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Incorporation of Arbitration Clauses: Dubai's 'onshore & offshore' perspectives

Usually, the arbitration agreement is contained in the main body of a contract with a binding effect exclusively limited to the signatories. Today however, the complexity of contractual frameworks may raise the question of extending the arbitration clause to non-signatories so reference is made to an arbitration clause covering disputes under that charter party

The usefulness of incorporation by reference

Frequently, when commodities are shipped requiring the full capacity of a single ship, the CIF seller or the FOB buyer will charter a ship. In addition, if the charterer wishes to sell the goods afloat in transit, it systematically prepares the bill of lading and arranges for the master to sign it on behalf of the ship owner. When the bill of lading is transferred to a subsequent buyer in due course, it becomes conclusive evidence of the terms of carriage and

an independent contract binding on the transferee and the ship owner as carrier. This is to ensure that the ship owner's liability to a subsequent third party transferee as carrier remains the same, as its liability to the charterer and is not extended by the issuance of one or several bills of lading. It is common practice that the ship owner inserts a reference clause in the bill of lading. Such a clause will bring the charter party's arbitration clause into the bill of lading to bind any subsequent third party transferee.

The validity of arbitration clause incorporated by reference

Since the basis for an arbitration procedure is a valid arbitration agreement, the non-charterer third party must be shown to have agreed to arbitration as stated by Article II(2) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Such agreement should be evidenced for example in writing or by the parties' signatures on the bill of lading contract. However, it





- a) When a national court is called upon to recognize the arbitration agreement to compel him to arbitrate a dispute and/or
- b) When the court is requested to enforce an arbitral award against him, on the grounds that the arbitration agreement does not fulfill the form requirement of Article II (2) of the New York Convention pursuant to their Articles II(3) and V.

Therefore, the incorporation by reference of a charter party's arbitration clause in a bill of lading, which is transferred to a non-charterer third party, are likely to be a source for disputes relating to the enforceability of the arbitration agreement against the non-charterer third party.

Dubai's legal approach

The examination of this subject in Dubai can be observed through Dubai's two tier legal system. The "on-shore" civil legal system - the Emirate of Dubai is part of the federation of the UAE which is a civil law state having a number of codes which govern various laws. In addition, the Government of the Emirate of Dubai established

several "Free Zones" amongst them the DIFC which is an independent "off-shore" English common law jurisdiction which has its own civil and commercial laws.

The examination of the two approaches in Dubai may well have a practical relevance regarding the common principles to be followed to establish whether a charter party arbitration clause is validly incorporated in a bill of lading and subsequently binding on the transferee. Especially, when we know that international mandatory regimes of carriage of goods by sea such as The Hague and the Hague-Visby Rules implemented in English law by the COGSA 1992 do not contain specific provisions on arbitration of maritime disputes; although, Article 22 of the Hamburg Rules provides for recourse to arbitration issues. It should be noted that the UAE is not a signatory to any of these conventions. Furthermore, since the courts used to treat "maritime" issues as "commercial" matters, thereby placing maritime disputes within the scope of the New York Convention which does not contain specific rules relating to maritime issues.

is not easy to tailor this requirement to the scenario when an arbitration clause contained in another document is incorporated by reference in a transferred bill of lading.

Moreover, the third party transferee usually has no knowledge of the charter party's terms, especially the incorporated arbitration clause. What makes matters more difficult is, rather than making a specific reference to the arbitration clause of the charter party, usually the bill of lading incorporates general wording such as "all terms, conditions, clauses and exemptions" of the charter party. The only way to know the content of these terms is to look at the charter party itself. Consequently, where the incorporation by reference has been specifically made the tacit acceptance of the arbitration clause by a non-charterer third party is considered valid in some jurisdictions. However, in other jurisdictions, a non-charterer third party might challenge the arbitration clause by raising a literal interpretation of Article II(2) of the New York Convention in the two enforcement stages as follows:-



Overview of a ship accident





Dubai's "onshore" perspective

The general rule of incorporation is the "express terms" requirement where specific wording is used. Indeed, in *Al Buhaira National Insurance Co. v. The Shipping Corporation of India Limited* (Cassation No. 363 of 2011, Civil Appeal), the wording of incorporation in the bill of lading stated that: "All terms, conditions and exceptions (including but not limited to Due Diligence, Negligence, Force Majeure, War, Liberties and Arbitration clauses) contained in which charter are herewith incorporated and form part hereof." The court of cassation held that, the above incorporation wording in the bill of lading was sufficiently express to enable the charter party arbitration clause to be validly incorporated by reference although, the names of the parties to the charter party and the date of the charter party were left blank in the bill of lading. In the UK the court took the same reasoning in *The National Navigation Co v. Endesa Generacion SA* (The "Wadi Sudr"). [2009] 1 Lloyd's Rep. 666, where it held that: "it is well-established that where a the bill of lading purports to incorporate a charter, but fails to identify its date or other details of the charter concerned, that is not fatal to the incorporation of the charter if it can otherwise be properly identified." The ruling of Dubai Court of Cassation in *Al Buhaira* case confirmed the principle already derived in its decision Nos. 49 and 96 of 2003 where it affirmed that a charter party arbitration clause can be incorporated into a bill of lading by reference to the charter party, as long as: (a) not only the charter party is incorporated by reference; but (b) the referral of disputes to arbitration as specified in the

relevant charter party clause is also specifically incorporated into the bill of lading.

Dubai's "offshore" perspective

The exception from the general rule of "express terms" requirement was reached by the English court of appeal in *The Merak*, 2 Lloyd's Rep. 527 (C.A.1964). In this case the court of appeal ruled that "general terms" such as "all terms of the charter party" can incorporate the arbitration clause into the bill of lading, provided that: (a) the arbitration clause in the bill of lading is wide enough so that it covers all provisions of the charter party and not only its conditions or exceptions; and (b) the arbitration clause in the charter party by its terms applies both to disputes under the charter party and to disputes under the bill of lading.

In *The Merak* there were two charter parties: a head charter party between the owner and the disponent owner and a sub-charter party between the disponent owner and the charterer, on the same form and in the same terms. Both charter parties stated that the bills of lading to be issued should incorporate: "all the terms, conditions, clauses (including clause 32) ... as per this charter." The incorporation clause in the bills of lading stated that: "all the terms, conditions, clauses and exceptions including clause 30 contained in the said charter party apply to the bill of lading and are deemed to be incorporated herein." Clause 30 was a typing mistake for clause 32, which was the arbitration clause stating that: "any dispute arising out of this Charter or any bill of lading issued hereunder...", while clause 30 was a substitution clause thus, inappropriate for incorpo-

ration. The court of appeal disregarded the typing mistake and held that the general reference contained in the bill of lading coupled with the arbitration clause 32, which expressly applied to disputes under both the bill of lading and the charter party, was sufficient to incorporate the charter party's arbitration clause into the bill of lading.

Conclusion

We may conclude from the above statement that, since in Dubai's "onshore" jurisdiction "express terms" of incorporation are required in order to bring over the arbitration clause into the bill of lading. Thus, an arbitration clause intended to be incorporated by "general terms" is not binding upon the third party in this jurisdiction. This fact raises a particular question: can the winning party enforce an arbitral award in Dubai's "onshore" jurisdiction if it has been rendered in Dubai's "offshore" jurisdiction. On the basis of an arbitration clause that used "general terms" of incorporation as we have seen in *The Merak*.

Our advice to be aware of the legal risks it is taking at pre-endorsement stage when accepting the endorsement of the bill of lading in its favor. The practical consequence of such acceptance is disputes involving claims brought by the bill of lading's transferee that may be caught by an un-bargained for and subsequently unfavorable arbitration clause in the bill of lading. ⚙️