furthermore, Article 11 of the Interpretation states as follows:

Where the contract provides that the valid arbitration clause of another contract or document shall apply when the contract dispute arises, the parties shall apply for arbitration based on such arbitration clause.¹³⁹

Therefore, once an incorporating arbitration clause under a charterparty is identified, the form of such a clause is legal and valid.

In terms of the substantial requirement, Article 16.2 of the Arbitration Law states that the content of the arbitration agreement shall contain: an express intention to require arbitration for disputes; the matters for arbitration; and the appointed arbitration committee.¹⁴⁰In practice, different judges and scholars have a different understanding of the preceding contents. For example, what is the scope of matters under the Arbitration Law? Article 2 of the Interpretation of the Arbitration Law provides a clear answer, which is “where the parties stipulate generally that the disputes arising from the contract are the matters for arbitration, all disputes arising from or out of the formation, validity, amendment, transfer, performance, breach of duty, interpretation,

¹³⁸ See Article 16, the Arbitration Law of P.R.C.

¹³⁹ See Article 1 and 11, the Interpretation of the Supreme Court Concerning Some Issues on the Application of the Arbitration Law.

¹⁴⁰ See Article 16, the Arbitration Law of P.R.C.

termination of the contract are recognized by arbitration.”¹⁴¹ On the ground of this provision, even if a charterparty arbitration clause states all disputes in connection with the bill of lading can be resolved through arbitration, the clause is valid. In addition, there is a broad option relating to the arbitration committee. In fact, as long as an arbitration committee may be identified through the arbitration agreement, such an agreement is approved in the context of the incomplete name of the arbitration committee.¹⁴²

As seen above, the arbitration legislation in China is broad. Basically, where the charterparty arbitration clause is incorporated into the bill of lading, there is no doubt that such a clause should be valid.

6. CONCLUSION

6.1 Summary under English Law and Chinese Law

As far as English law is concerned, even though the requirements of an incorporating arbitration clause are more stringent than those of general incorporation clauses, the application of such a clause can be approved by English judges in the context of the specific words and proper verbal manipulation. Apart from it, the persuasive requirements concluded for more than 100 years are well-established. However, the particular question is still at issue. For instance, it is debatable as to which approach is the most reasonable for identifying the charterparty. Even though several leading cases, such as, *The San Nicholas* and *The SLS Everest*, have come to a conclusion, the discussion is still open in maritime practice.

¹⁴¹ See Article 2, the Interpretation of the Arbitration Law.

¹⁴² Article 3 of the Interpretation of the Arbitration Law provides that where the name of the arbitration committee is inaccurate, but the committee can be identified, it shall be regarded as the committee appointed.

As far as Chinese law is concerned, the issue is relatively complicated. On the one hand, time and voyage charterparties are separated, which gives rise to the definite invalidity of an incorporating arbitration clause under a time charterparty. On the other hand, even though there is no prohibition on an incorporating arbitration clause under a voyage charterparty and also the arbitration law is of broad application regarding the form and substance of arbitration agreement, Chinese judges in practice entertain a conservative and cautious attitude towards the application and validity of such an clause, so that the judicial interpretations of the Supreme Court have established several harsh rules to avoid its validity. The judicial decisions and relevant *dicta* are inconclusive.

Without a doubt, the requirements under English law are more authoritative and persuasive. There is no reason to refuse to learn from English law. Certainly, as far as a debatable issue is concerned, Chinese judges need to create appropriate requirements in light of a specific situation. However, the prerequisite is to recognize enforceability in relation to the incorporation of the charterparty arbitration clauses. Otherwise, the process of trial will be reversed. Prior to rendering a decision, Chinese courts have determined to deny the application of such a clause. In this situation, the courts will endeavor to create a requirement to negate such a clause rather than hear the case objectively.

6.2 Conclusion

As mentioned earlier, the application of the law relating to incorporation of arbitration clauses is not consistent among different jurisdictions. While courts in Singapore and New South Wales have followed the practice adopted by English courts, courts in Canada, Hong Kong, Bermuda, Switzerland and the United States still adhere to the position that general words of incorporation may suffice as long as the words of

incorporation are adequately clear and a proper charterparty can be identified.¹⁴³ The present situation is that even though most developed jurisdictions have recognized and improved the rules relating to the incorporation of arbitration clauses, they are not unified.

In this situation, a uniform rule should be applied in order to the development of the world shipping industry. Currently, the Rotterdam Rules signed in September 2009 is expected to unify the rules, even though it has not yet entered into force. Article 76(2) of the Rotterdam Rules provides that –

Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:

- (a) Identifies the parties to and the date of the charterparty or other contract excluded from the application of this Convention by the reason of the application of article 6; and
- (b) Incorporates by specific reference the clause in the charterparty or other contract that contains the terms of the arbitration agreement.¹⁴⁴

¹⁴³ *Supra*, note 25, at pp.161-162.

¹⁴⁴ Article 7 provides that “notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charterparty or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6”. Article 6 provides that “1. This Convention does not apply to the following contracts in liner transportation: (a) Charterparties; and (b) Other contracts for the use of a ship or of any space thereon. 2. This Convention does not apply to contracts of carriage in non-liner transportation except when: (a) There is no charterparty or other contract between the parties for the use of a ship or of any space thereon; and (b) A transport document or an electronic transport record is issued”.

The intention of this provision clearly show that the application of the incorporation of an arbitration clause under a charterparty is acceptable and recognized in the shipping industry. Also, this provision sets out two uniform rules as to the application. The first rule is that the parties to the charterparty and its date must be identified. The implied wording is that in the event that the parties' names and the date of a charterparty are left blank in the bill of lading, the charterparty arbitration clause will not be applied. Furthermore, the name and the date are in conjunction with one another. However, the leading rule established by English case law is that the head voyage charterparty prevails in the absence of the names of parties and date of the charterparty. Notably, this rule cannot be applied anymore, if the Rotterdam Rules becomes law. Another new rule is that the arbitration clause must be incorporated expressly. Equally, the wording implies that the general words as to the incorporation of an arbitration clause are not applied. Correspondingly, some jurisdictions which have adopted general words need to revise the principle once the Rotterdam Rules enter into force.

It would appear that the fundamental intention of the Rotterdam Rules is to establish and unify the issue of recognition relating to the possibility of the application of charterparty arbitration clauses through an incorporation clause. Furthermore, the relevant provision refers to two requirements regarding the identification of a charterparty: identified date and parties' names; and specific words.¹⁴⁵ The prospects of the Rotterdam Rules becoming law are not clear and therefore the incorporation of an arbitration clause will continue to be recognized.¹⁴⁶

¹⁴⁵ See Article 76 (2) of the Rotterdam Rules.

¹⁴⁶ The above contentions are based on the premise that the Rotterdam Rules will enter into force at some point. However, the present state of ratification does not indicate that this is likely to happen anytime soon, if at all.

In conclusion, the incorporation of arbitration clauses has a long history, which is accepted in most jurisdictions, even though the application of such a clause is still at issue. The Rotterdam Rules provides specific requirements arrived at providing unification, however, owing to the unclear prospects of the Rules, the requirements of the application regarding the incorporating arbitration clause will remain open to discussion. In terms of China, even if the cautious attitude towards the incorporation of arbitration clauses continues, the requirements should to some degree reduce the standard so as to keep compatibility with most other jurisdictions.

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