Incorporation of Arbitration Clauses into Bills of Lading – in Search for a New Paradigm under Chinese Legal System

Submitted by *Luyu Dong*, to the University of Exeter as a thesis for the degree of *Doctor of Philosophy by Research* in *law*, January 2021.

I certify that all material in this thesis which is not my own work has been identified and that any material that has previously been submitted and approved for the award of a degree by this or any other University has been acknowledged.

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Abstract

Carriage of goods by sea constitutes a major means of transporting goods in international commerce, and bills of lading were invented by merchants as evidential instruments which are used as records of quality and quantity of loaded goods, evidence of contracts of carriage and evidence of lawful holders' right to claim delivery. This means that terms and clauses contained in bills of lading may greatly affect interests of parties to sea commerce. Besides, arbitration has been increasingly welcomed by businessperson and legal systems. For instance, bringing an arbitration clause from a charterparty to a bill of lading by an incorporation clause in a bill of lading is commonplace. Special attention has been drawn to the legal effect of such an incorporation clause because this clause may 'drag' a lawful holder of a bill of lading into a charterparty arbitration agreement. Although certain rules have been imposed on the wording of incorporation clauses, uncertainties arising from such an incorporation clause still exist both in law and commercial practice.

This study focusses on addressing those uncertainties, particularly, this thesis examines the underpinning legal principles for the incorporation of an arbitration clause from a charterparty into a bill of lading under Chinese legal system. This thesis firstly challenges the prevailing presumption about the legal nature of bills of lading, clarifying that they are mere evidential instruments. According to this view, the ensuing question is whether an incorporation clause in a bill of lading can be a self-contained contract between a holder of the bill of lading and a shipowner. The study demonstrates that the legal status of such an incorporation clause depends on the position of a holder of the bill of lading. Accordingly, this thesis discusses the legal effect of a bill's incorporation clause under two scenarios, namely when the holder is a third party to the related charterparty, and

when the holder is the charterer (an original party to the related charterparty). It argues that in the former scenario an incorporation clause can be an independent contract if this clause makes explicit reference to an arbitration clause. The underpinning principles are separability of arbitration, principle of incorporation, principle of assignment and principle of implying parties' consents. Consequently, an explicitly worded incorporation clause in a bill of lading can be a self-contained contract binding a holder and a shipowner. In the latter scenario, an incorporation clause in a bill of lading remains as evidence, and the governing contract is the related charterparty. Therefore, disputes between a holder and a shipowner shall be addressed as it was stipulated in the related charterparty. The discussion of these two scenarios leads to a new paradigm rendering the incorporation of an arbitration clause from a charterparty to a bill of lading.

The workability of this new paradigm under Chinese legal system is tested. This thesis argues that the new paradigm can be adopted in Chinese law, as principles underpinning the new paradigm are accepted by Chinese law. Moreover, considering the challenges imposed by certain unique provisions contained in Chinese law, this thesis proposes a reform of Chinese law and provides suggestions for businessperson.

Contents

Chapter 1

The Framework of the Thesis

1.1. Introduction

Commercial shipping industry plays an important role in international commerce, as carriage of goods by sea would be the most efficient and economical way to transfer goods from one market to another.[1] In order to ensure the shipment, carriage and delivery of goods can be carried out smoothly, agreements are reached among relevant parties, and these agreements are generally contained in charterparties and bills of lading.[2] Specifically, a charterparty is a kind of contract of affreightment between the charterer and the carrier. This contract normally requires the carrier to provide a vessel or a slot in a vessel and to provide services concerning the shipment, carriage and delivery.[3] By contrast, bills of lading are unilaterally issued by the carrier to the shipper (the person who provide goods at the loading port, and this person can be a third party to the related charterparty) at the loading port. At this point, these issued bills of lading are used to prove two facts. Firstly, quality and quantity of the cargo received by the carrier, and secondly the carrier's promise in terms of acting upon the related charterparty. After receiving these bills of lading from the carrier, the shipper may transfer these bills to a third party (who does not participate in the arrangement of shipment). These transferred bills of lading will entitle the transferee (the lawful holder of a bill of lading) to claim delivery of the goods from the carrier at the unloading port. Therefore, bills of lading generally have three functions, namely receipts for the loaded goods, evidence of the relevant charterparty, and title to goods.[4]

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[1] Filippo Lorenzon, 'International trade and shipping documents' in Yvonne Baatz (ed) *Maritime Law* (London: Informa Law from Routledge 2018) 100-101.
[2] ibid.
[3] John Wilson, *Carriage of Goods by Sea* (7th edn. Pearson Education Ltd. 2010) 3-4; Yvonne Baatz 'Charterparties' in Yvonne Baatz (ed) *Maritime Law* (London: Informa Law from Routledge 2018) 123-124.
[4] Wilson (n 2) 5-8; Charles Debattista, 'Cargo Claims and Bills of Lading' in Yvonne Baatz (ed) *Maritime Law* (London: Informa Law from Routledge 2018); Andrea Lista, 'Knocking on heaven's door: in search for a legal

Since title to goods and contract of carriage can be transferred to a third party by simply transferring a bill of lading, it is then reasonable for the carrier to wish to ensure his/her rights and liabilities under the contract of carriage remain unchanged, even his counterparty changed from a charterer to a third party holder of the bill of lading.[5] It is then common to find an incorporation clause in a bill of lading, and this clause normally aims to bring in the provisions in a related contract of carriage.[6] In other words, a relationship between the carrier and the holder of a bill of lading would be governed by a contract of carriage contained in the bill of lading, and terms and clauses of this bill may partly or wholly same as those in a related charterparty.

Considering advantages of international commercial arbitration, arbitration has been a preferred disputes resolution.[7] It is then common to see that the carrier would not only wish to incorporate clauses which are directly germane to shipment, carriage and delivery, they also intend to bind a third-party holder to an arbitration clause in the related charterparty by a bill's incorporation clause. It also can be a scenario in which a holder of the bill of lading insists on an incorporation of an arbitration clause, while the carrier refuses to arbitrate disputes arising from the bill of lading. It is then crucial to decide whether the charterparty arbitration clause is incorporated in the bill of lading.[8] This issue is a universal concern, and a satisfactory solution has not yet been provided.

Since the United Kingdom plays a leading role in maritime law and international commercial arbitration, this thesis takes English law as the prototype. Specifically,

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definition of the bill of lading as a document of title' in Chuah J(ed), *Research Handbook on Maritime Law and Regulation* (Edward Elgar Publishing 2019) 252; Nicholas Gaskell, *Bills of Lading Law and Contracts* (2nd edn. Routledge 2014) ch 1.

[5] Meliz Özdel, *Bills of Lading Incorporating Charterparties* (Hart Publishing 2015) 197.

[6] ibid.

[7] James M. Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (2004) 4 Iss.3 Pepp.Disp.Resol. L.J. 469, 491; William Holdsworth, 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 Harvard Law Review 997; Robert Merkin (ed), *Privity of Contract* (LLP Professional Publishing 2000) 2.49; Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press 2015) 9.22.

[8] Yvonne Baatz, 'Should third parties be bound by arbitration clauses in bills of lading?' (2015) Lloyd's Maritime and Commercial Law Quarterly 85, 86.

English case law has developed a general rule of incorporating an arbitration clause from a charterparty to a bill of lading, namely an arbitration clause should be incorporated by an explicitly worded incorporation clause.[9] In other words, present judicial decisions are mainly supported by interpreting the disputed incorporation clause and the referred charterparty's arbitration clause. However, this rule is not consistently followed,[10] and this inconsistency may cause uncertainty both in law and commerce.[11] In addition, academical opinions about legal principles applicable to the disputed incorporation also conflicting. For instance, it is suggested that principle of contractual incorporation is inapplicable in bill of lading cases,[12] but the current legal reasoning still heavily rely on a contractual construction of the incorporation clause.[13] Moreover, in terms of binding a third-party holder, it is unclear whether the bill's incorporation clause can be legally binding and whether the judicial construction of this clause can add any legal effect, if bills of lading are not necessarily contractual in nature.[14]

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[9] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 108.

[10] Baatz, 'Should third parties be bound by arbitration clauses in bills of lading?' (n 8) 86.

[11] One trend of judicial construction of general wording favours a restrictive interpretation which limits the terms incorporated by general words to those that directly deal with the subject-matters of bills of lading. This trend of construction is represented by the case *TW Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C.1, and the judgement in this case was upheld in later cases: *The 'Njegos'* [1936] P 90, *The Annefield* [1971] P 168, *The Varenna* [1984] QB 599, *The Miramar* [1984] AC 676, *The Federal Bulker* [1989] 1 Ll Rep 103, *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2012] 1 CLC 448. This trend is recognised by Michael Wagener, 'Legal Certainty and the Incorporation of Charterparty Arbitration Clauses in Bills of Lading' (2009) 40 Journal of Maritime Law and Commerce 115, 117; Guenter Treitel and FMB Reynolds, *Carve on Bills of lading* (3th edn, Sweet & Maxwell 2012) para 3-016, 3-021and 3-021. By contrast, the opposite trend, a more flexible construction of general words, is illustrated by the case of *The Merak* [1964] 2 Lloyd' s Rep. 527, discussed in WJ Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (1986) 16 Victoria U Wellington L Rev 177, 181. This trend is also discussed in the case *The Athena* [2006] 2 CLC 710.

[12] Meliz Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' in Malcolm Clarke (ed), *Maritime Law Evolving: Thirty Years at Southampton* (Hart Publishing 2013) 181-196, 182, it is suggested that a holder cannot have access to the referred charterparty, and therefore the contractual incorporation principle does not apply in bills of lading cases.

[13] The contractual construction rule which is one limb of the contractual incorporation principle, and it seems that the case law on this matter still regards this issue as a matter of construction, see the line of cases represented by *TW Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C.1, 7 (Lord Gorell). However, it may be argued that the judicial construction of the bill's incorporation clause and the charterparty's arbitration clause cannot make sense if a holder has no knowledge of the disputed incorporation in the first place, because the judicial construction should be made from the perspective of a reasonable businessperson (a holder of a bill of lading in this case). The fact that a holder cannot be aware of the referred arbitration clause can also be detrimental to the validity of an arbitration clause, because the principle of arbitration, particularly the requirement of agreement in writing and the principle of separability, requires the consent from every involved party.

[14] It is commercial practice to use bills of lading as receipts only, and commercial law derives from commercial practice.

1.2. Aims and Research Questions

The aim of this research is to find a new paradigm which provides legal support for the incorporation of an arbitration clause from a charterparty to a bill of lading, and to advise the reform of Chinese law on this issue. The necessity of establishing a new paradigm derives from the existing disputes concerning the incorporation. These disputes may arise from the conflict between custom of merchants and principles of international commercial arbitration. To be specific, custom of merchants shows that a holder of a bill of lading generally cannot have access to the referred charterparty, and consequently a holder neither has knowledge of the referred arbitration clause nor express a consent to this clause.[15] However, according to principles of arbitration, especially principle of autonomy, engaged parties' expressed consent is vital to validate an arbitration agreement.[16] In other words, the validity of this incorporation may be challenged on the basis that the referred arbitration clause does not contained a consent from a consignee (a holder of the bill of lading).[17]

It is especially the case when a sale contract is concluded under CIF term.[18] Under a CIF sale contract, the CIF seller should be responsible for arranging the shipment, namely the seller is the charterer in the charterparty and the shipper in the issued bill of lading. However, the buyer (a holder of the bill of lading) is neither a contractual party in the charterparty nor a participant in the issuance of bills of lading. In order to enable the buyer to receive the goods from the seller, the seller is obligated to transfer the bill to the buyer, while it is not the seller's

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[15] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 181-196, 187.

[16] Baatz, 'Should third parties be bound by arbitration clauses in bills of lading?' (n 8) 85; Paul Todd, 'Arbitration, privity of contract and carriage of goods by sea' in Jason Chuah(ed), Research Handbook on Maritime Law and Regulation (Edward Elgar Publishing 2019) 378.

[17] Sandra Lielbarde, 'A comparison of the UK and US approaches to the incorporation of a charterparty arbitration clause into bills of lading' (2011) JIML 17(4) 291, 292.

[18] In The Incoterms® rules 2010, CIF (Cost, Insurance and Freight) means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination.

obligation to provide the charterparty to the buyer. As a result, if the charterparty contained an arbitration clause, the buyer's consent to this clause is absent, as this buyer is a third party to the charterparty as well as a third party to the charterparty arbitration clause. Moreover, it is still questionable as to whether the buyer's consent to this arbitrate clause can be evidenced by an incorporation clause in the bill of lading, because the buyer does not participate in the issuance of the bills. Without the disclosure of such a consent to arbitrate, it would be very hard to bind a holder of the bill of lading to a charterparty arbitration clause, since the parties' autonomy is a paramount principle in international commercial arbitration.

By contrast, this problematic situation would not be incurred when a sale contract is concluded on FOB term.[19] This is because under this term, the buyer is obliged to arrange the shipment. This means that this buyer is the original party in the charterparty, while the seller is only the shipper. Therefore, the relationship between the buyer and the carrier would be governed by the charterparty, and disputes between these parties should be addressed by the dispute resolution clause contained in the charterparty. If this charterparty contained an arbitration clause, the buyer's and the carrier's joint consent to arbitrate is expressed and should be given legal effect.

It then seems that incorporating an arbitration clause from a charterparty to a bill of lading is not only a matter of construction, it also encompasses the consideration of other legal principles and factual circumstances in each case.

Therefore, the research question framing this research is:

> *On the first tier: regarding English law as the prototype, what are the underpinning legal principles for the incorporation of an arbitration clause from*

[19] In The Incoterms® rules 2010, 'Free On Board' means that the seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards.

a charterparty into a bill of lading, and what legal devices should be employed to render this incorporation effective and free from problematic issues? On the second tier: setting the scene in Chinese legal system, whether the new paradigm can be adopted in Chinese law system?

Answering this question is of great importance for both legal certainty and commercial efficiency. Legally speaking, a holder's consent to arbitrate should be considered as a preliminary condition to launch arbitration proceedings on the basis of a charterparty's arbitration clause. This is because it is against legal principles to compel a party to give up his/her original legal remedy in court without confirming this party's intention about choosing an alternative dispute resolution, such as arbitration. However, confirming a holder's consent to arbitrate can be especially a thorny problem in bill of lading cases, as the holder of a bill of lading generally cannot have access to the referred arbitration clause in a charterparty. Moreover, the validity of the disputed incorporation clause may further affect the arbitration procedure and the enforcement of an arbitration award at a later stage, because the procedure and the award can be challenged if the validity of the incorporation clause is questionable.

For the second tier of research questions, this thesis aims to clarify the position of Chinese law on this special incorporation. This clarification may on the one hand legally support an incorporation of an arbitration clause from a charterparty to a bill of lading under Chinese law. On the other hand, it may provide instructive information for other legal systems, which is of great importance to promoting international commercial arbitration. In terms of international commercial arbitration, a cross-reference concerning the validity of the incorporation of an arbitration clause from a charterparty to a bill of lading may particularly be with practical meanings. This is because as a separate contract, the applicable law to an arbitration clause may be different from that to the main contract. This fact may add an international feature to a contractual relationship, and such international feature may further be enhanced by the transferability of bills of

lading. These international features can add burden on arbitral tribunals and courts when recognise an arbitration agreement or enforce an arbitration award. It follows that a cross-reference may be alleviate such pressure and provide useful information.

Commercially, a clear and unified instruction about the incorporation of an arbitration clause from a charterparty to a bill of lading may provide businessperson with ascertained expectations about the chosen dispute resolution and increase efficiency of solving substantial disputes. This is because with a clear instruction, it is unlikely for businessperson to spend additional time and money to settle their disputes about what is the chosen dispute resolution.

Therefore, this thesis aims to establish a new paradigm of the incorporation of an arbitration clause from a charterparty into a bill of lading. In this paradigm, the incorporation of an arbitration clause can be supported by widely recognised legal principles. Moreover, in conjunction with the current Chinese law, this thesis will propose a reform of Chinese legal system and therefore promote the international arbitration.

1.3. Research Methodology

The basic method employed in this research is doctrinal research, and the thesis is based on an in-depth analysis of primary sources, such as legislations and cases on relevant issues.[20] Additionally, secondary source mainly includes journal articles and books on relevant subjects. Therefore, this research is a library-based study.[21] Doctrinal legal research firstly laid down a foundation for this research. Since this research aims to find legal principles underpinning the incorporation of an arbitration clause from a charterparty to a bill of lading, it is

[20] Ernest M Jones, 'Some Current Trends in Legal Research' (1962-1963) 15 J. Legal Educ. 121,130; Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin L Rev 83, 110.

[21] Jones (n 20) 129; Van Gestel, Rob and Micklitz, Hans-W., Revitalizing Doctrinal Legal Research in Europe: What About Methodology? (January 2011) EUI Working Paper LAW No. 2011/05, Available at https://ssrn.com/abstract=1824237 or http://dx.doi.org/10.2139/ssrn.1824237.

then necessary to disclose legal problems existing in such an incorporation in the first place. Therefore, this research employed doctrinal research, as this research method may provide relevant instructions. Specifically, under this research method, a research starts from organising and analysing judicial decisions around certain legal propositions.[22] More importantly, these judicial decisions will be critically evaluated,[23] and therefore problems existing in these decisions will be exposed.[24] Doctrinal legal research also plays an important role in achieving the aim of this research. The aim of this research is to provide a new paradigm for an incorporation of an arbitration clause from a charterparty to a bill of lading. This aim is in line with that of conducting a doctrinal research, specifically a doctrinal research is normally designed to provide a doctrine for a certain legal issue.[25] To illustrate, a doctrine is 'a synthesis of various rules, principles, norms, interpretive guidelines and values. It explains, makes coherent or justifies a segment of the law as part of a larger system of law.'[26] Therefore, doctrinal legal research is the suitable research method for this research.

To supplement this doctrinal research, comparative legal research is employed, and it plays an indispensable role in producing a workable solution to the incorporation of an arbitration clause from a charterparty to a bill of lading. Firstly, a comparative study contributes to identifying the legal nature of bills of lading.[27] By taking a historical perspective,[28] namely comparing custom of merchants in the Middle Ages, the legal nature of bills of lading is ascertained as evidential

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[22] Jones (n 20) 130; Emerson H. Tiller and Frank B. Cross, 'What Is Legal Doctrine?' (2006) 100 Nw. U. L. Rev. 517, 518.
[23] ibid.
[24] ibid; Jones (n 20) 132.
[25] Tiller and Cross (n 22) 519; Jones (n 20); Brian R Cheffins, 'Using Theory to Study Law: A Company Law Perspective' (1999) 58 Cambridge L.J. 197, 199.
[26] Hutchinson and Duncan (n 20) 84.
[27] The historical approach is highly valued in comparative studies, see in Eugene Clark, 'Comparative Research in Corporate Law' (1996) 3 Canberra L. Rev. 62, 63.
[28] Boris Kozolchyk, 'Comparative Commercial law and the NLCIFT Methodology for Economic Development' (2013-2014) 30 Ariz. J. Int'l & Comp. L. 65, 99, where is states: 'fact-driven logic, it depends upon the comparative law researcher's ability to collect not only the above-described experiences with official legal institutions, but also thorough and accurate comprehension of commercial and consumer customs and practices and their socio-economic context.'.

instruments. Secondly, conducting a comparative study is of great importance to test the workability of the proposed paradigm for the incorporation. Comparative legal studies are highly valued in legal research featuring international elements. This is because the study of comparative law may make a major contribution toward the unification of law, which is vital to address issues involving multiple jurisdictions.[29] In this research, international elements are brought by the usage of bills of lading, as they are shipping documents facilitating international trades. Therefore, in order to establish a widely recognised solution to the incorporation issue at concern, comparative research method is employed. To be specific, by comparing English law with Chinese law, differences between these two jurisdictions can be identified. These differences may be mitigated and addressed by a further comparative analysis about their common understanding of principles of international commercial arbitration. Consequently, differences and conflicts in current legal practice would be resolved, and therefore legal certainty and commercial efficiency can be improved.[30] Therefore, this research is a mixture of doctrinal and comparative research.

More specifically, this research is based on a two-stage analysis.[31] To illustrate, this research starts from analysing primary and secondary legal sources concerning the legal nature of bills of lading and the traditional basis of extending the scope of an arbitration clause.[32] Considering the United Kingdom's leading position in maritime law and international commercial arbitration, this thesis chooses English law as the prototype for analyses. These analyses disclose

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[29] Clark (n 27) 62 and 70; Mark Van Hoecke and Maek Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 Int'l & Comp. L.Q. 495; Geoffrey Wilson, 'Comparative Legal Scholarship' in Mike McConville(ed) and Wing Hong Chui(ed) *Research Methods for Law* (Edinburgh University Press 2017);

[30] KH. N. Bekhruz, 'Comparative Legal Research in an Era of Globalization' (2010) 5 J. Comp. L. 94, 107; Hiram E. Chodosh, 'Comparing Comparisons: In Search of Methodology' (1998-1999) 84 Iowa L. Rev. 1025, 1027-1028; Clark (n 27) 70, where it pointed out that 'Legal philosophers frequently employ comparative research methods as indispensable aids to test the validity of general hypotheses, to provide concrete examples to illustrate abstract theories. Law reformers will turn to comparative law for insights and examples of new approaches and solutions to legal problems.'

[31] Hutchinson and Duncan (n 20) 110; Dawn Watkins and Mandy Burton, *Research Methods in Law* (2nd edn. Routledge 2018); Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing 2011).

[32] Jones (n 20) 101 and 130; Hutchinson and Duncan (n 20) 105.

existing problems in the incorporation of an arbitration clause from a bill of lading to charterparty.[33] After identifying these problems, the second stage of this research focuses on offering a new formulation of legal principles which may solve those existing problems and justify the incorporation issue.[34] The following paragraphs will explain the methodology in detail.

At the first stage of this research, the existing problems are identified based on a two-line of analysis. Despite the fact that the literature on 'incorporating an arbitration clause from a charterparty to a bill of lading' is extensive, the discussion is still largely open. Additionally, regulations on this issue are unclear and English case law is conflicting and confusing. Accordingly, this research divides the incorporation issue into two basic questions, namely the legal nature of bills of lading and the traditional basis of extending the scope of an arbitration.

For the legal nature of bills of lading, the doctrinal analysis takes a historical perspective.[35] Specifically, this research investigates the historical background of bills of lading and provides historical insights to a legal analysis of the nature of the bills.[36] The reason for analysing the legal nature of bills of lading is that it may have a direct impact on the legal effect of an incorporation clause in a bill of lading, and consequently affect legal consequences of an incorporation of an arbitration from a charterparty to a bill of lading.[37] The reason for taking a historical view includes three aspects. Firstly, in the relevant statutes or in case law, the nature of bills of lading is unclear. Secondly, existing research on the history of the bill of lading is mainly focused on its function as a document of title. Therefore, in order to determine whether bills of lading are contracts or not, a

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[33] Jones (n 20) 132; Hutchinson and Duncan (n 20) 112.
[34] Jones (n 20) 130; Hutchinson and Duncan (n 20) 103.
[35] Hutchinson and Duncan (n 20) 103.
[36] Watkins and Burton (n 31) 118.
[37] In other words, the disputed incorporation clause would be binding if the bill of lading can be considered as a contract between the shipowner and the holder of the bill. However, the legal nature of bills of lading remains controversial and it seems to be irrational to compel a holder of a bill to the incorporation clause contained in the bill merely because the bill is the only link between the holder and the carrier. It is then necessary to extend the doctrinal analysis to the discussion of the legal nature of the bills.

further exploration of the bill's emergence and development is necessary. Thirdly, rules of using bills of lading may be gradually accumulated through commercial practice, rather than created by legislators and judges. This indicates that the bill's legal regime originates in customary rules, and therefore a reference to the history of bills of lading appears as a natural starting point when investigating the legal nature of bills of lading.

The primary materials are mainly in the form of collections of merchant law and case reports.[38] The collection of merchant law is mainly provided by *The Black Book of the Admiralty: With an Appendix*,[39] which presents the early merchant law in different areas of Europe.[40] At a later stage of development, legislations, namely the Bills of Lading Act 1855 and the Carriage of Goods by Sea Act 1992 were enforced, and therefore these two legislations and the related case reports were also included in primary source. The plea roll and law report are in the *Extracts from the Records of the High Court of Admiralty*.[41] The secondary sources include books and journal articles. They are accessible in the University's library and online databases, such as HeinOnline, Westlaw UK and i-law. Additionally, the background material for the social development of sea commerce is essentially from *The Cambridge Core: the Cambridge Economic History of the Europe*.[42]

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[38] Watkins and Burton (n 31) 105.
[39] Travers Twiss (ed), *The Black Book of the Admiralty: With an Appendix*, vol 4 (Cambridge University Press 2012).
[40] The collection of merchant law reflects the custom of using bills of lading or their functional equivalents straightforwardly. Since some documents with a function similar to bills of lading were not named in the same way, the research looks into these collections with consideration for all the relevant customary practices that can be considered as functional equivalents of bills of lading.
[41] 'Extracts from the Records of the High Court of Admiralty.' (1887-2011; Vols 129-132 (2012-2015) are currently available through the Selden Society).
[42] Watkins and Burton (n 31) 107; Peter Mathias and MM Postan (eds), *The Cambridge Economic History of Europe*, vol 7 (Cambridge University Press 1978). This book presents the primitive need for carriage of goods by sea and the motivation for the sea voyage, which form the basis for the later development of sea carriage. The analysis considers the interaction between merchant law and its social context. On the one hand, a certain social background may have an impact on the manner merchants managed their business, which may reveal the rationale behind the invention of bills of lading. This rationale may allow to answer the question of whether there was any contractual intention when using the bills. On the other hand, the social development of trading and economy may give suggestion on which collection of merchant law should be

For the traditional basis of extending the scope of an arbitration clause, the analysis focuses on the question as to whether or not the traditional basis can be applied in bill of lading cases under the historical analysis on the legal nature of bills of lading. Since extending the scope of an arbitration clause is governed by both contract law and arbitration law, sources concerning both of these areas of law are examined. Specifically, in terms of contract law, sources about the principles of assignment, incorporation, and third-party beneficiary are analysed under the legal nature of bills of lading. Additionally, from the perspective of arbitration law, sources about principle of autonomy and principle of separability are also considered. If the analysis indicated that the traditional basis cannot support an incorporation of an arbitration clause from a charterparty to a bill of lading, the research at this stage may therefore lie down the foundation for the second stage of this research.

Based on the previous discussion, the analysis at the second stage of this research focuses on re-organising relevant principles in order to offer a new formulation of legal principles justifying the incorporation of an arbitration clause from a charterparty to a bill of lading.[43] The doctrinal analysis at this stage is divided into two parts. The first part is establishing a paradigm sufficing the disputed incorporation by interpreting and analysing legal principles under the context of bills of lading. The second part is designed to test the feasibility of the proposed paradigm in Chinese law, and to propose a reform within Chinese legal system. As a result, an incorporation of an arbitration clause from a charterparty to a bill of lading can be directed by a clear and widely recognised rule, which may increase legal certainty and commercial efficiency.

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paid more attention to, as a commercially prosperous area is more likely to be the harbour of the prevalent custom.

[43] Hutchinson and Duncan (n 20) 101, 103 and 112; Trischa Mann, *Australian Law Dictionary* (Oxford University Press 2010) 197.

For the first part, the new paradigm is proposed according to different positions of a holder of bills of lading, namely when the holder is a third-party to the relevant charterparty and when the holder is the charterer. In the former situation, special attention is paid on the bill's incorporation clause. Specifically, due to the non-contractual nature of bills of lading, a contractual effect of an explicitly worded incorporation clause is required to be established, and accordingly principle of separability deserves a special examination. By doing this, the principle of assignment and the principle of incorporation can be applied, and consequently a third-party holder of bills of lading can be potentially bound by a referred arbitration clause. The following problem may derive from the autonomy of arbitration, and therefore a holder and a shipowner's joint consent is required to be established. To achieve this, the principle of implying consent is examined. For the latter situation, the charterparty's dispute resolution clause should be weighed up, as it is obvious that the charterparty should be the contract between the charterer and the shipowner. Therefore, principles originated in contract law is considered.

For the second part, the thesis testes the usefulness and workability of the new paradigm under Chinese legal system. In order to test the workability of the paradigm which takes English law as the prototype, this thesis makes a comparative analysis between English law and Chinese law with regard to the incorporation of an arbitration clause from a charterparty to a bill of lading.[44] This analysis may provide reform suggestions for Chinese legal systems, and therefore enable China to be fully engaged in international commercial arbitration.

Reasons for choosing Chinese law are: (1) the commerce relation between the United Kingdom and China may be enhanced by the launch of The One Belt One

[44] Hutchinson and Duncan (n 20) 103; Watkins and Burton (n 31) 137-142; G. Samuel, 'Does One Need an Understanding of Methodology in Law Before One Can Understand Methodology in Comparative Law?' in M. Van Hoecke (ed.), *Methodologies of Legal Research: Which Kind of Method for Which Kind of Discipline?* (Hart Publishing 2011) 177.

Road' (OBOR) initiative, and such an increase in commerce is likely to bring about an increase of commercial disputes; (2) International commercial arbitration is frequently the preferred dispute resolution method in commercial transactions; (3) bills of lading as an indispensable instrument in performing the carriage may be even more used while the practise of incorporating an arbitration clause will still continue; and (4) Chinese arbitration law is still developing and has its own distinctive characteristic. Therefore, a workable solution may be desired in the international trade, because the differences in recognising arbitration clauses may undermine the efficiency in solving the disputes, particularly in terms of the recognition of a valid incorporation clause and the enforcement of an award.[45]

Accordingly, in order to test the workability of the proposed paradigm, it is necessary to analyse and conclude Chinese law on this matter. The source includes Chinese cases and articles on the relevant subject. Case reports and legislations are available on the website of The Supreme People's Court of The People's Republic of China (www.court.gov.cn), and journal articles are available on the website of cnki (www.cnki.net), in the databases available at the University's on-line library, such as HeinOnline, Westlaw UK, and Lexis Library.

1.4. Structure of the Thesis

The thesis consists of eight chapters. Chapter 1 presents the framework of the discussion and it is designed to be a guide to this thesis. The main body of the thesis starts from Chapter 2 to Chapter 7. Chapter 8 presents the new paradigm for an incorporation of an arbitration clause from a charterparty to a bill of lading and makes final remarks.

[45] Even though the New York Convention has provided a rule in recognising arbitration clauses, one country's domestic law may still have impact on this issue.

Specifically, Chapter 2 introduces the Chinese legal system. Since this thesis aims to address the incorporation issue under Chinese legal system, it is then necessary to investigate distinctive features of Chinese legal system and existing problems encountered by Chinese law when it comes to an incorporation of an arbitration clause from a charterparty to a bill of lading.

Chapter 3 and Chapter 4 identifies existing problems. Chapter 3 explores the legal nature of bills of lading, which determines the legal effect of an incorporation clause in a bill of lading. It argues that, although transferrable bills of lading can be documents of title and contracts of carriage, the transferred terms and clause are not include arbitration clauses, because arbitration clauses are not directly related to shipment, carriage and delivery. Therefore, a generally worded incorporation clause cannot bring an arbitration clause from a charterparty to a bill of lading. In addition, the incorporation clause which explicitly refers to an arbitration clause also cannot bind the holder of a bill of lading, because bills of lading are evidential documents in nature.

Chapter 4 examines the traditional legal basis for extending the referred arbitration clause to a holder of a bill of lading. It argues that the incorporation of an arbitration clause from a charterparty to a bill of lading cannot be sufficiently supported by these legal bases, because these legal bases are established on the binding effect of an explicitly worded incorporation which is challenged in Chapter 3. Therefore, in order to justify an incorporation of an arbitration clause from a charterparty to a bill of lading, a nexus connecting the holder to the referred arbitration clause or to this incorporation should be established.

Chapter 5 and Chapter 6 then focuses on establishing the above-mentioned nexus. Chapter 5 discusses the cases in which the holder of a bill of lading is a third party to the related charterparty, namely two-contract cases. Since there is no existing contract between the holder and the carrier in this situation, this chapter suggests that it is necessary to establish a contract between the holder

and the carrier based on the explicitly worded incorporation clause. This chapter starts from theoretical analysis in terms of regarding an explicitly worded incorporation clause as an arbitration clause between the parties. The analysis then focuses on implying the parties' consent to arbitrate and attaching legal effect to such an implication by employing legal devices, such as arbitral estoppel. Therefore, it suggests that the explicitly worded incorporation clause could be a nexus, and consequently if any conflicts incurred by the wording of the referred arbitration clause and the incorporation clause, modifications should be made upon the former.

Chapter 6 discusses the situation in which the holder of a bill of lading is an original party to the related charterparty. It suggested that the proper nexus is the arbitration clause in the related charterparty, because the holder as the original charterer should be contractually bound by this arbitration clause by reference to rules of contract law. Therefore, one-contract doctrine can be applied. Consequently, the intention in the arbitration clause should prevail over that in the bill of lading. In addition, it argues that the situation in which the holder can have the knowledge of an incorporation of an arbitration clause while this holder is not the charterer should be distinguished from one-contract cases. This is because a mere knowledge of an arbitration clause cannot amount to a contractual commitment to this clause. Therefore, this kind of cases should be regarded as two-contract cases.

Chapter 7 test the applicability of the new paradigms under Chinese legal system. It is suggested that the new paradigm can be used to justify such a special incorporation under Chinese law, but special attention should be made to certain points. In this case, this chapter also attaches additional attention to those challenges which are imposed by special requirement of validating an arbitration clause under Chinese law.

Finally, Chapter 8 concludes the proposed paradigm to the incorporation of an arbitration clause to a bill of lading and makes the final remarks.

Chapter 2

Setting the Scene of Incorporating an Arbitration Clause from a Charterparty to a Bill of Lading in Chinese Legal System

2.1. Introduction

This chapter will briefly introduce distinctive features of Chinese legal system and recent development of international commercial arbitration in China. This introduction is followed by a discussion about problems encountered by Chinese law when it comes to an incorporation of an arbitration clause from a charterparty to a bill of lading. This discussion may lay down the foundation for this research, as a working paradigm should be able to accommodate those distinctive features of Chinese legal system. Additionally, taking Chinese law into consideration has practical meanings for this research. This is because a widely recognised incorporation of an arbitration clause from a charterparty to a bill of lading may play an important role in international commercial arbitration, and yet a unified rule of validating and recognition of such an incorporation has not been concluded. Specifically, although some international conventions, such as the New York Convention and the UNCITRAL Model Law, have been widely accepted, the validity of an arbitration clause is generally determined by domestic laws of arbitration which can be varied in certain detailed requirements concerning validating an arbitration agreement.[46] It is then crucial to test the proposed paradigm against a world-wide background.[47]

The necessity of establishing the paradigm with an international consideration also lies in the fact that international trade is growing, and bulk cargos are

[46] Lielbarde (n 17) 292-293.
[47] Johannes Trappe, 'The Arbitration Clause in A Bill of Lading' (1999) Lloyd's Maritime and Commercial Law Quarterly 01. Jan. 337, 343.

generally transferred by vessels. In other words, carriage of goods by sea facilitates international trade. In terms of the carriage of goods by sea, bills of lading play an indispensable role, as the bills are used as receipts of the goods, evidence of the contract of carriage and title to goods.[48] Meanwhile, it has been a trend for a carrier to incorporate clauses, especially arbitration clauses,[49] from a charterparty to a bill of lading by employing an incorporation clause. This is because it is reasonable for a carrier to ensure that his/her liabilities owed to a holder of the bill of lading are not varied or extended from those he/she owes to a charterer.[50] Therefore, there are international elements in the incorporation of an arbitration clause from a charterparty to a bill of lading. Moreover, disputes about such incorporation may increase along with the growth of international trade, as the validity of such an incorporation clause, especially when it incorporates an arbitration clause, remains controversial. This is because domestic laws can be different in the legal status of a bill of lading, the legal interpretation of such an incorporation clause, the law of validating an arbitration clause, and the law of transferring rights and liabilities. These differences may result in different judgments about the validity of an incorporation clause. As a result, an arbitration award may be unenforceable in a country where the incorporation clause is regarded as invalid.[51] Such opposing legal positions on the same clause may undermine the legal efficiency and the businessperson's reasonable expectation, as it prolongs the process of solving parties' disputes

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[48] Bills of lading are used to evidence the existence of a relevant contract of carriage, the quality and quantity of the loaded goods and the lawful identity of a receiver of the goods. This means that statements on the bills directly impact involved parties' interests in a transaction and the delivery of the goods.

[49] Zhong Jianpin, *Annual of China Maritime Trial* (2011) (Guangdong People Publishing House 2012) 35, it suggests that over 80% of disputes involving charterparties are addressed by arbitration.

[50] Yang Liangyi*, Bills of Lading and Other Transport Document* (China University of Political and Law Press 2001)119.

[51] Meliz Özdel, 'Enforcement of Arbitration Clauses in Bills of Lading: Where Are We Now?' (2016) 33 J Int'l Arb 151,154. James Spigelman, 'The centrality of contractual interpretation: a comparative perspective' (2015) Arbitration 234. Similarly, the enforcement of a foreign arbitration award may be impeded if the disputed incorporation clause was invalid under Chinese law, see in Zeng Xianwu, 'Can a Foreign Company Contract out of a Chinese Court – A comparison of the American and Chinese Legal Systems Regarding the Enforceability of the Arbitration Clause in a Commercial Contract' (1999) 8 China L. Rep. 85; Zhang Liying, 'Conflict of Jurisdictions in Maritime Disputes in China' (2005) China Oceans L. Rev. 563; Zhang Liying, 'A Case Study: The Validity of Incorporation Clause in Bill of Lading' (2007) China Oceans L. Rev. 115.

and it increases misunderstandings among parties.[52] Therefore, a workable paradigm should take differences arising from domestic laws into consideration.

This research chooses China to test the proposed paradigm, and the reason is twofold. The first is the fact that China is increasingly active in foreign-related arbitrations,[53] as it enhances its role in international trade by initiating the Belt and Road Initiative (BRI) and launching Free Trade Area construction; establishing a dispute resolution paradigm is an essential part in each programme.[54] Compared to previous decades, such intensive commercial activities bring more foreign-related arbitration cases to Chinese courts or Chinese arbitration commissions, and this means that Chinese law will be increasingly important in international commercial arbitration.

Secondly, Chinese law has distinct characteristics, which can be illustrated by two points. On the one hand, Chinese arbitration law and English arbitration law have acute differences in terms of the recognition of an arbitration clause. For example, it is a compulsory rule in Chinese arbitration law that a valid arbitration clause should include an expressed consent of the application scope of the agreed arbitration clause and the name of the chosen commission for holding the arbitration proceeding.[55] However, a nomination of an arbitral tribunal does not constitute a necessity for a valid arbitration clause under English law.[56] Such a difference in law may result in opposing judgements about the validity of an arbitration clause if this clause was in a written form but it was silence about the

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[52] For instance, it is a preliminary issue to determine the applicable dispute resolution before addressing any substantial issue. it is reasonable for a Chinese receiver of the goods to presume that an arbitration clause does not containing a choice of forum is not legally binding, while a shipowner with English legal background knowledge may insist that such an arbitration clause is binding.

[53] Chinese law translates international arbitration as foreign-related arbitration, see in Song Jianli, *Judicial Review of Foreign Arbitration Awards: Principles and Practice* (Law Press China 2016).

[54] Zhang Hongyu and Han Wei. 'A Study of the process of professionalizing international commercial arbitration under the context of initiating the One Belt and One Road Initiative', *Journal of the Open University of Guangdong*, (2016) 2, 37-42. The China（Shanghai）Pilot Free Trade Zone Arbitration Rules (2015).

[55] Jing Pengnian and Dong Yupeng, *The Procedure of Maritime Special Litigation and The Rules of Arbitration* (Law Press China 2015) 160.

[56] Arbitration Act 1996 does not contain any provision which requires a valid arbitration agreement should contain an expressed nomination about the chosen arbitration tribunal.

name of the chosen arbitral tribunal. Different judicial positions may affect the ensuing arbitration proceedings and the enforcement of an arbitration award.[57]

On the other hand, China, as a civil law country, has a rather rigid approach in interpreting the law and parties' intentions. In other words, statutory law has a great impact on judicial decisions, and the parties' intention to arbitrate may be subject to the rules provided by legislation in relevant areas of law.[58] Comparatively, since the United Kingdom is a common law country and case law plays a significant role in judicial judgements, English judges may have more liberty in interpreting the law, and the law may be interpreted in order to suffice the parties' expressed intentions in the most feasible way. This means that having different legal systems may directly impact the legal practice, which consequently will affect the recognition of an arbitration clause.

Given the fact that China is an important participant in international commerce, and that parties may nominate Chinese law as the applicable law to their arbitration agreement, it is then necessary to take Chinese law on the validity of an arbitration clause into consideration in order to test the workability of the proposed paradigm. This paradigm may provide the parties with a clear idea about whether or not an arbitration clause in the transferred bill of lading can be legally binding, or how they can make an enforceable arbitration clause in a bill of lading. This clear idea may increase fairness and efficiency in international trade, as it enables parties to be fully aware of the rights and liabilities they have, and the process of settling disputes can be smoothly carried out in the chosen forum.

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[57] Özdel, 'Enforcement of Arbitration Clauses in Bills of Lading: Where Are We Now?' (n 51) 154. Spigelman (n 51).

[58] Chi Manjiao, *Certain Problems and Improvements of the International Arbitration Regime: A comparative Study of Chinese and Foreign Arbitration Rules* (Law Press China 2014) 5-12; Luo Huijie, 'Recent Developments in Chinese Maritime Law' (2010) 16(2) JIML 150.

The following sections will discuss the necessity of establishing a new paradigm to address the incorporation issue under Chinese law by illustrating special features of Chinese legal system and exposing problems in Chinese law.

2.2. Maritime Arbitration in China

Before looking into the question as to the incorporation of an arbitration clause from a charterparty to a bill of lading under Chinese law, it is necessary to briefly introduce the current development of Chinese law in the field of international maritime and commercial arbitration, including the source of law as well as the relationship between a court's jurisdiction and an arbitral tribunal's jurisdiction. This introduction provides a general overview of the legal structure of Chinese law, which forms the grounds for the ensuing analysis.[59] The analysis in this section will focus on the flaws in Chinese law in respect to incorporating an arbitration clause from a charterparty to a bill of lading; the cases taken into consideration are those in which Chinese law is the applicable law.[60]

In China, the system of law is comprised of statutory laws, judicial interpretations made by the Supreme People's Court of China, and the Supreme People's Court's reply to certain specific issues in cases.[61] For the specific issue discussed in this research, statutory laws refer to related domestic laws, and relevant international conventions that China has signed up to.[62] The Supreme

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[59] Specifically, the status of statutory law in Chinese legal system explains why this research weighs statutory law more than judgments in cases. An introduction about forums which accepts arbitration-related cases illustrates the relationship between litigation and arbitration, particularly, issues as to which is the proper forum to decide the validity of an arbitration clause may be affected by such relationship. A clarification about cases in which Chinese law has jurisdiction over the related arbitration clause will frame the cases/situations discussed by this research, and give a clear idea about in which circumstances the parties should be aware that Chinese law may decide the validity of an arbitration clause, and therefore certain issues should be noted, such as the content of an arbitration clause.

[60] In terms of what kind of cases are subject to Chinese law, relevant statutory laws are Law of the Application of Law for Foreign-related Civil Relations of the PRC, and the Interpretation of Law of the Application of Law for Foreign-related Civil Relations of the PRC.

[61] Chi, *Certain Problems and Improvements of the International Arbitration Regime: A comparative Study of Chinese and Foreign Arbitration Rules* (n 58) 8. Zhang Wenxian, *Jurisprudence* (3rd edn, Higher Education Press 2007) 89.

[62] For example, Article 6, Article 9, Article 12, Article 20, Article 26 and Article 27 of the Civil Procedure Law of the People's Republic of China [enacted in 2013]; the Arbitration Law of the People's Republic of China [amendment in 2017, enacted in 2018]; the Contract Law of the People's Republic of China [enacted in 1999]; the CMAC (China Maritime Arbitration Commission) Arbitration Rules-2018; the UNCITRAL Model Law and

People's Court's judicial interpretation is made to clear doubts arising from general worded provisions, and an interpretation made by the Supreme Court is final and enforceable.[63] A Supreme People's Court's Reply is normally made to answer a question raised by a court concerning a specific issue in a case.[64] In other words, when a court cannot make a decision based on available statutory laws and judicial interpretations, this court may ask for instructions from the Supreme People's Court. Such a reply provides a final answer to the submitted issue, and it may have a binding effect on any similar issues in other cases.[65] This means that the Supreme People's Court's judicial interpretations and the replies are complements to statutory laws, and any court's decisions should abide by them.

The forums for deciding the validity of a bill's arbitration clause in Chinese law can be either a court or an arbitration commission (the Chinese version of an arbitral tribunal). Courts are the judicial branch of the government,[66] while arbitration commissions are generally affiliated to non-governmental organisations. For example, considering complex legal relationships in maritime cases, the China Council for the Promotion of International Trade (CCPIT) set up independent commissions for maritime arbitration in 1959,[67] namely the China Maritime Arbitration Commission (CMAC) and its branches,[68] to exclusively

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the New York Convention; Zhu Ling and Li Xiaojing, 'Jurisdiction over disputes involving the multimodal transport of goods: Chinese law approach' (2019) 8 JBL 617, 633-634.

[63] Chi, *Certain Problems and Improvements of the International Arbitration Regime: A comparative Study of Chinese and Foreign Arbitration Rules* (n 58) 10; Chi Manjiao, 'Domestic Arbitration in China: A Comparative Perspective' in Michael Moser (ed), *Disputes Resolution in China* (Juris Publishing 2012) 47-48.

[64] Chi, *Certain Problems and Improvements of the International Arbitration Regime: A comparative Study of Chinese and Foreign Arbitration Rules* (n 58) 10; Chi Manjiao, 'Is It Time for Change? – A Comparative study of Chinese Arbitration Law and the 2006 Revision of UNCITRAL Model Law' (2009) 5 (2) Asian International Arbitration Journal 142,145.

[65] Zhu and Li (n 62) 619.

[66] ibid 623.

[67] In 1988, China Council for the Promotion of International Trade (CCPIT) changed its name into China International Economic and Trade Arbitration Commission (CIETAC). In 2000, CIETAC started to use the name of the Court of Arbitration of China Chamber of International Commerce. See in The State Council's Official Reply Concerning the Renaming of the Foreign Economic and Trade Arbitration Commission as the CIETAC and the Amendment of its Arbitration Rules (effective since June 21, 1988); Chi, *Certain Problems and Improvements of the International Arbitration Regime: A comparative Study of Chinese and Foreign Arbitration Rules* (n 58) 14.

[68] Jing and Dong (n 55) 140 and 152; Chi, *Certain Problems and Improvements of the International Arbitration Regime: A comparative Study of Chinese and Foreign Arbitration Rules* (n 58)14; Article 1 of

accept maritime arbitration cases.[69] These arbitration commissions can only have jurisdiction over a case in which parties to a contract expressed a clear and explicit consent to arbitrate their disputes.[70] Comparatively, the courts' jurisdiction does not require an expressed consent from parties to a contract. In other words, litigation can be initiated by one of the parties, and the other party's agreement to the litigation is unnecessary.[71] Such a manner of determining the jurisdiction over a case in China is similar to that in the United Kingdom, and this may give rise to a question as to what is the proper forum to decide the validity of an arbitration clause. Specifically, for the party who tries to oppose an arbitration clause, a court would be the proper forum, as this party may claim that an arbitral tribunal does not have the jurisdiction on the ground that he/she did not 'consent' to the arbitration clause. However, for the counterparty, he/she may claim that an arbitral tribunal has the jurisdiction, as an arbitration clause is clearly stated in the related contract. Therefore, the key point that should be decided is whether or not the wording of a disputed arbitration clause is explicit enough to demonstrate parties' intention to arbitrate their disputes. Compared to English law, Chinese law has a more specific and distinct requirement about how a valid arbitration clause should be worded, which will be discussed in Chapter 7.

2.3. Problems in Chinese Legal system concerning the incorporation of an arbitration clause from a Charterparty to a Bill of lading

It seems that with specific provisions in Chinese law and the establishment of professional arbitration commissions, incorporating an arbitration clause from a charterparty to a bill of lading would not be an issue. However, such an

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Decisions of the State Council of the People's Republic of China Concerning the Establishment of a Maritime Arbitration Commission within the China Council for the Promotion of International Trade (effective since November 21, 1958).

[69] Chi, *Certain Problems and Improvements of the International Arbitration Regime: A comparative Study of Chinese and Foreign Arbitration Rules* (n 58) 14; Chen Zhongqian, 'The origin, development and further of Arbitration', (2006) 3 Arbitration Study 44.

[70] Jing and Dong (n 55) 140.

[71] ibid; Zhu and Li (n 62) 627.

incorporation remains controversial.[72] The difficulty of applying specific provisions to enforce an arbitration on the basis of a bill's incorporation clause may lie in the complex situation of bill of lading cases. In these cases, an arbitration clause is not directly stated on a bill of lading. Instead, it is transferred to a holder of the bill of lading by an incorporation clause in the bill of lading. In other words, from a holder's perspective, the validity of such an arbitration clause should be established upon two inspections: (1) the validity of the bill's incorporation clause; and (2) the validity of a referred arbitration clause. This means that before diving into the specific question as to the interpretation of an arbitration clause, the preliminary issue is to give legal effect to an incorporation clause in a bill of lading.

The problematic situation is that the generally worded statutory laws cannot be very constructive in terms of determining the legal effect of such an incorporation clause. This problem can be an issue for Chinese courts and Chinese arbitration commissions, as the judges cannot interpret the law based on the situations of each case. In other words, a judgement cannot have any legal effect, if it cannot directly be supported by relevant statutory laws. As a result, the current judicial trend takes a rather cautious attitude to evaluate an incorporation of this kind.[73] Specifically, requirements set by law tend to prevail over the parties' autonomy in each case.

For example, although Article 95 of the Maritime Code of the People's Republic of China (the PRC) provides that the relationship between the carrier and the holder of a bill of lading shall be regulated by terms and clauses in the relevant

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[72] Ling Li, 'Binding Effect of Arbitration Clauses on Holders of Bills of lading as Nonoriginal Parties and a Potential Uniform Approach through Comparative Analysis' (2012) 37 Tul. Mar. L. J. 107, 118, it seems that contradictory judgements exist, some hold that the incorporation clause is binding while some others hold that it is not binding. However, the legal reasonings are barely provided. Article 71 and Article 77 of Maritime Code of the People's Republic of China provide that bills of lading are evidential instruments, and Article 73 of this code is explicit about the terms that are evidenced by bills of lading. Although Article 78 provides that bills of lading bind the carrier and the holder, the legal basis for such a binding effect is unclear.

[73] Zhang Weiquan, 'Judicial Review of Charter's Arbitration Clauses incorporated in bills of lading', and it was delivered in the 23rd China Maritime Trail Conference in 2014.

bill of lading,[74] it is unclear as to whether these terms and clauses include an arbitration clause.[75] However, considering the special characteristics and functions of an arbitration clause or an incorporation clause with an equivalent effect,[76] it is important for this Article to be clear about what category of terms and clauses can be transferred to a third-party holder of a bill of lading. Without a clear definition, the problem as to whether a generally worded incorporation clause can bring an arbitration clause from a charterparty to a bill of lading is still unsolved, even though Chinese maritime law gives a binding effect to a bill of lading. However, this question has not been clearly answered by any amendment or supplement to the law. Without a specific guidance from the law, Chinese courts tend to reject the incorporation of an arbitration clause if the incorporation clause is generally worded, and the rejection is made on the ground that an arbitration clause cannot be categorised as any of the subject-matters of a bill of lading.[77]

Additionally, the Arbitration Law of the PRC is also obscure about how to validate an incorporation clause of this kind.[78] Specifically, this law does not address the issue of the incorporation of an arbitration clause. The Supreme Court's

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[74] Article 95 of Maritime Code of the PRC: Where the holder of the bill of lading is not the charterer in the case a bill of lading issued under a voyage charter, the rights and obligations of the carrier and the holder of the bill of lading shall be governed by the clauses of the bill of lading. However, if the clauses of the voyage charter party are incorporated into the bill of lading, the relevant clauses of the voyage charter party shall apply.

[75] Liang Zhao and Li Lianjun, 'Incorporation of arbitration clauses into bills of lading under the PRC law and its practical implications' (2017) 33 Arbitration International 647, 651-652.

[76] As it is discussed in Chapter 1, an arbitration clause does not naturally germane to subject-matters in a bill of lading. Han Lixin, Yuan Shaochun and Yi Weimin, *Maritime Litigation and Arbitration* (2nd edn, Dalian Maritime University Press 2016) 247, it is suggested that some Chinese scholars insist that terms and clauses contained in a bill of lading are those regulating substantive rights and liabilities concerning the related carriage of goods by sea, while an arbitration clause cannot be regarded as a general clause in that category. It further suggests that such explicit statement should include an intention to incorporate an arbitration clause from a traceable charterparty. Therefore, the incorporation clause also needs to be clear about the contracting time, name of the parties, and name of contracting place of the referred charterparty. See also in Han Jian, *Theory and Practice of Modern International Commercial Arbitration* (Law Press China 2000) 141-142; Si Yuzhuo and Han Lixin, A Study of the Rotterdam Rules (Dalian Maritime University Press 2009) 529.

[77] Letter of Reply of the Supreme People's Court on Request for Instructions Re Arbitration Clause Validity in the Dispute over Insurance Subrogation Claim under Contract for Carriage of Goods by Sea in the case Dalian Branch of China Ping An Insurance (Group) Co., Ltd. v. COSCO Shipping Co., Ltd., and Guangzhou Ocean Shipping Co., Ltd. [issued and effective on January 26, 2007].

[78] Zhang, 'A Case Study: The Validity of Incorporation Clause in Bill of Lading' (n 51) 121.

Interpretation of this law tries to address this issue, but it is not sufficiently instructive. This is because it merely states that an arbitration clause can be incorporated in another contract, while it remains unclear about on what legal bases and requirements an incorporation clause can successfully bring an arbitration clause from a contract to another.[79] Therefore, it is ambiguous in the Arbitration Law of the PRC about what role the principle of autonomy plays in the incorporation of an arbitration agreement. In other words, it is unclear whether or not a holder's consent to an incorporation of an arbitration clause can be implied, if he/she becomes the holder of a bill of lading containing an incorporation clause.[80] This ambiguity in Chinese law may put an incorporation of an arbitration clause from a charterparty to a bill of lading in an unfavourable situation. Chinese courts have found several grounds to reject the incorporation, and the core and undebatable ground is a lack of a holder's consent to arbitrate, since such an intention is essential to validate an arbitration agreement.[81] To illustrate, in the case *He De Group Co. Ltd. v Cherry Valley Shipping Co. Ltd.,*[82] it was held that even though the incorporation clause in the bill of lading was specific about incorporating an arbitration clause from a charterparty to a bill of lading, it was only an agreement between the carrier and the shipper since the holder of the bill of lading did not engage in the negotiation and conclusion of this clause.[83] Moreover, a holder of the bill cannot initiate the said arbitration, since this incorporation clause did not provide the holder with an approach in terms of appointing the arbitrator.[84] In another case where an incorporation clause was clear about bringing an arbitration clause from a charterparty to a bill of lading, the Chinese court rejected to extend the referred arbitration clause to a third-party

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[79] Han, Yuan and Yi (n 76) 248; Chu Beiping, 'Do Charterparty Arbitration Clauses Bind Brokers - From a Perspective of Chinese Law' (2015) 39 Tul. Mar. L. J. 661, 666.
[80] ibid 665.
[81] Han (n 76) 229; Liang and Li (n 75) 656.
[82] *He Dei Group Co., Ltd* v *Cherry Valley Shipping Co., Ltd.*, referred by Si Yuzhuo in *Case Book of Maritime Law* (Intellectual Property Publishing House Co., Ltd. 2003) 65.
[83] Edward Yang Liu and Johanna Hjalmarsson, 'Arbitration clauses: incorporation in China' (2016) 16 STL 1 1.
[84] ibid; Han (n 76) 231; Li (n 72) 118.

holder of the bill of lading.[85] It was held that this explicit incorporation clause can only bind the holder who is the charterer. This is because the incorporation clause was not explicit about the fact that the said arbitration clause can bind a third-party holder of the bill of lading (the holder was not the charterer), and meanwhile the third-party holder did not expressly agree to this special incorporation.[86]

These judgements indicate that when the holder of a bill of lading is not the charterer, this party's expressed consent to incorporating an arbitration clause from the said charterparty to the bill of lading is paramount to suffice an incorporation of this kind.[87] This is because when the holder is not the charterer, namely the holder is not a party to the relevant charterparty, it is unreasonable to imply that the holder has a knowledge of, and then acknowledged, the incorporation of the referred arbitration clause.[88]

Since Chinese arbitration law does not provide a specific instruction about the incorporation, and since binding a holder of the bill of lading to an incorporation clause of this kind is equal to transferring a contract to a third party,[89] it is then necessary to refer to Chinese contract law for articles covering issues as to the transfer of a contract. However, the difficulties in applying the contract law are also acute.[90] On the one hand, the nature of bills of lading and the legal status

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[85] '*The Monte*' (1994) Guangdong Superior People's Court Case No.146; a recording and an analysis of this case can be found in Yang Jun, *Case Book of Maritime Law* (1st edn, Peking University Press 2003) 119-121, it can also be found in *Annual of China Maritime Trail* (2000) (Guangdong People Publishing House 2001) 532.

[86] ibid.

[87] Reply of the Supreme People's Court on the Request for Instructions Concerning an Incorporation of an Arbitration Clause in the Bill of Lading in Fujian Shengchanziliao Co. v Golden Pigeon Co., Ltd.(issued in October 20, 1995, No. [1995] 135 of the Civil Division IV of the Supreme People's Court.), this reply confirms that the arbitration clause was incorporated in the bill of lading and bound the third-party holder on two grounds. Firstly, the incorporation clause was explicit and clear about incorporating an arbitration clause. Secondly, the third-party holder expressly agreed to this clause.

[88] *People's Insurance Company of China Fujian Branch* v *Emeraldreeferlines, LLC.* Xiamen Maritime Court [2001] Xia-Hai-Rong-Chu-Zi No. 022 Civil Judgment, in this case, the incorporation clause was explicit about the incorporation of an arbitration clause, while the referred charterparty was not transferred with the bill of lading. This means that the third-party holder of the bill of lading cannot know the content of the referred arbitration clause. Therefore, it was held that without an expressed consent from the third-party holder, the referred arbitration clause cannot be binding; Han (n 76) 231.

[89] Zhao Jian, 'The long-armed Arbitration Clause: Binding Non-signatories to An Arbitration clause' (2000) Arbitration and Law (1), available at http://www.bjac.org.cn/news/view?id=563; Liu Xiaohong, 'Legal Bases for Extending the scope of an Arbitration Clause' (2004) 1 Beijing Arbitration Quarterly 51.

[90] ibid.

of an explicitly worded incorporation clause (which aims to bring in an arbitration clause) require additional consideration. On the other hand, based on the Contract Law of the PRC, it is difficult to ascertain whether the aimed transfer includes the transfer of an arbitration agreement. To illustrate, Articles 79 and 80 provide rules about transferring rights, and require that such a transfer only has to inform the debtor about the underlying transfer.[91] The problem is that even though the debtor agrees to settle disputes through arbitration with the transferee, the transferee's attitude to this dispute resolution is still unknown.[92] As a result, Chinese courts tend to apply a separate evaluation as to the transfer of an arbitration agreement from the transfer of a contract. For example, it was held that the transferee was not bound by the arbitration clause in a supply contract, as the transferee had no knowledge of the arbitration clause when he/she was transferred the rights in the contract.[93] Additionally, Article 84 provides that liabilities can be partly or wholly transferred, and such a transfer of liabilities should inform the creditor.[94] The problem in this Article is that when liabilities in a contract are partly transferred, it is not certain whether the liability in the agreed arbitration will be transferred along with those transferred liabilities or stayed with the rest of the liabilities.[95] Moreover, although Article 88 provides that a contract can be transferred as a whole,[96] it remains unclear about whether or not an

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[91] Contract Law of the PRC, Article 79: The obligee may assign its rights under a contract, in whole or in part, to a third party, except under the following circumstances: (1) such rights may not be assigned in light of the nature of the contract; (2) such rights may not be assigned according to the agreement between the parties; (3) such rights may not be assigned according to the provisions of the laws.
Contract Law of the PRC, Article 80: Where the obligee assigns its rights, it shall notify the obligor. Such assignment will have no effect on the obligor without notice thereof. A notice by the obligee to assign its rights shall not be revoked, unless such revocation is consented to by the assignee.

[92] Liang and Li (n 75) 656.

[93] Reply of the Supreme People's Court to the Request for Instructions on the Validity of an Arbitration Clause for a Dispute over a Vessel Material Supply Contract in the case Chimbusco Marine Bunker (Tianjin) Co., Ltd. v. O.W. Bunker China Ltd. and Shandong Yantai International Marine Shipping Company (issued in October 10, 2010,No. 62 [2010] of the Civil Division IV of the Supreme People's Court).

[94] Contract Law of the PRC, Article 84: Where the obligor delegates its obligations under a contract in whole or in part to a third party, such delegation shall be subject to the consent of the obligee.

[95] Contract Law of the PRC, Article 79, 80, 84, 88 and 89 provides that a contract can partly or as a whole be transferred to a third party; Xu Jinsheng and Chen Xi, *Practice Guide to China's Foreign Related Commercial Arbitration* (Law Press China 2014) 61-62; Cui Jianyuan, *Contract Law* (Law Press China 2005) 179.

[96] Contract Law of the PRC, Article 88: Upon the consent of the other party, one party may transfer its rights together with its obligations under contract to a third party.

arbitration agreement can be transferred along with the substantive part of the contract, since the right and liability in arbitration are not directly related to the subject-matters of the contract.[97]

To conclude, since relevant statutory laws do not directly address this specific issue,[98] Chinese courts and arbitration commissions are reluctant to imply a consent (between the carrier and the holder of a bill of lading) to incorporate an arbitration clause from a charterparty to a bill of lading, if such consent was not explicitly expressed on the bill of lading.[99] As a result, it is very difficult to incorporate an arbitration clause from a charterparty to a bill of lading based on current Chinese law.[100] This rigid legal trend may to some extent overlook the parties' true intention to arbitrate and not in line with commercial practice. Therefore, it is crucial for Chinese law to reform and employ a new paradigm to solve the current problems in terms of the incorporation of an arbitration clause from a charterparty to a bill of lading. The following two chapters will take English law as the prototype in order to find out how does English law deal with the incorporation of an arbitration clause from a charterparty to a bill of lading and to what extent Chinese law can learn from English law.

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[97] Xu and Chen (n 95) 61-62; Article 79, 80, 84, 88 and 89 provides that a contract can partly or as a whole be transferred to a third party.
[98] Fei Lanfang, 'A Review of Judicial Attitudes Towards the Incorporation of Arbitration Clauses into Bills of Lading in China' (2009) 15(1) JIML 99, 100.
[99] Liu and Hjalmarsson (n 83); it also can be seen in some cases that an incorporation was not given effect even the bill's incorporation clause was explicitly worded about the incorporation of an arbitration clause.
[100] Han (n 76) 233; Fei (n 98) 103.

Chapter 3

Functions and Legal Nature of Bills of Lading

3.1. Introduction

It has been well-recognised that bills of lading have three functions: (1) as receipt of the loaded cargo, (2) as evidence of the contract of carriage and (3) as a document of title.[101] However, it remains controversial as to whether these three functions can vest a contractual effect in bills of lading. In this case, this chapter aims to clarify the legal nature of bills of lading.

The reason for an exploration of the legal nature of bills of lading is that it may have a profound impact on the incorporation of an arbitration clause from a charterparty into a bill of lading. This impact can be illustrated from two aspects: (1) the legal nature of bills of lading may shed light on the construction of general words in the bill's incorporation clause, since current judicial constructions on this matter are not unified; (2) the bill's legal nature is also crucial to determine the legal effect of the bill's incorporation clause, namely whether this disputed incorporation clause can legally bind a lawful holder of the bill of lading.

Specifically, the legal nature of bills of lading can provide general words in the bill's incorporation clause with a consistent construction in the first place. In other words, the first hurdle of the incorporation is the judicial construction of general words in a bill's incorporation clause.[102] The general words refer to those words which do not directly and clearly nominate an arbitration clause, such as 'term', 'clause', 'condition', 'whatsoever' and their combinations.[103] The question is

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[101] Wilson (n 2) ch 5; Julian Cooke, Tim Young and Michael Ashcroft, *Voyage Charters* (4th end, Informa Law from Routledge 2014) ch 18; Debattista, 'Cargo Claims and Bills of Lading' (n 4).

[102] This first hurdle is described as the 'description test'. Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 185; Meliz Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (2015) Arbitration 389; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 108.

[103] For example, *TW Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C.1, the concerned general words were 'all other terms and conditions'; in *The Varenna* [1983] 1 Q.B. 599, the concerned general words were 'all conditions and exceptions'; in *The Federal Bulker* [1989] 1 Lloyd's Rep.

whether these general words can sufficiently bring an arbitration clause into a bill of lading.

Judicial decisions on this issue are confusing and they can be divided into two trends.[104] One trend of judicial construction of general words favours a restrictive interpretation, by which generally worded incorporation clause can only bring in terms directly germane to shipment, carriage and delivery. By contrast, the opposite trend indicates that generally worded incorporation clause can lead to an incorporation of arbitration clause. However, it is important to note that although these two trends result in opposite interpretations of general words in a bill's incorporation clause, both trends of construction aim to reveal the true intention of the parties to a bill of lading.[105] This shared consideration of parties' intention is in line with the principle of autonomy in arbitration. It is then important to decide which trend can truly disclose an intention to arbitrate disputes arising from bills of lading.

Since an intention to arbitrate must be made upon a clear understanding of the incorporation clause, it is then crucial to enquire whether or not the lawful holder of bills of lading can have the knowledge of the incorporation of an arbitration clause by reading a generally worded clause. This means that the judicial construction should greatly rely on the merchant's understanding of those general words contains in the bill's incorporation clause.[106] Such understanding may

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103, the wording 'terms and conditions' was held to be too generals; in *Siboti K/S V BP France SA* [2004] 1 CLC 1, the word 'whatsoever' was categorised as general words. Similar considerations also can be found in Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 94.

[104] One trend of judicial construction of general words favours a restrictive interpretation which limits the terms incorporated by general words to those directly deal with the subject-matters of bills of lading, and this trend of construction is represented by the cases *TW Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C.1, and the judgement in this case was held in the later cases: *The 'Njegos'* [1936] P 90, *The Annefield* [1971] P 168, *The Varenna* [1984] QB 599, *The Miramar* [1984] AC 676, *The Federal Bulker* [1989] 1 Ll Rep 103, *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2012] 1 CLC 448, and this trend is recognised in Wagener (n 11) 117; Treitel and Reynolds (n 11) 3-016, 3-021and 3-021. By contrast, the opposite trend, a more flexible construction of general words, is illustrated by the case *The Merak* [1964] 2 Lloyd' s Rep. 527, and this case was discussed in Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 181. This trend is also discussed in the case *The Athena* [2006] 2 CLC 710.

[105] Ryan Catterwell, 'Automation in contract interpretation' (2020) 12(1) Law, Innovation & Technology 81, 84-85; Steven J. Burton, *Elements of Contract Interpretation* (Oxford University Press, Inc. 2009) 1-2.

[106] Burton (n 105) 2.

gradually be formed along with commercial practice.[107] In other words, it is reasonable for any prudent merchant to presume that the general words only refer to the general issues which are customarily regarded as subject-matters of bills of lading.[108] In order to define these subject-matters, it is necessary to look into the development of bills of lading, as the customary usage of the bills confines the information, namely the subject-matters, generally contained in the bills.[109] Therefore, the following sub-chapters will clarify the legal nature of bills of lading by analysing how did merchants use bills of lading throughout history and whether merchants intended to use bills of lading as contracts. Consequently, a common understanding about the terms and clauses contained in bills of lading can be concluded and the construction of the general words in a bill's incorporation clause could be unified.[110]

Secondly, the legal nature of bills of lading may be instructive in the consistency test.[111] Specifically, the second hurdle potentially affecting the incorporation is the inconsistency between a bill's incorporation clause and a charterparty's arbitration clause. The core debate among different judicial constructions may be about the question as to what and to what extend the wording of the referred arbitration clause can have an effect on the intention of incorporation recorded in the bills. In other words, it remains questionable as to whether the wording of the

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[107] ibid 159-160, and 176; The relation between commercial law and merchant law is illustrated by Gerard Malynes, *The Ancient Law-Merchant* (London: Printed for T. Basset, R. Chiswell, T. Horne, and E. Smith 1686) 1-2; Frederic Rockwell Sanborn, *Origins of the Early English Maritime and Commercial Law* (The American Historical Association 1930) 1-10, 19-42; Jacob M. Goodyear, 'The Romance of the Law Merchant' (1929) 34 Dick. L. Rev. 218; Kurt Gronfors, *Towards Sea Waybills and Electronic Documents* (Gothenburg Maritime Law Association, Elanders Tryckeri, Sweden 1991) 7; Wyndham Anstis Bewes, *The Romance of the Law Merchant: Being an Introduction to the Study of International and Commercial Law, with Some Account of the Commerce and Fairs of the Middle Ages* (Sweet & Maxwell 1923).

[108] The concept of subject-matters of bills of lading was put forward in *TW Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C.1, and it was considered by the later cases, such as *The 'Delos'* [2001] 1 Lloyd's Rep. 703. John P McMahon, 'The Hague Rules and Incorporation of Charter Party Arbitration Clauses into Bills of Lading' (1970) 2 Journal of Maritime Law and Commerce 1, 6.

[109] English law barely provides justifications for the definition on the subject-matters of bills of lading.

[110] Catterwell (n 105) 84, it suggests that some materials should be considered by contract interpretation, and these admissible materials may include 'the text as a whole, the potential meanings for the words, the background, the objects served by the contract, the potential consequences of each interpretation, and normative standards and objectives, such as business common sense.'

[111] When the wording of the incorporation clause is in conflict with the wording of the referred arbitration clause, the consistency test is used to decide which clause prevails. See in Özdel, *Bills of Lading Incorporation Charterparties* (n 5) 121.

referred arbitration clause can be manipulated in order to fit the context of the bill of lading.[112] This can be especially the case when the bill's incorporation clause was explicit about incorporating the charterparty's arbitration clause, while the wording of the referred arbitration clause made this clause inapplicable to the disputes arising from the bill of lading.[113] A similar question also exists in the situation where an explicit reference was made in a bill of lading, while the relevant clause in the referred charterparty did not provide an arbitration clause.[114] It seems that these questions remain unsolved and rules of contract interpretation cannot be the solution, as English courts generally regard these issues as a matter of construction but judicial decisions on this matter are inconsistent.[115]

Alternatively, answers may root in the legal nature of bills of lading, because it fundamentally determines the legal effect of the incorporation clause contained in bills of lading. Specifically, the legal nature of bills of lading answers the question as to whether the effect of the wording of the bill's incorporation clause can prevail over the wording of the referred arbitration clause. If bills of lading were contractually binding, certain manipulation on the inconsistent wording of the referred arbitration clause can be required; if not, the referred arbitration clause may have a decisive impact on the incorporation, which means that the incorporation could be unsuccessful because the referred arbitration clause is inapplicable to the disputes arising from a bill of lading, or a litigation clause may

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[112] The manipulation generally happens after the consistency test. Once decided one clause should prevail, the wording of the other clause need to be manipulated in order to suffice the intention expressed by the prevailed clause. For example, in *The Merak* [1964] 2 Lloyd' s Rep. 527, the general worded incorporation clause was manipulated into a specific one, in order to suffice the specific intention expressed by the arbitration clause in the bill of lading.

[113] For example, in *The Rena K* [1978] 1 Lloyd's Rep. 545, the wording of the charterparty's arbitration clause provided 'Any dispute which may arise under this Charter', and it was held that the wording 'this Charter' incurred inconsistency when this clause was read in the bills.

[114] For example, in *The Channel Ranger* [2013] 2 CLC 480, the charterparty's arbitration clause provided a clause named 'law and jurisdiction clause' while bills of lading specifically referred to arbitration.

[115] Manipulation was permitted in the cases: *The Rena K* [1978] 1 Lloyd's Rep. 545, *The Nerano* [1996] 1 Lloyd's Rep. 1, *The 'Epsilon Rosa'* [2003] 2 Lloyd's Rep. 509, *The Delos* [2001] 1 Lloyd's Rep. 703, and *The Kallang (No.2)* [2009] 1 Lloyd's Rep 124. By contrast, in some cases manipulation was not permitted: *Hamilton & Co. v Mackie & Sons* (1889) 5 T.L.R. 677; *T. W. Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C.1, *The 'Njegos'* [1936] P 90, *The 'Phonizien'* [1966] 1 Lloyd's Rep. 150, and *The Annefield* P 168; Baatz, 'Should third parties be bound by arbitration clauses in bills of lading?' (n 8) 92.

be incorporated because the relevant charterparty clause only provides for English courts' jurisdiction.

The situation becomes more complex with the fact that charterparties generally are not available to lawful holders of bills of lading.[116] The conflict is that the incorporation enshrined in bills of lading more or less requires the access to an arbitration clause or its equivalent in a referred charterparty, but the commercial practice hinders such access and it is especially the case in a CIF contract.

Under a CIF contract, the seller is obliged to arrange the shipment, while the buyer will not engage in the negotiation of the agreement concerning the carriage of goods by sea. Before the loading process, the contract of affreightment which usually takes the form of a charterparty is signed by the seller (the charterer) and the carrier,[117] and this contract is designed to include their agreement about chartering the carrier's vessel or a slot of the vessel and taking the loaded goods to a destination. An arbitration clause may be contained in the charterparty if the seller and the carrier agree to it.

At the loading port, bills of lading are unilaterally issued by the carrier to the seller (the shipper who provides the goods to be loaded) after the loading process,[118] and the bills are used as receipts of the goods, prima facie evidence of the relevant charterparty, and documents of title.[119] The incorporation clause which aims to bring the charterparty's clause into bills of lading may be inserted by the carrier in the bills, as the carrier may try to ensure that their liabilities are limited to those stipulated in the charterparty.[120] It then seems that the issuance of bills

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[116] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 181 and 182.
[117] Wilson (n 2) 3-4.
[118] Cooke, Young and Ashcroft (n 101) 3.
[119] Wilson (n 2) 5-8.
[120] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12); Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 178.

of lading are solely made by the carrier and it is unlikely for the buyer (lawful holder of the bill of lading) to participate in this process.

The buyer can only acquire bills of lading by the seller's indorsement, and the relevant charterparty generally is not transferred along with the bills. This means that the buyer cannot have any knowledge of the charterparty's clauses, including the referred arbitration clause.

The problem is that this unknown arbitration clause may have an impact on the buyer's lawful claim. This is because the buyer may have the need to sue the carrier, because on the one hand the buyer has a valuable consideration in the carried goods, and on the other hand the risk concerning the carriage of goods by sea will be passed on to the buyer after the transfer of bills of lading.[121] However, the buyer's right to sue seems to be out of his/her control, if it is restricted by an arbitration clause in a charterparty which is unavailable to the buyer and was not agreed upon by him.[122]

It then seems that the legal nature of bills of lading may firstly affect the judicial constructions of the bill's incorporation clause, and secondly affect the manipulation of the referred arbitration clause. These constructions may consequently affect the incorporation of an arbitration clause from a charterparty to a bill of lading. Therefore, it is necessary to clarify the legal nature of bills of lading, as this issue may unify the judicial construction and consequently increase certainty in both legal and commercial practice.

Moreover, from the perspective of international commercial arbitration, the legal nature of bills of lading also plays a fundamental role in sufficing an incorporation of an arbitration clause. Two pillars of arbitration, namely principle of autonomy

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[121] Raoul Colinvaux (ed), *Carver's Carriage by Sea*, vol 2 (13th edn, Stevens & Sons 1982) para 1609.

[122] For example, the buyer will be deprived of the basic remedy in court and only can be heard by an arbitral tribunal if the referred arbitration clause was successfully incorporated, see in *The Rena K* [1978] 1 Lloyd's Rep. 545; the buyer may accept the proposition that arbitration should be the dispute resolution after reading the explicit words of the bills of lading, and yet the buyer is compelled to a court litigation as no arbitration clause is contained in the referred charterparty, see in *The Channel Ranger* [2013] 2 CLC 480.

and principle of separability, indicate that parties' mutual consent to arbitrate should be the essence of a valid arbitration clause.[123] This means that the incorporation clause in a bill of lading can legally bind a holder of the bill and the shipowner on two grounds. First, it can be proved that the bill of lading containing such an incorporation clause is a contract between the holder of a bill of lading and the shipowner. Alternatively, it can be proved that the holder and the shipper independently agreed into this special incorporation.[124] However, the practical situation is that lawful holders of bills of lading generally cannot have ready or practical means to know and to acknowledge the disputed incorporation. In this case, it is necessary to verify the legal nature of bills of lading, in order to test the possibility to bind a holder of the bill of lading on the first ground.

Additionally, as it discussed in Chapter 2, although Article 95 of the Maritime Code of the PRC regulates that terms and clauses in a transferred bill of lading is binding, it is still uncertain whether an arbitration clause or an incorporation clause with the same effect is included in these binding terms and clauses. It is then necessary to look into the development history of bills of lading to address the problem as to whether an arbitration clause or an incorporation clause with the same effect is naturally contained in bills of lading and whether it can be automatically transferred to a holder of the bill of lading.

To conclude, the legal nature of bills of lading primarily determines the construction of the bill's incorporation clause and the legal effect of the bill's incorporation clause. Unlike a presumption merely based upon custom of merchants, a legal recognition of the legal nature of bills of lading could ascertain the function of bills of lading and subsequently justify the subject-matters

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[123] Gary B Born, *International Arbitration Cases and Materials* (2nd edn, Wolters Kluwer 2015) 190; Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (Oxford University Press 2010) 4.55; Andrea Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (2019) Journal of Business 21, 23.

[124] Özdel, 'Enforcement of Arbitration Clauses in Bills of Lading: Where Are We Now?' (n 51); Born (n 123) 190, and 384; Tweeddale and Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (n 123) 4.05, and 4.55.

legitimately contained in bills of lading. As a result, a consistent rule concerning the construction of a bill's incorporation clause could be made. Meanwhile, a legal recognition of the nature of bills of lading is decisive to the legal effect of an incorporation clause contained in a bill of lading, which is crucial to address the conflict between the wording of an incorporation clause and the wording of a referred arbitration clause. It is then of great necessity to look into the legal nature of bills of lading in the first place.

It seems that a historical analysis of the emergence and development of the bill of lading may be of great relevance to the legal nature of bills of lading. On the one hand, the present commercial law derives from the Law Merchant, namely the so-called *Lex Mercatoria*.[125] On the other hand bills of lading are products of merchants' practice. Therefore, the legal nature of bills of lading may be affected by the law of merchants. In other words, in order to address the incorporation issue concerned by this thesis, it is necessary to carry out an historical analysis of the customary usage of bills of lading at the beginning of the research.

Accordingly, this chapter focuses on this fundamental question, namely whether or not bills of lading were used as contractual documents. The analysis can be divided into two parts. First part is about bills of lading at its early stage of development, and this part comprises four sub-chapters. Second part is comprised of sub-chapter 3.7 and 3.8, and this part mainly addresses the question as to whether the legislation vest a contractual effect in bills of lading, and whether such a statutory effect can impact the issue of incorporating an arbitration clause from a charterparty to a bill of lading.

Before diving into the above-mentioned two parts of analysis, the next sub-chapter provides a general introduction about relationship between the

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[125] Malynes (n 107) 1-2; WP Bennett, *The History and Present Position of the Bills of Lading as a Document of Title to Goods* (Cambridge University Press 1914) 1-2. A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press 2003) 109 and 126.

development of sea commerce and the development of bills of lading. This analysis may answer the question as to when and why bills of lading were invented by merchants. The answer to this question may decide the basic legal nature of bills of lading.

3.2. Custom of Merchants

Apart from the existing research on the development of bills of lading,[126] the main sources for this analysis are compilations of merchant law.[127] These compilation are collected from the most commercially prosperous area, such as Amalfi and Trani, because places where are famous for their commercial activities seem to be the harbour of the good custom.[128]

The customary usage of bills of lading appears to be gradually formed along with the practice of the sea commerce, and the bills and its equivalents have been indispensable instruments in performing the carriage of goods by sea.[129] In

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[126] A brief history of bills of lading (since 11th century) is introduced in Bennett (n 125), especially in the Chapter 1 of this book. However, Bennett's concern focuses on bills of lading as documents of title, but Bennett does not consider whether bills of lading have a contractual nature; Raymond E Negus, 'Evolution of Bills of Lading' (1921) 37 L. Q. Rev. 304 considers the functions of bills of lading as representative of the goods and constituting titles to goods; for a more detailed legal analysis concerning 19th century case law on this issue, see Raymond E Negus, 'Negotiability of Bills of Lading' (1921) 37 L. Q. Rev. 442; Chester B. McLaughlin, 'The Evolution of the Ocean Bill of Lading' (1925-1926) 35 Yale L.J. 548 also mentioned the development of bills of lading since 11th century, focusing on bills of lading as evidence of shipment. The transferability of bills of lading is considered by Norman Miller in 'Bills of lading and Factors in Nineteenth Century English Overseas Trade' (1957) University of Chicago Law Review vol. 24, Iss. 2, Article 4; Daniel E Murray, 'History and Development of the Bill of Lading' (1982-1983) 37 U. Miami L. Rev. 689 illustrates the legal effect of the presentations on bills of lading, particularly the judicial treatment of carrier's liability of misrepresentation since 16th century; Boris Kozolchyk, 'Evolution and Present State of the Ocean Bill of Lading from Banking Law Perspective' (1992) 23 J. Mar. L. & Com. 161, firstly gives a very brief introduction of the function of bills of lading dating back to 17th century and it mainly discusses bills of lading being documents of title and issues related to the negotiability of the bills; SF du Toit, 'The Evolution of the Bill of Lading' (2005) 11 Fundamina 12, also provides a historical research on bills of lading and its emphasis is put on the bills' function as documents of title; Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (2nd edn, Informa UK 2015) also provides a short history of bills of lading. These sources mainly address the history of bills of lading from the perspective of one of the bills' functions, such as being documents of title, and they barely provide detailed analyses about or link their findings to the legal nature of bills of lading, particularly as being of a contractual nature. Nevertheless, these analyses about the functions of bills lading may contribute to the analysis about the legal nature of bills of lading, because the recognised legal consequences of using bills of lading will shape the overall legal nature of the bills.

[127] Travers Twiss (ed), *The Black Book of the Admiralty: With an Appendix*, vol 4 (Cambridge University Press 2012) is the main source of compilations of the custom of merchants. It provides compilations of custom of sea commerce within Mediterranean with English translation. Charles Henry Monro MA (tr), *The Digest of Justinian*, vol 1 (Cambridge University Press 1904) provides the statute concerning the carriage of goods by sea in Roman Law; Cutler (n 125) 113-114.

[128] Bewes (n 107); Cutler (n 125) 111, 113 and 115.

[129] Cutler (n 125) 126-129.

addition, social backgrounds and interactions between merchants from different areas may contribute to formation and unification of the merchant's practice in terms of conducting sea commerce.[130]

For instance, in the 11th century, the 'divorce' of the cargo owner and the shipowner results in the use of certain written documents, such as a register book or a memorandum,[131] and this kind of written documents was used to record the agreement between the cargo owner and the shipowner about chartering a whole or a slot of a vessel for carriage of goods by sea. Before the 11th century, sea commerce used to be performed by merchants (cargo owners) who owned a vessel themselves, and for this reason there was no need to charter a vessel for transporting merchandise. This situation changed in the 11th century as more merchants were engaged in sea commerce,[132] and it was unrealistic for every merchant to have their own vessel for carriage of goods by sea.[133] For this reason, certain written documents which may be regarded as quasi-charterparties were invented.[134]

Later, in the 13th century, the cargo owner no longer travelled with the loaded cargo, and alternatively the cargo owner handed over the goods to the shipowner and stayed ashore.[135] This major evolution in the management of sea commerce increased the necessity of using some written documents to clarify the ownership of the loaded cargo. This need was realised by recording the shipper's name on a register book and issuing its copies. Specifically, shipowners distinguished

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[130] Sanborn (n 107) 1-10, 19-42; Goodyear (n 107); Gronfors (n 107) 7. In terms of the interaction between a certain social background and the trend of sea commerce, in addition to the work of Sanborn and Goodyear, it is also considered by Malynes (n 107); Bewes (n 107); Runciman S, 'Byzantine Trade and Industry' in Edward Miller, Cynthia Postan and MM Postan (eds), *The Cambridge Economic History of Europe from the Decline of the Roman Empire*, vol 2 (2nd edn, Cambridge University Press 1987); Cutler (n 125) 108.

[131] McLaughlin (n 126) 550; Aikens, Lord and Bools (n 126) para 1.1.

[132] Runciman S, 'Byzantine Trade and Industry' in Edward Miller, Cynthia Postan and MM Postan (eds), *The Cambridge Economic History of Europe from the Decline of the Roman Empire*, vol 2 (n 130).

[133] McLaughlin (n 126) 550.

[134] Cutler (n 125) 129.

[135] Toit (n 126) 13, where provides that merchant used to travel with their goods before 1250, and yet it turned to be impractical to follow every single trip in person as the volume of trading was soaring. Consequently, merchants changed their previous practice, and started to hand over the goods to the carrier and stay ashore themselves. The merchant of this novel kind was referred as 'the sedentary merchant'.

loaded cargos by referring the shipper's name and the cargo's name recorded in the register book. When the vessel arrived at the destination, cargo owners claimed the delivery by presenting copies of the register book which were issued by the clerk. These copies were used as evidence to help the shipowner to identity the true receiver. As Gronfors noted, 'the documentation must serve as an instrument to create "a grip on the cargo"'.[136]

More importantly, this kind of written document not only recorded the agreement of chartering a vessel, but also recorded the quantity and quality of the loaded cargo. Since the cargo owners cannot take care of the loaded cargo during the voyage by themselves, it was of greater practical necessity for the shipper and the shipowner to have a piece of written evidence at the loading port. This is because this written evidence may prove the fact that the shipowner received the said goods and the status of the goods at the shipment.[137]

To illustrate, with the comparison between the initial record and the final condition of the carried goods, the fact whether there was a loss or damage could be easily established. As a result, compensation could be granted according to the merchant's rightful claim.[138] Meanwhile, the carriers' lawful defence could also be supported when there was a fraud committed by the other party.

This means that copies of a register book could primarily evidence facts that happened at the loading port. Moreover, these copies also played an importance role to help the shipowner to identify cargo receiver at the destination, and this function may lay the foundation for the transferability of bills of lading. Since sellers stayed ashore and they could not unload the cargo at the destination, shipowners needed help to identify the receiver at the destination in order to make the right delivery. This practical need of shipowners added another function to the copies of a register book, namely being evidence of the cargo receiver's identity.

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[136] Gronfors (n 107) 15.
[137] Bewes (n 107); Cutler (n 125) 129.
[138] Cutler (n 125) 121.

In other words, at the unloading port, the receivers needed to prove their right to claim delivery by presenting the copies, and the shipowners verified receivers' identity and delivered the corresponding cargo by comparing records on a register book and on copies held by the receiver. In order to enable cargo receivers to usefully produce a copy of the register, shippers needed to write the receiver's name on the copy and then sent the copy to the receiver before the vessel reached its destination.

Additionally, the peril of sea gave birth to the practice that multiple copies of a register book were issued. It was suggested that a register book could be damaged or lost if some unpredictable misfortune happened during the voyage.[139] In this case, a single copy of this register could not enable to perform its evidential function, especially when the cargo owner remained ashore and could not witness the misfortune by himself.[140] Therefore, the Law Merchant highlighted the necessity of producing multiple copies of a register book, and the copy left on land could be the back-up one, with the same validity. This suggests that copies of a register remained as evidential instruments and issuing multiple copies was designed to guarantee that a piece of evidence was accessible when it was required.

In the 16th century, merchants started to make commercial transactions by selling and buying bills of lading. As a result, this written instrument embraced its new function as being document of title.

It seems that due to the changes in commercial practice, the development of bills of lading can be divided into four main stages, namely the emergence of a register book, the emission of copies of a register book (rudimentary bills of lading), the first appearance of bills of lading and the rise of transferable bills of lading. In order to clarify the legal nature of bills of lading, the following sub-chapters will

[139] McLaughlin (n 126) 551.
[140] Toit (n 126) 13.

look into functions and legal nature of the above-mentioned written documents respectively.

3.3. The Register Book

A register book was widely used in sea commerce in the 11th century, and it was customarily used to record the contract of carriage between the cargo owner and the shipowner and the quantity and quality of the loaded cargo.

The popularity of register books resulted from its an indispensable role in sea commerce. From the perspective of the cargo owner's interests, a register book evidenced the shipowner's promise of providing the ship and taking care of the cargo during the voyage. The record of the information and of the condition of the loaded cargo could be used to evaluate whether the shipowner fulfilled the promise. If not, due compensation was expected to be made by the shipowner. From the shipowner's standpoint, a register book evidenced the cargo owner's promise of hiring the ship and paying the freight, and the record concerning the cargo could serve as evidence in deciding whether the cargo owner was responsible for the damage or loss of the cargo. This means that a contract of carriage and a piece of evidence of the information and condition of the loaded cargo were both embodied in a register book.

It follows that certain links exist between register books and bills of lading, as they are used in a similar manner at the loading port. Therefore, the legal recognition of register books may shed light on the legal nature of bills of lading. The legal recognition of register books is examined in below.

It seems that like bills of lading, register books were primarily used as an evidential instrument. Even though there was no specific legislation directly defining functions of register books or any other documents with equivalent effect, the requirement of producing a written document of this kind can be implied from

the legal recognition of the shipowner's responsibility of safe custody in the Roman Law since the 6th century.[141]

In Title IX of Book IV of the *Digest of Justinian*,[142] it is provided that the carried goods should be protected from theft and damage throughout the whole journey,[143] and the carried goods may include the actual cargo and the items which were carried by the passenger for daily use.[144] Moreover, there were special officers who answered for the *exercitor* (owner or charterer) and were assigned to receive and take care of the goods which were expressly entrusted to them or that merely were put on board.[145] In addition, it is stated that the praetor should grant an action against the shipowner if the shipowner breached the duty of safe custody.[146]

It follows that in order to determine whether the shipowner breached the duty of safe custody, it is necessary to prove the fact that the loaded goods was damaged or lost. It then highlighted the evidential function of a register book, as the recording in this book can evince the initial condition of the loaded cargo, and the promise made by the shipowner. By comparing this recording with the final condition of the cargo, it would be clear whether the shipowner breached his/her promise.

Moreover, Article 10 of the Amalphitan Table states:[147]

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141 Bewes (n 107) Ch VI.
142 Monro (tr) (n 127).
143 ibid 297.
144 ibid 294-295.
145 ibid.
146 ibid.
147 *The* Amalphitan *Table* was one of the prestigious compilations of merchant law and it was drafted before the 11th century. According to Sanborn (n 107) 30-49 and 50-51, and Goodyear (n 107) 219-220, the Amalphitan Table preserves the most prevailed merchant custom at that time. First, The Italian city of Amalfi was the harbour of merchant custom. Amalfi was on the one hand experiencing a favourable political environment and was boasting of its maritime power on the other. Additionally, the religious zest and the close communication with Alexandria (the busiest port at that time), Levant, Sicily and Bari also contributed to the Amalfi's leading role in commercial activities. Secondly, the abundant experience in commercial activities laid a foundation for its legal impact on maritime law. The existence of a maritime court in Amalfi and its own maritime law can be traced back to the 10th century, and its high reputation attracted merchants from other regions to have their disputes heard before the Amalphitan Admiralty Court.

> ‘Likewise the masters on setting sail ought to show and declare to all the mariners and associates, the ship's account and the merchandise, and also the money which they bring from the city, and likewise to narrate to them where they are going.’[148]

This provision indicates that it was the masters’ obligation to make an official declaration, and the content should include the ship’s account, the loaded goods, the money and the route of the voyage.

However, with a closer examination, it seems to be imprudent to completely equal register books to bills of lading, because register books and bills of lading are slightly different. Particularly, differences are twofold: (1) the person who was in charge of a register book; and (2) the relationship between a register book and a contract of carriage. This distinction may be of great importance to analyse the legal nature of bills of lading, because if register books was completely equal to bills of lading, the contractual effect of register books could subsequently be inherited by bills of lading. These two differences are fully discussed in below.

3.3.1. The Clerk – Officer in Charge of the Register Book

A register book was only available to a clerk, and yet bills of lading are issued to several relevant parties. This difference may result from the different manner of managing business. In the 11th century, merchants accompanied the cargo during the voyage and witnessed the loading process by themselves. This may have made it unnecessary to issue a copy to the shipper in order to evidence the fact that the cargo was loaded with the quantity and quality noted down. By contrast, nowadays merchants do not travel with the cargo, which may highlight the importance of acquiring a piece of evidence from the shipowner.

The clerk’s exclusive control over a register book can be evidenced by two categories of provisions in merchant law. One category of provisions provided

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[148] Twiss (ed) (n 127) 9.

that a clerk was responsible for recording and this person was an independent official. Another category provided that the clerk's recording – or a register book – was solely kept by the clerk. By contrast, bills of lading are normally prepared and issued by the master or the shipowner, and copies of bills of lading are available to the shipper and the consignee.

Article 25 of the Amalphitan Table states:

> 'Likewise every (master of a) vessel, that carries a clerk, ought to come to the court and make the clerk be sworn according as the rule requires, and after he has been sworn, his writing ought to be received in the court as the proper public writing of a notary-public.'[149]

It was noted by Travers Twiss that this 'clerk' was originally recorded in the Latin title of 'scriba' (hereunder referred to as 'scribe'),[150] and this position was not a compulsory one, as it was provided that 'it is not as yet incumbent on all vessels to carry a ship's clerk.'[151] According to this Article, it is clear that from that early time there was a specific officer who was required to perform an 'honesty' inspection, and this particular officer was in charge of producing a written document with legal effect.[152]

It seems that in terms of the shipowner's responsibility of safe custody, the Amalphitan Table took a similar position as it was provided in the Digest of Justinian. Similarly, an inventory of the loaded items was a desirable written evidence. This is because the recording in such a written evidence may play a crucial role in investigating the claimed lost or damage, which may consequently determine whether or not the shipowner fulfilled his responsibility in taking care of the cargo on board. If not, the corresponding compensation that should be paid

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[149] Twiss (ed) (n 127) 17.
[150] 'scriba' or 'scribe' means the ship's clerk in English.
[151] ibid.
[152] Lista, 'Knocking on heaven's door: in search for a legal definition of the bill of lading as a document of title' (n 4) 254.

by the shipowner may also be calculated based on the recording on such a written evidence.

Moreover, in this merchant code of sea commerce, the prominent development is that it enhanced the credibility of the clerk's writing by compelling the clerk to make an oath which could lead to a severe punishment if the clerk broke his promise of conducting an honest inspection and recording accordingly. For this reason, the clerk's writing was so highly valued that it qualified as an unbiased evidence in the court.

This practice clearly disclosed the evidential function of the clerk's writing, and it is reasonable to consider that the content of such writings was limited to the information that was directly relevant to the operation of the voyage and the safe custody, such as the ship's name, the designed route, and the information and condition of the loaded goods.

Similarly, Article XVI of the Ordinamenta et Consuetudo Maris of Trani provided that every master must take on board a scribe, and this person should be responsible for recording the loaded merchandise in a register book which was covered with parchment under an oath of fidelity.[153]

Moreover, the credibility of a register book fully depended on the honest behaviour of the scribe, because this article also indicated that a piece of dishonest or false recording invalidated the whole register book.[154] This means that a register book was used as a conclusive evidence of the information and condition of the loaded goods, and this strict regulation was intended to guarantee the truthfulness of the recording. It was then reasonable to use a register book to evaluate the loss and damage if any misfortune happened.

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[153] Twiss (ed) (n 127) 533. Trani was the most commercially prosperous city during the 11th century.
[154] ibid.

As it was stipulated in Article XXIII which mainly dealt with the issue of general average, the 'delicate articles of value' shall not be included in the average if they were not recorded by the scribe.[155] This provision further emphasised the important role of the ship's clerk and of the register book in the assessment of any subsequent damage. More importantly, it evidences the fact that there was a registration procedure during the boarding.

The Ordinance of King James I of Aragon of 1258 and the Statute of Marseilles of 1255 also inherited the concept of ship's clerk – in the form of scrivano or scriptor.[156]

The truthfulness of the recording was also guaranteed by the neutral position of a nominated clerk. It was strictly required that the nominated clerk should be a public officer who had no common interest either with the shipper or with the carrier, which means that this officer was appointed to safeguard the interests of both.[157] This is because a recorded inspection carried out by a third party is more likely to be persuasive and accepted by courts as evidence. In other words, only unbiased evidence can provide trustworthy information for the court to distinguish the legal rights and responsibilities of the shipper or the carrier respectively.

Before the 14th century, there are other compilations of custom regarding maritime commerce. For example, the Le Fuero Real which was published by Alfonso X of Castile in 1255 and stated that 'the owners of ships should cause to be enrolled in the register all the articles put on board ship, their nature and quantity.'[158]

Unlike the previous collections of merchant law which mainly dealt with the responsibility of the clerk at length, the Ordinance of the Prudhommes of

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155 ibid 539.
156 ibid.
157 McLaughlin (n 126) 550.
158 Bennet (n 125) 4.

Barcelona in 1341 paid additional attention to the recording parchment itself and officially named it ‘register of the ship’s clerk’.[159]

It is then clear that a register book is solely kept by an independent officer, namely a clerk. By contrast, in bill of lading cases, the shipowner (as a party to the contract of carriage) signs bills of lading, and then this shipowner retains one copy of the bill and issues the other copies to the shipper who may transfer the bills to others. Therefore, register books and bills of lading share similar functions in terms of being evidential documents, but bills of lading are used in a different manner.

3.3.2. The Contract of Carriage Recorded in the Register Book

Apart from the above-mentioned difference in usage, the content of register books may also slightly different from that of bills of lading. Specifically, register books may contain contracts of carriage, while in bill of lading cases contracts of carriage are normally contained in separate written contracts, such as charterparties. This difference may derive from the aforementioned difference in managing business. A register book was exclusively prepared and kept by a clerk. It was designed to conclusively record the agreement between the shipper and the shipowner and the operation concerning the shipment, carriage and delivery. Therefore, a register book naturally included both contracts of carriage and evidence that the shipowner received the shipper’s cargo on board. Consequently, certain contractual effects could be acknowledged to a register book.

Provisions in the Ordinamenta et Consuetudo Maris of Trani stated that a register book not only contained information of the loaded goods, but also agreements between the charterer and the shipowner about chartering the vessel to ship the cargo. The rationale of adding the role of a clerk and inventing register books was that, compared to an oral agreement, certainty and reliability were more likely to

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[159] Twiss (ed) (n 127) 87.

be guaranteed by a written evidence, especially when the transportation involved multiple parties. It then seems that, apart from being a receipt, certain contractual elements were introduced in the register, since a part of the register was used to record contracts of carriage.[160]

Provisions in the Customs of the Sea,[161] provided that the recording in register books should include almost every event or occurrence during the whole trip as long as it was true. As a result, the clerk was obliged to supervise the operation of the undergoing carriage, and the register book was his/her tool to fulfil the obligation. Chapter XIII of the Customs provided that the inspection of the loading operation and the purchase of necessities should be the clerk's duty, which indicates that the relevant note about these activities were written in a register book.[162] Chapter XV also provided that all the expenses and wages should be noted in a register book.[163]

As for bills of lading, in nowadays practice, the charterparties and the bills of lading are prepared separately. Charterparties are generally concluded between the charterer (who might not be the shipper) and the shipowner before the bills of lading are issued. It means that bills of lading are unlikely to contain its related contract of carriage since the contract of carriage has already been concluded in the form of a charterparty.

It is then reasonable to conclude that the paramount function of being an evidential instrument is shared by register books and bills of lading. However, bills of lading which contain references to charterparties should be distinguished from register books. Indeed, in nowadays practice, the charterparty and the bills of lading are prepared separately so that bills of lading are generally issued after a charterparty has been concluded between the charterer and the shipowner. In

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160 ibid.
161 The *Customs of the Sea* was drawn up at Barcelona in the later 14th century.
162 Twiss (ed) (n 127) 85.
163 ibid 87.

other words, this contractual effect of the charterparty is unlikely to affect the legal nature of bills of lading.

3.4. Copies of the Register Book and Rudimentary Forms of Bills of Lading

Since merchants no longer travelled with the cargo, the merchant stayed ashore needed a piece of evidence to prove the shipment. It is stated in the Statutes of Marseilles of 1253-1255 that there should be an officer whose duty was to enter the information about the goods brought on board on a certain parchment.[164] More importantly, this compilation of merchant law provides that when a merchant asked for the parchment, the officer was obliged to issue one copy of the parchment to the merchant.[165]

The significance of this compilation of merchant law is that it firstly recognised the practice that an official recording of the quality and quantity of the loaded goods could be issued in multiple copies,[166] and it seems that these copies are likely to be the origins of bills of lading.[167] This is because access to register books was no longer strictly limited to the nominated officer and a copy of a part of the register could be produced at the merchant's request.

This operation resembles the usage of bills of lading, as a couple of copies of the bills are normally issued and they are available to the involved parties. Although copies of a register book were issued by the nominated officer, while copies of a bill of lading are issued by the shipowner, it is also reasonable to compare these two kinds of copies. This is because the major aim of having the nominated officer is to guarantee the truthfulness of the recording on the copies, and the copies were therefore qualified as evidential documents. Such aim still can be achieved even though copies of bill of lading are issued by the shipowner, since Article III

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[164] Toit (n 126) 18.
[165] ibid.
[166] ibid.
[167] Aikens, Lord and Bools (n 126) para 1.1; Lista, 'Knocking on heaven's door: in search for a legal definition of the bill of lading as a document of title' (n 4) 254.

(3) of the Hague-Visby Rule clearly states that the shipowner should note the condition of the loaded goods objectively, and Article III (4) legally recognised bills of lading as evidential documents.[168]

Meanwhile, it seems that the information contained in one copy of a register book may be tailored for each shipper. This is because it seems to be impossible for the clerk to copy the whole register book for each shipper. On the one hand, the recording in a register book was rather inclusive, including various agreements of chartering the ship and information of all the loaded goods. On the other hand, a shipper would only concerned about the goods he/she shipped, and it was unnecessary for him/her to have the knowledge of other cargos. Similarly, a set of bills of lading is also only used for one particular shipment. To clarify, a vessel generally is loaded with goods from multiple shippers, and the shipowner is obliged to issue bills of lading to every shipper according to their respective cargos.

The custom of issuing copies of the register book was followed in the 14th century, and compilations of customs related to sea commerce may prove the presumption that the copies of the register book are more likely to be the origin of bills of lading.

For example, an Extrait du Statut de Sassari in1316 was one of the pioneering provisions on the carriage of goods by sea,[169] and Part I, Chapter LVI states:

> ‘The Masters of ships which shall come to the port of Torres and which shall have been freighted by merchants to carry their goods shall give a sufficient written security (de dare suffitiente securitate) that the merchandise which they have promised to transport shall be shipped in entirety on their vessels. When this written security shall have been given before the Podesta or his deputy and

[168] Article III (3) and Article III (4) of the Hague-Visby Rule.
[169] Bennet (n 125) 4.

when the merchant shall have received his 'police de chargement' (sa puliza) the ship may leave the port without further permission from the officials.'[170]

The author Bennett equated the phrase 'police de chargement' to 'bill of lading', and such opinion had been verified by the authority in the Customs of the Sea, drawn up at Barcelona in 14th century. Unlike the previous merchant law in which the legal nature of register books could only be implied from the provision directly dealing with obligations of a clerk, this provision (Chapter LVI) provided particular recognition of this special written security. Moreover, two 'compulsory' requirements in this provision may also evidence developments in official recognition of this evidential instrument. One is that for every vessel before its departure, the authority at the port could carry out a scrutiny over the goods on board and the scrutiny was made according to the written security. Another one is that the merchant staying ashore should receive one copy of the written security before the departure of the vessel.

The customary usage of issuing copies of a register book also can be evidenced by a statute of the City of Ancona in 1397. It provided that a copy of the clerk's register should be available to the person who had the right to demand it, and the copy should be delivered within three days.[171] This regulation was rather a strict one, as the clerk would face a fine of £10 and a liability in a civil action for damages if the clerk failed to provide a copy.[172]

It is then clear that since the copies of a register book and bills of lading are used in a similar manner, the origin of the bills may be more likely to be the copies rather than the register book.[173] Consequently, the legal nature of the copies may impose effect on the legal nature of bills of lading. Considering the custom of sea commerce, it is possible to presume that a contract of carriage was more likely to

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[170] ibid.
[171] McLaughlin (n 126) 551.
[172] ibid.
[173] ibid.

be recorded in a register book, while the statement contained in the copies tended to be those directly related to the information about the navigation and about the condition of the loaded cargo, as the copies were used as receipts to evidence the shipment.

This conclusion can be confirmed by some chapters in the Customs of the Sea, because these chapters may indicate that a distinction had been made between the agreement of chartering a vessel and the agreement of freighting goods. Consequently, since the agreement of freighting goods had been treated as an independent written document, it could be considered as a rudimentary form of bills of lading.

Chapter XXXVIII and XLIV indicate that the agreement of shipment could involve a written contract, or it can be concluded in the presence of a witness and the parties end up with by shaking hands. The conclusion of the contract should be recorded in the register.[174] Chapter LVII also states:

> '… Every covenant which the merchant enters into with the managing owner of the ship he is bound to fulfil, if it be entered in the ship's book…. Let us suppose that the merchant has made a writing, or that it is written in the ship's book, the merchant is bound to fulfil it.'[175]

This chapter seems to confirm that a register could be seen as a collection of various agreements or contracts. It evidenced the contractual relationship between the merchant and the shipowner. The agreement of chartering the shipowner's vessel was indeed recorded in the register after it had been concluded.

Chapter CCXXXVI exclusively deals with the contract of freighting goods, and it reads:

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[174] Twiss (ed) (n 127) 111,121.
[175] ibid 160-161.

> ‘If merchants have freighted goods to any managing owner of a Vessel in writing or in the presence of witnesses it is incumbent that the said managing owner should fulfil to the said merchants all that shall be contained in the said Writing; and all that the said witnesses have heard when the said affreightment took place.’[176]

It seems to the author Bennett that such a separate regulation about the agreement of carrying cargo may indicate that during this period of time there was a distinction between the freighting of goods and the freighting of vessels.[177] In this sense, these two different documents are used to address different issues accordingly. From a modern perspective, issues related to the freighting of vessels are mainly governed by a contract of carriage. It follows that the document governing the freighting of goods is more likely to be regarded as a rudimentary form of bills of lading, as this independent document mainly used to record the condition of loaded cargo.[178]

Therefore, in order to evidence the information and conditions of the loaded cargo, the copies issued to the shipper were more likely to be made from the page(s) of a register in which the recording was related to the freighting of goods, and not include the issues about freighting of vessels. Since it was suggested that the copies are a rudimentary form of bill, it is then reasonable to imply that bills of lading merely function as evidence and include the information directly related to the shipment, carriage and delivery of the loaded cargo.

3.5. The Book and/or The Bill of Lading

Entering the 16th century, a kind of written documents named ‘book or bill of lading’ appeared in the records of the High Court of Admiralty. According to these case reports, it is reasonable to infer that the book or bill of lading took the place of the

[176] Twiss (ed) (n 127) 562-563.
[177] Bennet (n 125) 5-6.
[178] ibid.

copies of a register book. To be specific, these case reports clearly illustrate that the book or bill of lading inherited the core function of the copies of a register book, namely as receipts at the loading port and evidential instruments in identifying the cargo receiver at the unloading port. In addition, these case reports also illustrate an initial interaction between law and custom of merchants in the area of sea commerce, as judgements took the custom into considerations.

It seems that a book or bill of lading was recognised as an evidential instrument, and it was used as a receipt at the loading port, a concise memorandum for the carrier to accomplish the carriage of goods by sea, and an evidential document to identify the true receiver at the destination.

The case *Chapman v Peers* (1534) seems to be the first case in which English law recognised the legal nature of bills of lading in terms of being evidential documents, and the judgment in this case was affected by custom of merchants.[179] In this case, a document named 'book of lading' was used by a merchant in order to record the information on the loaded goods, and the dispute was about whether the shipowner should be responsible for the lost or damaged goods which were not entered in the book of lading.[180]

The court firstly paid considerable consideration to custom of merchants. It was further held that the custom of using a book of lading should be the rule and respected by the law as this merchant practice had been lawfully observed by merchants and courts repeatedly.[181] It is then suggested by Bennett that the book of lading had been widely used among the merchants before the 16th century and it could be the heritage from the practice in early times, such as the usage of a register book and its copies.[182]

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[179] 'Extracts from the Records of the High Court of Admiralty.' (1887-2011; vols 129-132 (2012-2015) are currently available through the Selden Society) Selden Society 27, 44 and 184.
[180] ibid.
[181] ibid.
[182] Bennet (n 125) 8-9.

The long-established merchant custom indicated that the book of lading and its equivalents were used as receipt, and subsequently the book of lading was mainly recognised as a conclusive evidence in law, and it proved the fact that the shipowner received the recorded goods and the shipowner was responsible for these goods, as a judgment of the High Court of Admiralty stated:

> '… owners and masters or charterers of ships or their pursers are not bound and ought not nor is any one of them bound nor ought be to be bound to answer for goods or things carried or laden in their shups that are not entered mentioned or inserted in the book of lading…'[183]

This judgement evidences the presumption that the book of lading derived from the register and confirms the Chapter LXIX of *the Customs of the Sea* in the 14th century which stated that '… the managing owner of the ship or vessel is not to be responsible for any damage which the goods may suffer, since they are not entered in the clerk's register.'[184] It then seems that although the documents were named differently, one is a 'register' while the other is a 'book of lading', their function remained similar, as they mainly served as a receipt.

For this reason, it is possible to conclude that the information customarily evidenced by and contained in the book of lading is directly related to the carriage and the carried goods, because the book of lading was used to testify to the shipowner's performance of the liability of safe custody. It follows that the legal nature of the book of lading may be confined to an evidential instrument.

The book of lading may not only be linked to the register customarily used in past, but also have a connection with the modern bills of lading. Regardless of the slight difference in the name, the function shared by the book and the bills of lading should be given more weight. It is clear that they are both used to record the information about the goods on board. Moreover, this recording of the carried

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[183] *Chapman v Peers* (1534) (n 85).
[184] Twiss (ed) (n 127) 175-177.

goods had been legally used as a conclusive evidence which can be decisive in clarifying the responsibilities of the involved parties.[185]

The exact wording 'bills of lading' was firstly used in *The Thomas* (1538),[186] and the content of bills of lading could be well-illustrated by this case, as it is related to the oldest extent copy of bills of lading.[187] However, the legal recognition of the bill of lading remains uncertain in that decision because the report merely provides a copy of the bill while no judgement is attached.

This copy of the bill of lading supports the proposition that the content of bills of lading would be confined to the issues directly germane to the shipment, carriage and delivery of the cargo.

The items recorded in this bill of lading could indeed be roughly categorised into two categories. The first group was mainly the statement of relevant facts. These facts included the time of loading, the name of the parties, the name of the vessel, the description of the loaded goods, the name of the consignee and the destination.[188] The second part concerned the rights and liabilities related to the operation of the shipment, carriage and delivery. Those recorded responsibilities were mainly shouldered by the carrier. To illustrate, the carrier, John Halmdry, was obliged to carry the loaded salt from Newcastle to London by the named vessel, the Thomas.[189] In addition, to accomplish this specific carriage, the carrier should complete the carriage within a reasonable time, during which period the master should pay due diligence to take care of the goods and navigate the vessel to London directly, and finally the carrier should discharge the carried salt to the specific assignee or the lawful attorney who was appointed by Robert Manne's master, Sir Oswald Wylstrop within a limited number of working days of

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185 Aikens, Lord and Bools (n 126) para 1.7.
186 'Extracts from the Records of the High Court of Admiralty.' (1887-2011; Vols 129-132 (2012-2015) are currently available through the Selden Society) Selden Society 27, 61.
187 Bennet (n 125) 9.
188 *The Thomas* (1538) (n 186).
189 ibid.

its unloading.[190] In turn, the carrier should be paid for the agreed amount. Accordingly, the other party's responsibilities were to hand over the said goods to the carrier and to pay the agreed freight.[191]

The truthfulness of the bill of lading was guaranteed, because it was made under a merit promise and with the presence of an unbiased third party.[192] As a result, it is safe to conclude that the terms contained in the bill were highly likely to have been well-acknowledged and were so objective that they could be qualified as a piece of evidence.

To supplement the evidential function of the clerk's writing, copies of the register book were at merchant request. Similarly, multiple copies of bills of lading were issued, and this merchant practice can be evidenced by the case *Hurlock and Saunderson v Collett* (1539).[193] In this case, Collett sold a certain amount of iron to Hurlock and Saunderson, and the iron was carried by Thomas Holande's ship named Mary Martyn.[194] Similar to *The Thomas*, the information on the bills of lading in this case were also falling into the same two categories.

The distinct feature of this case is that three copies of the bill were issued, as it states 'In wytness of the truythe I the said master or the purser for me have firmyd iij bylls of one tenor the one complied and fullfylled and the other to stand voyd.'[195] It is worth mentioning that this practice is consistent with the custom recorded in *the Statutes of Marseilles of 1253-1255* and *the statute of the City of Ancona* in 1397.[196]

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[190] ibid.
[191] ibid.
[192] ibid.
[193] 'Extracts from the Records of the High Court of Admiralty.' (1887-2011; Vols 129-132 (2012-2015) are currently available through the Selden Society) Selden Society 27, 88.
[194] ibid.
[195] ibid 89.
[196] *The Statutes of Marseilles of 1253-1255* is referred by SF du Toit in 'The Evolution of the Bill of Lading' (n 126); *the statute of the City of Ancona* in 1397 is referred by Chester B. McLaughlin in 'The Evolution of the Ocean Bill of Lading' (n 126).

This means that the practice of issuing multiple copies of the bills has been preserved as a custom, as this practice played an important role in carrying out the commercial transaction.[197] To be specific, the shipper used it as a receipt which proved that he had shipped the agreed cargo, the carrier used it as a memorandum of safe custody and to help him/her identify the receiver, and the consignee used it as a piece of evidence to prove his identity and to check the condition of the cargo.[198]

Moreover, it is of great importance to note that the symbolic delivery as the result of the transfer of bills of lading seems to be legally recognised in this case, as the case report states that:

> 'A copy of the bill of lading is endorsed upon the article upon first decree, upon the passing of which the goods were delivered to Hurlocke and Saunderson.'[199]

It follows that the bill of lading remained as an evidential document, and the facts evidenced by the bills were not only the information and conditions about the loaded cargo, but also the consignee's right to claim the delivery of the goods.

Since the consignee's right to goods should derive from the sale contract, it is then impossible to hold that such a symbolic delivery can define the legal nature of bills of lading as a contract which contained the absolute property of the goods.[200] The bill may only be used to verify the consignee's identity in order to help the shipowner to make the right delivery.[201]

3.6. Bills of Lading as Transferrable Documents

The next stage in the development of bills of lading is marked by the bill's transferability. The transferrable bills of lading are commonly used in commercial transactions which involve the carriage of goods by sea. By using this kind of bills,

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[197] Aikens, Lord and Bools (n 126) para 1.1.
[198] Aikens, Lord and Bools (n 126) para 1.7.
[199] *Hurlock and Saunderson v Collett* (1539) (n 193).
[200] Colinvaux (ed) (n 121) para 1596.
[201] Aikens, Lord and Bools (n 126) para 1.7.

merchants can perform a sale contract simply by transferring the bill of lading containing the information about the sold goods. Consequently, the legal nature of bills of lading has been considered as open to discussion as to whether the bills can be regarded as contracts, if the consignee or assignee's right to goods appears to be realised by presenting the bill to the shipowner. In other words, because of this transferability, the claimed contractual effect of bills of lading can be implied from two aspects. One results from the consignee or assignee's right to claim the delivery, as it appears that bills of lading contain a contract concerning the transfer of property in goods. The other results from the consignee or assignee's right to sue the shipowner for compensation about the damage or loss of the goods, as the bills tend to be the only relevant documents that link the consignee or assignee and the shipowner concerning the carriage of goods by sea.

However, it seems that the contract transferring the property and the contract of carriage are unlikely to be contained in bills of lading, and that there are specific contracts for these two issues while bills of lading remain as evidential instruments. The following sub-sections will illustrate the bill's pure evidential function before the bill's transferability being recognised in English law.

3.6.1. Before the Bill's Transferability being Recognised in English law

Unlike the case *Hurlock and Saunderson v Collett* (1539), bills of lading used in *The 'John Evangelyst'* (1544) were not only deliverable to the named receiver, but also deliverable to the assignee who was nominated by the named receiver.

This development was illustrated by a statement in the bills of lading used in *The 'John Evangelyst'* (1544) that:[202]

'… the sayd shipe shall make here right discharge unto my master Henry

[202] 'Extracts from the Records of the High Court of Admiralty.' (1887-2011; Vols 129-132 (2012-2015) are currently available through the Selden Society) Selden Society 126.

Richards or to his assigns he or any of them paying for the fraight acording unto chartter partty with average acostomyd.'

The similar expression also can be seen in later cases, such as *The Andrewe* (1544) and *The Brandaris* (1546).[203]

According to this statement, the development can be seen in two aspects. On the one hand, it seems that bills of lading tended to be written in a similar form. To illustrate, the name of involved parties, the information of the loaded goods and the route of the voyage were the core facts recorded by the bills, and the recording generally finished with the declaration about the number of the bills of lading issued so that once one of the bills was accomplished, the others should consequently be null and void. On the other hand, and more importantly, merchants started to use bills of lading in a more flexible manner. It is clear from the recorded bills of lading that according to the prevail mercantile custom, bills of lading can be further assigned by the named consignee, and the assignee subsequently can claim the delivery of the cargo.

It is then suggested by Bennett that bills of lading started their life as documents of title in 16th century. As the property of the goods was transferred because of the transfer of the bills of lading, bills of lading began to be traded on the market.[204] However, it is unlikely that these case reports would lead to vary the legal nature of bills of lading as evidential documents because the transfer of property was not triggered by the transfer of the bills per se.[205] To be specific, bills of lading in this situation still operated as pieces of evidence which proved the fact that the holder of the bill was entitled to claim the delivery of the goods,[206] while the title to goods should be transferred because of the contract between

[203] ibid 126-127.
[204] Bennet (n 125) 9-10; Aikens, Lord and Bools (n 126) para 1.8; Lista, 'Knocking on heaven's door: in search for a legal definition of the bill of lading as a document of title' (n 4) 255.
[205] Aikens, Lord and Bools (n 126) para 1.6.
[206] ibid.

the buyer and the seller or the contract between the holder and the shipowner.[207]

In order to determine whether the legal nature of bills of lading was changed because of this transferability, it is necessary to look into the legal effect of the transfer of bills of lading. However, such legal effect seems unknown, since the *Extracts from the Records of the High Court of Admiralty* only provided the recording of the bills used in these cases, while the disputes and the corresponding judgements were not provided.

Nevertheless, it may be implied from custom of merchants that such a 'document of title' is unlikely to make the nature of bills of lading amount to contracts.

First, the transfer of the ownership of the goods should be the result of the performance of an underlying sale contract, such as the sale contract of iron between Collett and Hurlocke and Saunderson. This means that bills of lading can hardly be the contracts operating the transfer of the ownership of the goods.

Second, it was generally stipulated in the bills that three copies were issued and if one of the bills was fulfilled, then the others would have no effect. Yet it did not provide that only the consignee can claim the delivery. This may indicate that since the ownership may remain with the shipper,[208] a consignee or assignee of a bill does not acquire the exclusive ownership over the goods by merely receiving the bill of lading.

Third, the relationship between the assignee and the shipowner seems to be governed by a new contract which can be implied from the parties' conduct since the shipowner made the delivery when the assignee paid the freight. This is because according to these recordings of bills of lading, in order to take the goods from the shipowner, it was the assignee's duty to make the payment agreed in the charterparty with average custom. It also can be implied that bills of lading

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[207] Lista, 'Knocking on heaven's door: in search for a legal definition of the bill of lading as a document of title' (n 4) 256.
[208] Toit (n 126) 19.

were unlikely to be the contract of carriage, since there was a clear reference to the charterparty which was the contract of carriage that the shipowner engaged in.

Therefore, it seems safe to define the legal nature of bills of lading as an evidential instrument. This conclusion is supported by the compilations of merchant law within Europe. For example, at the end of the 16th century, a compilation of mercantile custom named *Le Guidon de la Mer* provided a definition of the bill of lading that reads: 'the acknowledgement which the master of the ship makes of the number and quality of the goods loaded on board.'[209] A similar definition is also provided by another compilation named *Les Us et Coutumes d'Olonne*.[210] Hence, it appears that during the 16th century, the bills of lading mainly referred to those documents identifying the loaded goods.

From 17th to 18th century, it seems that the transferability of bills of lading has been recognised as a mercantile custom,[211] while bills of lading were still regarded as evidential instruments in a French Ordinance dated from 1657.[212] Moreover, the legal definition of bills of lading was scarce, and only the *Cunningham Law Dictionary* in 1764 defined the bill of lading as 'a memorandum signed by masters of ships acknowledging receipt of the merchant's goods.'[213] This definition merely acknowledged the bills' function as a receipt and consequently confirmed its legal nature as an evidential document.

3.6.2. The Leading case Lickbarrow v Mason

The analysis of the legal effect of the transfer of a bill of lading has long been controversial.[214] It is important to look into the leading case *Lickbarrow v*

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[209] Bennet (n 125) 8. See also in JM Pardessus, *Collection de Lois Maritimes*, Tome 2 (A L'Imprimerie Royale 1824), 381 *Guidon de la Mar,* Chapter II, Article VIII.
[210] Toit (n 126) 20.
[211] Bennett (n 125) 11; Toit (n 126) 21; Aikens, Lord and Bools (n 126) para 1.24.
[212] McLaughlin (n 126) 553.
[213] ibid 554.
[214] According to Bennet (n 125) 14, the judgement in Snee v Prescott (1743) provided that leaving the consignment box in blank may be insufficient to transfer the property, and this means that nominating the consignee expressly would be of great necessity for passing title to the property. In contrast, in Savignac v

Mason,[215] which is regarded as the first case that recognised the legal effect of the transferability of bills of lading.[216] It seems that before the Bills of Lading Act 1855, the title that was transferred to a holder of the bill of lading depended on the question of whether bills of lading were endorsed by a clear order or in blank.

According to the judicial decision in *Lickbarrow v Mason* (1787), when bills of lading were transferred by a clear order, they were unlikely to be contracts. Indeed, in this situation the bills were used to prove the fact that the holder was entitled to possess the carried goods, while the property had been passed according to the relevant contract of sale concluded between the seller and the buyer, and the property should be passed at the unloading port.[217] Two arguments are developed by the court in support of this conclusion. Firstly, the property transferred by bills of lading is actually subject to the terms of the contract. It was indeed held that since the buyer and the seller were very likely to prolong the negotiation period by taking advantage of the time-consuming transporting process, certain adjustments could be made in order to accommodate the forthcoming situation.[218] Therefore, before the actual delivery of the goods, it seems to be too early to transfer a complete property right by means of a bill of lading. This means that the title to goods transferred by a bill of lading must eventually comply to the stipulations in the independent contract between the seller and the buyer. Secondly, in case of the consignee's insolvency, it was also of great necessity to vest the consignor with the right to stop the goods in *transit*,[219] but this right to stop the goods would conflict with the complete transfer of title. In this case, the consignee of the bill of lading hardly can claim a

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Cuff (1780), the judge held that it did not matter whether the bills of lading were endorsed in blank or by a specific order, because the title to goods can be passed in both situations.

[215] *Lickbarrow v Mason* 100 E.R. 35.

[216] Aikens, Lord and Bools (n 126) para 1.28.

[217] *Lickbarrow v Mason* 100 E.R. 35, 39 (Ashhurst J), 41(Buller J); Aikens, Lord and Bools (n 126) para 1.29-1.33.

[218] ibid.

[219] ibid; Colinvaux (ed) (n 121) para 1599.

complete title to the carried goods, and the bill is more likely to be considered as a mere evidentiary document with no contractual effect.

This decision was followed in *Thompson v Dominy* (1845).[220] It was held that a bill of lading cannot be negotiated as a bill of exchange.[221] This is because bills of lading merely passed the possessory right over the property.[222] Therefore, the original sale contract was not transferred by negotiating bills of lading.[223] However, when the bills of lading were subsequently transferred by the consignee to a third party (the assignee), the delivery of the bills was more likely to resemble the actual delivery of goods, with the absolute property right in the goods being transferred.[224] Two considerations were presented by the court to justify this solution. The first consideration was that the law should protect the reasonable expectation of a bona fide assignee. According to the second consideration, by indorsing bills of lading in blank, the vendor released his authority on the goods to the vendee.[225] It means that the vendee could further transfer the bills of lading to an assignee under the vendor's authority. It follows that the absolute property right in goods was transferred.[226] However, in this category of cases, it seems that there should be an underlying sale contract to trigger the transfer of bills of lading, because the consignor gives credit to a bill of lading only if the money for the goods is paid.[227]

To conclude on these first two cases, bills of lading could hardly transfer the property. Between the consignor and the consignee, the principles of equity applied to determine the parties' title to goods. As to the property transferred between the consignee and the assignee, it was transferred by a sale contract.

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[220] *Thompson v Dominy* 153 E.R. 532
[221] ibid; *Wright v Campbell* 96 E.R. 363; Lista, 'Knocking on heaven's door: in search for a legal definition of the bill of lading as a document of title' (n 4) 260-261.
[222] ibid.
[223] Bernard Eder, Howard Bennett, Steven Berry, David Foxton and Christopher Smith, *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet & Maxwell 2011) 2-002.
[224] *Lickbarrow v Mason* 100 E.R. 35, 39 (Ashhurst J).
[225] ibid 40 (Buller J).
[226] ibid 39-40 (Ashhurst J).
[227] ibid 41(Grose J).

Therefore, from this perspective, the legal nature of bills of lading remained unchanged as an evidential document representing a transfer of the constructive possession of the goods.[228]

In terms of the legal relationship between the consignee and the shipowner, it was held by Lord Ellenborough C.J. in *Cock v. Taylor* (1811) that a new agreement between the purchaser and the shipowner should be introduced, and this agreement may indicate the promise of the final receiver to pay the due freight in exchange for the title to the carried goods.[229] However, this proposition was questioned in *Sanders v Vanzeller* (1843).[230] It was held that a new contract cannot be implied between the shipowner and the consignee. This is because this implied contract cannot be supported by legal principles, and the fact used to support such implied contract seems to be insufficient.[231]

Two reasons were given by the court for this decision.

First, the payment of the freight should be an obligation owned by the charterer and normally stipulated in the charterparty concluded between the charterer and the shipowner.[232] This means that there could be an additional arrangement between the charterer and the consignee requiring the consignee to make the actual payment. However, such a duty to pay would derive from the charterparty, rather than from a new agreement between the shipowner and the consignee.

Meanwhile, it was provided that according to the legal principle, that is the contract cannot be transferred to a third party simply due to the transaction of the goods, which means that the contractual party to the charterparty cannot be

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[228] Lista, 'Knocking on heaven's door: in search for a legal definition of the bill of lading as a document of title' (n 4) 260; Caslav Pejovic, 'Documents of title in carriage of goods by sea: present status and possible future directions', (2001) 9 J.B.L. 461, 470.
[229] *Cock v. Taylor* 104 E.R. 424.
[230] *Sanders v Vanzeller* 114 E.R. 897.
[231] ibid.
[232] ibid.

altered merely because the goods were received by a third party at a different location.[233]

Second, it was held that when bills of lading made reference to a charterparty, a new contract could hardly be implied in a legal sense. This is because such a reference clearly indicated that the original parties were unwilling to vary the contractual terms within the charterparty, which means that it is impossible for the consignee and the shipowner to create a new contract to invalidate the charterparty.[234]

Therefore, it is unlikely to imply a contract of carriage between the consignee and the shipowner, if an explicit intention of replacing the previous contract of carriage with a bill of lading issued thereunder was absent. In conjunction with the previous analysis of the constructive possession right transferred to the consignee, it is then difficult to vest contractual effect into bills of lading used in this early time, since neither transferring the ownership of the goods nor delivering the goods to a consignee was a contractual agreement stipulated in bills of lading. To clarify, these agreements were stipulated in respective contracts, and bills of lading were only evidential instruments safeguarding the aimed transactions.

It is then reasonable to conclude that before being regulated by any legislation, bills of lading were used as evidential instruments. The following development of bills of lading was stimulated by the enactment of the Bill of Lading Act 1855 and the Carriage of Goods by Sea Act 1992, and the ensuing analysis will focus on the question as to whether the legal nature of bills of lading was changed because of the relevant legislation.

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[233] ibid.
[234] ibid; Lista, 'Knocking on heaven's door: in search for a legal definition of the bill of lading as a document of title' (n 4) 259.

3.7. The Legal Nature of Bills of Lading under the Bills of Lading Act 1855

The Bills of Lading 1855 tried to establish a link between the transfer of a bill of lading and the transfer of its related contract of carriage. According to the Act, the consignee or assignee's title to sue the shipowner for lost or damaged goods should result from the fact that the property in the goods has been passed to the consignee or assignee.[235] In other words, the contract of carriage can be contained in the bills of lading and subsequently transferred to the consignee or assignee, if the property in the goods has been passed accordingly.[236] It follows that the contractual effect of bills of lading will depend on whether the property in the goods can be passed to the consignee or assignee because of the endorsement of the bill of lading.

However, it appears that the endorsement of bills of lading does not necessarily lead to the transfer of the property in goods, as per the analysis below. For this reason, the contract of carriage is unlikely to be contained in bills of lading, and consequently the consignee or assignee may be deprived of the title to sue the shipowner.[237] Bills of lading therefore cannot be defined as contracts concluded between the shipowner and the consignee or assignee.[238] There are three grounds considered by this thesis, and they are fully-discussed as below.

Ground 1: The transfer of property did not incur by reason of the endorsement of bills of lading

The endorsement of bills of lading seems to be able to facilitate various commercial purposes which roughly can be divided into two categories, one is for the sale and purchase of the shipped goods and the other is for other purposes such as using a bill of lading as a security for a loan. The reason for such a

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[235] Bills of Lading Act 1855, s 1; Colin Ferris, 'The Carriage of Goods by Sea Act 1992' (1992) 3(12) ICCLR 432.
[236] ibid; Pejovic (n 237) 474.
[237] Nicholas Gaskell, Regina Asariotis and Yvonne Baatz, *Bills of Lading: Law and Contracts* (LLP 2000) 4.12.
[238] Aikens, Lord and Bools (n 126) para 1.44-1.45.

classification is that different kinds of rights may be transferred depending on the transaction.[239] For example, an absolute property right is passed on when selling and purchasing goods, while a different type of right is passed in case of hypothecation.[240]

It is suggested that the meaning of the expression 'the property in the goods' in the Bills of Lading Act 1855 refers to an absolute propriety right over the goods.[241] Indeed, the Act provided that all rights to sue and liabilities regarding the carried goods should be vested in a consginee, and it seems that such exhaustive transfer of the rights and liabilities could only be triggered by the transfer of an absolute property right.[242]

In contrast, for some holders of the bill of lading, such as a bank, the transfer of a conclusive package of rights and liabilities under the carried goods was unlikely to be a favourable result.[243] It was in their interests to take those goods as a leverage in negotiation in order to recover economic benefits, whereas the complete transfer of rights and liabilities, especially the liabilities, may become a burden.[244] In this case, the transfer of an absolute property was undesired.

In order to justify the transfer of an absolute property right by the endorsement of a bill of lading, it was suggested that the bill of lading is the symbol of the goods, and consequently the delivery of the bill symbol for the delivery of the goods.[245] Moreover, the key to the warehouse was used as a metaphor for bills of lading.[246] Therefore, by receiving the bill of lading an absolute property right on the carried goods was transferred to the holder of the bill of lading.[247]

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[239] Paul Todd, 'Bills of lading as documents of title' (2005) Nov. JBL 762, 773-774.
[240] *Sewell v Burdick* (H.L.) (1884) 10 App. Cas. 74.
[241] ibid.
[242] ibid; John Bassindale, 'Title to sue under bills of lading: the Carriage of Goods by Sea Act 1992' (1992) 7(10) JIBL 414.
[243] ibid.
[244] Treitel and Reynolds (n 11) 5-010.
[245] *Sanders v Maclean* (1883) 11 QBD 327.
[246] ibid.
[247] ibid.

However, it is important to note that the transfer of an absolute property right normally results from sale contracts.[248] In the context of a bill of lading, it means that the buyer (the consignee) is vested with all the rights of suit and liabilities related to the goods while the seller (the consignor) is correlatively deprived of these rights and liabilities, if the goods were sold and bought according to these parties' agreement.[249] Moreover, it was clearly held that the true custom of merchants was that the absolute property right was normally passed because of the performance of the related sale contract, rather than by endorsement of the bill of lading.[250] To clarify, the endorsement of bills of lading seems to be a tool to aid the parties to perform the sale contract.

Lord Blackburn seemed to consider that, in the context of the Bills of Lading Act 1855, the 'assignee' should be the person who was not only entitled to hold the endorsed bill of lading, but also was entitled to hold it against the endorser. The absolute transfer of the property right derived from the endorsee's out and out purchase interest in the goods. By contrast, the endorsee to whom a bill of lading was transferred as a security for a loan hardly could be qualified as an assignee within the meaning of the Bills of Lading Act 1855, and therefore this person would not be entitled to have a whole legal title to the goods by the endorsement.[251]

In terms of the proposition of the symbolic function of the bills of lading, it may be more reasonable to regard the symbolic delivery operated by the transfer of the bills of lading as one scenario in which the bills evidence the delivery by conforming with the written instruction in the consignment box.[252] It is interesting to note that the information disclosed in the box would not include the reason for such a delivery, as it would not be the shipowner's concern. In other words, the

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[248] Todd, 'Bills of lading as documents of title' (n 239) 773.
[249] ibid.
[250] *Sewell v Burdick* (H.L.) (1884) 10 App Cas 74 (Lord Bramwell).
[251] ibid.
[252] A consignment box is a blank in bills of lading, and it is under the title 'Consignee'. It is designed for the shipowner to fill the information about the consignee of the bill of lading, and the information can be a specific name, or it can be in the form of 'in order'.

person would be entitled to be the lawful holder of a bill of lading as long as he was the person nominated in the consignment box, regardless of his purpose in the commercial transaction. By contrast, the reason of transfer a property would be explicit in a commercial contract. This is because the contractual parties' rights and liabilities need to be drawn up accordingly.

For this reason, the symbolic delivery of a bill of lading may be defined as a preliminary delivery of the goods, as the information on bills of lading are used to help the shipowner to make the right delivery. This means that transfer bills of lading only can transfer a constructive possession.[253] To clarify, the idea of 'symbolic delivery' and 'document of title' are unable to vest a contractual effect on bills of lading, and they are not necessarily related to the transfer of property right and the transfer of a carriage contract.[254] The transfer of property right and the legal issues regarding the carriage of the goods should thus still be governed respectively by the contracts of sale and of carriage.[255]

Therefore, for the sell and purchase cases which were within the meaning of Bills of Lading Act 1855, a sale contract seemed to be the legal device that transferred an absolute property right and the rights and liabilities under the transferred property. This means that the endorsement of the bills of lading could not be the reason of the passing of property, and consequently all rights of suit and liabilities in the contract of carriage hardly could be transferred to the consignee or assignee by means of transferring the bills. Therefore, bills of lading were unlikely to have any contractual effect.

In the cases where the property was partially or was not passed, the Bills of Lading Act 1855 could not be applicable.[256] This is because the transferred

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[253] Todd, 'Bills of lading as documents of title' (n 239) 774.
[254] Colinvaux (ed) (n 121) para 1623; Lista, 'Knocking on heaven's door: in search for a legal definition of the bill of lading as a document of title' (n 4) 256; Todd, 'Bills of lading as documents of title' (n 239) 774.
[255] Lista, 'Knocking on heaven's door: in search for a legal definition of the bill of lading as a document of title' (n 4) 257.
[256] Eder, Bennett, Berry, Foxton and Smith (n 223) 2-002.

property was regarded as a special one, and subsequently the transferred rights and liabilities should be decided based on a different context. To be specific, the passing of an absolute property right can hardly be inferred in these cases. Taking the principles governing pledges into consideration, the intention of an endorsee of this kind is more likely to take the bill of lading as a guarantee for retrieving a loan, rather than have a valuable consideration over the goods.[257] Therefore, the creditor (endorsee) benefits from a special type of right, which may entitle him to sue under either trover or detinue.[258] Meanwhile, the endorser seems unlikely to transfer an absolute property right to the endorsee who is not the buyer of the goods, and it is the endorser's interest to retain the general property right over the goods.[259] Since the Bills of Lading Act 1855 is inapplicable, it seems that English courts tended to imply a special contract between the consignor and the consignee.[260] It follows that the transfer of a special type of right was operated by reason of a special contract, which means that the bills of lading in these cases also cannot transfer the contract of carriage and the bills remain only as evidential documents.

To clarify, it was held that the gap between the endorsement of bills of lading and the transfer of the property should be bridged by adding certain factors.[261] These factors should expressly reveal the intention of the parties and the nature of the aimed transfer, which would allow to answer the question as to what kind of property should be transferred and accordingly what related rights and liabilities should be transferred to the consignee.[262] In *The 'Future Express'* (1992),[263] it was established that the legal basis for the transfer of property rights and of other related rights and liabilities could not merely result from the transfer of bills of

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[257] *Sewell v Burdick* (H.L.) (1884) 10 App Cas 74.
[258] *Bristol and West of England Bank v Midland Railway Company* [1891] 2 Q.B. 653.
[259] *Jenkyns v Brown* 14 QB 502.
[260] *Sanders v. Maclean* (1883) 11 QBD 327; *Sewell v. Burdick* (H.L.) (1884) 10 App. Cas. 74, *Brandt v Liverpool Brazil and River Plate Steam Navigation Co.* [1924] 1 K.B. 575.
[261] *Sewell v Burdick* (H.L.) (1884) 10 App Cas 74 (Lord Selborne).
[262] ibid.
[263] *The 'Future Express'* [1992] 2 Lloyd's Rep. 79.

lading, but that it should be established on the true intention of the parties. Such an intention is more likely to be revealed and to become contractual if expressed in the original or in subsequent contracts.[264] Hence, it is reasonable to conclude that under the Bills of Lading Act 1855, the legal status of a bill of lading was still merely to serve as an evidential instrument.

Ground 2: A contract of carriage cannot be transferred by bills of lading.

Another difficulty in transferring the contract of carriage to the holder of a bill of lading under the Bills of Lading Act 1855 was that no contract could be contained in the bills.[265] The Act provided that the transferee should be vested in the rights 'as if the contract contained in the bill of lading had been made with him'.[266] This led to the question of whether a contract was already contained in the bill of lading before the transfer. However, before this transfer, the contract of carriage had been concluded by the charterer with the shipowner in the form of a charterparty that was independent from the bill of lading issued thereafter. The bill of lading at this stage was merely an evidential document and no contract was contained in it.[267]

It is then questionable in the s 1 of the Bill of Lading Act 1855 as to how the contract of carriage can be contained in a transferred bill of lading without the aid of any legal devices.

Ground 3: A new contract was implied between the shipowner and the consignee

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[264] ibid. A similar judicial opinion was also given by Sir Brian Neill in *The Berge Sisar* [1999] Q.B. 863. The judge firstly took a history review on this issue. It was concluded that before the enforcement of Bills of Lading Act 1855, the transfer of the rights and liabilities within the contract of carriage was disconnected with the 'constructive possession'. Unlike an actual possession, this special kind of possession was introduced because of the symbolic delivery which derived from the indorsement of the bills of lading.
After Bills of Lading Act 1855, the transfer of rights and liabilities depended on the fact whether the property, or in particular which property, in goods has been transferred. This enquiry would be answered by the contract that the indorsee engaged in. For example, a contract of sale may result in an absolute transfer of property, and thus the rights and liabilities regarding the carriage of goods by sea would be transferred based on the contract of carriage. This was the situation that within the meaning of Bills of Lading Act 1855. In terms of the situations which fell out of Bills of Lading Act 1855, a special property would be transferred according to the fact.

[265] Treitel and Reynolds (n 11) 5-047; *Sewell v Burdick* (H.L.) (1884) 10 App Cas 74, 105.

[266] Bills of Lading Act 1855, s 1.

[267] Treitel and Reynolds (n 11) 5-047; Julian Cooke, Timothy Young, Q.C., Andrew Taylor, John D. Kimball, Davide Martowski and LeRoy Lambert, *Voyage Charters* (3rd edn, Informa 2007) 18.83; *Tate & Lyle, Ltd. v Hain Steamship Company, Ltd* (1936) 55 Ll. L. Rep. 159.

The proposition that bills of lading can hardly be considered as contracts concluded between the shipowner and the consignee or assignee may be further supported by the judicial assertion that a new contract should be implied at the unloading port between the shipowner and the consignee or assignee.[268]

Since the transfer of property was unlikely to be triggered by the endorsement of bills of lading and since it is difficult for a contract of carriage to be contained in the bill of lading, the courts used another legal device, namely implying a new contract between the endorsee and the shipowner. Therefore, these two parties' legal relationship would be governed by this implied contract.[269]

This contract was implied by the parties' conduct: the endorsee's presentation of the bill of lading to demand the delivery, the shipowner's handing over of the goods, and the endorsee's acceptance of the said goods.[270] It seems that the offer, consideration and acceptance process which is essential to the formation of a legally binding contract is followed.[271] In other words, this implied contract discloses the endorsee's willingness to take the rights and liabilities attached to the goods, and the shipowner's consent in parting from his lien over the goods in exchange for due payment.[272]

Therefore, the rights and liabilities were transferred because of the birth of a new contract, rather than the endorsee replacing the shipper or consignor from the original contract of carriage. This is also true when the endorsee transfers the bill of lading to another, namely the endorsee passes all rights and liabilities along with the cargo to an assignee, and the assignee takes those legal consequences by accepting the cargo based on an implied contract between the assignee and

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[268] *Sewell v Burdick* (H.L.) (1884) 10 App Cas 74; Frank Stevens, 'Third Party Rights under Bills of Lading' (2012) 4 EJCCL 54, 55.
[269] ibid; Bassindale (n 242) 415.
[270] Paul Todd, 'Brandt v Liverpool again' (1988) 3(4) Journal of International Banking Law 179; B.J. Davenport, 'Problems in the Bill of Lading Act' (1989) Law Quarterly Report 174; G.H.Treitel, 'Bills of lading and Implied Contracts' (1989) Lloyd's Maritime and Commercial Law Quarterly 01 Jan 162; F.M.B.R., 'Proper Law of A Brandt v Liverpool Contract *The Elli 2*' (1985) Lloyd's Maritime and Commercial Law Quarterly 01 May 188.
[271] *Brandt v Liverpool Brazil and River Plate Steam Navigation Co.* [1924] 1 K.B. 575.
[272] ibid.

the shipowner.[273]

A similar judgment was delivered in *Tate & Lyle, Ltd. v Hain Steamship Company, Ltd.*[274] It was held that the consignee cannot be assigned any rights and liabilities from the transfer of the bill of lading, because presumably the bill did not contain any rights and liabilities.[275] Nevertheless, the relationship between the consignee and the shipowner should be contractual, as it seems to the judge that a new contract sprang up which contained the terms of the bill of lading.[276] This new contract independently governed these parties' respective rights and liabilities.[277]

It then seems that a distinction should be made between the transfer of title to the goods and the passing of rights and liabilities contained in the contract of carriage. To be specific, the transfer of the property normally happens because of a specific contract between the consignor and the consignee, while the rights and liabilities regarding the carriage and shipment seems to be transferred by a new contract which is implied by the court according to the parties' conduct at the destination.

Hence, under the Bills of Lading Act 1855, bills of lading were more likely to be the instruments which assemble the information which could be a quick reference for directing the shipowner to perform the due carriage, shipment and delivery. The next development experienced by bills of lading is the enactment of the Carriage of Goods by Sea Act 1992, as this Act replaced the Bills of Lading Act 1855 and provided new provisions with respect to bills of lading. Therefore, the following analysis focuses on the question as to whether the evidential nature of bills of lading is affected by the enactment of the Carriage of Goods by Sea Act 1992.

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[273] Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 405-406.
[274] *Tate & Lyle, Ltd. v Hain Steamship Company, Ltd* (1936) 55 Ll. L. Rep. 159.
[275] ibid.
[276] ibid.
[277] ibid.

3.8. The Legal Nature of Bills of Lading under the Carriage of Goods by Sea Act 1992

Under the Carriage of Goods by Sea Act 1992, bills of lading are unlikely to be contracts transferring property in goods, as this statute broke the causal link between the transfer of property in goods and the indorsee's right to sue the shipowner.[278] Instead, the Carriage of Goods by Sea Act 1992 provides that a lawful holder of a bill of lading shall be transferred all rights of suit under the related contract of carriage.[279] The contract of carriage related to a bill of lading is further defined as a contract contained in or evidenced by that bill of lading.[280]

According to this legislation, it appears that a transferred bill of lading can have a certain legal effect on the relationship between the shipowner and the lawful holder of the bill.[281] However, such a legal effect is unlikely to bind the lawful holder to an arbitration clause contained in a related contract of carriage.[282] The reasons are twofold. Firstly, the disputed arbitration clause may not be contained in the contract of carriage that is contained in or evidenced by the bill of lading. Secondly, the contract of carriage is unlikely to be contained in the bill.

The first point can be illustrated by three reasonings. Firstly, an arbitration clause is excluded from range of clauses that can be transferred in the context of bills of lading, because this clause governs a matter that is ancillary to the subject-matters of the bills.[283] Based on the previous research on the usage of bills of

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[278] This causal link was created by the Bill of Lading Act 1855; Bassindale (n 242) 414.

[279] Carriage of Goods by Sea Act 1992, s 2. A lawful holder of a bill of lading is defined in section 5(2) of Carriage of Goods by Sea Act 1992, and it states: (a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates; (b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in a bearer bill, of any other transfer of the bill; (c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates; Bassindale (n 242) 415-416.

[280] Carriage of Goods by Sea Act 1992, s 5(1).

[281] Frank Stevens, 'Third Party Rights under Bills of Lading' (2012) 4 EJCCL 54, 60.

[282] ibid 61.

[283] See the discussion in the para 2.1. For the cases which defined an arbitration clause as an ancillary clause: *T. W. Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C.1, *The Annefield* [1971] P168 at p.184, *The Varenna* [1984] Q.B. 599 per Hobhouse J at p.608, *The Federal Bulker* [1989] 1 Lloyd's Rep. 103 at p.107 per Bingham L.J., *Aughton Ltd v M.F. Kent Services Ltd* 1993 WL 963255, *The*

lading in merchant law, the subject-matters of bills of lading may limit the clauses and terms that can be incorporated in bills of lading. In other words, without an explicit agreement, only clauses and terms which are directly related to the shipment, carriage and delivery can be contained in or evidenced by bills of lading and bind the lawful holder.

Secondly, the arbitration clause inserted in a charterparty is a personal agreement made between the charterer and the shipowner, which makes this clause inapplicable to the relationship between the shipowner and the lawful holder of the bill of lading.[284]

Thirdly, the paradigm of imposing liability and vesting right under Carriage of Goods by Sea Act 1992 may be another obstacle limiting the binding effect of the charterparty's arbitration clause on the lawful holder of the bill of lading. It is clear that this Act only entitles a lawful holder to sue the shipowner based on terms and clauses of the contract of carriage which is contained in or evidenced by the bill of lading. However, under this Act, liabilities and rights are not transferred to a lawful holder of the bill of lading simultaneously.[285] Specifically, the provisions concerning the imposition of liability is separately stipulated in s. 3 of the Carriage of Goods by Sea Act 1992.[286] According to s.3, the liability only can be incurred when the holder of a bill of lading:

> '(a) takes or demands delivery from the carrier of any of the goods to which the document relates;

'Delos' [2001] 1 Lloyd's Rep. 703, *Siboti K/S V BP France SA* [2014] 1 CLC 1, *The Athena (No. 2)* [2007] 1 Lloyd's Rep. 280, *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2012] 1 CLC 448.

[284] It is related to the severability of arbitration agreement, and this reasoning also considered in the judicial decisions which prefer a restrict construction of general words in the bill's incorporation clause. For the discussion on the separability of arbitration clause: *Fiona Trust v Privalov* [2008] 1 Lloyd's Rep. 254, *Buckeye Check Cashing, Inc. v Cardegna* 546 U.S. 440 (2006), *Bremer Vulkan v South India Shipping* [1981] A.C. 909, *Aughton Ltd v M.F. Kent Services Ltd* 1993 WL 963255.

[285] Carriage of Goods by Sea Act 1992, s 3. It also discussed in *The Berge Sisar* [2002] 2 A.C. 205; Bassindale (n 242) 416.

[286] Gaskell, Asariotis, and Baatz (n 237) 132.

(b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or

(c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods …'

It is then important to note that an arbitration clause contains both rights and liabilities.[287] It then seems that when the claim is about whether the holder of bills of lading should be bound by the charterparty's arbitration clause, the right to sue and the paradigm of imposition of liability may cause conflicts. On the one hand, a lawful holder would not necessarily intend and expect to give up the original remedies in court when endorsing a bill of lading. This is because this Act only vest a right to sue in a lawful holder, while it does not impose the liability of submitting the dispute to an arbitral tribunal only.[288] On the other hand, even a lawful holder is subject to the liabilities under the contract of carriage, those liabilities are imposed on a lawful holder after the claim has been made. This means that the liability of submitting the disputes to arbitration only can be imposed on a lawful holder, after a court proceeding has been commenced. However, an arbitration clause is a dispute resolution clause, and it should be decisive about how the claim should be made in the first instance.

Therefore, in absence of an independent contract between the shipowner and the holder, an arbitration clause is unlikely to be transferred to a lawful holder of the bill of lading.

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[287] Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 23; Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 375-376.

[288] For the consideration that an arbitration clause may exclude the jurisdiction of court: *T. W. Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C.1, *Siboti K/S V BP France SA* [2014] 1 CLC 1, *Aughton Ltd v M.F. Kent Services Ltd* 1993 WL 963255, *The 'Athena'* [2007] 1 Lloyd's Rep. 280 at p.291, *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2012] 1 CLC 448, 466.

For the second point, an arbitration clause in a bill of lading may not bind a lawful holder, as bills of lading are unlikely to be the contract of carriage between a holder of bills of lading and the shipowner.

It has been agreed that when the lawful holder is the charterer, the bill of lading remains as a receipt and the relationship between the shipowner and the lawful holder is still governed by the charterparty rather than the bill of lading.[289] This is because the lawful holder (in his role as a charterer) has formed a contractual relationship with the shipowner concerning the carriage of goods by sea before the issuance of the bill of lading, and this contract of carriage will not be cancelled nor replaced by the related bill of lading. In this case, the bills are receipts only.

The legal nature of the bills of lading becomes more controversial when the bills are transferred to a third party who is alien to the contract of carriage. However, it seems theoretically impracticable to compel a third party to comply with the contract of carriage, because the contract of carriage is unlikely to be contained in bills of lading.

The problem in the Bills of Lading Act 1855 still exists in the Carriage of Goods by Sea Act 1992: a contract of carriage is generally not contained in bills of lading, but it is normally contained in a charterparty.

It is then claimed that the contract of carriage is transferred by issuing the bills, because the issuance of the bill of lading does not only convey the shipowner's acknowledgement of the loaded goods, but also embodies the shipowner's authorisation of passing the bill as the contract of carriage.[290] Nevertheless, this proposition merely justifies that a part of the contract of carriage (namely the part which is directly germane to shipment, carriage and delivery) may consequently

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[289] *The Heidberg* [1994] 2 Lloyd's Rep. 287 at 310; Treitel and Reynolds (n 11) 5-043.
[290] *The 'Al Battani'* [1993] 2 Lloyd's Rep. 219.

be contained in the bills,[291] and the consignor is authorised to send a third party an offer to contract on the terms on the bills.[292]

According to the principles of contract law, in order to produce a legally binding contract, the endorsee's or the lawful holder's signature which verifies his/her acceptance and commitment to the offer is crucial. Specifically, the contract of carriage would be contained in the bills of lading and bind an endorsee, if both parties' signatures could be identified on the bills and it does not matter whether or not the parties read the terms or not.[293]

However, the problematic issue in bill of lading cases is that the lawful holder's consent to the terms contained in the bills is absent, and this absence may be detrimental for the formation of a legally binding contract.

In commercial practice, only the shipowner's signature on the bills of lading shows personally recognition of the statement in the bills, while the other parties' names shown on the bills are merely stated as a presentation of relevant facts. For instance, under a sale contract under CIF terms, a seller is under the obligation of arranging the shipment and providing the goods.[294] Consequently, the contract of carriage is generally contained in a charterparty which is concluded between the seller and the shipowner before the shipment. At the loading port, the shipowner signs the bill of lading to the seller in order to testify the said goods are loaded on board under certain conditions. Meanwhile, the seller's name and the buyer's name are noted on the bills by the shipowner, and the buyer's name may not point to a specific person and it may be in the form of 'to order'. Therefore, the buyer's name shown in the bills cannot amount to personal a consent.

Additionally, the endorsement of bills of lading may be unilaterally operated by the consignor, while the endorsee generally does not have the opportunity to

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[291] Pejovic (n 237) 474.
[292] ibid 474-475.
[293] HG Beale (ed), *Chitty on Contracts* vol 1(33rd edn, Sweet & Maxwell, London 2015) 13-002.
[294] Colinvaux (ed) (n 121) para 1609.

express his opinion on the terms and clauses contained in the bill.[295] This is mainly because the endorsee or the lawful holder and the consignor generally does not have their negotiations and agreement contained in the bill. For example, a CIF contract seller generally endorses the bill of lading according to the sale contract. It is then reasonable to presume that the endorsement must be a liability of the seller (the consignor of the bill) which is stipulated in this separate contract agreed between the seller (the consignor) and the buyer (the endorsee or the lawful holder). This may possibly mean that the endorsement of bills of lading merely constitutes one step to perform a commercial contract, and the bills themselves cannot be the contract.

It then seems that the terms in the bills of lading barely amount to a contract to bind a lawful holder, in that the contract of carriage is generally contained in a relevant charterparty, while the bill of lading is used as a piece of evidence. On the one hand, it evidences the fact that the said goods are loaded with the shipowner's inspection. On the other hand, it evidences the fact that the goods are shipped by the named shipper and should be delivered to the person named as consignor or as per the consignee's order. This means that these names appearing in bills of lading cannot be regarded as the consent from the relevant party, and consequently there is no intention to contract contained in the bills of lading.

3.9. Conclusion

The legal nature of the bills of lading may therefore be confined to a kind of evidential instrument. Be it as a document of title or as an instrument evidencing a contract of carriage, a transferred bill of lading can barely convey any contractual rights to a consignee or a third-party assignee.

Before the intervention of the legislator, the legal nature of the bills of lading could

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[295] Wilson (n 2) 3-4; Gaskell, Asariotis, and Baatz (n 237) 65.

only be implied from custom of merchants. According to merchant practice, the only possibility to claim that a bill of lading is contractual may derive from the fact that a consignee or a third-party assignee used a transferred bill of lading to claim his/her title to goods. However, it seems that such a fact does not reveal the true legal relationship among the relevant parties, and a transferred bill of lading is unlikely to be the operating contract.

Firstly, bills of lading are not used as contracts of carriage to bind a consignee or a third-party assignee. It has been proved that by considering merchant practice, bills of lading did not derive from the register book but evolved from copies of the register book. This finding may exclude the possibility that bills of lading are designed to be contractual, as a contract of carriage was normally contained in the register book rather than in the copies. By contract, the origin of the bills of lading, namely the copies of the register book, are merely pieces of evidence which prove the fact that the goods are loaded on board under the noted conditions, and the necessity of using this evidential instrument is to evaluate whether the shipowner fulfilled the liability of safe custody and right delivery.

Secondly, bills of lading are not used as contracts which contain the agreement of transfer the property in goods. Bills of lading were transferred and traded since 16th century, and this new development triggered the function of the transferred bills as being documents of title. According to case reports, it seems that the right to goods recorded in bills of lading is subject to the consignor's order and the property of the goods is transferred according to the relevant agreement between the seller and the buyer. Therefore, bills of lading are only the evidence to prove the fact that the holder has the right to claim the delivery.

The question as to whether a contract of carriage is contained in a bill of lading if a bill was transferred to a lawful holder (a consignee or a third party) is introduced by the provisions of the Bills of Lading Act 1855 and of the Carriage of Goods by Sea Act 1992, in that these two statutes were trying to convey a right to sue to

the endorsees of the bills of lading. However, it seems that this right to sue is unlikely to make bills of lading contractual and to further bind the endorsee to the disputed arbitration clause.

It is then safe to conclude that in the case where a contract of carriage is concluded prior to the issuance of the bills of lading, the legal nature of the bills of lading may be of a kind of evidential instruments. The statements contained in the bills can be classified into two categories, one is the statement of the shipowner's inspection on the loaded goods, and another is the re-statement of the charterparty's terms and clauses concerning the shipment, carriage and delivery.

Therefore, this confirmed legal nature of the bills of lading may support the proposition that the subject-matters of the bills are only those directly germane to the shipment, carriage and delivery, and an arbitration clause is not per se contained in the bills. In this case, the construction of general words in a bill's incorporation clause may confine the incorporated terms and clauses to those dealing with the subject-matters of the bills only. This strict construction is in line with custom of merchants, and it is important to note that custom in commercial transactions has a significant influence on any reasonable businessperson's understanding and expectations about the context and legal effect of the bills, and it has been agreed that judicial constructions should be made with commercial sense.[296]

Moreover, the non-contractual feature of the bill of lading may further exclude the possibility of establishing the binding effect of the bill's incorporation clause by arguing that a bill of lading is a contract between the holder and the shipowner. For this reason, the legal effect of the bill's incorporation clause (incorporating an arbitration clause from a charterparty into a bill of lading) needs to be established

[296] Burton (n 105) 176; Stevens (n 281) 61-62.

by employing other legal devices or legal principles.

It follows that the question of whether and to which extent the wording of the referred charterparty's arbitration clause can have an impact on its incorporation in a bill of lading will depend on which legal device or legal principle is applicable to establish the binding effect the bill's incorporation clause. This is because the result of the consistency test may be determined by the competition of these two clauses' respective legal effect. It is no doubt that the referred arbitration clause is a contract between the charterer and the shipowner, and yet the legal effect of the bill's incorporation clause may depend on the legal device or legal principles which enables the incorporation clause to bind a holder of bills of lading to the incorporation clause, particularly extend the effect of the referred arbitration clause to a holder.

The subsequent chapters will look into those possible means and analyse their applicability under the consideration of the legal nature of bills of lading. For instance, Chapter 4 will discuss whether or not the traditional legal basis for extending the referred arbitration clause to a third party, such as assignment, incorporation by reference, third-party beneficiary and agency, can be applicable to bill of lading cases.

After confirming the applicable legal device, a further analysis will focus on the consistency test, namely what is the solution when the wording of the incorporation clause is inconsistent with that of the referred arbitration clause. Consequently, the legal effect of the bill's incorporation clause, particularly whether or not a lawful holder of bills of lading should be bound by the referred arbitration clause, will be presented in a clear and consistent manner.

Chapter 4

Traditional Legal Basis for Extending the Referred Arbitration Clause to a Holder of a Bill of Lading

4.1. Introduction

As discussed in Chapter 3, because of the non-contractual nature of bills of lading, a holder of a bill of lading is not necessarily bound by an incorporation clause in the bill of lading. This is because if this incorporation clause referred to a charterparty's arbitration clause, a direct contractual link between the holder and the shipowner concerning incorporating this arbitration clause is absent. It is especially the case when this holder is a third party to the referred arbitration clause, for example, the holder is a buyer in a CIF contract. As it is explained in Chapter 3, a CIF buyer is neither responsible for the arrangement of shipment nor participates in the issuance of bills of lading. This means that this buyer can never see nor sign an arbitration clause or an incorporation clause with an equivalent effect with the shipowner. However, an arbitration clause cannot bind a party who does not sign this agreement, because the principle of autonomy is the core spirit of commercial arbitration. Accordingly, an arbitration clause is generally regarded as a customised clause, meaning it exclusively binds the parties who express consent to this choice of dispute resolution.[297] Therefore, it remains questionable as to on what legal basis a charterparty's arbitration clause can be extended and therefore bind a holder of a bill of lading.

In order to answer this question, this Chapter examines traditional legal devices which are normally used to extend the scope of an arbitration clause, and the analysis focuses on whether these legal devices can be applied in bill of lading cases.

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[297] Baatz, 'Should third parties be bound by arbitration clauses in bills of lading?' (n 8) 85.

The traditional legal basis may indicate that it is possible for a businessperson to be a non-signatory to an arbitration clause. However, in order to bind this person to an arbitration clause, it is still crucial to prove that in fact this person is a party to this clause in the related commercial practice. In other words, such a party's consent to an arbitration clause is not an expressed one (consent cannot be evidenced by this party's signature), and yet his/her commitment to this clause can be implied by factual circumstances. It has been well-recognised that these proven facts can be equally effective as a signature,[298] and English courts are willing to accept these relevant facts to imply a non-signatory's consent to arbitrate.[299] Therefore, there is a class of cases in which arbitration clauses appear to be 'extended' to a 'non-signatory'.

It is important to clarify that such 'extension' of the scope of an arbitration clause does not contradict the principle of autonomy, because the extension is made upon concrete evidence which indicates that the 'non-signatory' is an original party to the arbitration clause. This means that an 'non-signatory' is not a third party to the arbitration clause, and his/her consent can be implied from relevant facts when his/her signature is absent. It follows that the scope of an arbitration clause is not extended, since the 'non-signatory' is proved to be an original party to this clause. As a result, this flexible approach to interpreting the parties' consent actually gives full effect to an arbitration clause.

Those facts which disclose a 'non-signatory' to be an actual signatory can be divided into two types: (1) the fact revealing the true identity of the 'non-signatory', for example, if an arbitration clause is signed by the agency of the 'non-signatory' or the 'non-signatory' is a member of a group company; (2) the fact indicating the actual engagement of the 'non-signatory' in respect to an arbitration clause, which includes personal participation in the negotiation, performance, or termination of

[298] Beale (ed) (n 293) 13-002.
[299] ibid 13-003.

the agreement.

In terms of the cases of bills of lading, relevant facts are as follows. Firstly, a holder of the bill of lading is an assignee of the contract of carriage which is contained in the transferred bill of lading. Secondly, an incorporation clause is contained in the transferred bill of lading indicating that a charterparty's arbitration clause is incorporated therein. Thirdly, a holder of the bill of lading is a third-party beneficiary of the charterparty, as the holder may benefit from this contract of carriage, in which the holder is not a contractual party, by receiving the goods. Fourthly, the relationship between a holder of the bill of lading and the charterer (who has a direct contractual relationship with the shipowner in terms of the carriage of goods by sea) may involve issues related to the agency or group of companies.[300]

These four facts are often considered by English courts in order to imply a holder's intention to arbitrate the disputes arising from the bill of lading. However, under the new consideration of the legal nature of bills of lading discussed in Chapter 3, the legal basis applicable to the above-mentioned factual circumstances, namely assignment, incorporation, principle of third-party beneficiary, agency and the doctrine of group of companies, may be subject to

[300] Agency and the doctrine of group of companies: Principle of agency is used to bind a non-signatory in the cases in which the true identity of the non-signatory is the principal of the signatory and the signatory signed an arbitration clause in the capacity of the non-signatory. This situation may exist in bills of lading cases, for example, under a sale contract concluded with Free On Board (FOB) terms, it is convenient for the buyer (based in the unloading port) to hire an agency located in the loading port to arrange the shipment with the shipowner. In this case, the buyer (the holder of the bill of lading) may be bound by the arbitration clause contained in the charterparty even though the buyer does not personally sign the charterparty and he as the holder of a bill of lading does not sign the bill of lading. Similarly, applying the doctrine of group of companies is also used to disclose the true identity of a non-signatory to the referred arbitration clause. However, being a member of a group company does not mean that this member should be bound by any arbitration clause concluded between another member and a third party. The capacity of this member to an arbitration clause is still heavily reliant on the facts that can directly prove that this member has a close connection with the member who signs the arbitration clause, and that can evidence this member's conduct in the negotiation, performance and termination of the agreement containing the arbitration clause. This situation may happen in bills of lading cases. Therefore, principle of agency and the doctrine of group of companies could be the potential legal principles supporting the incorporation in bills of lading cases, but their applicability heavily depends on the factual circumstances in each case. In other words, it should be firstly confirmed that there is a relationship of agency or a close connection between members within a group, and then, in order to disclose the true identity of the holder of bills of lading as a signatory of an arbitration clause, the according principle may be applied. These two principles are less relative to the main research questions, and therefore they are simply mentioned but not analysed in detail.

reconsideration. This is because the legal nature of bills of lading roots in the customary usage of the bills, and the customary usage discloses the possibility that a holder of bills of lading agrees to the referred arbitration clause. Such a possibility may have certain influence on the application of the above-mentioned legal bases, and subsequently impacts the implication of the parties' intention to arbitration. This may finally determine whether or not a holder of bills of lading (non-signatory to the charterparty's arbitration clause) is a party to the referred arbitration clause by receiving a bill of lading containing an incorporation clause.

In order to find out whether these legal bases can continue to be underpinning principles as to supporting an incorporation of an arbitration clause from a charterparty to a bill of lading, this chapter will re-examine these traditional legal bases in conjunction with this thesis's analysis of the legal nature of bills of lading.

4.2. Assignment

Assignment has been increasingly accepted as a legal basis for extending the arbitration clause to a third party.[301] In other words, even though an expressed consent from a third party is absent, an arbitration clause can be legally binding if a third party was an assignee of a contract containing this arbitration clause. Such an extension of the scope of an arbitration clause seems to be an exception to the doctrine of privity of contract,[302] and the motivation for making this exception may lie in the commercial necessity and the fact that arbitration is a preferred dispute resolution in international business as it features professionalism, efficiency, and confidentiality.[303]

The statutory law framing the transfer of an arbitration clause is provided by s 136 of the Law of Property Act 1925, particularly (1) (b) of this section. According

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[301] Steingruber (n 7) 9.13; Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 491; Stavros L. Brekoulakis, *Third Parties in International Commercial Arbitration* (Oxford University Press 2015) 2.06.

[302] Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 491.

[303] ibid; Holdsworth (n 7) 997; Merkin (ed), *Privity of Contract* (n 7) 2.49; Steingruber (n 7) 9.22.

to this provision, by assigning a contractual right, the related legal and other remedies are also assigned to the assignee. Therefore, under a statutory assignment, the assignee is entitled to sue the debtor in his/her own name if the debtor failed to perform the assigned obligation.[304] In cases where an arbitration clause is the agreed legal remedy between the assignor and the debtor, this arbitration clause is highly likely to bind the assignee as it is the only available legal remedy which affiliates to the assigned contractual rights. This statutory rule is confirmed in case law, as it was suggested the meaning of s 136 of the Law of Property Act 1925 is that the assignee will be assigned the contractual right and the remedy for that right simultaneously, and it is impossible for the assignee to refuse the remedy whilst accepting the assigned right.[305] This means that the assignor should be bound by the arbitration clause if the assigned contract provided that arbitration is the chosen remedy. Consequently, the assignee is entitled to initiate an arbitration against the debtor and obtain an arbitration award if the debtor fails to perform the assigned obligation.[306] It is then suggested that the principle of automatic assignment is widely applied to cases involving an arbitration clause.[307]

However, the validity of an arbitration clause assigned to a third party is still subject to some reasonable doubts.[308] For example, it is argued that an arbitration clause is a personal agreement separate from the main contract and that an absence of an expressed consent to the arbitration from an assignee and a debtor can be fatal to the validity of an arbitration clause.[309] It follows that an expressed consent from the assignee and the debtor should be required to

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[304] Beale (ed) (n 293) 19-008.
[305] *Montedipe S.P.A. v JTP-Ro Jugotanker 'The Jordan Nicolov'* [1990] 2 Lloyd's Rep. 11, 15-16; *Schiffahrtsgesellschaft Detlev von Appen GmBH v Voest Alpine Intertrading GmBH* [1997] 2 Lloyd's Rep. 279; Brekoulakis (n 301) 2.27.
[306] ibid.
[307] Brekoulakis (n 301) 2.08-2.18, in which it illustrates that the automatic transfer has been widely approved.
[308] Stephen Jagusch and Anthony Sinclair, 'The impact of third parties on international arbitration - issues of assignment' in *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 318.
[309] *Cottage Club Estates Ltd. v Woodside Estates Co. Ltd.,* [1928] 2 K.B. 463; *London Steamship Owners Mut. Ins. Ass'n. Ltd. v Bombay Trading Co. Ltd.,* [1990] 2 Lloyd's Rep. 21, 25; Steingruber (n 7) 9.22.

validate an arbitration agreement.[310] This means that the automatic assignment of an arbitration clause would be inapplicable if the arbitration clause is proven to be a personal contract between original parties. This is because a personal contract may indicate that original parties do not intend to assign their arbitration clause to any other parties.[311] Moreover, it is also observed that an arbitration clause not only provides a legal remedy, but also imposes a liability to arbitrate.[312] The problem is that under the rule of statutory assignments, liabilities generally cannot be assigned unless the liability is construed as a condition which is relevant to the exercise of the assigned right.[313] This means that an arbitration agreement would be assigned, if it can be proved that accepting this agreement is a condition for the assignee to acquire the assigned rights. Otherwise, an assignee's consent to arbitrate is a still a prerequisite in terms of transferring this liability in arbitration to a non-signatory. This difficulty of transferring a liability to arbitrate to some extent highlights the importance of a demonstration of an assignee's consent to arbitrate.[314]

These problems also exist in bill of lading cases. It should be firstly noted that the contract that is assigned to a holder of the bill of lading does not necessarily include the arbitration clause in the charterparty. As a result, the automatic

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[310] Steingruber (n 7) 9.14, where it refers to The Foreign Trade Arbitration Commission at the USSR Chamber of Commerce and Industry, award in Case No 109/1980, 9 July 1984, *All-Union Foreign Trade Association 'Sojuznefteexport' (USSR) v Joc Oil Ltd (Bermuda),* XVIII YBCA 92 (1993) para 17.

[311] Steingruber (n 7) 9.20, where it suggestes that the debtor's consent to assign the arbitration clause is also fatal, as it is possible to imply that the debtor only agrees to arbitrate with the assignor, rather than other unknown assignee; and in 9.21, the author considered the confidentiality of an arbitration; Brekoulakis (n 301) 2.34-2.38; Greg Tolhurst, *The Assignment of Contractual Rights* (Oxford: Hart Publishing 2016) 215-216, where explains that a contract cannot be assigned if this contract concerns personal contractual rights and obligations.

[312] Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 409; Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 23.

[313] Brekoulakis (n 301) 2.07, and 9.14; Beale (ed) (n 293) 19-078, and 19-081.

[314] *Tolhurst v Associated Portland Cement Manufacturers Ltd* [1902] 2 K.B. 660,668; *Hirachand Punamchand v Temple* [1911] 2 K.B. 330; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85, 103; Steingruber (n 7) 9.19; Beale (ed) (n 293) 19-078; Jagusch and Sinclair (n 308) 318, referring to *All-Union Foreign Trade Association (Sojuzneftexport) v Joc Oil Ltd,* Foreign Trade Arbitration Commission of the USSR Chamber of Commerce and Industry, Award of 9 July 1984 in Case No. 109/1980 reprinted in XVIII YBCA 92 (1993) para 17; Daniel Girsberger and Christian Hausmaninger, 'Assignment of Rights and Agreement to Arbitrate' (1992) 8 (2) Arbitration International 121.

transfer of an arbitration clause is unlikely to be applicable to bill of lading cases.

To illustrate, in terms of the assignment triggered by the transfer of bills of lading, s 2 of the Carriage of Goods by Sea Act 1992 provides the lawful holder of a bill of lading with all rights of suit under the contract of carriage as if the holder was an original party to that contract. This Act defines the transfer of rights by negotiating bills of lading as a statutory assignment.[315] This means certain rights and liabilities can be transferred by bills of lading. It is then important to clarify what rights are assigned to a lawful holder of a bill of lading, since the 1992 Act is not specific about whether the assignment includes an arbitration clause.

It seems that a contract of carriage is assigned to a holder of the bill of lading, since the 1992 Act provides the lawful holder of a bill of lading with all rights of suit under the contract of carriage as if the holder was an original party to that contract. Meanwhile, a title to goods would be assigned to the holder, as the holder is entitled to claim the delivery by presenting the related bill of lading. However, with a closer examination, it would be reasonable to suggest that only the right to performance is assigned to the holder, and the reasoning is as follow. On the one hand, a contract of carriage is not assigned to a holder of the bill of lading. This contract is concluded between a charterer and a shipowner, and it is used to stipulate issues concerning a transport of goods which is provided by a shipper. Moreover, a transfer of bills of lading does not terminate the contractual relationship between a charterer and a shipowner, and a contract of carriage is a binding contract between a charterer and a shipowner throughout the shipment. Firstly, a holder of a bill of lading does not completely replace the position of a charterer, as a holder only has the right to claim the delivery. Secondly, a holder's right in claiming compensation for the damage to the goods from the shipowner derives from an estoppel, rather than from the shipowner's obligations stipulated

[315] Beale (ed) (n 293) 19-003; Brekoulakis (n 301) 2.64; R Goode, Commercial Law (2nd edn, Penguin 1995) 1075; Merkin (ed), *Privity of Contract* (n 7) 2.76.

in a contract of carriage.[316] Specifically, a shipowner is estopped from denying the statement on bills of lading.

On the other hand, a title to goods may not refer to a propriety right. Instead, it is only the right to performance. Specifically, the transfer of the title to goods is normally triggered by a sale contract in which the seller's title to goods is extinguished and the buyer's title is subsequently created.[317] This means that the transfer of title is neither triggered by the transfer of bills of lading nor an assignment of a contract of carriage. However, considering the fact that the holder of a bill of lading is entitled to claim the delivery from the shipowner by presenting the bill of lading, it would be wise to define such right as the right to performance, namely to claim the delivery of the goods.

Additionally, this transfer of rights complies with the principles of an assignment of contractual right. Firstly, an assignment of the shipper's title to the right to performance does not create a new contract between the shipowner and the holder. In other words, the holder of the bill of lading merely replace the shipper to claim the benefit assigned to him from the shipowner, while the other agreement contained in the contract of carriage still exists and is valid between the original parties. This situation can be evidenced by the fact that the shipper is still entitled to sue the shipowner under the contract of carriage and vice versa. In addition, s 2 of the Carriage of Goods by Sea Act 1992 merely provides that the holder of a bill of lading should be treated as an original party to the contract of carriage. This means that in terms of enforcing the assigned contractual rights, the holder of a bill of lading (the assignee) is merely in the position of the shipper or the charterer (the assignor) who is an original party to the contract of carriage. The original contract of carriage is not extinguished,[318] and in respect of the assigned contractual right to performance the shipowner performs the exact

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316 Stevens (n 281) 55.
317 Tolhurst (n 311) 35-36.
318 Beale (ed) (n 293) 19-089, and 19-090, where the effect of an assignment is distinguished from the effect of a novation; Brekoulakis (n 301) 2.19 – 2.21; Tolhurst (n 311) ch 3.

obligation as it is in the original contract, but to the assignee.[319]

Secondly, once the right has been successfully transferred to a holder of the bill of lading, the shipper will be deprived of this right.[320] This effect of the transfer is in line with that of an assignment, as what happens in an assignment is the extinction of a right and the imposition of an equivalent one.[321]

Thirdly, the intention to transfer can be evidenced by the bill of lading. Bills of lading are generally issued from the shipowner to the shipper, and it is suggested that the shipowner's consent to the following assignment can be implied from the shipowner's willingness in issuing the bills, since it is well-known that bills of lading will generally be transferred by the shipper.

Fourthly, the transfer triggered by bills of lading is an immediate transfer. It has been well-settled that the right to goods will be transferred to the holder of the bill of lading as soon as the bill has been transferred; because of which transferable bills of lading are regarded as symbols of goods and the following sale of goods can be accomplished by the mere selling and buying bills of lading.

It follows that the paradigm framing the assignment evidenced by bills of lading is as following: by issuing bills of lading at the loading port, the shipowner and the shipper agree to assign a title to the right to performance under a relevant contract of carriage to the holder of a transferred bill of lading. For this reason, the shipper's title to that right is extinguished and an equivalent title is created and vested in the holder of the transferred bill of lading. However, the obligation of the shipowner is not replaced and extinguished because of this assignment, and the obligation owed by the shipowner to the holder is the same that he/she

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[319] Tolhurst (n 311) 37, where the author concluded that 'the whole point of the institution of assignment is achieved by recognizing that the contractual right to performance is actually transferred upon the transfer of title with the result that the obligor performs the exact same obligation, but to the assignee' and '…all true assignment of contractual rights require an actual transfer of the right to performance… a transfer of title to a contractual right always carries with it the actual right to performance.'

[320] Carriage of Goods by Sea Act 1992, s 2(5); This point is also observed in Merkin (ed), *Privity of Contract* (n 7) 2.76.

[321] Tolhurst (n 311) 35, it refers to the case of *R v Preddy* [1996] AC 815, 834 (Lord Goff) and 841 (Lord Jauncey) and 36 where the author points out that a transfer requires a disposition.

owes to the shipper. Consequently, at the stage of delivery, the shipowner should perform his/her obligation under the contract of carriage to the holder of the bill of lading as if the holder was the original party of the contract of carriage.

Therefore, the transfer of bills of lading facilitates 'the immediate transfer of an existing proprietary right, vested or contingent, from the assignor to the assignee'.[322] It is equally important to note that the transfer of a property right triggered by the transfer of a bill of lading does not create privity of contract between the shipowner and the holder of a bill of lading, which is also a distinguished feature of assignment.[323]

It is then suggested that the automatic transfer of an arbitration clause could be applied to bill of lading cases, since the transfer of bills of lading is qualified as a statutory assignment. Consequently, a holder of bills of lading as an assignee of the referred charterparty would be bound by this charterparty's arbitration clause.[324] However, this inference is questionable, particularly when the following aspects are taken into consideration:

(1) The charterparty's arbitration clause is not assigned to the holder of a bill of lading, as this clause is not contained in the contract of carriage evidenced by or contained in the transferred bill of lading.

(2) A holder's consent to the assignment of an obligation to arbitration is absent.

(3) An arbitration clause may be unassignable if it was proved as a personal performance.

These three aspects are discussed in the following sub-chapters.

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[322] Tolhurst (n 311) 30, it suggests that a description of the modern assignment is given by Windeyer J in *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, and this description is regarded as the most accurate definition of nowadays assignment.
[323] Tolhurst (n 311) 58.
[324] Brekoulakis (n 301) 2.64, and 2.65.

4.2.1. The Charterparty's Arbitration Clause is not Assigned to the Holder of a Bill of Lading

The paradigm governing the assignment of bills of lading may embody some special features, as the contract assigned by the shipper to the holder of a bill of lading is unlikely to be the original contract of carriage in full.

As it was discussed in Chapter 3, the long-established custom of merchants limits the usage of bills of lading, which subsequently restrains the merchant's presumption about terms and clauses contained in the bills.[325] Since the bills are used as receipts, evidence of contracts of carriage and as document of title, it is reasonable for businessperson to presume that the terms and clauses contained in the bills are merely those that directly deal with substantive aspects of shipment, carriage and delivery of the goods, rather than a procedural agreement, such as an arbitration clause.

The legislation may also indicate that the contract of carriage evidenced by or contained in a bill of lading does not contain an arbitration clause, as this clause does not belong to the subject-matters of bills of lading.

For instance, the representation in bills of lading is legally confirmed by s 4 of the Carriage of Goods by Sea Act 1992, and according to which the transferred bills of lading are merely 'conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment.' It is clear that s 4 evidences that the subject-matters of bills of lading are only those germane to shipment, carriage and delivery of the goods.

Additionally, the meaning of 'the contract of carriage' under the Carriage of Goods by Sea Act 1992 is provided by s 5(1), and in this Act this contact is explicitly interpreted as a contract 'contained in or evidenced by the bill of lading'. This interpretation may give rise to the understanding that the contract of carriage

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[325] Burton (n 105) 176.

contained in the bill of lading and subsequently transferred to a holder is different from the original contract of carriage. The difference is caused by the legal nature of bills of lading, which means that the limited subject-matters of bills of lading may refine and select terms and clauses of the original contract of carriage. Consequently, only those substantially relevant to carriage, shipment and delivery can be contained in the bills and then transferred to a holder.

From the perspective of assignment, it is reasonable for the shipper to only assigns a part of contractual right to performance under the original contract of carriage. This is because the original contract of carriage can be inclusive of issues that concern the shipper and the shipowner, but not all of these issues are of concern to a lawful holder. For example, a holder generally does not have to be engaged in agreements which are explicit about rights and obligations performed at the loading port. However, these agreements can be crucial for the shipper and the shipowner. It follows that issues concerning a lawful holder merely constitute a part of the related contract of carriage. This part may specifically relate to his/her right to claim the delivery and to sue the shipowner if the goods were not delivered in expected quality and quantity.

For this reason, the assignment suitable for bill of lading cases should be able to force the shipowner (the debtor) to perform his/her obligations to deliver the goods to the lawful holder (the assignee). Therefore, the lawful holder is entitled to claim the delivery and to sue the shipowner in his own name if the goods was lost or damaged because of the shipowner’s fault. In this case, the lawful holder’s right to sue may derive from the assignment of a contractual right to performance. Specifically, this assigned right only relates to the delivery of the goods, which does not include an arbitration clause.

It is also suggested that an arbitration clause should be regard as a legal remedy available to the assignee if it was attached to the main contract. Therefore, an

assignee should be bound by an arbitration clause,[326] since a legal remedy is automatically transferred to the assignee and an arbitration clause provides the assignee with a forum to settle the disputes.[327] However, this opinion may require a re-consideration in bill of lading cases. As discussed above, the contract contained in or evidenced by bills of lading and then assigned to the assignee does not naturally include the arbitration clause contained in the original contract of carriage. In other words, an arbitration clause does not attach to the main contract assigned to the lawful holder, since the separability of an arbitration clause enable this clause to be regarded as an independent contract. Therefore, the argumentation based on the legal remedy may be inapplicable to bill of lading cases, and consequently the lawful holder of a bill of lading is unlikely to be bound by the arbitration clause contained in the original contract of carriage in respect to an arbitration clause being a legal remedy.

4.2.2. A Holder's Consent to the Assignment of An Obligation to Arbitration is Absent

As discussed above, one of the obstacles impeding a unanimous acceptance of the automatic assignment of arbitration clauses is that this clause embodies an obligation to arbitrate, while an obligation generally cannot be assigned without the assignee's consent.[328] Theoretically, the assignor only can assign a 'thing' that he/she owns, and the 'thing' can only be a right or a right to an obligation. It is illogical for a party to own an obligation, and consequently an obligation cannot be assigned.[329] Moreover, being assigned a contractual right must require the assignee to have previously entered into a contract containing both rights and liabilities with the assignor. These liabilities are unlikely to be those which the

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[326] ibid.
[327] Law of Property Act 1925, s 136 (1)(b); Brekoulakis (n 301) 2.27.
[328] Beale (ed) (n 293) 19-078; Tolhurst (n 311) 301-302; *Tolhurst v Associated Portland Cement Manufacturers Ltd* [1902] 2 K.B. 660; *Hirachand Punamchand v Temple* [1911] 2 K.B. 330; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85.
[329] Tolhurst (n 311) 302.

assignor owes to the debtor.[330]

This general rule may be subject to the conditional benefit principle and the pure benefit and burden principle.[331] It then seems that the fate of the assignment of an arbitration clause in bill of lading cases may rely on the answer to the question as to whether or not these two principles can be applied in bill of lading cases. However, the separability of an arbitration clause and the absence of a lawful holder's consent to arbitrate can be obstacles to apply these principles, as the issuance of bills of lading does not necessarily consider the holder's consent.

According to the conditional benefit principle, a burden only can be automatically assigned when this burden is 'an intrinsic part' of the assigned right.[332] This means that such an obligation can be observed or assumed by the assignee when he/she is assigned the right. It follows that this principle is only applicable to the situation where the burden is naturally embodied in the benefit, and therefore it is impossible for the assignee to take the benefit only.[333] However, it is difficult to apply this principle to bill of lading cases, because an arbitration clause and the contract evidenced by or contained in the transferred bills of lading tend to be two independent contracts: the inter-connection between them does not naturally exist. An arbitration clause as a separate contract exclusively binds the parties who made such a choice, while the contract assigned to the holder of a bill of lading only addresses issues which are directly related to the carriage of goods by sea. This means that an arbitration clause as an ancillary contract represents a personal choice of dispute resolution, and it is unreasonable to automatically assign this separate contract along with the assignment of a contract of carriage evidenced by a bill of lading.

It is also suggested that an obligation can be assigned on the basis of the pure

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[330] Beale (ed) (n 293) 19-079; *Pan Ocean Shipping Ltd v Creditcorp Ltd* [1994] 1 W.L.R. 161.
[331] Beale (ed) (n 293) 19-080, 19-081; Tolhurst (n 311) 302.
[332] ibid; *Tito v Waddell (No.2)* [1977] Ch 106, 290; Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 384.
[333] ibid;

benefit and burden principle.[334] Unlike the conditional benefit principle which requires an inherent causal link between the right and the liability, the assigned right and the assigned liability can independently exist under this pure principle of benefit and burden.[335] For this reason, it appears that the relationship between the right and liability under this principle may resemble the situation in bill of lading cases, since an arbitration clause is not naturally contained in bills of lading and the separability of an arbitration clause makes this clause independent from the main contract.

However, the major problem of applying the pure benefit and burden principle in bill of lading cases is that a prerequisite of applying this principle is to pass an intention test,[336] while to reveal a holder's consent to arbitrate can be a difficulty in bills of lading case.[337] According to this principle, to suffice an assignment of a liability, the assignor's intention to assign and the assignee's consent to take on this liability should be expressed or can be implied.[338] However, the holder of a bill of lading generally cannot have the opportunity to express his/her opinion about this additional liability to arbitrate, as bills of lading are prepared by the shipper and signed by the shipowner. Subsequently, a third party receives the bill of lading passively and becomes a holder of the bill of lading according to the order given by the consignor of the bills. Therefore, the absence of an intention could be fatal to the assignment of a liability to arbitrate in bill of lading cases, since the consent of involved parties is decisive for the assignment and the validity of an arbitration clause.[339] It follows that the only hope may rely on the contract separately concluded between the assignor (the shipper or a subsequent assignee who assigns the bill to another party) and the assignee (the holder of a bill of lading). Specifically, if the intention of the assignment of a liability to arbitrate

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334 Beale (ed) (n 293) 19-081; Tolhurst (n 311) 319-322.
335 Tolhurst (n 311) 320; *Tido v Waddell* [1977] 1 Ch 106, 290 and 302.
336 *Tido v Waddell* [1977] 1 Ch 106, 302.
337 Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 395.
338 Tolhurst (n 311) 320.
339 Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 395-396.

can be verified in this separate contract, it is then possible to extend the scope of an arbitration clause to a holder of the bill of lading by means of assignment.

4.2.3. An Arbitration Clause would be Unassignable if it is Proved as a Personal Performance

The general rule of assignment prohibits the automatic assignment of a personal performance,[340] and relevant parties' consent to this assignment is required to suffice such an assignment.[341] This rule may increase the difficulty in extending the scope of an arbitration clause in bill of lading cases.

The question as to whether the assigned contract is personal or impersonal is a matter of the construction of the parties' intentions,[342] and several factors are used to produce a reasonable construction. Under the context of an arbitration clause, relevant factors are: (1) personal confidence, and (2) dispute resolution.

To be specific, it is reasonable to classify an arbitration clause as a contract involving personal performance. Firstly, the confidentiality of arbitration may reinforce the personalised feature of an arbitration clause.[343] Secondly, an arbitration as a dispute resolution is initiated by mutual consent, and thus the personal intention is decisive to the validity of the arbitration clause.[344] Thirdly, the change of the parties to the arbitration may have an impact on the arbitration procedure and the award.[345]

It is clear that an arbitration clause itself is likely to be classified as a personal contract, and this personal feature can be easily noted in bill of lading cases. It is common for a charterparty's arbitration clause to be specifically worded and only

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[340] Beale (ed) (n 293) 19-055, and 19-056; Tolhurst (n 311) 216-220; Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 493.
[341] ibid.
[342] *Tolhurst v Associated Portland Cement Manufacturers Ltd* [1903] AC 414.
[343] Steingruber (n 7) 9.22;
[344] ibid.
[345] Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 494, the example given by the author is that the parties to an arbitration are required to make a personal appointment of arbitrator, which may have an influence on the following proceeding and the outcome.

applicable to the disputes arising from the original contract of carriage.[346] For example, in *T W Thomas & Co Ltd v Portsea Shipping Co Ltd* the arbitration clause stated, 'Any dispute or claim arising out of this charter … shall be settled by arbitration';[347] it was held that the holder of the bill of lading was not bound by the arbitration clause since the disputes arising from the bill of lading were not within the scope of this arbitration clause, and the parties to the charterparty restricted the application of the arbitration clause by using such specific wording. This restricted construction of the specific wording is very likely to be insisted on, especially under the consideration of the negotiability of bills of lading.[348] It is irrational for a shipowner to give consent to have an arbitration with an unknown party, since the final receiver of the goods can be uncertain until the vessel reaches its destination. Meanwhile, it is unlikely for the holder of a bill of lading to agree to an arbitration which will be held in a distant place and whose governing law may put the holder in an unfavourable position.[349]

It is then reasonable to apply the rule of personal performance in a situation where the arbitration clause is in this wording or other forms with an equivalent effect, as such an arbitration clause involves personal performance. This means that the automatic assignment of an arbitration clause cannot be applied in bill of lading cases. Therefore, in order to assign this personal agreement about arbitration, it is a prerequisite to identify the shipowner's and the holder's consent to arbitrate.

The shipowner's consent can be evidenced by the wording of the terms on this matter in bills of lading. It is necessary to additionally verify the consent of the

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[346] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 124.
[347] *T W Thomas & Co Ltd v Portsea Shipping Co Ltd* [1912] A.C. 1.
[348] It is suggested in *T W Thomas & Co Ltd v Portsea Shipping Co Ltd* [1912] A.C. 1, 9 (Lord Gorell) that given the fact that bills of lading can be passed to a third party to the charterparty, in order to limit the scope of the arbitration clause, the shipowner and the charterer may deliberately use a clear wording to achieve such purpose; Catterwell (n 105) 84, in which admissible materials include 'the potential consequences of each interpretation', and therefore the transferability of bills of lading may have an impact judicial interoperations of general wording in bills of lading.
[349] *T W Thomas & Co Ltd v Portsea Shipping Co Ltd* [1912] A.C. 1, 8 (Lord Gorell).

shipowner, as it is possible for the shipowner to only give consent to have an arbitration with the counterparty in the original contract of carriage.

In addition, in bill of lading cases the holder's consent to arbitration should simultaneously require identification. Since the arbitration clause cannot be automatically assigned as a legal remedy, it can only be assigned as a contract involving both a right to sue and a liability to arbitrate. In this case, a consent to the assignment of a liability to arbitrate from the assignee, namely the holder of a bill of lading, is necessary. However, as discussed above, compared to evidencing the shipowner's consent, it is harder to prove the holder's consent. This is becasue it is not a custom of merchants as to a holder negotiates terms and clauses through a bill of lading. It follows that in the absence of the holder's consent, the assignment of a charterparty's arbitration clause may be hindered.[350]

To conclude, it is very hard to extend an arbitration clause to a holder of the bill of lading by employing the legal principle of assignment. Indeed, the Carriage of Goods by Sea Act 1992 creates the possibility of the assignment of a contract of carriage through transferring the relevant bills of lading, but such an assignment does not naturally include the arbitration clause owing to the limited subject-matters covered by bills of lading. Therefore, the assignment of such arbitration clause may rely on a separate assignment of an arbitrate agreement. However, this separate assignment cannot be achieved by simply transferring bills of lading on three grounds. Firstly, the conditional benefit principle cannot used to suffice an assignment of the liability embodied in an arbitration, as this liability does not form an intrinsic part of the title to goods. Secondly, the pure benefit and burden principle cannot facilitate a separate assignment of the liability to arbitrate, since the holder's consent is absent. Thirdly, an arbitration clause in a charterparty is highly likely to be construed as a personal contract between the charterer and the shipowner, as the confidentiality of arbitration and the autonomy of arbitration

[350] Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 376-377.

normally defines an arbitration as a rather personal choice of dispute resolution. Such personal element in an arbitration may hinder the automatic assignment of an arbitration clause.

Difficulties as to assigning the liability to a third party also exist in Chinese law. As discussed in Chapter 2, these difficulties can be illustrated from two points. On the one hand, the Arbitration Law of the PRC does not instructive about whether an arbitration clause can be automatically transferred. On the other hand, although the Contract Law of the PRC provides that rights and liabilities can be transferred to a third party without verifying this party's expressed consent, it is remain unclear as to whether such a transfer can be applied to arbitration clauses, since the validity of an arbitration clause is heavily rely on parties' consent to arbitrate. Additionally, it is also questionable to automatically transfer an arbitration clause to a holder of the bill of lading, even the Article 95 of the Maritime Code of the PRC provides that the relationship between the holder and the shipowner is governed by the transferred bill of lading. This is because the Article 73 of the Maritime Code of the PRC and the historical research of bills of lading in Chapter 3 may indicate that an arbitration clause is not a subject-matter of bills of lading under Chinese law. Considering these difficulties, this thesis will fully analyse the incorporation issue under Chinese law in Chapter 7.

In this case, this thesis considered the other possible legal devices, and the following analysis is focus on the question whether principle of incorporation can be used as a legal basis in terms of extending a charterparty's arbitration clause to a holder of the bill of lading.

4.3. Incorporation by Reference

Incorporation by reference has been recognised as a feasible method in respect to extending the scope of an arbitration clause to a third party.[351] The paramount

[351] UNICITRAL Model Law, Option I, Article 7(6) and Arbitration Act 1996, s 6 both provide that an arbitration clause can be incorporated. Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue*

rule is that the parties' intention to incorporate an arbitration clause can be clearly identified by expressed words or implied by factual circumstances.[352] The rationale behind this paramount principle lies in the autonomy of arbitration, and this basic principle indicates that the intention of the parties to arbitrate is an essential prerequisite for a valid arbitration clause.[353]

In terms of disclosing and ascertaining the parties' intention, two trends of approach are co-existing, namely a strict approach and a liberal approach. The strict approach requires specific wording about incorporating an arbitration clause; this approach is prevailing in English law and some other countries recognising the UNCITRAL Model Law, such as Germany, Spain, Greece, and Canada.[354]

Taking English law as an example, this issue is regulated by s 6(2) of the Arbitration Act 1996, and it states:

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

In order to suffice an incorporation of an arbitration clause, two points within this provision need to be clarified: (1) the meaning of 'a written form'; (2) the meaning of 'make that clause part of the agreement'. The meaning of 'a written form' is easy to find and it has gradually been expanded due to the development of communication technology. It has been widely accepted that apart from a formal written agreement of arbitration, the conducts between the parties, and the exchange of communication (such as the exchange of e-mails) can also be

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and Class Actions (Kluwer Law International 2005) 29; Brekoulakis (n 301) 2.181; Tae Courtney 'Binding Non-Signatories to International Arbitration Agreements: Raising Fundamental Concerns in the United States and Abroad' (2009) 8 Iss.4 Richmond Journal of Global Law & Business 581, 586; Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 538.

[352] Here 'the parties' refers to those who are parties to the incorporation clause, and both or one of them are alien to the referred arbitration clause.

[353] Tweeddale and Tweeddale, Arbitration of Commercial Disputes International and English Law and Practice (n 123) 33; Born (n 123) 335.

[354] Brekoulakis (n 301) 2.190-2.202.

qualified as ‘an agreement in writing’, if the intention to arbitrate can be revealed by certain conduct or the recorded communications.[355] However, this Act does not provide a further explanation in terms of to what extent the incorporation clause can ‘make that clause part of the agreement’,[356] and therefore the answer to this question may be concluded from case law on this matter.

Compared to a liberal approach, English courts tend to hold that a strict approach is more apt to meet this requirement. For example, in *Aughton Ltd v M.F. Kent Services Ltd*,[357] it is suggested that an explicit wording that straightforwardly describes the intention to incorporate an arbitration clause should be easily identified in incorporation clauses. The rationale behind this requirement is that an arbitration clause is a self-contained contract in nature.[358] Unlike other clauses governing substantive issues of commercial transactions, an arbitration clause represents parties’ joint intention about their distinctive choice of dispute resolution, and it can only be legally binding when this intention is so clearly expressed. Therefore, the same requirement should be imposed on the incorporation clause with an equivalent effect, as only in this case can such an incorporation clause legally function as an arbitration clause in a new contract, namely to ‘make that clause part of the agreement’.

Comparatively, the liberal approach takes the view that an incorporation of an arbitration clause suffices as long as the parties’ intention to arbitrate can be implied from factual circumstances, while specific wording about incorporating an arbitration clause is not strictly required.[359] For instance, in *Tradax Export v Amoco Iran Oil Amoco Company*,[360] the judgment advanced by the Swiss

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[355] Arbitration Act 1996, s 5; Hosking, ‘The Third Party Non-Signatory’s Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent’ (n 7) 540; UNICITRAL Model Law, Option I, Article 7 (3) (4) (5).
[356] Lielbarde (n 17) 294.
[357] *Aughton Ltd v M.F. Kent Services Ltd* 1993 WL 963255.
[358] Paul Todd, ‘Incorporation of arbitration clauses into bills of lading’ (1997) 6 J.B.L. 331, 337.
[359] Brekoulakis (n 301) 2.203-2.218; Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (n 351) 29.
[360] *Tradax Export v Amoco Iran Oil Amoco Company* 7 February 1984, in (1986) 11 YBCA 532.

Federal Tribunal is that a generally worded incorporation clause in a bill of lading is able to bring in an arbitration clause from a relevant charterparty. The reason is that factual circumstances in this case were adequate to prove that the incorporation of the referred arbitration clause was within the expectation of the parties to the bill of lading. The relevant facts are: (1) the involved parties were professionals in sea commerce and transportation; (2) the bill's incorporation clause referred to a certain form of standard charterparty which was customarily used in the business where the parties were professionals; and (3) an arbitration clause was one of the standard clauses contained in the referred standard charterparty.[361] It is then reasonable to conclude that the arbitration clause should be within the parties' knowledge and the incorporation rule should be applied in a flexible manner.[362] This conclusion may be further supported by the spirit of the New York Convention and the UNCITRAL Model Law,[363] according to which arbitration should be facilitated and the court should be supportive in promoting the arbitration process and giving full effect to party autonomy.[364] Moreover, the liberal approach may be motivated by the fact that international commercial arbitration is increasingly welcomed and preferred by business.

Similarly, in a US case, *Progressive Casualty Insurance Co v CA Reaseguradora Nacional de Venezuela*,[365] it was held that an arbitration clause was incorporated although both this referred arbitration clause and the incorporation clause were generally worded. The relevant facts are: (1) the two parties presented had

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[361] ibid.
[362] Brekoulakis (n 301) 2.204, and 2.234.
[363] Article II of the New York Convention does not provide provisions on the issue of incorporation, and it is required by this Article that party's autonomy should be respected by the court of a contracting state. In UNICITRAL Model Law, the supportive role of a court is regulated in Article 6, and 'give full effect of party's autonomy' is provided by Article 8. Meanwhile, the aim of 'to facilitate an arbitration' also can be evinced by the expanded definition of 'an agreement in writing' in Option I Article 7.
[364] Brekoulakis (n 301) 2.204; *Tradax Export v Amoco Iran Oil Amoco Company* 7 February 1984, in (1986) 11 YBCA 532; Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 540; Department Advisory Committee on Arbitration Law (UK), A New Arbitration Act? 42 (Dep't of Trade & Indust. 1989); Astel-Reiniger Joint Venture v Argos Eng'g & Heavy Indus. Co. Ltd., Alternative Dispute Resolution Law J. 41, 48 (1995) (per Kaplan J).
[365] *Progressive Casualty Insurance Co v CA Reaseguradora Nacional de Venezuela* 991 F 2d 42 (2nd Cir 1993)

entered into a retrocession agreement; (2) this retrocession agreement contained a generally worded incorporation clause, and this clause stated 'subject to Facultative Reinsurance Agreement'; (3) the referred Facultative Reinsurance Agreement was a contract concluded by different parties; and (4) a generally worded arbitration clause, namely one that did not restrict the parties to this arbitration clause, was contained in this independent contract.[366] The incorporation was not impeded by those generally worded clauses, because the signature on the retrocession agreement was adequate to evidence the presented parties' acknowledgement of the incorporation, and the general wording meant that the referred contract should be incorporated in full. Consequently, the arbitration clause was included. This inclusive incorporation was also evinced by the general wording in the arbitration clause, as it did not hinder its application in disputes arising from non-original parties.

To conclude, the application of a liberal approach aims to give full effect of the parties' autonomy. When asserting the parties' intention, this question may convert into whether the arbitration clause is within the parties' expectation,[367] especially when a specific instruction which can directly disclose parties' intention is absent. Therefore, the analysis may heavily rely on certain surrounding circumstances and available written evidence.[368] For the Swiss case, the holder of the bill of lading did not have a contractual relationship, but the parties' intention was implied by the usage of a standard form of charterparty and the parties' professional knowledge. For the US case, the presented parties had a contractual relationship, and the parties' intention was indicated by their signature on their contract.

It is then clear that no matter whether a strict or a liberal approach is applied, both of them aim to facilitate the true intention of the parties. It is plain that specific

366 ibid.
367 Burton (n 105) 2.
368 ibid 25.

wording may cogently represent parties' intention, and therefore an incorporation of an arbitration clause by specific wording is commonly accepted and granted without any doubt. By contrast, a liberal approach is used when the incorporation lacks the support of specific wording. Consequently, additional consideration of factual circumstances is required in order to reveal parties' unexpressed intention. The advantage of this approach is that it may close the loophole left by the strict approach, since it is possible for parties to be so intended while no expressed intention was made. For this reason, having a liberal approach as a complement to a strict approach may truly be in line with the spirit expressed by the New York Convention and the UNCITRAL Model Law, and give full effect to the parties' autonomy.[369] However, caution should be taken when using a liberal approach to avoid unduly stretching the language of relevant clauses. In other words, the implied intention should be supported by concrete evidence otherwise the true intention of the parties may be misinterpreted.

Although there is no final answer as to which approach should prevail, the incorporation by reference to arbitration clauses has been widely used in commercial practice, and among which bill of lading cases have drawn special attention from both courts and academia.[370] The fundamental reason for this is that it is difficult to ascertain parties' intention to arbitrate in bill of lading cases, as in this class of cases the legal relationships between parties are complex and generally the holder of a bill of lading can have little access to the referred charterparty.[371]

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[369] Baatz, 'Should third parties be bound by arbitration clauses in bills of lading?' (n 8) 85.
[370] Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 538.
[371] Brekoulakis (n 301) 2.195, and 2.232; Wilson (n 2) 3-4, and 5-8; Cooke, Young and Ashcroft (n 101) 3; Treitel and Reynolds (n 11) 3-033; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 94. According to these authors, the commercial transaction particularly under a CIF contract in which the seller is obliged to arrange the shipment, the charterer (the seller under a CIF contract) and the carrier may firstly sign a contract of affreightment, and this contract usually takes the form of a charterparty. Bills of lading are unilaterally issued by the carrier to the shipper (the person who provides the goods to be loaded), and used as the receipt of the goods, the prima facie evidence of the relevant charterparty, and the title to goods. Subsequently, bills of lading can be transferred to a consignee who may be a third party to the charterparty (such as the buyer under a CIF contract). This consignee may have no knowledge of the clauses, such as the arbitration clause, in the charterparty.

Specifically, it is impossible for a holder to have the knowledge of an arbitration clause, unless there is specific wording in the transferred bill of lading. This is because, without a specific nomination to the arbitration clause, a holder's presumption about incorporated clauses is limited to those directly germane to the shipment, carriage and delivery of the goods. Such an understanding of a generally worded incorporation clause derives from the common knowledge about the context of bills of lading. This common knowledge is affected by the customary usage of bills of lading.[372] For this reason, the ejusdem generis rule is applied to the construction of a bill's incorporation clause,[373] and consequently general wording only bring in terms and clauses concerning the subject-matters of bills of lading, that is issues that directly deal with shipment, carriage and delivery.[374]

In this special situation, the strict approach to incorporation generally prevails over the liberal one, which means that the specific wording of incorporating an arbitration clause is required. This is because an explicit wording may enable the holder of a bill of lading to be aware of the existence of an arbitration clause and thus the arbitration could be within a holder's expectation, which would contribute to both the commercial certainty and the legal certainty.

The leading case is *T W Thomas & Co., Limited v Portsea Steamship Company, Limited*.[375] It is established that an arbitration clause as a collateral contract independently dealing with the dispute resolution, which means that it does not belong to the subject-matters of bills of lading. Consequently, an arbitration clause cannot be naturally within a holder's expectation.[376] Meanwhile, the negotiability of bills of lading hinders the holder of a bill of lading to acquire the

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[372] Treitel and Reynolds (n 11) 3-014.
[373] Lucy Greenwood, 'Principles of interpretation of contracts under English law and their application in international arbitration' (2019) 35(1) Arbitration International 21, 23.
[374] Debattista, 'Cargo Claims and Bills of Lading' (n 4) 209-210.
[375] *TW Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C.1.
[376] ibid 6 (Lord Loreburn LC and Lord Atkinson), 8 (Lord Gorell). See also in Treitel and Reynolds (n 11) 3-022.

knowledge of the referred arbitration clause.[377] Since it is impossible for a holder to consent to an arbitration clause without knowing it, it follows that specific wording about the intention to arbitration should be clearly stated in the incorporation clause.[378] This judgment is followed, for example, in *The 'Rena K'* in which the referred charterparty's arbitration clause was successfully incorporated in the bill of lading because the bill's incorporation clause was explicit about the incorporation of the charterparty's arbitration clause.[379]

It appears that the principle of construction could be a tool with which to analyse the validity of an incorporation, since the interpretation of the bill's incorporation clause does have an impact on the outcome of the incorporation. However, situations that involve bills of lading are not always so simple and straightforward,[380] and the drawbacks of regarding this issue as a mere matter of construction are illustrated by conflicting decisions in case law.

In the light of the discussion in Chapter 3, the reason for these conflicting decisions may have roots in the problematic presumption of the legal nature of bills of lading. Since it is wrongfully held that bills of lading are contracts, incorporation clauses contained in the bills are regarded as naturally binding. Consequently, the principle of incorporation is automatically applied, and the principle of construction is used in order to determine which clauses can be incorporated in. However, different opinions arise when the wording of the bill's incorporation clause and the wording of the charterparty's arbitration clause cannot produce a consistent result. For this reason, it is necessary to return to the basic question as to the legal nature of bills of lading, since it directly determines the legal effect of a bill's incorporation clause.

The following sub-sections will illustrate the point that the principle of

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[377] ibid 6 (Lord Atkinson); See also in Treitel and Reynolds (n 11) para 3-015; Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 181.
[378] Lielbarde (n 17) 295.
[379] *The Rena K* [1978] 1 Lloyd's Rep. 545.
[380] Eleni Magklasi, 'A New Channel to the Heart of Incorporation of Clauses' (2014) 6(20) JIML 397, 398.

incorporation alone cannot be the underpinning legal principle to the issue of incorporating a charterparty's arbitration clause to a bill of lading. The reasons are twofold: (1) the current constructions of the bill's incorporation clause are conflicting, which cannot provide the merchant with a guidance in concluding a charterparty and interpreting the bill's incorporation clause; (2) under the principle of incorporation by reference, the bill's incorporation clause cannot lead to an incorporation, which may frustrate the attempt to apply the principle of incorporation in the first instance.

4.3.1. *The Conflicting Judgments about Interpreting the Bill's Incorporation Clause*

The conflicting judgements in case law can be noted in a confusing attitude toward the bill-centric approach and the legal effect of the wording of the referred arbitration clause.

English case law treats the incorporation of an arbitration clause from a charterparty to a bill of lading as a matter of construction, while the applied method is not always consistent. This inconsistency may be triggered by the additional construction of the referred arbitration clause. To be specific, conflicting methods are used to address the inconsistency incurred by the wording of the bill's incorporation clause and the wording of the referred arbitration clause. Generally, English case law follows the bill-centric method. However, this long-established method was not followed in the recent case *The Channel Ranger*.[381]

The bill-centric method indicates that the wording of the bill's incorporation clause may have a decisive effect.[382] This means that a generally worded incorporation clause which does not specifically refer to an arbitration clause cannot bring an arbitration clause into the bill, even if the referred arbitration clause contained an

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[381] *The Channel Ranger* [2013] 2 CLC 480.

[382] Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 392; Debattista, 'Cargo Claims and Bills of Lading' (n 4) 210.

expressed intention to apply this arbitration clause to disputes arising from the bill of lading.

In this case, the dispute as to the validity of such incorporation may arise from the cases in which the bill's incorporation clause made specific reference to an arbitration clause, while the wording of the referred arbitration clause specifically restrains its application to disputes between the original parties to the charterparty. Under a bill-centric method, this conflict of wording does not prevent the enforcement of the expressed intention in the bill of lading, namely, to incorporate an arbitration clause from a charterparty to a bill of lading. In order to suffice this expressed intention, the English courts are, in most cases, willing to modify the inapt wording in the referred arbitration clause.[383]

For example, the inconsistency in *The 'Rena K'* was accurate, as the bill's incorporation clause was explicit about the intention to incorporate the charterparty's arbitration clause by stating: '… including the Arbitration Clause…', while the referred arbitration clause specified that the arbitration was only applicable to disputes arising under the charter by stating '… disputes under this Charter to be settled by arbitration in London…'[384] It was held that since the inconsistency was evident when the referred arbitration clause was written in the bills verbatim, the wording '…under this Charter…' should be subject to manipulation in order to make the disputed arbitration clause applicable to disputes arising from the bill of lading.[385] This is because in this case the parties to the bills of lading have their intention about incorporating the charterparty's arbitration clause clearly written in the bill of lading, and thus it would be unreasonable to disregard such explicit intention and make the inconsistency a barrier to prevent the aimed incorporation.[386]

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[383] Debattista, 'Cargo Claims and Bills of Lading' (n 4) 209.
[384] *The Rena K* [1978] 1 Lloyd's Rep. 545.
[385] ibid 551.
[386] ibid; Miriam Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (2007) 19 Denning Law Journal 171, 174.

In *The Varenna*,[387] Sir Donaldson M.R. concurred with this decision by stating:

> 'The start point for the resolution of this dispute must be the contract contained in or evidenced by the bill of lading, for this is the only contract to which the shipowner and the consignee are both parties. What the shipowners agreed with the charterers, whether in the charterparty or otherwise, is wholly irrelevant, save in so far as the whole or part of any such agreement has become part of the bill of lading contract. Such an incorporation cannot be achieved by agreement between the shipowner and the charterers. It 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.'[388]

In other words, intentions contained in a bill of lading should be of greater relevance than that contained in a referred charterparty, since the current disputes are between the holder of a bill of lading and the shipowner.[389] Additionally, the charterparty legally binds merely the charterer and the shipowner, rather than the parties to the bill of lading.[390]

The rationale behind the bill-centric approach is that a bill of lading is a conclusive evidence in the hand of a holder of the bill of lading.[391] This means that if a dispute was between the lawful holder and the shipowner, compared to the charterparty's arbitration clause, the intention expressed in the bill's incorporation clause should be held more weight. Consequently, the wording of the referred arbitration clause cannot have a decisive effect on the aimed incorporation.[392] Moreover, it is reasonable to argue that if the parties to a bill of lading intended to arbitrate, their usage of an incorporation clause would be to avoid an unnecessary repetition of a similar choice of dispute resolution. It follows that the

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[387] *The Varenna* [1983] 1 Q.B. 599.
[388] ibid 615, 616.
[389] ibid 604; Lielbarde (n 17) 295.
[390] ibid.
[391] Carriage of Goods by Sea Act 1992, s 4.
[392] *The Varenna* [1983] 1 Q.B. 599, 604; Lielbarde (n 17) 295.

limitation imposed by the original party about the scope of arbitration, as well as how bills of lading issued thereunder should be drafted may be irrelevant.[393] Nevertheless, the problem is still accurate if the holder of a bill of lading did not agree to arbitrate its disputes with the shipowner, since under the discussion in Chapter 3, it is difficult to bind a third party holder to a bill's incorporation clause.

The bill-centric approach may also take the wording of the referred arbitration clause into consideration. For instance, in *The Annefield*,[394] it was held that specific wording is required for the incorporation of an arbitration clause, and such an explicit intention should be identified either in the bill's incorporation clause or in the referred arbitration clause.[395] However, the consideration of the referred arbitration clause merely constitutes as a supportive role.

After interpreting the bill's incorporation clause, the question as to what clauses can be incorporated is answered by the judgment advanced by Lord Esher M.R. in *Hamilton & Co. v Mackie & Sons*,[396] which states:

> '… the conditions of the charterparty must be read verbatim into the bill of lading as though they were there printed in extenso. Then, 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.'[397]

Accordingly, this judgement firstly restricts the incorporated clauses to those directly germane to the shipment, carriage and delivery of the goods, if the bill's incorporation clause did not express an intention to incorporate the arbitration clause. This is because an arbitration clause does not belong to the subject-matters of a bill of lading,[398] and therefore should be disregarded. It appears that

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[393] Wagener (n 11) 122; Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 193.
[394] *The Annefield* [1971] P. 168; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 122.
[395] ibid 177.
[396] *Hamilton & Co. v Mackie & Sons* (1889) 5 T.L.R. 677.
[397] ibid.
[398] As it is discussed in chapter 2, the context of bills of lading is determined by the nature and the customary usage of the bills which indicate that an arbitration clause does not naturally belong to a bill of lading.

this rule has been strictly followed by later cases, as it has been established that an arbitration clause should be incorporated by specific wording.

Secondly, Lord Esher M.R.'s judgement concerning the effect of the bill's subject-matters is used as a supportive reasoning to refuse an incorporation in which the bill's incorporation clause was generally worded. In other words, the reasoning 'the wording of the referred arbitration clause restricts its application to disputes between the original parties to it' merely amounts to an additional basis to confirm the failure of incorporation made by general wording.[399]

In *T W Thomas & Co., Limited v Portsea Steamship Company, Limited*,[400] the incorporation of an arbitration clause was denied because the incorporation clause was generally worded. To reinforce such a result, it was additionally held that the referred arbitration clause was inapplicable to the disputes arising from the bill of lading, because the wording of the arbitration clause in the referred charterparty read: 'Any disputes or claim arising out of any of the conditions of this charter party…' resulted in an inconsistency when this arbitration clause was written in the bill of lading, as in the present case the dispute was under the bill of lading rather than arising from the charterparty.[401] However, the judge was reluctant to adapt the inapt wording in order to enable the arbitration clause to be sensible in the bill of lading's context, namely to change the wording '… this charter party…' to '… this bill of lading…'. It was held that since the negotiability of the bill of lading was well-known to the merchant, the words '… this charter party…' should be construed in such a way that the merchant deliberately used these specific words to limit the application of the arbitration clause to the issues under the charterparty only.[402]

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399 Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 193.
400 *T. W. Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C.1
401 ibid 9 (Lord Gorell).
402 ibid.

A similar position was taken by Gross J in *Siboti K/S V BP France SA*.[403] It is interesting to note that even in cases where the incorporation of an arbitration clause has been decided to be an unsuccessful attempt because of the general wording, the court would still be willing to take the wording of the referred arbitration clause as a secondary reasoning to support the rejection of the incorporation.[404]

The only exception to the bill-centric method is the case of *The Merak*,[405] in which the charterparty's arbitration clause is incorporated by a generally worded incorporation clause in the bill of lading. However, it is important to note the exceptional circumstances in *The Merak*. On the one hand, Clause 32 (the arbitration clause) stated: 'Any dispute arising out of this Charter or any Bill of Lading issued hereunder shall be referred to arbitration…', while the bill's incorporation clause did not make a specific reference to the arbitration clause.

On the other hand, the parties to the charterparty were the same parties to the bill of lading, and consequently the holder of the bill had access to the charterparty. This means that it was possible for this holder to have knowledge of the arbitration clause. Moreover, the holder's consent to the arbitration clause may be revealed by the fact that he/she had signed for the charterparty which contains the referred arbitration clause.[406]

Therefore, the decision in this case does not contradict the bill-centric method, as the decisive factor of the judgement is the fact that the incorporation of the arbitration clause is within the expectation of the holder of the bill of lading. It is therefore problematic to stretch the decision in *The Merak* to cases in which a holder of the bill of lading is a third party to the contract of carriage. As it was held by Hobhouse J in *The Varenna*,[407] when the parties to the bill of lading vary from

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403 *Siboti K/S V BP France SA* [2014] 1 CLC 1, 19 (Gross J).
404 ibid.
405 *The Merak* [1964] 2 Lloyd' s Rep. 527; Lielbarde (n 17) 298.
406 ibid 534 (Davies LJ).
407 *The Varenna* [1983] 1 Q.B. 599.

those to the charterparty, the intention of incorporating an arbitration clause should be clear and explicit in the bill itself. In the cases in which the incorporation clause does not specifically refer to the arbitration clause, while the referred arbitration clause is expressed applicable to disputes arising from the bill. The true construction would be that the parties to the bill intend to exclude the arbitration clause.[408] It is also important to note that the intention of choosing arbitration is a rather personal choice, so it is illogical and unreasonable to force a lawful holder to comply with an other's arbitration clause without confirming this holder's intention.

However, a recent judgement indicates that the intention of the parties to a bill of lading may be subject to the intention expressed in a related charterparty. This newly emerged problem is well-illustrated by circumstances in *The Channel Ranger*.[409] The incorporation clause in the bill was explicit in incorporating the 'law and arbitration clause', while the relevant clause in the charterparty was titled as a 'law and jurisdiction clause'.[410] The difficulty existing in this case is that no existing arbitration clause can be incorporated in the bill of lading, while only a 'law and jurisdiction clause' which provided for English court's jurisdiction was contained in the charterparty. It was held that a modification should be made to the bill's incorporation clause, and it should be modified and interpreted as the 'law and jurisdiction clause'.

The approach of construction taken by this judgement is rather different from that in previous cases, and to some extent it contradicts the long-established bill-centric method. According to the bill-centric method, the clause subjected to modification should be the referred clause contained in the charterparty, as this clause does not represent the intention of the parties to the bill of lading.[411]

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[408] ibid 610.
[409] *The Channel Ranger* [2013] 2 CLC 480.
[410] ibid.
[411] Debattista, 'Cargo Claims and Bills of Lading' (n 4) 210.

However, in *The Channel Ranger*,[412] the parties to the bill of lading were compelled to comply with the agreement to which the holder of the bill of lading did not consent to.[413]

The reasoning provided by Males J indicates that the issue of incorporation is no more than an issue of construction, and yet it seems that Males J's construction blurs the line between litigation and arbitration, and also overlooks the meaning of the single word 'arbitration' from a businessperson's perspective. It is suggested in the judgement that the construction of the wording in the bill's incorporation clause, namely 'including law and arbitration clause', cannot be strict and must instead adhere to 'arbitration'. Instead, such phrase merely indicates that a jurisdiction clause is incorporated, and the meaning of 'arbitration' can be extended to 'court jurisdiction'.[414] To support this flexible construction, it is claimed that since the holder cannot have knowledge of the content of the referred clause, it further decreases the necessity to adhere to the word 'arbitration'. This is because even though there was an arbitration clause, the holder may still have question about proceeding issues, such as the appointment of arbitrators and the seat of the arbitration.[415] Therefore, this phrase only constitutes a notice about the incorporation of an ancillary clause.

Nevertheless, this flexible construction may be questionable, as it is possible to argue that the arbitration is the true intention of the parties to the bill of lading. As a result, a modification should be made to the charterparty's clause. The detailed analyse is as below.

Firstly, the expressed word 'arbitration' may represent an specific intention to arbitrate, rather than merely constituting a notice of incorporation of an ancillary

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412 ibid.
413 The fact in *The Channel Ranger* [2013] 2 CLC 480 did not reveal any factual circumstances where the holder of the bill of lading can have the knowledge of the fact that the referred clause turned out to be an English court jurisdiction.
414 *The Channel Ranger* [2013] 2 CLC 480, 492-493.
415 ibid 494.

clause. On the one hand, it has been well-established by the bill-centric rule that specific wording results in a successful incorporation in most cases. If the meaning of the word 'arbitration' can be extended to a court jurisdiction clause, it would contradict this established rule. On the other hand, as it was claimed by the receiver and insurer (the holder of a bill of lading) in this case, businessperson are generally cautious about the dispute resolution clause, and it is well-known in commercial practice that 'arbitration' represents the exclusion of court's jurisdiction. Therefore, the word 'arbitration' must have a specific meaning itself.[416]

Secondly, the fact that the charterparty is not available to the parties to the bill of lading does not give much liberty to the interpretation. The starting point of a construction, also recognised by Males J, is to put oneself in the position of any reasonable reader. Since bills of lading are the only accessible material, it is reasonable for the reader to heavily rely on the words in the bills, and therefore the expressed word 'arbitration' will guide the reader's understanding. It is therefore highly likely for the parties to presume that an arbitration clause was contained in the charterparty.[417] In other words, the fact that the charterparty is inaccessible should highlight the importance of the words in bills of lading, rather than providing a basis from which to modify the bill's incorporation clause with fewer limitations. For this reason, stretching the meaning of 'law and arbitration clause' to 'a jurisdiction clause' may infringe on reasonable expectations of a businessperson, and yet these expectations are greatly weighed in commercial law.[418] Thus, it is unreasonable to make the meaning of the word 'arbitration' be

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[416] Filip De Ly, 'Interpretation clauses in international contracts (characterization, definition, entire agreement, headings, language, NOM-clauses, non-waiver clauses and severability)' (2000) 6 IBLJ 719, 768, it suggests that 'headings may be part of the literal interpretation process'.

[417] The international commercial arbitration is the preferred dispute solution: see in Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 491; Holdsworth (n 7) 997; Robert Merkin (ed), *Privity of Contract* (n 7) 2.49; Steingruber (n 7) 9.22.

[418] Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 176, where it highlighted the certainty and predictability resulted from the standardisation an incorporation clause, and Clause 1 in the CONGENBILL which states '…including the Law and Arbitration

subject to a clause which is unknown to the parties to the bill of lading.

Thirdly, the judgment may contradict the principle of incorporation. This is because the bill's incorporation clause is an independent agreement between the lawful holder and the shipowner, and such agreement should not be affected by the agreement made by other parties. Moreover, the separability of arbitration may highlight the independency of such agreement.

For these reasons, the current solution is unsatisfying, and the best working pattern of such incorporation remains unclear. In particular, two issues derive from this the conflicting judicial construction: (1) to what extent the referred arbitration clause can have an impact on the incorporation; and (2) why the wording of referred arbitration clause can have such an impact.

It then appears that the principle of construction alone cannot address the issue as to the incorporation of an arbitration clause from a charterparty to a bill of lading, since the meaning of the words may be subject to personal understanding which may vary from person to person.

Therefore, it is necessary to address this dilemma from the basic question as to the legal status of an incorporation clause contained in bills of lading, since it may be theoretically unsound to apply the principle of construction before having a clear idea about whether or not such a clause in a bill of lading can be legally binding under the principle of incorporation.

4.3.2. *The Non-Contractual Effect Bill's Incorporation Clause Hinders the Application of the Principle of Incorporation*

According to the principle of incorporation in contract law, a successful incorporation is validated by means of identifying the parties' signatures, qualifying an incorporation notice, or complying with the course of dealing or

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Clause …' was the example to show that this clause will ensure a holder that arbitration is the chosen disputes resolution.

merchant custom.[419] However, it is impractical to use these three means to justify the incorporation of an arbitration clause from a charterparty to a bill of lading, given the fact that circumstances in bill of lading cases bear certain differences from those in general contractual incorporation cases. The following discussion aims to clarify the inapplicability of the contractual principle of incorporation by analysing (1) the meaning of the signature in bills of lading; (2) whether or not the bill's incorporation clause can be qualified as a sufficient notice; and (3) whether or not 'a course of dealing' and 'custom' can justify an incorporation of an arbitration clause in bill of lading cases.

Firstly, the meaning of signatures in bills of lading is different from that in general contracts. Signatures within the meaning of a contractual principle of incorporation are those signed by both parties.[420] This requirement derives from the well-established principle in contract law which gives full contractual effect to a signed document, unless it involves an illegal element.[421] From this perspective, the incorporation clause should be legally binding, because the incorporation clause is contained in a contractual document signed by both parties, and these signatures represent the parties' intention to be bound by the incorporation clause.

By contrast, in bill of lading cases, only the shipowner's signature can be found in bills of lading, while other parties' names are recorded in the bills as relevant facts. It follows that the bill's incorporation clause can hardly be the agreement between the holder of a bill of lading and the shipowner. To be specific, the signature box on bills of lading only contains the shipowner's name,[422] because the bills are signed unilaterally by the shipowner. This shipowner's signature may

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[419] Ewan McKendrick, *Contract law: text, cases, and materials* (Oxford University Press 2016) 316; Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 183.
[420] ibid.
[421] ibid; This principle was confirmed by the judge Scrutton LJ in *L'Estrange v. F. Graucob Ltd* [1934] 2 K.B. 394, and it was held '… when a document containing contractual terms is signed, then in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.'
[422] Gaskell, Asariotis, and Baatz (n 237) 747-781 Appendices A: Standard Forms.

function as his/her recognition and verification of the information contained in the bill of lading, as such bills are generally issued after the shipowner's due inspection of the loaded goods.[423] Meanwhile, the other parties' names are stated in the respective boxes under the title of shipper or consignee.[424] These names of the other parties would mean no more than the representation of the relevant information. This is because these parties normally do not participate in composing the statement in the bills. Instead, blanks for these parties' names in the bills are normally filled in by the shipowner, and these names are used as information which instructs the shipowner's operation.[425] For example, the consignee's name may help the shipowner to make the right delivery. In this case, these handwritten names cannot disclose the acknowledgement and commitment from the shipper and the consignee, as these parties do not sign the bills personally. Hence, these signatures function differently from those contained in a contract.

These facts mean that signatures on bills of lading are made by the shipowner unilaterally, and the significance of these signatures are to acknowledge the condition of the onboard goods and the verification of the statement in bills of lading. This usage of signatures is different from signatures which are intended to conclude a contract. Consequently, the legal effect of the bill's incorporation clause will be affected by this different usage.

As discussed in Chapter 3, the legal nature of bills of lading, as evidential instruments, may further negate the binding effect of an incorporation clause in a bill of lading. This limited effect of certain instruments is illustrated by the case of *Grogan v Robin Meredith Plant Hire & Anor*, in which the judgement clearly indicated that an administrative document, a time sheet in this case, was merely

[423] Treitel and Reynolds (n 11) ch 2.
[424] Gaskell, Asariotis, and Baatz (n 237) 747-781 Appendices A Standard Forms.
[425] Treitel and Reynolds (n 11) ch 2.

an instrument and itself could not qualify as an independent contract. This administrative document normally constitutes one part of the execution of a concluded contract. In other words, the content of this document would be a record of one operation, which is one of the stipulated liabilities in the relevant contract. Meanwhile, the content of the administrative document would in turn be indispensable in performing the concluded contract. It is therefore unreasonable to compel the party to be bound by a document merely because it has this party's signature. Enquiry has to be made as to the nature of such a document, and moreover if this document was used as an administrative document, the concluded contract related to this document would be the crucial material to consider.

It seems that bills of lading are in a similar position, because bills of lading are issued in order to perform a contract of carriage. In particular, the bills' primary function is to record matters germane to carriage, shipment and delivery. Hence, a bill of lading as a mere evidential instrument cannot be qualified as an independent contract, and it is less plausible to infer that the signature on a bill of lading could compel the signing party to be legally bound by the terms recorded in the bill. Consequently, incorporation by signature is unlikely to justify the contractual effect of the incorporation clause in bill of lading cases.

Secondly, the disputed incorporation clause cannot be qualified as a sufficient notice,[426] because it is very hard for a notice of incorporation to be sent in a timely manner, and the legal nature of bills of lading increases the unlikelihood of a notice being contractual.

The second approach of contract law to making a validate incorporation is to give sufficient notice of the intended incorporation to the other contracting party.[427]

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[426] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 181-196.
[427] McKendrick (n 419) 324.

Then the evaluation of the validity of the incorporation may thus shift to the discretion on the notice.

There are three requirements to a qualified notice. The first pertains to the time when the notice is sent, which must be before the conclusion of the contract.[428] The second requirement relies on the contractual nature of the documents carrying such notice. It requires that the notice must be written in a document which is intended to be legally binding.[429] The third requirement is that reasonable steps must be taken in order to direct the other party's attention towards such incorporation.[430] Those reasonable steps should be themselves evident and striking enough to any reasonable person. For example, the notice may be written in red and be positioned on the face of a document.[431] However, whether sufficient attempts have been taken or not is subject to the court's judgement, while the actual effect of these reasonable steps, namely whether or not the recipient of the notice becomes aware of the referred contract and then reads it, is out of court's consideration.[432]

In bill of lading cases, it is difficult to have a notice of incorporation sent in a timely manner. The principle in contract law is that the notice of the intended incorporation should be made before the contract has been concluded,[433] but the scenario that occurs in carriage of goods by sea may bear certain complexities.

Between the shipper and the shipowner, the notice of incorporation may be sent in a timely manner, especially when bills of lading are in a certain standard form. This is because clauses and terms of a standard bill of lading are more likely to be known by or accessible to the experienced parties.

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[428] ibid.
[429] ibid 325.
[430] ibid
[431] *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* (C.A.) [1988] 2 WLR 615 (Bingham LJ).
[432] McKendrick (n 419) 325.
[433] ibid 324.

However, the difficulty is that bills of lading are generally sent to the lawful holder after the related charterparty has been concluded and the statement on the bills of lading has been fixed. Moreover, the lawful holder generally has no knowledge about what kind of bill of lading will be used and what terms will be contained in the related charterparty, since the lawful holder cannot have an access to the referred charterparty.[434] The situation can be more unpredictable for the lawful holder when a bill of lading does not make a clear nomination of the referred charterparty.

It is also difficult for bill of lading cases to have a notice of incorporation contained in a contractual document. This is because the legal nature of bills of lading remains controversial, and the debate is about whether or not bills of lading could be purported to be contracts. As has been discussed in previous chapters, it seems that bills of lading which make clear reference to charterparties are unlikely to be qualified as legally binding contracts. Consequently, this legal nature of bills of lading adds more difficulties in terms of making a sufficient notice of incorporation.

Furthermore, it is difficult for a lawful holder to be fully aware of the incorporation, even though certain reasonable steps have been made. The contractual principle of incorporation clearly requires that certain reasonable steps should be made to draw the attention of the other party to the notice of incorporation, especially when an unusual term is involved in the incorporation.[435] In terms of the meaning of 'particularly onerous or unusual', this refers to terms and clauses which are not in line with the mercantile custom. In addition, it may also include a condition that 'involves the abrogation of a right given by statute'.[436] In this case, any terms and clauses which are not customarily contained in the bills, or an arbitration clause,

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[434] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 187.
[435] McKendrick (n 419) 325. For the incorporation of an onerous and unusual clause see Gaskell, Asariotis, and Baatz (n 237) 2.36; *Interfoto Picture Library Ltd v Stiletto Visual Programmed Ltd* [1989] Q.B. 433.
[436] Beale (ed) (n 293) 12-015.

should be referred to using clear wording.

It seems that even though the incorporation clause has made a clear reference, the lawful holder still cannot be fully informed about the substantial context of the incorporated terms and clauses. This problematic situation is rooted in the fact that the lawful holder has no implied right to have access to the related charterparty.[437]

Thirdly, it is difficult to classify incorporating an arbitration clause from a charterparty to a bill of lading as a course of dealing or a custom. In terms of a course of dealing, this means that the aimed for incorporation is a regular and consistent performance in transactions between parties.[438] When it comes to an incorporation by a custom, the custom is more likely to be a common practice which has been consistently carried out by the merchant in the same trade or industry,[439] and subsequently the incorporated terms should be the 'usual trade conditions'.[440] This means that any reasonable person who runs a business in one particular trade would habitually expect a customary incorporation, and it is common for this merchant to surrender their rights and liabilities to the incorporated terms.

In bill of lading cases, the customary usage of the bill of lading may confine the scope of terms which are incorporated by the bills to those that directly deal with shipment, carriage and delivery. This is because within an ordinary reasonable businessperson's knowledge, bills of lading are no better than evidential

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[437] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 187.
[438] *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 430 and *Transformers & Rctifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC) are quoted in McKendrick (n 419); The meaning of 'course of dealing' was further explained in Beale (ed) (n 293) 12-011, and it seems that the 'course of dealing' should be illustrated by certain frequency and formality. Frequency means that those terms are not merely incorporated occasionally, while the incorporation should be performed on a regular and consistence basis. In terms of formality, it would indicate that on the one hand those incorporated terms should be settled down in the previous negotiations. On the other hand, the party who aims to the incorporation should act professionally, and this means that they should explicitly express their intention in surrender both their rights and liabilities under the government of those incorporated terms.
[439] Beale (ed) (n 293) 12-011.
[440] ibid.

documents which deal with issues related only to the carriage of goods by sea, and thus the terms and conditions evidenced by bills of lading may reasonably be presumed as those merely germane to shipment, carriage, and delivery.[441] Therefore, without specific notice, the incorporated terms may be limited to the issues concerning carriage, shipment and delivery only.

By considering the practical difficulties, namely that the name on a bill of lading cannot be construed as a parties' commitment to the incorporation clause, the incorporation clause cannot be a sufficient notice, and the incorporation of an arbitration clause from a charterparty to a bill of lading does not amount to a custom. It is then safe to conclude that in English law the contractual principle of incorporation alone cannot justify such incorporation issue in bill of lading cases.

Similar difficulties also exist in Chinese law. As illustrated in Chapter 2, the Arbitration Law of the PRC does not provide a satisfied solution to the issue as to incorporation of an arbitration clause from a charterparty to a bill of lading. Specifically, the provision only states that an arbitration clause can be incorporated, but it remains unclear how and on what legal bases an incorporation clause can sufficiently bring an arbitration clause from a contract to another document. Additionally, the Maritime Code of the PRC also silence about whether an arbitration clause or an incorporation clause with the same effect can be transferred to a holder of the bill of lading. Therefore, courts prefer to take rather cautious attitude towards an incorporation of an arbitration clause, and successful incorporation cases are scarce. It then seems that it is difficult to suffice an incorporation of an arbitration clause from a charterparty to a bill of lading by a mere application of incorporation. In this case, Chapter 7 will provide detailed analysis as to how principle of incorporation can be used and suffice the aimed incorporation under Chinese law.

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[441] *The Annefield* [1971] P 168; Treitel and Reynolds (n 11) 3-014.

Therefore, this thesis considers the last available legal device in the next section, and it focuses on the question as to whether the principle of third-party beneficiary can be the legal principle underpinning the incorporation of an arbitration clause from a charterparty to a bill of lading.

4.4. Third-party Beneficiary

The principle of third-party beneficiary is commonly used as an exception to the principle of privity. Under a contract made for a third party's benefit, a third-party beneficiary may be entitled to claim the benefit which the promisor and the promisee intend to confer.[442] Once this has been conferred as a benefit, this third party may avail himself/herself of the legal remedy clause contained in the contract between the promisor and the promisee. For the purpose of this thesis, the meaning of the conferred benefit and the scope of the legal remedy clause need to be clarified. Specifically, whether or not a right to request a delivery can be a 'benefit', and whether or not an arbitration clause can be the legal remedy considering the burden to arbitrate naturally exists in such clause.

Under s 1(1)(b) of the 1999 Act, the conferred 'benefit' should be a substantive one and it has an inclusive meaning which covers any performance that the promisor agreed in the original contract.[443] Therefore, it is legitimate to define the right transferred to a lawful holder as the one that within the meaning of 'benefit' under s 1(1)(b) of the 1999 Act, since the transferred right enables the holder to possess the carried goods and make benefit from the goods as they wish.

In terms of the transferability of an arbitration clause under the principle of a third-party beneficiary, it is suggest that the arbitration clause can be a written agreement between the promisor and the third-party beneficiary.[444] By virtue of s 8 of the 1999 Act, a third-party beneficiary may be bound by the arbitration

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[442] Stevens (n 281) 59.
[443] Beale (ed) (n 293) 18-093.
[444] Beale (ed) (n 293) 18-101; Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 527.

clause, if this party initiated a legal proceeding against the promisor for acquiring the conferred benefit.[445] This means that the promisor is entitled to a stay of court's proceedings if the third party sued in court.[446] This rule is further confirmed by Colman J in *Nisshin Shipping Co Ltd v Cleaves & Co Ltd*,[447] in which an analogue was made to the situation involving an assignment. It was held that the arbitration clause may still bind the third party, even the wording of this clause limits its application to the original parties to the contract. This is because, similar to an assignment, a third party is placed in the position of the promisee who originally contracted with the promisor.[448]

However, it is of great importance to note that a third-party beneficiary has no duty to arbitrate.[449] In other words, the third party may be entitled to initiate an arbitration against the promisor, while it is difficult for the promisor to force this third party to address their disputes by arbitration.[450] This means that a third-party beneficiary is not obliged to participate in an arbitral proceeding commenced by the promisor. This is because when an arbitration clause is involved in transferring right, the benefit conferred to the third party is a conditional one which means that in order to enforce the conferred right the third party must accept the arbitration clause.[451] It follows that in cases where the third party does not wish to enforce the right against the promisor, this third party may not be bound by the arbitration clause. Therefore, this third party cannot be forced into an arbitration which is initiated by the promisor.

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[445] ibid; *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] 2 CLC 1097; 'conditional benefit': *Fortress Value Recovery Fund I LLC v Blue Sky Special Opportunities Fund LP* [2013] 1 Lloyd's Rep. 606 (Toulson LJ); *Hurley Palmer Flatt Ltd v Barclays Bank Plc* [2015] Bus. L.R. 106; Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 377.

[446] ibid; *Christina Mulchrone v Swiss Life (UK)* [2005] EWHC 1808 (Comm); Brekoulakis (n 301) 2.168.

[447] *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] 2 CLC 1097, 1104.

[448] ibid; see also in *Christina Mulchrone v Swiss Life (UK)* [2005] EWHC 1808 (Comm); Brekoulakis (n 301) 2.143 - 2.163.

[449] Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 376-377.

[450] Brekoulakis (n 301) 2.168; James M. Hosking, 'Non-signotorires and International Arbitration in the United States: The Quest for consent' 20(3) (2004) Arb Int 292.

[451] The note related to s 8(1) in The Explanatory Report of the Contracts (Rights of Third Parties) Act 1999; *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] 2 CLC 1097; Brekoulakis (n 301) 2.163 - 2.167; Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 377.

It therefore follows that the principle of third-party beneficiary can be one of the methods to extend the scope of an arbitration clause to a third party, particularly a non-signatory to the arbitration clause.[452] Nevertheless, this principle may not be able to help the promisor to bring an arbitration proceeding against the third party.

Due to the reasoning above, in bill of lading cases, if a holder of a bill of lading can be legally recognised as a third-party beneficiary, this holder will be entitled to take advantage of the legal remedy clause agreed between the charterer (the promisee) and the shipowner (the promisor). It follows that in cases where the legal remedy clause is an arbitration clause, this holder may be entitled to sue the shipowner in an arbitration tribunal if the shipowner failed to perform his/her promise.

To confer a holder of a bill of lading a benefit which takes the form of a right to request the delivery is a joint consent made by the charterer or the shipper and the shipowner. Therefore, such a conferred benefit is possible within the meaning of the 1999 Act. However, this possibility is diminished because of the s 6 of the 1999 Act. The Contracts (Rights of Third Parties) Act 1999 excludes its application to contracts for the carriage of goods by sea. According to s 6 of the 1999 Act, the right acquired by a holder of the bill of lading and the liability imposed on this person should be exclusively regulated by the Carriage of Goods by Sea Act 1992.[453] This means that a holder of the bill of lading cannot initiate an arbitration as a third-party beneficiary of the contract of carriage by referring to the 1999 Act. Instead, in the 1992 Act, the right conferred to a holder is by means of a statutory assignment.

Similarly, as explained in Chapter 2, principle of third-party beneficiary may have limited application in bill of lading cases and the Maritime Code of the PRC also

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[452] Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 380.
[453] Contracts (Rights of Third Parties) Act 1999, s 6; Beale (ed) (n 293) 18-117.

regulates that the assignment triggered by transferring bills of lading is a statutory one. Therefore, Chapter 7 will not consider principle of third-party beneficiary. Instead, analysis will focus on alternatives, such as principle of incorporation and principle of assignment.

4.5. Conclusion

As discussed above, it is difficult to simply apply one legal principle to justify the incorporation issue concerning this research, especially when considering the analysis of the legal nature of bills of lading in Chapter 3.

The charterparty's arbitration clause cannot be assigned to a holder of bills of lading, because the contract contained in the assigned bills of lading does not include an arbitration clause. It is important to note that the legal nature of bills of lading firstly restricts the content of bills of lading which exclude the charterparty's arbitration clause. It secondly illustrates the customary usage of bills of lading which indicates that the right assigned to a holder of bills of lading is the right to shipowner's performance of deliver the goods, and such assignment of right is not naturally intertwined with the assignment of an arbitration clause.

The charterparty's arbitration clause also cannot be incorporated by the bill's incorporation clause. Firstly, according to the contract law, the bill's incorporation clause cannot be a contract between the shipowner and the holder of bills of lading because the bill itself does not amount to a contract. In this case, when the wording of a bill's incorporation clause conflicts with the wording of the charterparty's arbitration clause, the construction of the bill's incorporation clause can hardly be consistent. A holder's understanding can start from a bill's incorporation clause or from the referred arbitration clause, since he is not bound by either of the clauses. Secondly, according to the principle of incorporation, the special usage of bill of lading cases may hinder the bill's incorporation clause to bring any clause from the charterparty, because this incorporation clause cannot be qualified as a contract, a notice or a custom. This leads to the conclusion that

the charterparty's arbitration clause cannot be incorporated in bills of lading by an incorporation clause in the bill.

In terms of the principle of a third-party beneficiary, it is banned from applying to bill of lading cases by the Contracts (Rights of Third Parties) Act 1999. Nevertheless, the reasoning established by the principle of agency and the doctrine of group of companies may suffice an incorporation, but a successful incorporation supported by these two principles still greatly depends on the factual circumstances. In other words, on the one hand, these principles cannot support all bill of lading cases, since not all the cases involve agency or the doctrine of group of companies. On the other hand, the factual circumstances which can prove the fact that a holder of a bill of lading has a close connection to the arbitration clause or the incorporation clause are decisive. This means that a mere argument made on these two principles is insufficient to contribute to a valid incorporation.

Moreover, with conjunction of the analysis in Chapter 2, it is obvious that difficulties of incorporating an arbitration clause from a charterparty to a bill of lading also exist in Chinese law. These difficulties may partly be incurred by some distinctive features of Chinese law, and Chapter 7 will specifically look into those distinctive features and to discuss the workability of the proposed paradigm. It is also clear that both Chinese law and English law are facing the same basic questions as to whether the liability in an arbitration clause can be automatically transferred to a holder of the bill of lading, and whether an arbitration clause or an incorporation clause with the equivalent effect can be transferred along with other clauses in a bill of lading. These basic questions play vital roles in determining whether the traditional legal basis can be applied to suffice an incorporation of an arbitration clause from a charterparty to a bill of lading.

The inapplicability of the traditional legal basis may result from the new analysis of the legal nature of bills of lading. Traditionally, analysis of the validity of the

bill's incorporation clause is generally made upon the presumption that bills of lading are a contractual document. This presumption may result in a contractual relationship between the shipowner and the holder of the bill of lading based on the terms and clauses in bills of lading. Consequently, principles of assignment and incorporation would successfully be applied in bill of lading cases, and sufficiently bring an arbitration clause from a charterparty to a bill of lading. However, the historical research in Chapter 3 fundamentally changes the basis on which these principles are applied. To clarify, unlike the general presumption about the contractual effect of bills of lading, the historical research on the legal nature of bills of lading indicates that the bills are customarily used as evidential instruments and therefore terms and clauses in bills of lading does not necessarily bind the holder of bills of lading. Additionally, although s 2 of the Carriage of Goods by Sea Act 1992 creates a statutory assignment, it should be noted that such an assignment is designed to transfer a contract of carriage which is evidenced by the related bill of lading. This means that terms and clauses transferred to a lawful holder may limited to those directly related to the shipment, carriage and delivery. It follows that an arbitration clause in the charterparty is not automatically assigned to a lawful holder, as this dispute resolution clause does not germane to shipment, carriage and delivery. Moreover, the lawful holder of bills of lading is in a statutory position in a contract of carriage, rather than in a contractual relationship with the shipowner on the terms and clauses contained in the related bill of lading. Accordingly, the lawful holder is not bound by a bill's arbitration clause and an incorporation clause with an equivalent effect. Therefore, it is difficult to apply the traditional legal basis to extend the charterparty's arbitration clause to a bill of lading, as the basis greatly rely on the contractual effect of the bill's incorporation clause.

For this reason, this thesis considers this issue from a different perspective in the following chapters. It is obvious that the drawback of the current solution is that its foundation is formed on a false definition of the legal nature of bills of lading.

Therefore, to validate the bill's incorporation clause it is necessary to make this clause able to bind a lawful holder by considering other legal principles or devices. For example, the legal effect of the bill's incorporation clause may be established upon principles of arbitration and the relevant factual circumstances. After establishing the legal effect of the bill's incorporation clause, relevant legal principles will be integrated according to different circumstances in each case. The following two chapters will look into these legal principles and to find a new paradigm in which the question as to whether or not a lawful holder should be bound by the charterparty's arbitration clause would be answered.

Chapter 5

The New Paradigm for the Incorporation of an Arbitration Clause from a Charterparty to a Bill of Lading (Part I)

5.1. An Overview of the New Paradigm

The new paradigm is discussed in Chapter 5 and Chapter 6. The criterion for this division is whether the holder of a bill of lading can have access to the referred arbitration clause after reading the incorporation clause in the bill of lading. The reason for this division is based on three considerations. Firstly, the situation in respective chapters may answer two crucial questions: (1) whether a mutual intention to arbitration can be directly identified in a bill of lading,[454] and (2) whether the disclosure of such a mutual intention is essential to validate an arbitration clause.[455] In bill of lading cases, since a consent (between a shipowner and a shipper) to arbitrate can be expressed by an incorporation clause in a bill of lading and this bill of lading may be subsequently transferred to a party who has no knowledge of those related clauses contained in the referred charterparty,[456] it is then necessary to address the incorporation issue by dividing situations into two categories: (1) the holder's consent is less obvious, as he/she is completely a stranger to the incorporated clause; and (2) the holder's consent to an arbitration can be directly evidenced or implied by the fact that this holder

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[454] It is suggested that a decision concerning the extension an arbitration clause to a non-signatory is a fact-based process, and when an intention to arbitrate is absence, courts will consider the factual circumstances in each case to see whether those facts can demonstrate an implied consent: Hosking, 'The Third Party Non-Signatory' s Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7); William W Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' in Permanent Court of Arbitration (PCA) (ed), *Multiple Parties in International Arbitration* (Oxford University Press 2009); Courtney (n 351) 585.

[455] Article II of the New York Convention; It has been well-established that an arbitration clause is a separate contract which requires an independent discretion: Courtney (n 351) 584, 585 and 590.

[456] As it explained in chapter 3, the charterparty generally does not attached to the transferred bills of lading. Also see in S. Mankabady, 'References to Charter-parties in Bills of Lading' (1974) Lloyd's Maritime and Commercial Law Quarterly 01 May 53, 54.

has access to the incorporated clause. It is suggested by this thesis that in order to suffice an incorporation of an arbitration clause, it is necessary to create or to find a nexus between the holder of a bill of lading and the incorporation of an arbitration clause, and this nexus is used to ascertain the holder's consent to arbitrate.[457]

Secondly, legal principles underpinning the incorporation of an arbitration clause from a charterparty to a bill of lading are directly affected by factual circumstances discussed in each chapter. To be specific, the factual circumstances discussed in Chapter 6, namely that a holder can have the knowledge of an incorporation of an arbitration clause and the context of the referred arbitration clause, may be used to disclose a mutual intention to arbitrate, and such a disclosure is essential to validate an arbitration clause.[458] Therefore, the applied legal principle mainly refers to those instructing constructions of contractual clauses. The aim of applying this principle is to confirm the mutual intention contained in relevant clauses.[459] Comparatively, in Chapter 5 where a holder is a complete stranger to a related charterparty, a mutual intention to arbitrate is not as obvious as it is in the situation discussed in Chapter 6, because such a holder cannot actually participate in a process of negotiation, conclusion and performance of the referred arbitration clause nor of the bill's incorporation clause.[460] Consequently, legal principles applied to the situation in Chapter 5 are twofold. The first is about where to find mutual intentions to arbitrate disputes arising from bills of lading, and the second is about the construction. These differences in applicable legal

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[457] Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 32; *P. Elliot & Co Ltd v FCC Elliot Construction Ltd* [2012] IEHC 361; London Arbitration 15/15, Lloyd's Maritime Law Newsletter (17 Sept. 2015); Lielbarde (n 17) 302.

[458] Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 378.

[459] English case law generally treats the issue of an incorporation of an arbitration clause as a matter of construction: *Lickbarrow v Mason* 100 E.R. 35; *Glyn Mills & Co v East and West India* (1882) 7 App. Cas. 591; *Sanders Brothers v Maclean & Co* (1883) 11 Q.B.D. 327; T W *Thomas & Co., Ltd v Portsea Steamship Company, Ltd* [1912] A.C. 1; *The Varenna* [1984] Q.B. 599; *Siboti K/S v BP France SA* [2004] 1 CLC 1; *The Channel Ranger* [2013] 2 CLC 480; Wagener (n 11) 122. Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 391.

[460] Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 395.

principles may further impact the result of an incorporation, namely whether an arbitration clause can be incorporated in a bill of lading.

Thirdly, different situations in each chapter may affect judicial interpretations of a bill's incorporation clause and the referred arbitration clause.[461] In particular, different situations determine which clause should be given priority. For example, when a bill of lading is transferred to a third party (a stranger to the related charterparty), clauses in the transferred bill of lading are generally weighted more than those in the charterparty.[462] This construction may further affect the treatment of an inconsistency incurred by the wording of a bill's incorporation clause and the wording of a referred arbitration clause in the charterparty. To elaborate, when a bill's incorporation clause merely constitutes a prima facie evidence, and the related charterparty is the governing contract, the wording of the bill's incorporation clause may be modified in order to suffice the contractual intention contained in the charterparty.[463] This means that the incorporation of an arbitration clause may be affected by different situations.

To conclude, the core rationale behind the proposed paradigm is to disclose the parties' intention, specifically a consent between the holder of the bill of lading and the shipowner to arbitrate disputes arising from their bill of lading. This rationale roots in the principle of autonomy which is the essence of arbitration.[464] However, the intention of the holder of a bill of lading is generally not so obvious, in that the relationship between the holder and the shipowner is not necessarily a contractual one.[465] It follows that in order to suffice an incorporation of an

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[461] Greenwood (n 373) 22-23.
[462] *The Rena K* [1978] Lloyd's Rep. 545; *SKIP A/S Nordheim and Others v Syrian Petroleum Co. Ltd. and Another* [1983] 1 Q.B. 599; *The Federal Bulker* [1989] Lloyd's Rep. 103; *Siboti K/S V BP France SA* [2004] 1 CLC 1; Lielbarde (n 17) 296.
[463] *The Merak* [1964] Lloyd's Rep. 527; *Starlight Shipping Co & Anor v Tai Ping Insurance Co Ltd, Hubei Branch & Anor* [2007] 2 CLC 440.
[464] Article II, the New York Convention; It has been well-established that an arbitration clause is a separate contract which requires an independent discretion: Courtney (n 351) 584, 585 and 590; Tweeddale and Tweeddale, Arbitration of Commercial Disputes International and English Law and Practice (n 123) para. 21.29.
[465] Todd, 'Incorporation of arbitration clauses into bills of lading'(n 358) 395, it suggests that a third party holder of a bill of lading could unaware of a related arbitration clause in a referred charterparty; and as

arbitration clause in bill of lading cases, the first step is to establish a nexus which brings an incorporation of an arbitration clause to a holder's acknowledgement.[466] A nexus with such function may be established on factual circumstances in each case. The second step is to give legal effect to such a nexus, and this may depend on applicable legal principles.[467] This chapter and the following chapter aim to find a proper nexus for a certain factual circumstance, and then the analysis will focus on the question as to whether this nexus can be given legal effect in order to create a legal link between a holder and an incorporation of an arbitration clause. This analysis may finally contribute to a new paradigm of an incorporation of an arbitration clause from a charterparty to a bill of lading.

5.2. The New Paradigm Part I: When the Holder of a Bill of Lading Cannot Have Access to the Referred Arbitration Clause

In this chapter, the analysis focuses on the first part of the new paradigm, and this part is designed to be applied to the cases in which a holder of a bill of lading is a third party to the charterparty's arbitration clause.

The difficulty in binding the holder of a bill of lading (a third party to the related charterparty) to an explicitly worded incorporation clause in a bill of lading is that there is no contractual relationship between the holder and the shipowner. Specifically, as it analysed in Chapter 3, it is unlikely to find a consent to arbitrate on a bill of lading because bills of lading do not customarily used as contracts between the holder and the shipowner. Moreover, it is impossible to find the holder and the shipowner's agreement of dispute resolution in the related charterparty,[468] as the holder neither participates in nor has access to the related

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discussed in chapter 2, the incorporation clause in a bill of lading cannot legally bind a third party holder due to the bill's non-contractual effect.

[466] Lista, 'Knocking on heaven's door: in search for a legal definition of the bill of lading as a document of title' (n 4) 277.

[467] ibid; Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 39.

[468] Özdel, 'Incorporation of Charterparty Clauses into Bills of lading: Peculiar to Maritime Law?' (n 12) 181-182. Baatz (n 8) 92; Brekoulakis (n 301) 33.

charterparty.[469] In other words, this difficulty arising from the fact that in this category of cases, the holder does not have any contractual relationship with the shipowner.

To address the incorporation issue as to incorporating an arbitration clause from a charterparty to a bill of lading, the bill's incorporation clause is more decisive than the charterparty's arbitration clause. Specifically, English courts generally give effect to an incorporation of an arbitration clause if an intention to arbitrate disputes arising from the bill of lading was explicitly expressed in the bill's incorporation clause.[470] This is because in the perspective of the holder of a bill of lading, the transferred bill of lading is the only source of information as to the contract of carriage. In other words, since a transferred bill of lading is the only readily available document, it is convenient to directly use the terms in it to establish a nexus linking the incorporation of an arbitration clause with a holder of the bill of lading.[471]

English case law indicates that an incorporation of an arbitration clause in bill of lading cases is a mere matter of construction, rather than an incorporation issue.[472] This is because it seems to English courts that a bill's incorporation clause has already trigger a sufficient incorporation, and therefore the following step is to determine which clauses can be incorporated in the bills. This can

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[469] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 187.
[470] ibid; *T W Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C. 1; *The Njegos* (1935) 53 Ll.L. Rep. 286; *The Annefield* (C.A.) [1971] P. 168; *The San Nicholas* [1976] 1 Lloyd's Rep. 8; *The Rena K* [1978] 1 Lloyd's Rep. 545; *Skips A/S Nordheim and Others v Syrian Petroleum Co. Ltd. and Others* [1983] 1 Q.B. 599; *The Federal Bulker* [1989] 1 Lloyd's Rep. 103; *The Heidberg* [1994] 2 Lloyd's Rep. 287; *The Delos* [2001] 1 Lloyd's Rep. 703; *Siboti K/S v BP France SA* [2003] EWHC 1278 (Comm); *The Athena (No.2)* [2007] 1 Lloyd's Rep. 280; *The Kallang (No.2)* [2009] 1 Lloyd's Rep. 124; *Stellar Shipping Co LLC v Hudson Shipping Lines* [2010] EWHC 2985 (Comm); *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL.* [2010] EWHC 29 (Comm); McMahon (n 108) 6; Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 193; Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358); Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386); Wagener (n 11) 121; Simon Allison and Kanaga Dharmananda, 'Incorporating Arbitration Clauses: The Sacrifice of Consistency at the Altar of Experience' (2014) Arbitration International 30(2) 265, 277; Miriam Goldby and Loukas Mistelis(eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 89.
[471] Lielbarde (n 17) 302-303.
[472] Magklasi, 'A New Channel to the Heart of Incorporation of Clauses' (n 380) 397, 398.

generally be determined by interpreting the wording of the bill's incorproation clause. It follows that a specifically worded incorporation clause (clear and explicit about incorporating a charterparty's arbitration clause) may result in a sufficient incorporation. This strict construction rule has particularly been followed in two-contract cases.[473]

However, the contractual result of such a strict construction may be questionable. As discussed in Chapter 4, in cases in which a holder is a third party to the referred arbitration clause, a bill's incorporation clause cannot be qualified as a sufficient notice of the incorporation of an arbitration clause,[474] as a bill of lading is unlikely to be a contract between a shipowner and a holder of a bill of lading. Consequently, the validity of an incorporated arbitration clause can be questioned on the ground that this incorporation clause does not contain a holder's consent to arbitrate.

It follows that the sufficient incorporation of an arbitration clause from a charterparty to a bill of lading should be supported by a two-tiered reasoning. The first tier is that such an incorporation clause in a bill of lading should be qualified as a self-contained contract, and the second tier is that a holder's consent to arbitration is contained in this independent contract. For the first tier, the contractual effect of the incorporation clause under discussion may be underpinned by principles of arbitration, particularly the separability of an arbitration clause. For the second tier, a holder of a bill of lading should be bound by a clause incorporating an arbitration clause from a charterparty to a bill of lading, if it can be proved that this holder is a 'less-than-obvious' party to this

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[473] *The Athena (No.2)* [2007] 1 Lloyd's Rep. 280; *Stellar Shipping Co LLC v Hudson Shipping Lines* [2010] EWHC 2985 (Comm); *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL.* [2010] EWHC 29 (Comm); Domenico Di Pietro, 'Incorporation of Arbitration Clauses by Reference' (2004) 21(5) Journal of International Arbitration 439, 445; Andrew Tweeddale and Karen Tweeddale, 'Incorporation of Arbitration Clauses Re-visited' (2010) 76(4) Arbitration 656, 658; Kenneth JH Tan and Shaun Pereira, 'Incorporation of Arbitration Clauses by Reference: International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and Another' (2014) 10 Asian International Arbitration Journal 1.

[474] Özdel, 'Incorporation of Charterparty Clauses into Bills of lading: Peculiar to Maritime Law?' (n 12) 186.

clause.[475] Considering the principle of autonomy in commercial arbitration,[476] evidence proving such a 'less-than-obvious' relationship between the shipowner and the holder of a bill of lading essentially refers to those disclosing parties' consent to arbitrate. Therefore, party's consent to arbitrate is the nexus that needs to be established in order to suffice an incorporation of this special kind.[477]

5.3. Establishing an Independent Contractual Effect of the Bill's Incorporation Clause

Under the consideration of the legal nature of bills of lading, namely that the bills are used as evidential instruments, it is important to re-establish the contractual effect of a bill's incorporation clause in order to bind a holder of bills of lading to the referred arbitration clause. The legal effect of the bill's incorporation clause may be established based on two considerations, one of which is the principle of arbitration in respect of the separability of an arbitration clause. The other is a combination of the principles of contractual assignment and autonomy of arbitration.

The following discussion will focus on establishing an independent contractual effect of the bill's incorporation clause from practical and theoretical perspectives, and the problem as to parties' consent to arbitrate will be addressed in 5.4.

5.3.1. The Practical Necessity to Regard an Incorporation Clause as a Separate Contract

In the context of a bill of lading, English case law tends to regard a clause incorporating an arbitration clause from a charterparty to a bill of lading as an

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[475] A 'less-than-obvious' party is defined in Park, 'Non-signatories and International Contracts: An Arbitration's Dilemma' (n 454) 3.

[476] Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (n 351) 7; the New York Convention, Article II; *Banque Arabe et Internationale d'Investissement v Inter-Arab Investment Guanrantee Corp.,*award of 17 November 1994, 21 *Y.B. Com. Arb*. 13 (1996) 18, 19; *Philippe Leboulanger*, 'The Arbitration Agreement: Still Autonomous?' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?* (Kluwer Law International 2007).

[477] Lista, 'Knocking on heaven's door: in search for a legal definition of the bill of lading as a document of title' (n 4) 275; Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 39.

ancillary clause.[478] It therefore follows that such an incorporation clause may be separable from the other clauses contained in a bill of lading.[479]

Judicial opinions confirming the ancillary feature of such an incorporation clause includes: (1) that an arbitration clause as a dispute resolution agreement is not germane to the subject-matters of a bill of lading;[480] (2) that an arbitration clause can be onerous and unusual to a holder of a bill of lading, since it has the effect of excluding a party's original legal remedy in courts.[481] Detailed analysis is in the following.

Ground 1: A disputes resolution clause

As discussed in Chapter 3, bills of lading are customarily used as evidential instruments which deal with issues directly related to the shipment, carriage and delivery of the goods. This means that bills of lading evidence substantive aspects of performing a contract of carriage.[482] In contrast, an arbitration clause as a dispute resolution clause governs a procedural aspect in a contract,[483] and thus this clause is not naturally contained in a bill of lading.[484] For this reason, this thesis suggests that it is in line with commercial sense to regard a clause incorporating an arbitration clause as a self-contained contract, namely such a clause is independent from the main context of a bill of lading. This observation may be evidenced by English case law, as it has been consistently required that in order to bring a charterparty's arbitration clause into a bill of lading, it is

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[478] *Siboti K/S v BP France SA.* [2004] 1 CLC 1; Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 335; Wilson (n 2) 249.
[479] Wagener (n 11) 116.
[480] *T. W. Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C.1, *The Annefield* [1971] P168 at p.184, *The Varenna* [1984] Q.B. 599 per Hobhouse J at p.608, *The Federal Bulker* [1989] 1 Lloyd's Rep. 103 at p.107 per Bingham L.J.; Debattista (n 4) 209-210.
[481] *Siboti K/S v BP France SA.* [2004] 1 CLC 1; *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL.* [2012] 1 CLC 448; 470; Paul Todd, 'Incorporation of charterparty terms by general words' (2014) 5 J.B.L. 407, 414; Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 181.
[482] Allison and Dharmananda (n 470) 269; Mankabady (n 456) 58.
[483] Tweeddale and Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (n 123) 2.06.
[484] Girsberger and Hausmaninger (n 314) 140.

essential for this bill's incorporation clause to have an explicit reference to that arbitration clause.[485]

This difference between an arbitration clause and other clauses customarily contained in a bill of lading is legally recognised in the leading case *T. W. Thomas & Co., Limited v Portsea Steamship Company, Limited*,[486] and it is further confirmed by later authorities, such as Lord Denning M.R. in *The Annefield*.[487] In this line of cases, the ancillary feature of an arbitration clause has been widely recognised by distinguishing subject-matters that are governed by an arbitration clause from those governed by a bill of lading.[488] Because of this ancillary feature, a consensus has been reached that an explicit reference is required when parties aim to incorporate a charterparty's arbitration clause into a bill of lading.[489] Nevertheless, in terms of where the explicit wording should be made, the authorities adopt a rather flexible approach, namely it can be made either in the charterparty's arbitration clause, or in the bill's incorporation clause.[490]

The ancillary feature of a specially worded incorporation clause may also contribute to the legally binding effect of this incorporation clause. To be specific, this ancillary feature highlights the severability of an incorporation clause of this special kind.[491] In other words, the legal effect of a clause incorporating an

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[485] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 186.
[486] *T. W. Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C.1.
[487] *The Annefield* [1971] P168, 184; Also, in the cases of *The Varenna* [1984] Q.B. 599, 608(Hobhouse J), it was held that an arbitration clause should be a collateral provision which means that it cannot be a condition in a bill of lading; *The Federal Bulker* [1989] 1 Lloyd's Rep. 103, 107(Bingham L.J), It is true that a wide range of clauses could be covered by the wording 'all terms, conditions and exceptions', and yet an arbitration clause cannot be categorised in any of these words; *The 'Delos'* [2001] 1 Lloyd's Rep. 703, the different legal effects between using general wording and specific wording were well-illustrated by this case, as there were two incorporation clauses to be considered, one made a specific reference to a charterparty's arbitration clause while the other was general-worded. The judgement of this case is that an arbitration clause can be incorporated in the bill which made a specific reference, and the attempt to incorporate an arbitration clause by general reference was failed; *Siboti K/S V BP France SA* [2014] 1 CLC 1. In a construction case, *Aughton Ltd v M.F. Kent Services Ltd* 1993 WL 963255, Sir John Megaw clearly stated that an arbitration clause as a 'self-contained contract' should be incorporated by explicit wording, and any general words, such as terms and conditions, are insufficient to achieve such incorporation.
[488] Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 345; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 122.
[489] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 185; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 199–200.
[490] *The Annefield* [1971] P168; *The Merak* [1964] 2 Lloyd's Rep.527.
[491] Wagener (n 11) 116.

arbitration clause from a charterparty to a bill of lading is severable from the legal nature of the document containing this clause.[492] As a result, the limited legal effect of a bill of lading, namely being an evidential document, does not necessarily affect the contractual effect of an incorporation clause of this special kind contained in a bill of lading.

Ground 2: An onerous and unusual effect of such an incorporation clause

The necessity of regarding a bill's incorporation clause (that is specific about bringing in an arbitration clause) as a separate contract is also illustrated by the fact that a sufficient incorporation of this kind can lead to a serious legal impact on the holder of the bill of lading.[493] It is obvious that such a legal impact cannot be simply imposed on a holder by a piece of conclusive evidence in a bill of lading, as the legal effect of such evidence is incapable of compelling a holder to comply with a burden in an arbitration.[494]

The legal effect resulting from such an incorporation clause can be onerous and unusual to a holder of bills of lading, because this clause may on the one hand deprive a holder of a remedy in court,[495] and it will impose a liability to arbitrate on the holder on the other hand.[496]

For example, in *T. W. Thomas & Co., Limited v Portsea Steamship Company, Limited*,[497] it is held that validating the incorporated arbitration clause will compel the parties to have their disputes addressed by an arbitration only, and this will

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[492] *Aughton Ltd v M.F. Kent Services Ltd* 1993 WL 963255; Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 337.
[493] Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 376.
[494] ibid 377; Wilson (n 2) 119, on the one hand, in a third party's hand, bills of lading are conclusive evidence of the facts against the carrier, rather than the holder. Also, the facts evidenced by bills of lading is germane to shipment, carriage and delivery, which does not necessarily include an arbitration clause.
[495] Todd, 'Incorporation of charterparty terms by general words' (n 481) 414; Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 181.
[496] Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 409; Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 23.
[497] *T. W. Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C.1

deprive the parties' of their original legal remedies in court.[498] This means that such an incorporation clause can bring about onerous and unusual results to a holder,[499] and therefore a special treatment which evinces the parties' mutual intention to waive their original legal remedies in court should be identified in this clause.[500]

Moreover, since an arbitration clause embodies both a legal right and legal liability, [501] a contractual agreement between a shipowner and a holder concerning the incorporation of an arbitration clause should be expressed. English case law suggests that validating such an incorporation clause leads to a waiver of the original legal remedy in court,[502] and it may simultaneously compel the parties to settle their disputes through arbitration.[503] It follows that such an incorporation leads to an imposition of a liability to arbitrate.[504] It has been established that the imposition of a liability requires an expressed commitment from the engaged parties.[505] Therefore, a specific reference to an arbitration clause should be made in order to demonstrate parties' mutual intention to arbitrate disputes arising from the bill of lading in the same manner as it is stipulated in the related charterparty.[506]

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[498] ibid 9 (Lord Gorell); Similar judgement also can be seen in *Aughton Ltd v M.F. Kent Services Ltd* 1993 WL 963255; *The 'Athena'* [2007] 1 Lloyd's Rep. 280.

[499] Beale (ed) (n 293) 12-015, The meaning of 'onerous and unusual' is twofold. On the one hand, it may refer to those not in line with the mercantile custom, which means that within a commercial activity of certain kind, any reasonable businessperson practicing in that field cannot foresee that themselves would subject to those terms, because those terms are not frequently used in a general transaction. On the other hand, it may also include the conditions which 'involves the abrogation of a right given by statue'. The authorities cogently held that due notice to these conditions should be sent in order to bring the other's attention.

[500] *The 'Athena'* [2007] 1 Lloyd's Rep. 280, 291; Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 183 and 190.

[501] Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 409; Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 23.

[502] Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 337; *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2012] 1 CLC 448, 462.

[503] Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 23.

[504] Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 334

[505] Tolhurst (n 311) 320.

[506] Tweeddale and Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (n 123) 21.29.

By highlighting the importance of an expressed intention from engaged parties, it seems that the bill's incorporation clause is not only a conclusive evidence for the related charterparty, but also a contract between the shipowner and the holder of the bill of lading. In this case, this incorporation clause can have a binding effect in respect to divesting an original legal remedy and imposing a liability in arbitration.

Ground 3: The issue of inconsistency

The inconsistency can be illustrated by two situations: namely (1) when the bill's incorporation clause is specific about incorporating an arbitration clause, while the referred arbitration clause is limited its application scope to disputes arising from the charterparty only; and (2) when the bill's incorporation clause is silence about incorporating an arbitration clause, while the arbitration clause in the related charterparty is specific about its application to disputes arising from the bills of lading issued thereunder. It is obvious that in order to interpret a unanimous intention about the incorporation, a degree of modification must be imposed on one of these clauses,[507] and the question is which one should be subject to the modification.

It seems that current judicial decisions on this matter cannot sufficiently provide a proper solution, as judicial decisions are self-contradictory in two aspects. Firstly, English case law on the one hand indicates that an intention to incorporate an arbitration clause from a charterparty to a bill of lading can either be expressed in the charterparty or in the bill of lading.[508] On the other hand, it has been recognised that a bill of lading as the sole shipping document transferred to a holder of the bill of lading should be the primary document to be construed.[509] Secondly, when a holder of the bill of lading is a third party to the related

[507] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 157.
[508] *The Annefield* [1971] P168; *The Merak* [1964] 2 Lloyd's Rep.527.
[509] *The Varenna* [1984] QB 599, *The Federal Bulker* [1989] 1 Lloyd's Rep. 103, *Siboti K/S v BP France SA* [2004] 1 CLC 1; Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 333, and 334.

charterparty, it is unreasonable to bind that holder to an arbitration clause when this specific intention only can be identified in the related charterparty.[510] Particularly, it is contradictory to principle of autonomy in arbitration and rules of imposing liabilities on a third party, if a holder of the bill of lading was compelled to an arbitration which did not contain his/her consent.

Alternatively, addressing the inconsistency issue by re-establishing a legal status of a bill's incorporation clause may provide a consistent solution. When an incorporation clause is silent about incorporating an arbitration clause, it is conclusive evidence in terms of incorporating clauses directly germane to shipment, carriage and delivery. This is in line with the well-established rule of interpreting a generally worded incorporation clause in a bill of lading, and it protects a holder of the bill of lading from being ambushed by an unknown arbitration clause.[511] Therefore, a charterparty's arbitration clause would be disregarded. Comparatively, when a bill's incorporation clause is specific about incorporating an arbitration clause from a charterparty, this explicitly worded incorporation clause may be embodied with a contractual effect.[512] As a result, the wording of the referred arbitration clause would be modified in order to suffice the contractual intention contained in the bill's incorporation clause.[513] Moreover, this incorporation clause may legally bind a holder of the bill of lading, because this holder's consent to arbitrate would be implied by his/her conduct, such as suing the carrier based on the bill of lading or taking the delivery by presenting the bill of lading.[514] Therefore, by establishing the independent contractual, the inconsistency issue can be addressed and supported by legal principles.

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[510] Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 332; Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 176; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 151.

[511] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 123.

[512] The practical basis is discussed in Ground 1 and Ground 2 in this section, and the theoretical basis will be discussed in 5.3.2.

[513] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 123; Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 335.

[514] See in 4.3 and 5.4.2.

Ground 4: Transferability of bills of lading

Because of the transferability of bills of lading, bills of lading can be transferred to a person who is not a contractual party to the related charterparty. In other words, the parties potentially bound by a bill's incorporation clause can be different from the parties who were originally bound by the referred arbitration clause.[515] For this reason, English case law categories the incorporation issue involving bills of lading as two-contract cases,[516] because of which an explicit reference to an arbitration clause is required to suffice an incorporation of an arbitration clause.[517] However, the problem is that without establishing a contractual effect, it is difficult to bind a holder of the bill of lading to such an explicit incorporation clause.

This special requirement should be clarified by comparing it with the requirement in one-contract cases. The one-contract doctrine indicates that no explicit reference is required to incorporate an arbitration clause if the parties to the incorporation clause are the same as the parties to the referred arbitration clause.[518] This is the situation in which the charterer is the holder of a bill of lading, as in this situation the parties to a charterparty are those to a bill of lading and the charterparty is the contract between the holder and the shipowner.[519] By contrast, when a holder is a third party to the related charterparty, a direct contractual relationship between the holder and the shipowner is absent, and therefore the requirements for a sufficient incorporation need to be re-considered.

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[515] The two-contract cases refer to cases in which the incorporation issue involves two contractual relationships. In other words, at least one party to the incorporation clause is different from the parties to the referred arbitration clause: see in the cases of *The Athena (No. 2)* [2007] 1 Lloyd's Rep. 280, 289; *Stellar Shipping Co LLC V Hudson Shipping Lines* [2012] 1 CLC 476, 492; Baatz (n 8) 91-92.

[516] *The Athena (No. 2)* [2007] 1 Lloyd's Rep. 280, 289; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 14; Tweeddale and Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (n 123) 21.09.

[517] Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 339; Todd, 'Incorporation of charterparty terms by general words' (n 481) 414; Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 181.

[518] *The Athena (No. 2)* [2007] 1 Lloyd's Rep. 280, 289; Brekoulakis (n 301) 2.183; Steingruber (n 7) 9.69.

[519] *The President of India v Metcalfe Shipping Co. Ltd* [1970] 1 Q.B. 289.

The distinction between one-contract cases and two-contract cases was clearly stated by Langley J in *The Athena (No. 2)*,[520] in which it was held that the explicit incorporation should be the requirement for two-contract cases, while general incorporation would be sufficient to bring in an arbitration clause in single contract cases.[521] The reason for this different approach is that the criteria validating an incorporation of an arbitration clause should be the holder's knowledge about the incorporated arbitration clause, and such a knowledge varies from case to case.[522] Generally, it can be divided into two presumptions. In single contract cases, the holder should know or should have the ready means to know the incorporated arbitration clause, and thus general wording is adequate.[523] In contrast, in two-contract cases, the explicitly-worded incorporation clause would be the only source by which the other party can be aware of the intended incorporation of an arbitration clause, and therefore an explicit incorporation should be required.[524]

This case indicates that the reason for requiring an explicit reference to an arbitration clause is that only specific wording can inform the holder of a bill of lading (a third party to the related charterparty) about this special incorporation.[525] This is because it has been well-established that general wording can only incorporate such clauses which are directly germane to the shipment, carriage and delivery, and therefore the holder of a bill of lading is unlikely to foresee that an arbitration clause is incorporated by reading a general reference (which does not mention the incorporation of an arbitration clause).[526] This reasoning can be

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[520] *The Athena (No. 2)* [2007] 1 Lloyd's Rep. 280, 289.
[521] ibid.
[522] Tan and Pereira (n 473) 7; Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 391.
[523] ibid; Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 178.
[524] ibid; Özdel, 'Enforcement of Arbitration Clauses in Bills of Lading: Where Are We Now?' (n 51) 169.
[525] Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 172.
[526] In *T. W. Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C.1, it was held by Lord Atkinson that general words are only capable to incorporate clauses directly related to the subject-matters of bills of lading. In Chapter 3, it has been discussed that the subject-matters of the bills are closed related to the customary usage of the bills and consequently they are only those directly related to the shipment,

reinforced by the consideration of the transferability of bills of lading, as such specific wording would be the only source that could result in a holder's awareness about the special incorporation.[527]

However, it is still questionable as to why a specifically worded incorporation clause can bring an arbitration clause into a bill of lading, and subsequently legally bind a holder of the bill of lading. In other words, it is necessary to point out that bill of lading cases may not perfectly fit into the category of two-contract cases. This is because, based on the legal nature of bills of lading, a bill's incorporation clause has not become a contract between a shipowner and a holder of bills of lading yet. To elaborate, a bill of lading is not a contract in nature, and it remains questionable as to whether a holder acknowledges an incorporation of an arbitration clause if the referred arbitration clause was inaccessible to a holder in the first place.

It is then important to establish the contractual effect on a bill's incorporation clause, which may enable bill of lading cases to be correctly categorised as two-contract cases. The reason for this establishment is that the two-contract doctrine plays a crucial role in validating an incorporation of an arbitration clause in bill of lading cases, and a contractual effect of the incorporation clause is essential to apply this doctrine.[528] Consequently, in order to justify the validity of an explicit incorporation clause in bill of lading cases, it is essential for such an incorporation clause to be given a contractual effect.

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carriage and delivery of the cargo. Similar judgement can be found in *Siboti K/S V BP France SA* [2014] 1 CLC 1, 18 (Gross J). In *The Varenna* [1983] 1 Q.B. 599, it was held that once the commercial-oriented construction has been confirmed by the court, it will be followed with no variation. This consistency of applying an established construction will be crucial to maintain the commercial certainty, particularly when bills of lading are negotiable.

[527] *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2012] 1 CLC 448; Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 193; Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 180.

[528] An explicitly worded incorporation clause can firstly give effect to an incorporation of an arbitration clause, and it secondly forms the basis for the consistency test. Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 14; Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 176.

To conclude, English case law is consistent that an explicit reference should be made in order to suffice an incorporation of an arbitration clause, but it remains unclear about the legal principles underpinning the binding effect of such an explicit reference in a bill of lading.[529] To be specific, a question as to why and to what extent a specifically worded incorporation clause can bind a holder of bills of lading to the referred arbitration clause is unanswered, and therefore it is necessary to establish the legal status of such an incorporation clause. Since the legal nature of bills of lading can barely be helpful on this matter, the focus should be shifted to the legal result of this kind of incorporation clause, namely how this clause actually functions as an arbitration clause. It follows that the legal effect of such an incorporation clause should be established upon the law of arbitration.

5.3.2. Theoretical Support: The Principle of Separability

In addition to the above-mentioned necessity to regard a specifically worded incorporation clause as an independent contract, the principles underpinning international commercial arbitration, particularly the principle of separability, may theoretically support the proposition that such an incorporation clause is capable of being a self-contained contract. Moreover, the significance of taking the principle of separability into consideration is that if an incorporation clause which brings an arbitration clause from a charterparty to a bill of lading was severable from other clauses contained in a bill of lading, the legal effect of this incorporation clause would not be affected by the legal nature of bills of lading. In other words, even though the evidential nature of bill of lading restricts the legal effect of the main context of a bill of lading to a conclusive evidence, an incorporation clause of this kind can still be legally binding. This is because this clause is severable from the other evidential statements in the same bill of lading, and therefore this clause should be qualified as an additional contract between the shipowner and the shipper. The principle of separability will be analysed from two aspects: (1)

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[529] Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 335-336.

an explicitly worded incorporation clause should be a severable contract in a bill of lading; and (2) the separability of an arbitration clause may highlight the requirement as to 'an agreement in writing'.

Ground 1: Principle of separability – a severable contract

It has been confirmed by statutory law that an arbitration clause is severable from the main contract. To illustrate, both Article 16 (1) of the UNCITRAL Model Law and section 7 of the Arbitration Act 1996 have confirmed the separability of an arbitration clause, and these provisions indicate that an arbitration clause should be regarded as a distinct agreement, and that its validity should not be affected by the invalidity or rescission of the main contract.[530] The principle of separability has also been recognised by English case law, in which it was held that an arbitration clause as a 'distinct agreement' should not be deemed as invalid on the basis of an argument that the main contract that contained this arbitration clause is void.[531] In other words, the validity of an arbitration clause can only be questioned in cases where the claim is either directly made about the validity of this clause or is made about the validity of a signature which indicates an acknowledgement of all clauses in a contract, including this arbitration clause.[532] This means that the principle of separability not only separates an arbitration clause from the main contract in terms of formality, but it also attaches an independent consideration of the legal effect of this clause.[533]

In terms of an incorporation clause that makes a clear reference to an arbitration clause contained in another document, this reference constitutes an arbitration clause between the parties to the incorporation clause.[534] Article 7(6) of the

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[530] Stephen M. Schwebel, Luke Sobota, and Ryan Manton, 'The Severability of the Arbitration Agreement' in *International Arbitration: Three Salient Problems* (2nd edn, Cambridge University Press 2020)11 and 16.
[531] *Fiona Trust v Privalov* [2008] 1 Lloyd's Rep. 254, 267 to 258; Courtney (n 351) 584; Mauro Rubino Sammartano, *International Arbitration: Law and Practice* (2nd edn, Kluwer Law International 2001) 225.
[532] *Fiona Trust v Privalov* [2008] 1 Lloyd's Rep. 254, 267 to 258; Wilson (n 2) 336; Courtney (n 351) 585, and 584.
[533] Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 528, citing Jack J Coe Jr, *International Commercial Arbitration: American Principles and Practice in a Global Context* (Transnational Pub Inc 1997) 133.
[534] Baatz (n 8) 86.

UNCITRAL Model Law recognises this effect of such an incorporation clause, and a similar provision is also contained in section 6(2) of the Arbitration Act 1996. Since such an incorporation clause can be effective as an arbitration clause, it is then logical for such an incorporation clause to be severable from the main contract.[535] It follows that the validity and the legal effect of an explicitly worded incorporation clause should be governed by the law of arbitration.

The rationale behind the principle of separability is that an arbitration clause, as a dispute resolution, is agreed to provide a proper forum to solve any disputes arising from a defined relationship, including a dispute about the validity of the main contract.[536] The separability of an arbitration clause may solve a dilemma in which there is no applicable dispute resolution to solve the parties' disputes, if the main contract turned out to be null and void.[537] In other words, if the validity of their arbitration agreement is controlled by the validity of the main contract, the parties, or one of the parties, may be forced to settle their disputes in a forum against their preference stated in the arbitration clause, as this clause becomes invalid along with the main contract.[538] Therefore, the principle of separability plays an essential role in facilitating parties' genuine intention to arbitrate their disputes.

It may follow that in bill of lading cases, an incorporation clause which clearly states an intention to incorporate a charterparty's arbitration clause to a bill of lading may actually be used as an arbitration clause between a shipowner and a shipper. It follows that the principle of separability may be applicable to such an incorporation clause.

To illustrate, the agreement of the incorporation of an arbitration clause is firstly made at the loading port. When a shipowner issues bills of lading to the shipper,

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[535] Wagener (n 11) 116.
[536] Tweeddale and Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (n 123) 4.59.
[537] ibid.
[538] ibid.

a shipowner and a shipper may at this point agree upon a dispute resolution applied to disputes arising from the issued bills of lading,[539] and this agreement takes the form of an incorporation clause in a bill of lading. In order to suffice this incorporation, this incorporation clause employs an explicit wording, because an arbitration clause does not naturally belong to the subject-matters of a bill of lading.[540] The mutual consent to incorporate a charterparty's arbitration clause can be evidenced by the process of issuing bills of lading, as there would be an exchange and confirmation of agreements. Specifically, a shipowner should sign the bills of lading prepared by a shipper to show the shipowner's acknowledgement of the terms and clauses stated in the bills, and shipper may acknowledge the shipowner's comments on the bills by accepting these bills.[541] If there were inappropriate terms and clauses stated in the bills, the shipowner may refuse to sign the bills, and similarly the shipper may refuse to accept the signed bills.[542] This means that, as a matter of fact, an incorporation clause of importing an arbitration clause from a charterparty to a bill of lading is a contract between a shipowner and a shipper if the process of issuing the bills of lading went smoothly. In addition, from the perspective of law, such an explicitly worded incorporation clause can meet the requirement put forward by Article 7 (6) of the UNCITRAL Model Law and section 6(2) of the Arbitration Act 1996, namely 'if the reference is such as to make that clause part of the agreement'.[543] Therefore, an explicitly worded incorporation clause would be legally recognised as an arbitration clause between a shipper and a shipowner.

It then follows that the principle of separability shall be applied to this additional agreement. As a result, this incorporation clause is severable from the main body

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[539] Treitel and Reynolds (n 11) 3-005, 3-006, 3-007, and 3-008.
[540] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 185; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 199–200.
[541] Wilson (n 2) 130.
[542] ibid 117-118.
[543] Arbitration Act 1996, 6(2): The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement. Pietro (n 473) 443; Born (n 123) 451.

of a bill of lading, and therefore the non-contractual nature of bills of lading does not affect the validity of this incorporation clause.

Moreover, since this incorporation clause is contractual, the intention contained in this clause may prevail over the intention contained in the referred arbitration clause, and this consequence may provide a guide to the following consistency test. To be specific, if this incorporation clause was clear and specific about an incorporation of an arbitration clause, it means that the engaged parties were so intended. Therefore, it is unreasonable to refuse an incorporation on the ground that the wording of the referred clause limits its application to disputes arising from a bill of lading.[544] Meanwhile, the incorporated clauses should be limited to incorporating an arbitration clause if an explicit wording in the incorporation clause provided that only an arbitration clause is incorporated therein.[545]

It follows that in cases where the incorporation clause does not make a specific reference to an arbitration clause, there will be no additional contract about incorporating an arbitration clause between the shipowner and the shipper. Consequently, the clauses that incorporated by a generally worded clause shall be limited to those customarily contained in a bill,[546] and meanwhile the intention contained in the charterparty's arbitration clause should be irrelevant, even if the wording of this arbitration clause is specific about its application in disputes arising from bills of lading. [547] This is because the function of an incorporation clause is to avoid the trouble of re-writing the same agreement, rather than to bring in the intention of other parties.[548] The generally worded incorporation clause indicates that the parties to a bill of lading did not intend to arbitrate

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[544] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 124.
[545] Magklasi, 'A New Channel to the Heart of Incorporation of Clauses' (n 380) 397, 399.
[546] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 185 and 192.
[547] Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 411- 415.
[548] *The Varenna* [1984] 1 QB 599, 619; *The Federal Bulker* [1989] Lloyd's Rep.103, 109; *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2012] 1 CLC 448, 455.

disputes arising from their bill of lading, and therefore the intention contained in the referred charterparty cannot prevail over.[549]

The resulting question would be how this contract between a shipowner and a shipper binds a holder of the bill of lading. This is closely related to the disclosure of such holder's consent to arbitrate which will be discussed in section 5.2.

Ground 2: An agreement in writing

Just as is required for a valid arbitration clause, an intention to incorporate an arbitration clause from a charterparty to a bill of lading is required to be in a written form.[550] This requirement forms an essential basis for an incorporation of this kind to be treated as an independent contract.

According to Article 7 (6) of the UNCITRAL Model Law and section 6(2) of the Arbitration Act 1996, an arbitration clause can only be incorporated in a contract or a document if the incorporation clause can be understood as the arbitration clause agreed between the parties. This means that, in bill of lading cases, an incorporation clause, bringing a charterparty's arbitration clause to a bill of lading, shall be regarded as the arbitration clause agreed between the shipowner and the holder of a bill of lading. In order to achieve this legal result, it is reasonable to impose the basic requirement validating an arbitration clause, namely 'an agreement in writing',[551] on an incorporation clause with an equivalent effect.[552]

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[549] Wagener (n 11) 122; Allison and Dharmananda (n 470) 273; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 146.

[550] *The San Nicholas* [1976] 1 Lloyd's Rep. 8; *The Heidberg* 2 [1994] Lloyd's Rep. 287; Allison and Dharmananda (n 470); Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (n 351) 7.

[551] The meaning of 'agreement in writing' is provided by Article II Rule 2 of the New York Convention, which provides that apart from a signed arbitration clause, the written agreement also can be in the form of a signed exchange of letters and telegrams which contained the expressed consent about choosing arbitration as the dispute resolution. Additionally, this written agreement could either be contained in a main contract or be separated from the main contract. This meaning has been expanded due to the development of technology of communication, and in Chapter II, Option I, Article 7 of UNICITRAL Model Law and in Section 5 of Arbitration Act 1996 the acknowledgement contained in the exchange of e-mails also can be regarded as a written agreement.

[552] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 184.

It follows that, apart from evidencing parties' consent to this incorporation clause,[553] such an incorporation clause should primarily amount to a sufficient and constructive notice about such a special incorporation.[554] To fulfil this requirement, it is obvious that an explicit reference should be made to an arbitration clause, since a clear and explicit reference should be the most sufficient and efficient approach to accurately convey an intention to arbitrate.[555]

English case law recognises this requirement in two aspects: (1) that the referred arbitration clause can be ascertained, for example it should be in a written form; and (2) that the incorporation clause itself should be explicit about incorporating an arbitration clause.

Firstly, for the format of a referred arbitration clause, it can exist in an informal document, such as a recap or a memorandum, but it must be itself clear and ascertainable.[556]

In *The Heidberg*,[557] it was strictly held that in the cases in which an arbitration clause is contained in an orally agreed document, this arbitration clause cannot be incorporated in bills of lading. It is also important to note that it was held that not only can an arbitration clause not be incorporated, the other terms and clauses contained in this undocumented instrument also cannot be incorporated in the related bill of lading.

The bill of lading used in this case was specific about an incorporation of an arbitration clause from a referred charterparty to the bill of lading, but it was unclear which charterparty was referred to, as the field for filling the date of the charterparty was left blank. There were two directly relevant documents. Firstly, a recap telex between a broker and the owner of the vessel *Heidberg*; this

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[553] Disclosing parties' consent to an incorporation of an arbitration clause is discussed in 5.4.
[554] McKendrick (n 419) 316; Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 183 and 192.
[555] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 192.
[556] Eleni Magklasi, '"Shaky" times for arbitration clauses: rethinking business common sense' (2016) 32 Arbitration International 199, 203; Baatz (n 8) 90.
[557] *The Heidberg* [1994] 2 Lloyd's Rep. 287.

communication happened before the issuance of the bill of lading. Secondly, a formal charterparty which was concluded based on that recap telex between the same parties, and yet this charterparty was officially concluded more than two years after that the bill of lading had been issued. The difficulty in this case is whether or not the recap telex can be incorporated in the bill of lading if a formal charterparty was formed at a later stage, which more or less evidenced the fact that this recap telex was designed to be a formal charterparty. It was strictly decided that such collateral oral terms cannot be incorporated, and consequently the communication about an arbitration agreement in the recap telex cannot be incorporated in the bill of lading.[558]

The reasons for this judgment are twofold. Firstly, the customary usage and the transferability of bills of lading results in a limited range of rights and liabilities which can be transferred to a holder of bills of lading.[559] This limited range only covers the terms and clauses that can be easily known by a holder through reading the bill of lading.[560] It follows that any agreement independent from a bill of lading does not naturally bind a holder of a bill of lading, unless a link between the agreement and the bill of lading is created by an incorporation clause in the bill. Secondly, the telex recap was in an unascertainable format and the formal charterparty was finally signed much later than the issuance and transfer of the bill.[561] It is then impossible for a holder of the bill of lading to ascertain the terms and clauses that were incorporated in it when he/she was referred the bill. Therefore, for commercial certainty, especially in bill of lading cases, it was held that a collaterally oral agreement cannot be incorporated in a bill of lading.

For the arbitration clause, it was claimed by the shipowner that an arbitration clause should be incorporated, as this incorporation was so specifically stated in

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[558] Cooke, Young and Ashcroft (n 101) 318.
[559] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 97-98.
[560] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 185 and 192.
[561] ibid 184.

the bill of lading. However, this claim was rejected on the ground that according to s 32 of the Arbitration Act 1950 and Art.II of the New York Convention, the referred arbitration clause did not qualify as a valid arbitration clause, since it was not in writing.[562] This is because this clause was contained in a recap telex which was regarded as a collateral oral document, and consequently the arbitration agreement in this document cannot amount to 'an agreement in writing'.

This case illustrates that an incorporation may be disregarded in a situation where an incorporation clause refers to a clause or a document that has not exist.[563] In other words, it is commercially unsound to bind a holder to a clause by a reference before the referred clause has produced in a written form. This is because it is difficult for a holder of a bill of lading to ascertain the rights and liabilities that he/she is subject to, when the referred clause or document containing such rights and liabilities cannot be ascertained. It follows that an incorporation can be disregarded if the referred clause is not in a good or ideal position for incorporation.

By contrast, English courts' discretion on the legal effect of a recap telex was different in *The 'Epsilon Rosa'*.[564] In this case, a recap relax was regarded as a written document that can be incorporated in bills of lading. It was held that even if the charterparty has not been formed in an official contract, the recorded communication between the parties, namely the recap telex, can facilitate an incorporation. This is because the factual circumstances in this case may evince that the recap telex had been mutually agreed and purports to be a charterparty.[565]

The rationale behind this flexible approach is that the meaning of an 'agreement in writing' should not be interpreted rigidly, and it should be used as a test of

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[562] *The Heidberg* [1994] 2 Lloyd's Rep. 287, 310; Baatz (n 8) 90.
[563] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 184.
[564] *The 'Epsilon Rosa'* [2003] 2 Lloyd's Rep. 509.
[565] ibid 512, 514 and 515; Cooke, Young and Ashcroft (n 101) 612.

certainty that can be guaranteed by a written agreement in any form.[566] Unlike the other undocumented agreement, the recap telex can provide such certainty, as it is in a written form and clearly noted the agreed terms and clauses.[567] Moreover, a recap telex has been widely recognised as an informal agreement which is readily able to be a charterparty in this area of business.[568] It is then reasonable to hold that the arbitration clause in the recap telex can be incorporated in the bill of lading.[569] This flexible approach is also within the meaning of the statute, as the provisions also recognise the recorded informal negotiations and regard such previous exchanges as written evidence.[570]

Secondly, for the wording of the incorporation clause, the meaning of 'an agreement in writing' may require this incorporation clause to include the exact wording of 'arbitration clause'.[571] However, the incorporation clause does not have to be specific about which charterparty is incorporated.[572]

In terms of the wording of the incorporation clause, a rather strict approach was taken by Sir John Megaw in *Aughton Ltd v M.F. Kent Services Ltd*.[573] It was held that the rationale for requiring a written agreement would relate to that fact that choosing arbitration will compel the engaged parties to give up their original legal remedies in litigation,[574] and such renunciation should be expressly made and evidenced by a written document.[575] For this reason, an oral agreement or an incorporation clause which is not specific about incorporating an arbitration clause would not be a valid arbitration agreement.[576]

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566 *The 'Epsilon Rosa'* [2003] 2 Lloyd's Rep. 509, 510-511; Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 184.
567 Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 64.
568 ibid 63.
569 ibid; Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 184.
570 Arbitration Act 1996, s 5(2)(a) and (3); Özdel, 'Enforcement of Arbitration Clauses in Bills of Lading: Where Are We Now?' (n 51) 163.
571 Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 99.
572 ibid 34; Lielbarde (n 17) 298.
573 *Aughton Ltd v M.F. Kent Services Ltd* 1993 WL 963255; Tan and Pereira (n 473) 2.
574 Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 336.
575 Tan and Pereira (n 473) 6; Allison and Dharmananda (n 470) 265, 273.
576 Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 336.

It follows that since the incorporation clause aims to be an arbitration clause between the parties to a bill of lading, the requirement of 'an agreement in writing' should be firstly understood literally, that is, in bill of lading cases, such an incorporation clause should make an explicit reference to an arbitration clause.[577]

In addition, the requirement of 'an agreement in writing' is used to ascertain the parties' mutual intention to arbitrate.[578] Although the parties' mutual intention is always evidenced by the parties' signatures to this clause, it is still possible to bind a non-signatory to an arbitration clause if this party's consent can be evidenced by certain facts.[579]

For example, in *The 'St. Raphael'*,[580] an arbitration clause was incorporated by an incorporation clause, even though this incorporation clause was contained in an unsigned broker's note. The defendant argued that the arbitration clause was not in writing because he did not know that an arbitration clause was contained in the referred standard contract, namely the GAFTA, and he did not sign the broker's note. However, this argument was rejected based on the following grounds.

On the one hand, the clause in the broker's note clearly nominated Clause 14 of GAFTA which turned out to be an arbitration clause, and therefore this explicit wording recognised the existence of the arbitration clause. This means that even though Clause 14 of GAFTA was not written *in extenso*, it still sufficed the requirement of 'an agreement in writing'. Moreover, this GAFTA Contract was a standard contract, and therefore the terms and clauses contained in it can be easily acquired by any businessperson.

On the other hand, the fact that the broker's note had not been signed cannot support the argument that there was no agreement in writing. It seemed to the

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577 Allison and Dharmananda (n 470) 265, 275.
578 Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 184.
579 Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (n 351) 88.
580 *The 'St. Raphael'* [1985] 1 Lloyd's Rep. 403.

judge that the fact of whether the document has been signed or not did not matter, because it was clear that the broker's note was received by the defendant with no objections, and it was common for businessperson in this field of commercial practice to leave a broker's note unsigned.[581] It is then reasonable to imply a consent to the incorporation of GAFTA Contract as well as the arbitration clause contained in it.

This case may shed light on bill of lading cases in two ways. The first is in terms of the format of the wording of the incorporation clause, namely that an incorporation clause can be 'an agreement in writing' when it clearly indicates the incorporation of an arbitration clause and the location of the referred arbitration clause. This specific reference should be made either by direct words, namely 'arbitration clause', or by a clear instruction about the location of the arbitration clause, namely the title or the clause number of the arbitration clause and what document contains this clause. In *The 'St. Raphael'*,[582] the incorporation clause amounted to an written agreement, as the wording 'Clause 14' coexisted with the wording 'GAFTA'. In other words, the reference to the GAFTA alone cannot qualify as a recognition of the existence of an arbitration clause, even though 'GAFTA' was a frequently used standard contract and it contained the referred arbitration clause. The point is the arbitration clause itself must be identified. However, a mere reference to 'Clause 14' is insufficient, as it is impossible for a holder of a bill of lading to have a clear idea about where they should look for this 'Clause 14'.

Therefore, an incorporation clause does not have to be detailed about the context of the referred arbitration clause, but it should clearly identify the arbitration clause in a referred contract, even if the referred contract was in a standard form that should be frequently used in commercial transaction. This written agreement

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[581] Robert Merkin, *Arbitration Law* (Informa UK plc 2020) 5.21 and 5.29; Michael H. Jr. Bagot and Dana A. Henderson, 'Not Party, Not Bound - Not Necessarily: Binding Third Parties to Maritime Arbitration' (2002) 26 Tul. Mar. L.J. 413, 434.

[582] *The 'St. Raphael'* [1985] 1 Lloyd's Rep. 403.

would give a constructive notice to a holder of bills of lading about this distinct incorporation,[583] and it may constitute prima facie evidence to ascertain the third party's knowledge of the referred arbitration clause.[584]

The second point is that without the parties' signatures, a specifically worded incorporation clause can still be a written agreement if surrounding circumstances can prove a consent to such incorporation.[585] This point can be especially important to the bills of lading case, since a holder of bills of lading generally does not personally sign the bills. A holder of bills of lading merely uses the bill as an evidential document to show their legal rights to the carried goods, and therefore they are entitled to require the carrier to release the corresponding goods. In this case, an explicit agreement of incorporating an arbitration clause could be defeated by a holder's argument that there is no agreement in writing, since the holder's signature cannot be found in the bill of lading. However, the decision in *The 'St. Raphael'* may reject such an argument, as it decided that the validity of an arbitration clause is not necessarily affected by the absence of a signature. Parties' signatures can indeed be conclusive evidence to the parties' consent, and yet other relevant factual circumstances, such as a course of dealing, may also be used as an approach to evidence parties' intentions. Therefore, a lack of signature would not be fatal to the validity of such an incorporation clause in a bill of lading, and it is possible to disclose the holder's acknowledgement from other approaches.[586]

Moreover, an insufficient reference to the charterparty, such as an absence of an identifying date of the referred charterparty, does not necessarily negate an incorporation.[587] The insufficient reference means that the bill's incorporation

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[583] *The 'Njegos'* (1935) 53 Ll.L. Rep. 286,.296; Li (n 72)124; McKendrick (n 419) 325. For the incorporation of an onerous and unusual clause see Gaskell, Asariotis, and Baatz (n 237) 2.36.
[584] Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 391.
[585] Bagot and Henderson (n 581) 434.
[586] Merkin, *Arbitration Law* (n 581) 5.21.
[587] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 34; Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 184.

clause is not explicit about which charterparty contains the referred arbitration clause, for instance when the name of the referred charterparty or its issued date was left blank. Such ambiguity could adversely impact the incorporation as it does not directly provide information that helps the parties to locate the referred arbitration clause. Nevertheless, English case law on this matter does not take a strict approach, and in order to suffice the intention to arbitrate English courts are willing to imply an appropriate charterparty to fill the gap.[588]

In *The San Nicholas*,[589] the incorporation clause in the bill of lading was silent about which charterparty should be incorporated in; one head charterparty and two sub-charterparties were related to the shipment. It was held that the head charterparty should be the propriate charterparty to be incorporated in the bill of lading because this charterparty had the closest connection with the bill of lading. To be specific, as one party to the bill of lading, the shipowner must aim to incorporate a charterparty in which he/she was also an original party, and this should be the head charterparty.[590] It follows that a silence about which charterparty should be incorporated is unlikely to negate an incorporation; in order to suffice the intention to incorporate, English courts may take the factual circumstances into consideration to draw an implication.[591]

This principle was recognised by Judge Diamond QC in *The Heidberg*,[592] which it is described as an exceptional situation in which some extrinsic evidence needs to be taken into consideration in order to decide which charterparty would be the propriate one to be incorporated. In contrast, in general cases extrinsic evidence is not allowed to determine the rights and liabilities with which a holder of bills of

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[588] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 184; Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 180.

[589] *The San Nicholas* [1976] 1 Lloyd's Rep. 8.

[590] ibid 11; Baatz (n 8) 87.

[591] ibid 11; Aikens, Lord and Bools (n 126) 7.104 and 7.115; Treitel and Reynolds (n 11) 3-026; Gaskell, Asariotis, and Baatz (n 237) 2.26; Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 184-185.

[592] *The Heidberg* [1994] 2 Lloyd's Rep. 287.

lading should comply with. A similar judgement also can be seen in *The 'Epsilon Rosa'*,[593] it was held that an obvious intention to incorporate an charterparty can be evidenced by the expressed terms in bills of lading, such as 'freight is to be payable as per the charterparty'. In order to suffice such an expressed intention, an absence of an identifying date of the charterparty would not be an obstacle to achieving this aimed incorporation, and a proper charterparty can be implied by considering two facts: (1) the referred charterparty should have the closest connection to the shipment recorded in the bill of lading;[594] (2) this charterparty should be in a written form in which terms and clauses are ascertainable.[595]

It follows that, as is required for a valid arbitration clause, a valid reference to an arbitration also needs to suffice the requirement as to 'an agreement in writing'. In an incorporation case, this requirement is not only imposed on the incorporation clause but also imposed on the referred arbitration clause.

To conclude, distinct principles of arbitration, particularly the principle of separability, enable a reference to an arbitration clause in a bill of lading to have an independent legal effect. This principle plays a crucial rule forming the legal basis for a binding incorporation clause, since the legal nature of bills of lading cannot endow a contractual effect to this incorporation clause. Moreover, this principle forms basic requirements for a valid reference to an arbitration clause. Specifically, an incorporation clause itself should be explicit about incorporating an arbitration clause, and the referred arbitration clause should be ascertainable, namely it needs to be in a written form, but it does not have to be a formal contract. After being qualified using these requirements, such an incorporation clause may be ready to be a contract, and yet in order to bind a holder of a bill of lading, it remains necessary to disclose this party's intention to arbitrate.

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[593] *The 'Epsilon Rosa'* [2003] 2 Lloyd's Rep. 509.
[594] See also in *The SLS Everest* [1981] 2 Lloyd's Rep. 389, 392 (Lord Denning MR); *The 'Wadi Sudr'* [2009] 1 Lloyd's Rep. 666, 697 (Gloster J); Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 31.
[595] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 64.

5.4. Parties' Consent to Arbitrate and its Legal Effect on An Incorporation

As discussed above, in order to suffice an incorporation of an arbitration clause from a charterparty to a bill of lading, it is necessary to treat an incorporation clause (explicit about incorporating an arbitration clause) as an independent arbitration clause between the parties to a bill of lading. For this reason, apart from the requirement on the wording and the format of such a clause, it is also crucial to take parties' consent to arbitrate into consideration. The importance of disclosure of parties' intention to arbitrate can be illustrated by the principles of both contract law and arbitration. As an independent agreement, it is required by contractual principles, in which an arbitration clause's contractual effect may heavily rely on a mutual consent.[596] The principle of arbitration in terms of parties' autonomy and 'an agreement in writing' also set parties' consent to arbitrate as a threshold for validating an arbitration agreement.[597]

The significance of supporting an incorporation of an arbitration clause by disclosing parties' consent can be illustrated by the two-contract doctrine. In order to facilitate an incorporation of such a special kind, the two-contract doctrine requires that an incorporation clause should contain an explicit reference to an arbitration clause, and this referred arbitration clause should be ascertainable, such as a written clause in an existing contract.[598] In other words, since both parties' intention to arbitrate has been sufficiently demonstrated by an explicit reference, this reference can amount to an arbitration agreement between the parties.[599] This means that in incorporation cases, an expressed consent to

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[596] Leboulanger (n 465) 25.
[597] ibid; Article II of the New York Convention; Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (n 351) 8; *Banque Arabe et Internationale d'Investissement v Inter-Arab Investment Guarantee Corp.,* award of 17 November 1994, 21 *Y.B. Com. Arb.* 13 (1996) 18-19.
[598] Brekoulakis (n 301) 2.236.
[599] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 111.

arbitrate is vital to extend the application scope of the referred arbitration clause.[600]

However, a mutual consent to arbitrate cannot easily be identified in bill of lading cases. This situation may become a hurdle to apply two-contract doctrine in bill of lading cases. Specifically, since a holder of bills of lading does not engage in the issuance of bills of lading,[601] an expressed intention does not necessarily include the consent from a holder of the bill of lading, even when an incorporation clause is explicit about incorporating a charterparty's arbitration clause. In other words, the only tool used by the two-contract doctrine to evidence the parties' consent to arbitrate, namely an explicit reference, cannot be directly used to demonstrate a holder's intention concerning the incorporation.

Therefore, the validity of a bill's incorporation clause may not only rely on an explicit reference to an arbitration clause, but also depend on facts which can disclose the capacity of a holder of a bill of lading as a less-than-obvious party to the incorporation clause.[602] These facts may create a nexus between a bill's incorporation clause and the mutual consent (between the shipowner and the holder of a bill of lading) to incorporate an arbitration clause, and consequently this incorporation clause can be legally binding.[603]

The necessity of creating such a nexus also lies in the legal nature of bills of lading.[604] A legal relationship is defined between a shipowner and a holder of

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[600] Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 391; Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 172.

[601] Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 395.

[602] A 'less-than-obvious' party is defined in Park, 'Non-signatories and International Contracts: An Arbitration's Dilemma' (n 454) 3.

[603] The importance of establishment of a nexus: Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (n 351) 8, in which a reference was made to an ICC case no. 1434; Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 39.

[604] Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 533, it suggests that a nexus should be able to manifest a contractual relationship between parties; Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 39.

bills of lading, and yet this defined relationship is not contractual as a bill of lading is an evidential instrument between a shipowner and a holder of the bill of lading. Therefore, the contractual effect of an incorporation clause may derive from this clause itself as a self-contained contract.[605] It is then important to disclose the parties' intention to arbitrate in order to make this special incorporation clause amount to an independent arbitration agreement, and such an intention can only be disclosed by a nexus hidden behind the bill of lading.

It follows that an explicit reference in a bill of lading merely plays a supportive role in bill of lading cases. Specifically, an explicit reference merely evinces a shipowner's intention to arbitrate, since by signing bills of lading a shipowner generally acknowledges those terms and clauses on the bills. However, an explicit reference may not represent an acknowledgement from a holder of bills of lading. An explicit reference may notify a holder of bills of lading about the dispute resolution nominated by the shipowner, but since a holder does not sign the bills, this holder's acknowledgement may rely on a different nexus which can disclose a holder's positive reaction to this explicit reference. Such an acknowledgement constitutes an essential factor in sufficing an incorporation from a charterparty to a bill of lading.

The following discussion will focus on establishing the nexus that may bind a shipowner and a holder of a bill of lading to a specifically worded incorporation clause, as well as the legal consequences resulting from the disclosure of intention.

5.4.1. The Consent from a Shipowner

A shipowner's consent to incorporate an arbitration clause from a charterparty to a bill of lading can be disclosed by a specifically worded incorporation clause in

[605] The separability of an arbitration clause may support a separate consideration of the validity of an arbitration clause, and such a consideration may be subject to law of arbitration, see in Schwebel, Sobota, and Manton (n 530).

those bills of lading that he/she issued for a specific shipment. This expressed intention may prevent the shipowner from denying an arbitration, if the holder of the bill of lading consented to the incorporated arbitration clause and sued the shipowner in an arbitral tribunal for disputes arising from the bill of lading. The following analysis will firstly focus on the question as to why an explicitly worded incorporation clause can evidence a shipowner's consent to arbitrate. Secondly, the analysis will focus on the question as to what legal principle would be used to give legal effect to the evidenced intention to arbitrate.

Step 1: The Disclosure of a Shipowner' Consent

In a bill of lading, an explicit reference to an arbitration clause may sufficiently disclose a shipowner's consent to arbitrate disputes arising from the bill of lading, and therefore the shipowner shall be bound by such an expressed intention. This conclusion is based in two grounds: (1) bills of lading are evidential instruments, especially when they are in the hands of a lawful holder of the bill of lading are used as conclusive evidence against shipowners; and (2) supported by the principle of separability, such a specifically worded incorporation clause could independently be contractual between the shipowner and the shipper.

For the first ground, a specifically worded incorporation clause contained in a bill of lading may evidence the shipowner's promise to choose arbitration as the dispute resolution. Generally, in the hands of a lawful holder of the bill, a bill of lading becomes conclusive evidence, which evidences the statement written on it, such as the quantity and quality of the loaded goods.[606] Although the subject-matters of a bill of lading do not naturally include an arbitration clause, the scope of subject-matters that is evidenced by a bill of lading may be expanded, when an explicit reference to an arbitration clause can be easily identified in a bill of

[606] Carriage of Goods by Sea Act 1992, s 2 and s 4; The Hague/Visby Rules, Article III Rule 4; Wilson (n 2) 119; Gaskell, Asariotis, and Baatz (n 237) 2.16; when a bill of lading is transferred, the legal effect of those terms may enhanced, see in Treitel and Reynolds (n 11) 3-009.

lading.[607] For this reason, an expressed intention to arbitrate can be one of the statements that are evidenced by a bill of lading. In addition, it conveys a notice to the holder of the bill of lading, that is in addition to the information customarily contained in bills of lading, the shipowner nominates arbitration for settling disputes arising from the bill of lading.[608]

For the second ground, a specifically worded incorporation clause contained in a bill of lading may not only be conclusive evidence, but also a self-contained contract. Such an incorporation clause may firstly bind a shipowner and a shipper. Generally, a shipper prepares the bills of lading for a certain shipment for the shipowner to sign; the shipowner signs the bills to demonstrate his acknowledgement of the terms and clauses contained in these bills.[609] In particular, a shipper offers a contract of incorporating a charterparty's arbitration clause by explicit expression in a set of bills of lading. Subsequently, a shipowner accepts this offer by signing the bill. If he/she refuses to arbitrate or has question about this incorporation, the shipowner still has an opportunity to negotiate with the shipper concerning this special incorporation.[610] For this reason, by signing the bills of lading, a shipowner acknowledges all the terms and clauses contained in the bills, and if an explicit reference to arbitrate was contained in the bills, the shipowner's acknowledgement may be extended to this explicit reference.

Given the fact that bills of lading are customarily transferred to a person who is a third party to the referred charterparty, and who is not present in person when bills of lading are issued, it is necessary and reasonable to bind a shipowner to such an incorporation clause even when the bills of lading are transferred by a

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[607] As discussed in Chapter 2, the limitation about the subject-matters may only be applied when there is no specific wording for adding other issues. This is used to protect the rightful interests of a holder of the bill of lading, as without an explicit wording, a holder's expectation to the terms and clauses contained in a bill may be limited by the customary usage of a bill which confines the subject-matters to the shipment, carriage and delivery. However, an explicit wording can make a difference. Wagener (n 11) 117; Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 174; Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 335.

[608] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 108; Tan and Pereira (n 473) 7.

[609] Treitel and Reynolds (n 11) 1-009.

[610] Wilson (n 2) 117-118.

shipper. This is because when signing bills of lading, a shipowner should expect that this specifically worded incorporation clause may enforce him/her to arbitrate with anyone who subsequently become a lawful holder of the bill of lading, as the transferability of bills of lading is well-known to individuals practiced in the shipping market.[611] This means that the arbitration clause concluded between the shipowner and the shipper indicates that the shipowner agrees to arbitrate any disputes arising from the bill of lading, and the counterparty is not limited to the shipper but also includes any lawful holder of the bill. Therefore, an explicit reference may have a contractual effect on the shipowner.

Step 2: Establishing the Legal Effect of This Disclosure

In a bill of lading, an explicit reference to arbitration may sufficiently disclose a shipowner's consent to arbitrate. As a result, a shipowner may be estopped from denying an incorporation of an arbitration clause. This is based on the principle of arbitral estoppel which prevents a contractor to an arbitration clause from avoiding an arbitration by arguing that the claimant is not a contractual party to the arbitration clause.[612]

The principle of arbitral estoppel suggests that a party (party A) cannot avoid an arbitration which is invoked by another party (party B) who does not directly have an arbitration agreement with him/her (party A).[613] To elaborate, an arbitral estoppel needs to be established on two grounds. The first is that the submitted dispute is related to the subject-matter of a contract in which the party A is a contractual party and an arbitration clause is contained in this contract. Secondly, party B should have a contractual or close relationship with one of the contractors

[611] Treitel and Reynolds (n 11) 6-041; This usage of a bill of lading may start from the case of *Lickbarrow v Mason* 100 E.R. 35.
[612] The doctrine of arbitral estoppel: Steingruber (n 7) 158-159. Brekoulakis (n 301) 131-145; Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (n 351) 20-29.
[613] Steingruber (n 7) 9.54.

to the contact containing the arbitration clause.[614] These two grounds are mainly established upon the factual circumstances in each case.[615]

In bill of lading cases, the shipowner is highly likely to be bound by such an explicit reference in the bill of lading, as the factual circumstances may satisfy the requirements of establishing the arbitral estoppel.

Before looking into those two specific grounds, it is a preliminary issue to disclose the shipowner's contractual commitment to an arbitration clause. This point can be initially illustrated by an arbitration clause contained in a related charterparty, especially when this clause provides that it can be incorporated in bills of lading issued thereunder. Moreover, the shipowner's intention to apply this arbitration clause to disputes arising from a related bill of lading can be evidenced by the bill's incorporation clause which is explicit about incorporating the arbitration clause in this bill of lading.

Evidenced by the charterparty's arbitration clause and the bill's incorporation clause, the shipowner's consent to arbitration is clear and obvious, and such an expressed intention may lead to legal consequences on two grounds. On the one hand, bills of lading as conclusive evidence can prove the fact that the shipowner acknowledges all terms and clauses, including this explicit reference in the bill of lading.[616] On the other hand, this specifically worded incorporation clause may amount to an independent contract. This is because an explicit reference of this kind actually functions as an arbitration clause in a bill of lading, and consequently the separability of arbitration may enable a special incorporation clause of this

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[614] The concept of arbitral estoppel is widely accepted in Anglo-American cases: *Hughes Masonry Co v Greater Clark County School Building Corp.* 659 F.2d 836 (7th Cir. 1981), *Sunkist Soft Drinks, Inc. v Sunkist Growers, Inc.* 10 F.3d 753 (11th Cir. 1993); *Choctaw Generation Limited Partnership v American Home Assurance Company* 271 F.3d 403 (2nd Cir. 2001); Brekoulakis (n 301) 133-139.

[615] Brekoulakis (n 301) 133; *Smith/Enron Cogeneration v Smith Cogeneration Int'l* 198 F 3d 88 (2nd Cir 1999) 97; *JLM Industries v Stolt-Nielse* 387 F 3d 163, 2004 (2d Cir 2004) 178; *Astra Oil v Rover Navigation* 344 F 3d 276 (2d Cir 2003) 279; *Choctaw Generation v American Home Assurance* 271 F 3d 403 (2nd Cir 2001); *Ex parte Isbell* 708 So 2d at 577–8 (Ala 1997).

[616] Wilson (n 2) 130; Julian Cooke, Tim Young and Michael Ashcroft, *Voyage Charters* (4th end, Informa Law from Routledge 2014) 18.12.

kind to be an independent contract.[617] Since the shipowner signed bills of lading containing this explicit reference without objection, he/she shall be bound by this independent contract.[618] Meanwhile, as an original party to the charterparty, the shipowner has access to the context of a referred arbitration clause. For these reasons, it is unlikely for a shipowner to deny his/her acknowledgement by claiming that an arbitration clause does not naturally exist in bills of lading,

Moreover, it is in line with the commercial necessity to confirm the legal effect of such an explicit reference in the bill of lading, in that from the perspective of a holder of bills of lading, the intention to arbitration expressed in the transferred bill of lading can be especially instructive about the dispute resolution. This is because a holder of a bill of lading can only know about the terms and clauses of the shipment by reading the transferred bill of lading. Therefore, such an expressed intention contained in the bill may be heavily weighed by the holder and convince the holder that a shipowner prefers arbitration as the dispute resolution.[619]

Returning to the first ground for establishing an arbitral estoppel, namely whether or not subject matters of the submitted dispute are covered by an arbitration clause, it seems that the disputes arising from the bill of lading generally fall within the issues governed by a related charterparty.[620] This is because a bill of lading which makes a specific reference to a charterparty is merely an evidential instrument, and this means the statement on the bill is composed of two parts. One part includes facts concerning the shipment of the goods, and the other is the terms and clauses concerning the shipment, carriage and delivery which were originally contained in the referred charterparty. In other words, the referred charterparty remains as the contract of carriage, and all the issues related to the

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[617] UNCITRAL Model Law, Article 7 (6); Arbitration Act 1996, section 6(2). Baatz (n 8) 86; Wagener (n 11) 116.
[618] Wilson (n 2) 130.
[619] Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 339.
[620] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 138.

carriage of goods by sea are covered by the terms and clauses in this referred charterparty.[621] Therefore, any dispute arising from a bill of lading may find its corresponding agreement in the referred charterparty.

The connection between the disputes arising from bills of lading and the charterparty's arbitration clause can be further enhanced in cases in which the wording of the charterparty's arbitration clause is explicit about its application to bills of lading issued thereunder.[622] However, in bill of lading cases, this connection only can be considered when a connection has been created by an explicit reference in the bill of lading. This is because a charterparty is not transferred to a holder of the bill of lading, and therefore the wording of a charterparty's arbitration clause cannot be taken into consideration if an explicit reference in the bill of lading was absent.[623]

For example, in *T W Thomas & Co. Limited v Portsea Steamship Company, Limited*,[624] it was held that the wording of the referred arbitration clause limited its application to the disputes arising from the charterparty, and therefore any disputes arising from a bill of lading did not covered by this arbitration clause. However, this reasoning only forms a secondary ground for refusing the incorporation of this arbitration clause, while the decisive factor still contained in the wording of the incorporation clause in the bill of lading.

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[621] In *Choctaw Generation v American Home Assurance* 271 F 3d 403 (2nd Cir 2001), it was held that the contractor was estopped from denying an arbitration on the basis of equitable estoppel. The dispute associated with a surety contract relating to the contractor's performance in the construction project, but there was no arbitration clause between the surety and the contractor. However, this project was governed by a construction contract which contained an arbitration clause, and the contractor was a contractual party to this contract. Since the issue was related to a certain performance governed by the construction contract, it was held that the surety can sue the contractor in an arbitral tribunal. Similar cases are : *Astra Oil Co. v Rover Navigation, Ltd.* 344 F3d 276 (2nd Cir 2003); *Fujian Pacific Electric Company Limited v Bechtel Power Corporation* 2004 U.S. Dist. LEXIS 23472 (N.D. Cal. 18 Nov. 2004); y Press, 2015) 133; *Smith/Enron Cogeneration v Smith Cogeneration Int'l* 198 F 3d 88 (2nd Cir 1999) 97; *JLM Industries v Stolt-Nielse* 387 F 3d 163, 2004 (2d Cir 2004); Steingruber (n 7) 4.1.

[622] Brekoulakis (n 301) 137. *McBro Planning Development v Triangle Electrical Construction* 741 F 2d 342, 343 (11th Cir 1984); *Hughes Masonry v Greater Clark County School Bldg* 659 F 2d 836 (7th Cir 1981).

[623] Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 333, it suggests that the consent should be identified in the bill of lading, rather than the related charterparty; Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 173.

[624] *T W Thomas & Co. Limited v Portsea Steamship Company, Limited* [1912] A.C. 1.

In terms of the second ground, namely the relationship between the signatories and the non-signatories, a close relationship between a holder of the bill of lading and a contractor to the arbitration clause (the charterer or the shipper) may be disclosed by their common interest in the underlying carriage of goods by sea.[625] It also can be disclosed by the performance at the unloading port. Specifically, a transferred bill of lading constitutes a direct link between shipowner and a holder of the bill of lading.[626]

It follows that when a bill's incorporation clause makes an explicit reference to a charterparty's arbitration clause, the shipowner who signed those bills may be compelled to an arbitration, if the holder's consent to arbitrate can be disclosed or the holder of a bill of lading actually invoked an arbitration proceeding against the shipowner.[627] English case law may indicate that a holder of bills of lading may have a greater chance to compel a shipowner to an arbitration on the ground that an explicit reference was made in the bill of lading, while a shipowner can hardly succeed in arguing that an explicit reference cannot incorporate an arbitration clause.[628]

5.4.2. The Consent from the Holder of a Bill of Lading

Compared to a shipowner, the consent of the holder of a bill of lading in respect to an incorporation of an arbitration clause from a charterparty to a bill of lading is not directly expressed by an explicit reference in a bill of lading. This is because

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[625] Brekoulakis (n 301) 139. It is suggested that a close corporate relationship between the signatories and the non-signatories may also satisfies the requirement, as this relationship disclose similar or even identical commercial interests between the signatory and the non-signatory.

[626] See in 5.4.2; Lista, 'Knocking on heaven's door: in search for a legal definition of the bill of lading as a document of title' (n 4) 276 and 277.

[627] Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (n 351) 88. It is suggested that a non-signature may be a claimant in an arbitration, if factual circumstances could prove the existence of intent of all the parties, that the non-signatory be parties to the underlying contract and its arbitration clause. The factual circumstances may include the non-signatory's role in the conclusion and performance of the contract, and the non-signatory's consent to the obligations contained in the contract; Jagusch and Sinclair (n 308) 319; W Laurence Craig, Willian W Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, Oceana 2000) 78-79.

[628] *The Channel Ranger* [2013] 2 CLC 480, 492, although an arbitration clause was not incorporated in a bill of lading, it does not mean that a shipowner can stopple from a liability in arbitration. The reason for a failure of an incorporation of an arbitration clause in this case is the court cannot find a corresponding arbitration clause in the charterparty, rather than the explicit reference clause in the bill of lading is invalid.

the signature of the holder cannot be found in the bill of lading, and the holder does not customarily participate in the process of issuing bills of lading. For these reasons, the holder of a bill of lading may not be bound by this specifically worded incorporation clause,[629] unless the holder's intention to arbitrate can be implied by considering surrounding circumstances in each case.[630] This may not contradict the principle of autonomy in arbitration, as on a basis of an implied consent the holder is a less-than-obvious party to the incorporation clause.[631]

Therefore, since a holder of a bill of lading cannot be a signatory to a specifically worded incorporation clause, it is crucial to disclose the holder's intention by considering the factual circumstances, such as taking the delivery with no objection or initiating an action against the carrier under s 3 of the Carriage of Goods by Sea Act 1992.[632] This implied consent to the incorporation clause may consequently contribute to binding the holder of the bill of lading to the referred arbitration clause. Such a binding effect may be underpinned by a combination of legal principles, such as the principle of assignment and the principle of estoppel.

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[629] Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (n 351) 7, it is suggested that a non-signatory of an arbitration clause may not participate in the arbitration.

[630] Bernard Hanotiau, 'Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law' in Albert Jan van den Berg(ed), *International Arbitration 2006: Back to Basics?* (Kluwer Law International 2007) 341, 349, it is suggested that a lack of signature may not invalidate an arbitration clause.

[631] Park, 'Non-signatories and International Contracts: An Arbitration's Dilemma' (n 454) 3; Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (n 351), in the chapter of 'Who are the parties to the Contract(s) or to the Arbitration Clause(s) Contained Therein? The Theories Applied by Courts and Arbitral Tribunals', it is suggested that the parties' consent can be implied by surrounding circumstances which may indicate a hidden legal relationship among the parties, and in the chapter of 'May an Arbitration Clause be Extended to Non-signatories: Individuals, States or Other Companies of the Group?', it is suggested that the issue as to who is the party to the arbitration clause is mainly viewed as an issue of consent, and such a consent of a non-signatory only can be implied by surrounding circumstances, and the legal effect of the implied consent may be confirmed by applying an appropriate legal theories, such as agency, trust or piercing the corporate veil. In the chapter of 'May an Arbitration Clause be Extended to Non-signatories: Individuals, States or Other Companies of the Group', it is suggested that since an agreement of arbitration should be made on parties' consent, the extension of the scope of application of the arbitration clause should be made on the same manner. For this reason, the consent to arbitrate should be made by the party who may affected by such extension, and this party's consent may be implicit; Hanotiau, 'Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law' in *International Arbitration 2006: Back to Basics?* (n 630) 341, 351, citing the first interim award of an ICC case no. 9517; and at page 352, it is suggested that an implicit consent or a fact that an non-signatory is aware of the arbitration clause and the submitted dispute is concerned by this non-signatory can be a ground to bind this party to the arbitration clause.

[632] Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 393 and 395.

The following analysis will be divided into two sections. Section one deals with the disclosure of the implied consent from a holder of the bill of lading in terms of the acceptance of a specifically worded incorporation clause. The second section discusses the legal effect of such implied consent, namely how the incorporation clause leads to the incorporation of an arbitration clause.

Step 1: Disclosure of the Holder's Consent to the Incorporation of an Arbitration Clause

In some cases, the capacity of a holder of bills of lading to the bill's incorporation clause may be disclosed by the fact that the shipper prepared and received the bills of lading from the shipowner on behalf of the holder of the bills.[633] In these cases, the holder of the bill of lading is in fact the original contractor to the incorporation clause, meaning the holder's consent to an incorporation of an arbitration clause is expressed by an specifically worded incorporation clause in the bill of lading.[634] Therefore, the holder should be bound by this clause.

For the remaining cases in which a holder of the bill of lading does not have an agent-principal relationship with a shipper or a shipowner, the binding effect of a bill's incorporation clause may rely on a combination of legal principles. It is a preliminary issue to apply principles of implied parties' consent, and it will be followed by the application of the principles of assigning contracts and of estoppel. To be specific, a holder of the bill of lading as a transferee/assignee of the bill's incorporation clause may form a legal basis for binding the holder to this specifically worded incorporation clause,[635] and may subsequently bind the holder to the referred arbitration clause.

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[633] Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (n 351) 10-14, 34; *Marine Drive Complex v Ghana*, 19 *Y.B. Com. Arb.* 11 (1994); Hanotiau, 'Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law' in *International Arbitration 2006: Back to Basics?* (n 630) 341.

[634] Steingruber (n 7) 9.04. The incorporation issue concerning this category of cases is fully discussed in the next Chapter.

[635] Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (n 351) 18; Jagusch and Sinclair (n 308) 291-319.

As an independent contract, the explicit reference to an arbitration clause may be able to be transferred. As discussed in Chapter 4, before establishing a contractual effect in the specifically worded incorporation clause, this clause cannot be transferred to a holder of the bill of lading. On the one hand, the contract of carriage transferred to the holder does not naturally include an arbitration clause in the referred charterparty. On the other hand, due to the defective legal status of bills of lading, an explicit reference in the bill of lading is merely a piece of evidence. It follows that a bill's incorporation clause can hardly transfer any right or liability to a holder of the bill lading, since this clause is only a piece of evidence which does not contain a legally binding agreement between the shipowner and the holder of a bill of lading concerning choosing a dispute resolution. For this reason, the separability of an arbitration clause is taken into consideration in 5.3.2, and consequently a specifically worded incorporation clause can be a legally binding agreement itself, rather than merely a piece of evidence. Specifically, a shipper and a shipowner agreed into an arbitration clause by making an explicit reference to a charterparty's arbitration clause.[636] By signing the bills of lading prepared by the shipper and issuing them to the shipper, the shipowner gives his/her acknowledgment of the incorporation clause and of the transfer of this special contract.[637] Therefore, a contractual effect of such a specifically worded incorporation clause accompanies with a shipowner's (an assignor's) acknowledgement enable the transfer of an explicitly worded incorporation clause in a bill of lading.

In order to bind a transferee to this contract, the next issue is whether or not a holder of the bill of lading accepts such an incorporation clause, after the original parties to this clause have consented to transfer an arbitration clause to a holder of the bill of lading. The disclosure of the acceptance of a holder may be especially important when considering the distinct feature of such an explicit

[636] See in 5.3.2.
[637] ibid.

reference, as it contains an obligation to arbitrate.[638] It is suggested that such consent can be implied from the conduct of the holder of the bill of lading,[639] since the parties' intention can be implied from their conduct.[640]

To illustrate, an implicit consent may be proved by the fact that the holder is in compliance with part of the obligations contained in the same document.[641] In bill of lading cases, this proposition may be enhanced by considering the implied contract doctrine which originated in *Brandt v Liverpool*.[642] In this case, the holder of the bill of lading is a bank, and the bank tried to sue the shipowner on the terms of the bill of lading. The necessity of inventing this doctrine is that there was no existing contractual relationship between the shipowner and the bank, as the related contract of carriage was concluded between the shipowner and the shipper. Additionally, the Bill of Lading Act 1855 did not give the bank a statutory legal right to sue the shipowner on the terms of the transferred bill of lading.[643] Therefore, in order to allow the bank to sue the shipowner, it is suggested that a contract needed to be implied between the bank and the shipowner. The implied contract was made based on two facts: (1) the goods has been delivered the goods against the presentation of the bill of lading, and (2) the holder of the bill of lading received the goods by presenting the bill of lading and then paid the freight.[644] This means that the implied contract is a fact-based contract, and relevant facts are those which can be used to infer offer, consideration and acceptance. Specifically, the first fact indicated the shipowner's consideration and

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[638] Girsberger and Hausmaninger (n 314) 140.
[639] Bernard Hanotiau, 'Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law' in *International Arbitration 2006: Back to Basics?* (n 630) 341, 353.
[640] *The Elizabeth H* [1962] 1 Lloyd's Rep. 172, in this case the shipowner's consent to court's jurisdiction was proved by the fact that the shipowner remained silence for 18 months after the cargo-owner initiated a court proceeding.
[641] *L. v M.,* 20 *ASA Bull.* 482 (2002); Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (n 351) 19.
[642] *Brandt v Liverpool Brazil and River Plate Steam Navigation Co.* [1924] 1 K.B. 575.
[643] According to the section 1 of the Bill of Lading Act, only the receiver who is the actual purchaser of the goods can have a cause of action against the shipowner. However, the bill of lading in *Brandt v Liverpool* was used as a security, rather than a document of title to goods.
[644] *Brandt v Liverpool Brazil and River Plate Steam Navigation Co.* [1924] 1 K.B. 575*;* Todd, 'Brandt v Liverpool again' (n 270) 179.

acceptance, and the second fact illustrated the bank's consideration and acceptance. This means that if a holder of the bill of lading takes the obligation contained in the contract of carriage that is transferred to him/her, such as paying the freight,[645] it is highly likely to imply a consent from the holder to the specifically worded incorporation clause.

However, it is important to note that this doctrine cannot directly be applied to a bill's incorporation clause. Firstly, the doctrine itself may be questioned. On the one hand, if the freight was not paid by the receiver, then it would be difficult to infer the receiver's consideration and acceptance.[646] Likewise, if the goods were not delivered as the quality and quantity stated in the bill of lading, it would be unlikely to infer the shipowner's consideration and acceptance.[647] Moreover, the facts which infers offer, consideration and acceptance may not be limited to delivery and paying freight.[648] On the other hand, with the effective of the Carriage of Goods by Sea Act 1992, the deficiency of the section 1 of the Bill of Lading Act 1855 has been amended, and the title to sue is not affected by what property has been transferred to the consignee of a bill of lading.[649] As a result, any lawful holder of a bill of lading can sue the shipowner on the contract of carriage which is contained in or evidenced by the bill of lading.[650] Therefore, it is unnecessary to imply a contract in order to provide a holder with a title to sue.

Secondly, even if the doctrine was applicable and the relationship between the holder and the shipowner was governed by an implied contract which was on the terms of the related bill of lading, the incorporation clause in the bill of lading (in the implied contract) does not necessarily can bring in an arbitration clause in the charterparty. This is because the legal nature of bills of lading may firstly restrain

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645 *Brandt v Liverpool Brazil and River Plate Steam Navigation Co.* [1924] 1 K.B. 575*;* Lista (n 4) 31.
646 Todd, 'Brandt v Liverpool again' (n 270) 179, 180.
647 ibid.
648 ibid; The Aramis [1987] 2 Lloyd's Rep. 58.
649 Bassindale (n 242) 414.
650 Carriage of Goods by Sea Act 1992, s 2.

the terms and clauses can be incorporated in.[651] Specifically, only terms and clauses which are directly germane to shipment, carriage and delivery can be contained in the bills. However, an arbitration clause is a dispute resolution clause which does not belong to those subject-matters of bills of lading. This means that arbitration clauses cannot be incorporated in bills of lading by a generally worded incorporation. Moreover, the separability of an arbitration clause may hinder an incorporation of an arbitration clause because an arbitration clause in a charterparty may be regarded as a separate agreement. In bill of lading cases, a charterparty arbitration clause may be independent from the other clauses in the charterparty. In other words, this clause is an additional agreement between the parties concerning how to address disputed arising from the charterparty. Meanwhile, the legal effect of this clause would not be affected by the legal effect of the charterparty. It is especially the case in CIF contracts. As mentioned before, a CIF seller is responsible for concluding a charterparty with a shipowner, while a CIF buyer (the holder of a bill of lading) is not a party to the charterparty. In this category of cases, if an arbitration clause was stated in the charterparty, this arbitration clause should be interpreted as a personal agreement which exclusively addressing the disputes arising from the charterparty. Consequently, even if a contract was implied between the shipowner and the holder of a bill of lading, this implied contract may only contain terms an clauses directly germane to shipment, carriage and delivery, while an arbitration clause which is exclusively agreed between the parties to the charterparty cannot naturally contains in this contract.

Thirdly, as a result of principle of separability, it is difficult for the implied contract to include a charterparty's arbitration clause in that the parties' consent to this separate contract is absent. As mentioned above, a charterparty's arbitration clause only contains a consent expressed by the parties to this contract.

[651] See in Chapter 3.

Therefore, in order to bind a holder of the bill of lading (a third party to the charterparty), this holder's expressed consent to this clause is essential. It is important to note that because of principle of separability, this consent to arbitration should be distinct from the consent to general issues governed by a bill of lading. However, the implied contract may only contain a consent about contacting with the shipowner on the terms of the bill of lading, specifically, the subject-matters of bills of lading. It follows that principle of separability not only restrains an incorporation by general words, but also highlight an expressed consent from the holder of a bill of lading. In other words, although the implied contract doctrine may bind the holder to the contract of carriage contained in the bill of lading, such implied consent is unlikely to be extended to an arbitration clause.

Nevertheless, the holder's consent to this special incorporation may be implied from the fact that the holder of the bills of lading gained benefits from their transaction.[652] In other words, a holder of bills of lading may be estopped from avoiding an obligation to arbitrate if the holder received the bills of lading without raising any objection and obtained certain benefits because of receiving them.[653] This is because the arbitral estoppel suggests that a non-signatory may be compelled to an arbitration when the non-signatory gained certain benefits under the agreement containing the arbitration clause.[654] In bill of lading cases, the direct benefit gained by a holder of the bill of lading would derive from the delivered goods, as these goods enable the holder of the bill of lading to make benefits in further commercial transactions.[655]

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[652] Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 376, and 378.
[653] ibid 380; John Bassindale, 'Title to sue under bills of lading: the Carriage of Goods by Sea Act 1992' (1992) 7(10) JIBL 414, 416; J. Brian Casey, 'Re-examining the Arbitration Agreement: Is it Still Autonomous? The Common Law Canadian Experience' in *International Arbitration 2006: Backs to Basics?* (Kluwer Law International, 2007); Courtney (n 351) 585, and 587.
[654] Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (n 351) 26-29; Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 393 and 395; Carriage of Goods by Sea Act 1992, s3.
[655] The idea of direct benefit was confirmed in *Amkor Tech., Inc., v Alcatel Bus. Sys.,* 278 F.Supp. 2d 519 (E.D.Pa. 2003); Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 390 and 393.

English case law may indicate that it is common to imply a consent from a holder of the bill of lading by considering his/her conduct after receiving the bill of lading.[656] It can be noted that it has seldom been an issue as to whether or not a holder of the bill of lading should be bound by the incorporation clause in the bill of lading;[657] instead the core issue is whether or not the incorporation clause made specific reference to an arbitration clause.[658]

Preliminary, a holder of the bill of lading may be bound by an incorporation clause (incorporating general issues covered by a bill of lading), and the holder's consent to this incorporation may be implied on the basis of the acceptance of the bill. For example, in sale contracts concluded on CIF or CFR terms,[659] the buyer is not responsible for shipment, and therefore he/she does not engage in any negotiation and conclusion of a contract of carriage. However, the buyer needs to participate in the performance of the contract of carriage at the stage of delivery, as both the sale contract and the contract of carriage stipulate that the buyer is the receiver of the goods. In this situation, a transferred bill of lading links two strangers in one commercial transaction, namely a shipowner and a holder of the bill. Meanwhile, the relationship between the holder (the buyer) and the shipowner could be formed on the terms of the contract of carriage evidenced by the bill of lading. This is because, by issuing bills of lading to the shipper, the shipowner gives his/her authority to the shipper in respect of transferring the contract of carriage between them to a third party.[660] This means that the transferred bill of lading contains an offer to a lawful holder on the terms of a

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[656] Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 178.
[657] Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 390; Carriage of Goods by Sea Act 1992, s 3.
[658] Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 335.
[659] In The Incoterms® rules 2010, CIF (Cost, Insurance and Freight) means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination; CFR (Cost and Freight) means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination.
[660] *Lickbarrow v Mason* 100 E.R. 35, 40 (Buller J).

related contract of carriage, and the holder's acceptance of the bill may result in being a party to the contract of carriage. The buyer's acceptance may be implied by the payment he/she made to the shipper (the seller). On the one hand, the payment under CIF or CFR contracts includes the freight and making payment for freight is one of the holder's liabilities stated in a bill of lading.[661] On the other hand, the payment is made in order to exchange shipping documents, including the bill of lading. This means that by complying with the liability imposed by the bill, the buyer's consent to the terms and clauses in the bill of lading can be implied, and consequently the buyer becomes a lawful holder of the bill and is entitled to claim the delivery of the carried goods. Consequently, the buyer may be estopped from denying his/her role in the contract of carriage, as he/she gained certain benefits, namely the carried goods, from this contract.

However, due to the customary usage of bills of lading, the transferred terms and clauses may only be those directly germane to shipment, carriage and delivery.[662] It follows that an arbitration clause should be incorporated by an explicit reference, as such an incorporation is not naturally within the reasonable expectations of a holder of the bill of lading.[663] Moreover, since such an incorporation actually functions as an arbitration clause between the parties to the bill of lading, the separability of an arbitration clause may pose an equal effect on this incorporation clause.[664] As a result, an implied consent to arbitrate needs to be separately established.

Specifically, with an explicit reference, two contracts are evidenced by a bill of lading, namely a related contract of carriage and an incorporation clause incorporating an arbitration clause from the related charterparty to the bill of lading. It is suggested that unlike other substantive issues regulated in a contract

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[661] It is common for a bill of lading contains a clause stated: 'Freight payable as per Charter Party dated…' for example, in the 'Congenbill 1994' form. This form is a well-known standard form of bill of lading.
[662] *TW Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C.1. 6(Lord Loreburn LC and Lord Atkinson), 8 (Lord Gorell). See also in Treitel and Reynolds (n 11) 3-022.
[663] McMahon (n 108) 6; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 123.
[664] See in 5.3.2.

of carriage, an arbitration clause or an incorporation clause with an equivalent effect may not be simply assigned. This is because an arbitration clause is a personal choice and it contains a liability to arbitrate: these two factors in particular require consent from an assignee.[665] Nevertheless, such a consent may be implied from the factual circumstances in bill of lading cases.

Firstly, the nomination of an arbitration as the method of dispute resolution to disputes arising from the bill of lading is acknowledged by a holder of the bill of lading. On the one hand, the incorporation is explicitly worded in the bill of lading. On the other hand, the holder of the bill of lading accepts the bill as a whole. It has been agreed that an additional signature is not necessary to an arbitration clause if this clause is contained along with other terms and clauses in the same document.[666] This means that the parties' signatures represent a consent to all the clauses contained in a document, and it is unnecessary to make a distinction between the arbitration clause and the rest of the clauses in this situation. For this reason, when a holder of a bill of lading receives the bill clearly containing both the contract of carriage and the incorporation clause, the holder's implicit consent may equally be applied to both contracts. Meanwhile, for a document that customarily is not signed by the receiver, the acceptance of the document may facilitate an implied consent to terms and clauses contained in it.[667]

Secondly, the fact that a holder of the bill of lading sue the shipowner based on terms of the bill of lading may trigger the acceptance of the obligation contained in the bill.[668] According to s 3 of the Carriage of Goods by Sea Act 1992, a holder of a bill of lading shall be subject to the same liabilities under the contract of carriage evidenced by the transferred bill of lading if this holder takes the goods or makes a claim concerning the goods under the contract of carriage against the

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665 Steingruber (n 7) 9.22.
666 Arbitration Act 1996, s 5 and s 6; UNCITRAL Model Law, Option I, Article 7.
667 *The 'St. Raphael'* [1985] 1 Lloyd's Rep. 403; Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 405.
668 Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 390, 391 and 393.

shipowner.[669] The claim made by a holder against the shipowner is generally in relation to the goods, such as them being damaged and short-delivery.[670] By making such a claim against the shipowner, the 1992 Act compels the holder to comply with the liabilities in the related contract of carriage.[671] For this reason, the liability of an arbitration contained in the contract may subsequently be imposed on the holder of the bill of lading.[672] In other words, the holder's consent to arbitrate can be implied when the holder sues the shipowner in respect of the quantity and quality of the goods.

The ensuing issue is whether a holder of a bill of lading has an opportunity to object to the explicit reference to an arbitration clause.[673] Since the bill of lading normally travels much faster than the goods on board, its holder may have abundant time to react to this explicit reference. Consequently, consent to arbitrate may be implied if the holder of the bill of lading has failed to object to the explicit reference since he/she received the bill of lading, and subsequently receives the goods by presenting the bill of lading.[674] Therefore, the holder may be estopped from denying an arbitration specifically referred by the incorporation clause in the bill.[675]

Step 2: Establishing the Legal Effect of Implied Consent

After establishing a mutual consent to the incorporation of an arbitration clause, the shipowner and the holder of the bill of lading are consequently bound by the bill's specifically worded incorporation clause. Subsequently, principles of

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669 ibid 377; Carriage of Goods by Sea Act 1992, s 3; Özdel, 'Enforcement of Arbitration Clauses in Bills of Lading: Where Are We Now?' (n 51) 168.
670 *The 'Rena K'* [1978] 1 Lloyd's Rep. 545; *The 'Heidberg'* [1994] 2 Lloyd's Rep. 287; *The Delos* [2001] 1 Lloyd's Rep.703; *The Epsilon Rosa* [2003] 2 Lloyd's Rep.509; *The Kallang (No.2)* [2009] 1 Lloyd's Rep. 124; *The Wadi Sudr* [2009] 1 Lloyd's Rep. 666.
671 Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 393.
672 ibid.
673 Jagusch and Sinclair (n 308) 291, 295 and 319, it is suggested that the fact that the assignee has an opportunity to scrutinize an assignment of an existing arbitration clause in advance of accepting the assignment is crucial to decide whether the assignee should be bound by the referred arbitration clause.
674 Han Lixin, 'A Study on the Validity of Incorporating Arbitration Clauses in Charterparties into Bills of lading under Chinses Law' (2011) 17 The Journal of International Maritime Law, 226, 235.
675 *Deloitte Noraudit A/S v Deloitte Haskins & Sells, US,* 9 F.3d 1060, 1064 (2nd Cir. 1993).

incorporation and principles of assignment may facilitate the binding effect of the referred arbitration clause between the shipowner and the holder of the bill of lading.[676]

Specifically, an explicit reference in a bill of lading may amount to a sufficient notice. This reference to an arbitration clause is in a written form, and the wording of it provides clear and specific instructions about this unusual incorporation.[677] Therefore, it is reasonable to conclude that by using specific wording the shipowner has made sufficient attempts to alert the holder of the bill of lading about this incorporation of an arbitration clause.[678] Additionally, the binding effect of this sufficient notice may result from the contractual effect of an explicitly worded incorporation clause in a bill of lading. This is mainly because, as discussed above, an explicit reference to an arbitration clause is an independent contract in the first place. After the transfer of a bill of lading, this separate contract is assigned to the holder of the bill of lading, and therefore an explicitly worded incorporation clause becomes a contract between the shipowner and the holder of the bill of lading.[679] Such a special assignment may address issues arising from the automatic assignment of an arbitration clause, namely the issues concerning the consent of the assignee and the obligator,[680] as the transfer of an explicitly worded incorporation clause is within a shipowner's acknowledgement, and a holder's consent is can also be implied from the factual circumstances.[681]

According to the principles of arbitration in respect of its incorporation, this explicit reference may make the referred arbitration clause a part of the agreement between the shipowner and the holder of the bill of lading. Firstly, since the incorporation clause under discussion is specifically worded, it is then not difficult

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676 Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (n 351) 30.
677 ibid 81, para 165; Beale (ed) (n 293) 13-015; Jagusch and Sinclair (n 308) 292.
678 *The Heidberg* [1994] 2 Lloyd's Rep. 287, 309; Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 174, and 180.
679 Steingruber (n 7) 9.22.
680 ibid 9.16-9.22; Brekoulakis (n 301) 29.
681 Discussed in 5.4.1 and previous paragraphs in this section.

for a holder of the bill of lading to interpret this clause as a clause functioning as an arbitration clause between him/her and the shipowner. Secondly, the explicit reference also records the parties' consent. Even though the shipowner and the holder of the bill of lading do not sign the referred arbitration clause, their mutual consent to this clause can be disclosed by the fact of the holder's acceptance of such a specifically worded incorporation clause,[682] and the conduct discussed in the previous section. Meanwhile, the signature of a holder does not constitute a requirement to manifest the parties' intention, as bills of lading are customarily unsigned.[683] Therefore, the referred arbitration clause is the written agreement of arbitration between the shipowner and the holder of the bill of lading.[684]

It therefore follows that the implied consent of a holder of the bill of lading may underpin the contractual effect of an explicitly worded incorporation clause, and consequently a holder shall be bound by such an incorporation clause, specifically a referred arbitration clause.

5.5. The Consistency Test

After establishing the binding effect of specifically worded incorporation clauses in bills of lading, the following step is to interpret arbitration clauses referred by those incorporation clauses. This interpretation is used to ascertain how will the arbitration be carried out, since detailed agreements concerning the commencement and procedural aspects of the arbitration are contained in the original arbitration clause. At this stage, disputes may arise in a situation where the relevant clause in charterparty caused inconsistency when it was written in the context of a bill of lading. Such inconsistency can be divided into two situations: (1) when a written arbitration clause can be found by following an explicit reference, but part of its wording hinders its execution in respect to dealing

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682 *The 'St. Raphael'* [1985] 1 Lloyd's Rep. 403.
683 ibid; Pietro (n 473) 443; Born (n 123) 444.
684 *X.S.A.L., Y.S.A.L. and A v Z,* SARL and ICC Arbitral Tribunal, DFT 129 III 727; Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (n 351) 52 and 53; Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 406.

with disputes between the shipowner and the holder of the bill of lading; and (2) when no written arbitration clause is ready for an incorporation instructed by the clause in the bill of lading. The consistency test is designed to provide solutions for issues arising from these two situations, specifically, whether or not the relevant clause can be incorporated in the bill of lading if this clause caused inconsistency. 5.5.1 and 5.5.2 will discuss the above-mentioned two situations respectively.

5.5.1. When the Wording of the Referred Arbitration Clause Incurs Inconsistency

In this situation, the referred arbitration clause may pass the consistency test and be incorporated in the bill of lading once the wording that causes the inconsistency has been modified. For example, when the bill's incorporation clause is specific about incorporating an arbitration clause, but the wording of the referred arbitration clause limits its scope of application to disputes arising from 'this charterparty' or 'the parties to the charter', these words that incur inconsistency and uncertainty may be modified and construed as 'this bill of lading' and 'the parties to the bill'.[685]

Applying modification on the wording of a charterparty's arbitration clause is to suffice an explicit intention expressed in the bill of lading. This is because the intention of the parties to the bill of lading can only be evidenced by expressed clauses and terms in the bill.[686] Such an expressed intention can be evidenced by a specific nomination, such as 'including the arbitration clause', in the bill's incorporation clause, as it clearly demonstrates the parties' consent to arbitrate disputes arising from the bill of lading according to an arbitration clause in the nominated charterparty. As a result, in order to give effect to this expressed

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[685] In *The Rena K* [1978] 1 Lloyd's Rep. 545, the arbitration clause in the charterparty provides that this arbitration clause applies to disputes arising 'under this Charter', while the bill's incorporation clause specific about incorporating the arbitration clause from the charterparty. As a result, the arbitration clause was modified and incorporated in the bill of lading; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 121-124, and 157; Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 185-186; Baatz (n 8) 92.

[686] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 121.

intention, the arbitration clause in the charterparty should be modified and adapted into the context of a bill of lading accordingly.[687] Additionally, the parties' intention to incorporate an arbitration clause also can be expressed by the wording 'including the Law and Arbitration clause'. The construction of this wording is that the parties to the bill of lading consent to incorporate a charterparty's clause which is under the title of 'Law and Arbitration clause'. It is important to note that such an expression may equally indicate that the parties to the bill of lading intend to arbitrate.[688] This means that it has been widely accepted that an arbitration clause should be incorporated, if the incorporation clause specifically nominates the 'Law and Arbitration clause' in a charterparty. Consequently, it is legitimate to modify the wording of the arbitration clause so as to apply it to disputes arising from the bill of lading.

Such a modification is justified by the contractual effect of an expressed intention to arbitrate. In other words, the incorporation clause which contains an explicit reference to an arbitration clause in a charterparty becomes a contract between the shipowner and the holder of the bill of lading.[689] Consequently, this contractual intention to arbitrate expressed by this incorporation clause should be given legal effect and be able to prevail over the intention contained in the referred arbitration clause.[690] In other words, by qualifying an explicit reference to an arbitration clause as an independent contrate, legal principles underpinning two-contract doctrine can be applied. This means that the parties to the bill of lading should only be bound by the clauses agreed between them, namely those recorded in the bill of lading.[691] Therefore, the charterparty does not have

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[687] *The Rena K* [1978] 1 Lloyd's Rep. 545, 551; Wagener (n 11) 121; Tan and Pereira (n 473) 11; Allison and Dharmananda (n 470) 280; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 123 and 124.
[688] *The Delos* [2001] 1 Lloyd's Rep. 703, 705; *The Epsilon Rosa* [2003] 2 Lloyd's Rep. 509, 515; *The Kallang (No. 2)* [2009] 1 Lloud's Rep. 124, 137; Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 176-177; Lielbarde (n 17) 296.
[689] See discussion in Chapter 5.
[690] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 121 and 128.
[691] *Manchester Trust v Furness* [1895] 2 Q.B. 539. *The Verenna* [1984] 1 Q.B. 599, 608, 610 and 616.

contractual force over the parties to the bill of lading.[692] It follows that the charterparty's arbitration clause does not naturally affect the rights and liabilities of the parties to the bill of lading, unless these parties mutually agreed to incorporate this clause from the charterparty to the bill of lading.[693] Therefore, it is justified to modify the wording of the referred arbitration clause in order to suffice an expressed intention in the bill of lading.

Additionally, the function of incorporation may indicate that it is unreasonable for the inconsistency incurred by certain wording in the referred clause to hinder the aimed incorporation. It is suggested that the aim of using an incorporation clause is to facilitate commercial efficiency, as it avoids the trouble of copying the clause which serves the same purpose. This follows that using such contract drafting technique in a bill's clause concerning disputes resolution is to illustrate that parties to a bill of lading intend to employ the same disputes resolution as it was in a referred charterparty.[694] For example, when the parties to the bill of lading are explicit about incorporating a charterparty's arbitration clause, it means that these parties agree to arbitrate their disputes in a way that is stipulated in the referred charterparty. Therefore, the contractual intention, namely the purpose of this incorporation, is to nominate arbitration as the method of dispute resolution to settle disputes arising from the bill of lading. Comparatively, the wording in the referred arbitration clause, such as 'arising under this Charter', should be regard as a personal consideration made by the parties to the charterparty for their particular situation.[695] This personal consideration should be disregarded when it comes to giving effect to the contractual intention of the parties to the bill of lading, as it is irrelevant to the intention of those parties to the bill of lading and it may impose difficulties in sufficing the expressed intention in the bill.[696]

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[692] ibid; Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 186; Brekoulakis (n 301) 2.233.
[693] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 128
[694] ibid.; Özdel, 'Enforcement of Arbitration Clauses in Bills of Lading: Where Are We Now?' (n 51) 163.
[695] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 121.
[696] ibid 146.

By contrast, it is unreasonable to modify the wording of the arbitration clause in cases in which the bill's incorporation clause does not contain an expressed intention to incorporate the arbitration clause.[697] This is because without an explicit reference to an arbitration clause, the intention of the parties to the bill of lading concerning the incorporated clauses may be limited to the those directly germane to shipment, carriage and delivery.[698] In other words, in the situation where the bill's incorporation clause does not mention 'including the arbitration clause', the modification cannot be applied to the wording of the arbitration clause, such as 'arising under this Charter', as such a special incorporation is neither the intention of the parties to the bill of lading, nor subject-matters of a bill of lading.[699]

Therefore, from a legal perspective, the consistency test may not hinder the incorporation when a clear and explicit reference is made to an arbitration clause, as a modification will be made to the inconsistent words in the referred arbitration clause in order to give effect to the independent agreement between the shipper and the shipowner.[700]

Meanwhile, from the perspective of commercial common sense, when an explicit reference to an arbitration clause is transferred to a holder of the bill of lading, this modification shall be made in favour of the expectation of the holder of the bill of lading. By reading such an explicit reference in the assigned bill of lading, a holder of this bill of lading may reasonably expect that an arbitration clause will be applied to disputes arising from the bill of lading, because in the hands of a holder, the transferred bill is conclusive evidence of the terms and clauses contained in it.[701]

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[697] *Hamilton v Mackie & Sons Ltd.*, (1889) 5 T.L.R. 677; *T. W. Thomas & Co., Limited v Portsea Steamship Company, Limited* [1912] A.C.1; *The Njegos* (1935) 53 Ll.L. Rep. 286; *The Phonizien* [1966] 1 Lloyd's Rep. 150; *The Annefield* [1971] P. 168; *The Rena K* [1978] 1 Lloyd's Rep. 545, 550; *The Delos* [2001] 1 Lloyd's Rep. 703, 705; Mankabady (n 456) 56; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 123-124.
[698] ibid; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 146; This result derives from the legal nature and customary usage of bills of lading, discussed in Chapter 3.
[699] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 146.
[700] ibid 157.
[701] Wilson (n 2) 130.

5.5.2. No Arbitration Clause Exists in the Referred Charterparty

In the second situation, namely when an arbitration clause cannot be found in the relevant charterparty, the incorporation shall be disregarded, as the clauses contained in the charterparty cannot pass the consistency test. The most problematic situation is when the bill's incorporation clause makes an explicit reference to an arbitration clause, but only a litigation clause is provided by the relevant charterparty. The question is whether this litigation clause can replace the arbitration clause in order to suffice an intention of incorporation when an arbitration clause cannot be found in the charterparty.

To address this issue, the consideration should be firstly made in terms of differences between a litigation and an arbitration, although they are both dispute resolution clauses. It has been confirmed that choosing an arbitration may lead to a waiver of the parties' original legal remedies in litigation,[702] since this choice may entitle the chosen arbitration tribunal to have an exclusive jurisdiction over the disputes.[703] This means a valid arbitration clause may directly impact the parties' rights and liabilities concerning legal remedy. It is then important to distinguish an intention to arbitration from an intention to litigation.[704] Therefore, when the bill's incorporation clause demonstrates an explicit and expressed intention to incorporating an arbitration clause, it is unjustified as to using a litigation clause to replace an intended arbitration clause.

Secondly, it is unreasonable to separate the intention to 'incorporation of an arbitration clause' into two parts, namely 'incorporation' and 'an arbitration clause'. This means that the incorporation can only be given effect when the incorporated clause is an arbitration clause, and the incorporation may be disregarded when

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[702] *T.W Thomas & Co. Ltd. v Portsea Steamship Co. Ltd.* [1912] AC 1; Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 337.
[703] The UNCITRAL Model Law, Art 7(1); the New York Convention, Art II (1) and (2); the Arbitration Act 1996, s 6.
[704] McKendrick(ed), *Goode on Commercial Law* (4th edn. the Penguim Group 2010) 1300; Magklasi, 'A New Channel to the Heart of Incorporation of Clauses' (n 380) 399; Magklasi, '"Shaky" times for arbitration clauses: rethinking business common sense' (n 556) 202.

the only dispute resolution clause that can be found is a litigation clause. This is because the true construction of an explicit reference to an arbitration clause is that disputes arising from a bill of lading shall be arbitrated in the manner that is stipulated in the referred arbitration clause. In other words, incorporating a litigation clause is not the intention expressed by the bill's incorporation clause, and this expressed intention may not be varied by the intention of the parties to the charterparty,[705] especially when the parties to the bill are different from those to the charterparty. The rationale is identical to that explained in the first situation, and it should be applied consistently.

Therefore, such a replacement can hardly be justified in law and it may not be in line with commercial common sense.[706]

The resulting issues would arise from the consequences of a failure to incorporate an arbitration clause, particularly when a litigation clause is not allowed to be substituted. The issues can be divided into two questions: (1) whether or not these consequences are acceptable, and (2) whether such a failure of incorporation would result in a situation where no dispute resolution is applicable to disputes arising from the bill of lading, especially when a litigation clause is disregarded.

Compared to incorporating a litigation clause, a failure of incorporation is a more acceptable legal consequence. On the one hand, it is in line with the principle of incorporation. The process of facilitate an incorporation may embody a process of sifting clauses and terms from the referred document, and this process is based on the intention expressed by the bill's incorporation clause. For example, a generally worded incorporation clause does not include an intention to arbitrate,

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[705] *The Verenna* [1984] 1 Q.B. 599, 610; Magklasi, 'A New Channel to the Heart of Incorporation of Clauses' (n 380) 399; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 125.
[706] Magklasi, 'A New Channel to the Heart of Incorporation of Clauses' (n 380) 398; Magklasi, '"Shaky" times for arbitration clauses: rethinking business common sense' (n 556) 221.

and therefore an arbitration clause cannot be incorporated.[707] Consequently, an arbitration clause is disregarded when incorporating clauses from a charterparty to a bill of lading.[708] It follows that since a bill's incorporation clause specifically refers to an arbitration clause, it is in line with the principle of incorporation in terms of sifting the arbitration clause out from the clauses in the related charterparty.[709] As a result, the rest of clauses which are irrelevant to the issue of arbitration may be disregarded. For this reason, a litigation clause may be disregarded, as it does not directly relate to initiating an arbitration.

Additionally, it is a common legal practice to object to the incorporation of an arbitration clause when the referred arbitration clause cannot be found, even when the bill's incorporation clause is explicit about such incorporation. For example, the incorporation of an arbitration clause is disregarded in cases in which the referred arbitration clause has not been in a written form when the bill's incorporation clause was concluded.[710] It is held that an orally agreed arbitration clause cannot be incorporated on the basis of two considerations. In the first place, it cannot qualify as a valid clause between the charterer and the shipowner as it cannot meet the requirement of a valid arbitration clause in respect to 'an agreement in writing'.[711] Additionally, the transferability of bills of lading may even highlight the requirement of a written agreement of arbitration, since it may have essential impact on commercial certainty, especially for the interests of a holder of the bill of lading who can only ascertain the rights and liabilities transferred to him/her by reading the terms and clauses in an ascertainable form, namely a written form.[712]

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[707] *T.W Thomas & Co. Ltd. v Portsea Steamship Co. Ltd.* [1912] AC 1; Treitel and Reynolds (n 11) 3-033, and 3-034;
[708] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 99.
[709] Magklasi, '"Shaky" times for arbitration clauses: rethinking business common sense' (n 556) 218.
[710] *The Heidberg* [1994] 2 Lloyd's Rep. 287, 309; *The Epsilon Rosa* [2003] 2 Lloyd's Rep. 509.
[711] *The Heidberg* [1994] 2 Lloyd's Rep. 287, 310; Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 336.
[712] ibid, 310; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 64; Magklasi, '"Shaky" times for arbitration clauses: rethinking business common sense' (n 556) 203; Baatz (n 8) 90.

To conclude, the incorporation cannot be supported when the factual circumstances indicate that there is no valid arbitration clause contained in the referred agreement.[713] For this reason, since the fact that a litigation clause exists in the relevant charterparty cannot change the fact that there is no valid arbitration clause between the charterer and the shipowner, the incorporation of an arbitration clause shall be disregarded on the basis that no arbitration clause is readily available for the aimed incorporation. Meanwhile, incorporating a litigation clause cannot be a compromised solution, unless it is a newly expressed agreement between the holder of the bill and the shipowner. This is because as it proposed in the first part of the new paradigm, an explicit reference to an arbitration clause amount to a contract between the shipowner and the holder of a bill of lading, and this means that parties' intention to arbitrate is clear and binding.

It then seems that the absence of a corresponding arbitration clause may lead to a situation where no dispute resolution clause can be incorporated in a bill of lading. This situation can especially be a problem when there is a litigation clause in the related charterparty. English courts prefer to incorporate a litigation clause, in that this alternative may avoid the result that no dispute resolution clause can be applied to disputes arising from the bill of lading; an English court jurisdiction clause is also an ancillary clause concerning the choice of law and dispute resolution.[714] However, it is questionable to address this issue in such a manner. In the first place, as discussed above, the differences between an arbitration clause and a court jurisdiction clause are apparent, and therefore an arbitration clause cannot be replaced without an expressed consent.

Meanwhile, such replacement may contradict the established rule of incorporation. From a rigid perspective, in cases in which an arbitration clause

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[713] ibid.
[714] *The Channel Ranger* [2013] 2 CLC 480, 493.

cannot be found in the relevant charterparty, the bill's specifically worded incorporation clause may be regarded as invalid because it is inoperative, unless it can be proved that it was an obvious mistake made by the parties.[715] By invalidating such an incorporation, there will be no valid arbitration clause between the shipowner and the holder of the bill of lading. Consequently, the parties to the bill of lading do not waive their original legal remedies, and their disputes can be solved by litigation. Meanwhile, an arbitration still can be nominated as the dispute resolution, as an arbitration agreement can be concluded after the cause of the dispute.

Although this consequence is in line with legal principles, it may have drawbacks, such as prolonging the process of determining the proper dispute resolution. It is then necessary to consider such an inconsistency from a different perspective. Alternatively, compared to the rigid perspective, it is more legally convincing and commercially attractive to facilitate the reconciliation of a specifically worded incorporation clause with a court jurisdiction clause. To illustrate, a court jurisdiction clause may play a supportive role to a specifically worded incorporation clause, and consequently an arbitration clause would be enforceable to the relationship between a shipowner and a holder of the bill of lading[716]. This is because it has been established that when an arbitration clause and an exclusive court jurisdiction clause are contained in a document, the court jurisdiction clause does not invalidate the arbitration clause.[717] Instead, this court jurisdiction clause may be a supportive role in safeguarding the operation of an arbitration procedure and the enforcement of an arbitration award.[718] For instance, in *Ace Capital Ltd v CMS Energy Corporation*,[719] it was held that a contract should be construed as a whole, and every single clause should be

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[715] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 146.
[716]Courtney (n 351) 593: '… court assistance is useful to ensure the enforcement of the agreement and the arbitral award.' Wilson (n 2) 343.
[717] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 157.
[718] ibid.
[719] *Ace Capital Ltd v CMS Energy Corporation* [2009] Lloyd's Rep IR 414.

equally weighted, and yet a priority should be given to clauses that are specifically agreed by the parties.[720] For this reason, since an arbitration clause is a self-contained contract,[721] and since its speciality can be identified by an expressed agreement about this matter, the exclusive English jurisdiction clause may play a role in terms of specifying the governing law of the arbitration clause and determining the court's supervisory jurisdiction,[722] rather than excluding the jurisdiction of the chosen arbitral tribunal.[723] Similarly, in *Sul América Cia Nacional de Seguros SA and Others v Enesa Engenharia SA and Others*,[724] it was held that the exclusive jurisdiction provision can be reconciled by the mediation and arbitration provisions. Specifically, the court jurisdiction clause enables the parties to resort to the support of a court in order to compel an arbitration and to recognise and enforce an arbitral award, or to dispense with arbitration if the parties agree to do so.[725]

In the present situation, as discussed above, a specially worded incorporation clause may itself equal to an arbitration clause. This means an incorporation clause of this kind may amount to a self-contained contract which contains the parties' specific consent to arbitrate. Therefore, this specific agreement should prevail over the relevant court jurisdiction clause. Meanwhile, based on the above-mentioned case law, the court jurisdiction clause does not necessarily invalidate the contract of incorporating an arbitration clause or exclude the jurisdiction of an arbitration. As a result, the court jurisdiction clause may primarily guarantee the execution of the agreed arbitration and the recognition and enforcement of an award.[726] Meanwhile, it also provides a ground for the parties to dispense with an arbitration if the parties mutually agree to waive their right to

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[720] ibid, 428; Magklasi, 'A New Channel to the Heart of Incorporation of Clauses' (n 380) 399.
[721] *Paul Smith v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 (Steyn J).
[722] ibid.
[723] ibid; *Axa Re v Ace Global Markets Ltd* [2006] Lloyd's Rep IR 683 (Gloster J).
[724] *Sul América Cia Nacional de Seguros SA and Others v Enesa Engenharia SA and Others* [2012] 1 Lloyd's Rep. 671.
[725] ibid 682.
[726] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 157.

an arbitration. Additionally, sufficing the specific intention in the bill's incorporation clause may avoid a conundrum in which the court may find the arbitration clause valid and therefore return the case back to arbitrators.[727]

5.6. The Case *The Channel Ranger*[728]

The decision in this case indicates that an incorporation clause that is explicit about incorporating an arbitration clause from a charterparty to a bill of lading does not necessarily result in an incorporation of an arbitration clause.[729] Such a failure of incorporation results from a fact that the related charterparty only provides an English law and English Courts jurisdiction clause. Therefore, it is held that this English Courts jurisdiction clause replaces an arbitration clause, and consequently disputes arising from bills of lading should be submitted to English Courts.

This decision may be questionable as to why an English Courts jurisdiction clause in a standard charterparty can bind the parties to the bill of lading. The judicial reasoning is that since the referred charterparty was on 'Amwelsh form 1979', a standard form of charterparty commonly used in coal shipment, it is reasonable to maintain that a holder of the bill of lading can be informed about this jurisdiction clause if an incorporation clause in this bill makes a clear reference to this standard form of charterparty. For this reason, it is not difficult for a holder of a bill of lading to know that 'The law and Arbitration Clause' in the Congenbill 1994 form which was used in this case, actually results in an incorporation of an English Courts jurisdiction clause.[730] Moreover, in order to confirm the incorporated terms and the context of these terms, it is important for a holder of the bill of lading

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[727] *Buckeye Check Cashing, Inc. v Cardegna* 546 U.S. 440 (2006), according to the Principle of Kompetence-Kompetence, an arbitral tribunal may have exclusive jurisdiction over the issue as to the validity of an arbitration clause or an incorporation clause having an equivalent effect; Allison and Dharmananda (n 470) 274.

[728] *The Channel Ranger* [2013] 2 CLC 480.

[729] ibid; Baatz (n 8) 94.

[730] *The Channel Ranger* [2013] 2 CLC 480, 492; Özdel, 'Enforcement of Arbitration Clauses in Bills of Lading: Where Are We Now?' (n 51) 162.

to take the initiative to read the referred charterparty.[731] Consequently, in this case the parties to the bill of lading shall be bound by an English Courts jurisdiction clause, rather than by a Law and Arbitration clause. However, it is questionable to establish a nexus between a holder of a bill of lading and the referred arbitration clause merely on the basis that this referred arbitration clause is accessible.[732] This is because such a knowledge of the English Courts jurisdiction clause does not necessarily contain the bill of lading's parties' consent to change the intention to arbitrate (expressed in the bill of lading) to an intention to litigate (contained in the charterparty).[733]

To illustrate, the holder of the bill of lading and the shipowner's intentions should primarily be found in the bill of lading, especially in two-contract cases.[734] It follows that the incorporated terms should be selected based on the construction of the incorporation clause, and an arbitration clause should be incorporated by explicit wording.[735] In *The Channel Ranger*,[736] an intention to arbitrate disputes arising from bills of lading was clear and explicit, as both a pre-printed incorporation clause on the reverse and a typed clause on the face literally provided that a law and arbitration clause would be incorporated. Consequently,

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[731] *The Channel Ranger* [2013] 2 CLC 480, 494. However, the fact that a holder of bill of lading cannot have access to the referred bills of lading may add difficulties in terms of requiring a holder to read the referred clause by themselves. This fact is acknowledged in Özdel, 'Incorporation of Charterparty Clauses into Bills of lading: Peculiar to Maritime Law?' (n 12) 181, and 182.

[732] Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 533, it suggests that a legal relationship between the parties should be disclosed; Lista, 'Knocking on heaven's door: in search for a legal definition of the bill of lading as a document of title' (n 4) 275.

[733] Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 393. In this article, the author primarily questioned the judgement as it is against the good law settled down in *The Varenna*; Magklasi, 'A New Channel to the Heart of Incorporation of Clauses' (n 380) 398.

[734] *The Varenna* 1 QB 599, 608; Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 332; Brekoulakis (n 301) 2.233 and 2.234; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 146.

[735] *The Fedaeral Bulker* [1989] 1 Lloyd's Rep.103; *The Varenna* 1 QB 599; *Siboti K/S v BP France SA* [2004] 1 CLC 1; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 87, and 111; Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 179.

[736] *The Channel Ranger* [2013] 2 CLC 480.

in the hands of the consignee of the bill of lading an arbitration clause would be incorporated in the first instance.[737]

The legal effect of this specific incorporation can be reinforced by the contractual effect of an incorporation clause of this kind. As discussed above, because of its separability of an arbitration clause, an incorporation clause that is explicit about incorporating an arbitration clause from a charterparty to a bill of lading would amount to an independent contract binding original parties to the bill of lading. This separate contract may be subsequently assigned to the consignee of the bill of lading, and therefore binds this consignee.

Consequently, the shipowner may be estopped from denying the Law and Arbitration Clause. Since the shipowner was not only an original party to those two specifically worded incorporation clauses in the bill, but also a party to the English law and English Courts jurisdiction clause, it is unreasonable to release the shipowner from his/her promise in the latter contract (incorporation clauses), as the shipowner was contracted to an English litigation clause and he/she can know that there was no arbitration clause in the referred charterparty.[738] Therefore, the incorporation clause may amount to a renewal of contract, which means that a shipowner would like to make the dispute resolution in bills of lading different from that in the charterparty. Meanwhile, the *contra proferentem* may be supportive in this case, which means that the interpretation of the conflict between an expressed incorporation and the related charterparty clause may be in favour of the holder of the bill of lading.[739]

The question that follows is how an intention to arbitrate in a bill of lading can reconcile with the intention to litigate in a referred charterparty. As discussed

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[737] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 157; Magklasi, 'A New Channel to the Heart of Incorporation of Clauses' (n 380) 398.
[738] Li (n 72) 126, where it is suggested that the shipowner should be imposed a liability to disclose the context of the referred clauses to the holder.
[739] Beale (ed) (n 293) 13-095; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 94; Brekoulakis (n 301) 6.90; Wilson (n 2) 248.

above, the English Law and English Courts jurisdiction clause may play a supportive role in respect to safeguarding an arbitration.[740]

5.7. The New Paradigm Part I: When the Holder of a Bill of Lading is a Third-party to the Related Charterparty

Due to the complexity of using bills of lading, the thesis divided the new paradigm into two parts, and this chapter focus on the situation in which the bill of lading is transferred to a third-party holder (a stranger to the related charterparty).

To conclude, in this part of the new paradigm, it is a two-step process to bind a holder of the bill of lading to a referred arbitration clause. The first step is to establish that a specifically worded incorporation clause amounts to an independent contract and that it has a legal effect in terms of incorporating a charterparty's arbitration clause into a bill of lading. As a self-contained contract, such an incorporation clause is transferred to the holder of the bill of lading. This transfer is facilitated by the transfer of the bill of lading, since this incorporation clause is contained in the transferred bill of lading. Therefore, the holder may be bound by this contract by accepting the bill of lading, although the holder does not sign the contract of incorporation. This is because an implicit consent may be proved by the holder's acceptance of a transferred bill of lading, especially when the holder complies with the obligation contained in the transferred bill of lading or the holder gains certain benefits from the acceptance of the transferred bill of lading. As a result, the holder may be estopped from denying the obligation embodied in the explicit refence to an arbitration.

The second step is to facilitate the incorporation. Since the contractual effect of a specifically worded incorporation clause can be supported by principles of incorporation and principles of arbitration, the referred arbitration clause may have a decisive effect concerning the incorporation, and subsequently bind the

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[740] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 157.

holder of the bill of lading and the shipowner. Consequently, the consistency test would regard the bill's incorporation clause as the primary document, and due modification should be made to the referred arbitration clause in order to realise the expressed intention in the bill of lading. In cases in which an arbitration clause does not exist, it would be better to have the courts play a supportive role as to effectuate the parties' intention to arbitrate.

By applying this part of the new paradigm, the difficulties and problems faced by current legal practice can be resolved in the following ways: (1) the consistency will be able to provide a consistent result; (2) a predictable result concerning disputes resolution will be available to a lawful holder of a bill of lading.

To elaborate, the essence of the first part of the new paradigm is that an explicit reference to an arbitration clause in a bill of lading is an independent contract. This essential point may underpin the judgement in the cases of *The 'Athena' (No 2)*.[741] Specifically, although in this line of cases judgments suggest that a separate consideration should be given to two-contract cases and therefore the bill-centric approach should be applied, they remain unclear as to the legal grounds supporting the binding effect of an explicitly worded incorporation clause in a bill of lading. Consequently, these judgments may be subject to questions, such as (1) why a holder of the bill of lading should be bound by this incorporation clause, since a holder neither has knowledge of the referred arbitration clause nor express a consent to this incorporation clause; and (2) why a bill-centric approach is preferable, since a flexible approach has also been accepted in case law, such as the judgement in *The Annefield*.[742]

By apply the new paradigm, these two questions may be properly answered, and can be illustrated from two angles.

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[741] *The 'Athena' (No 2)* 1 Lloyd's Rep. 280.
[742] *The Annefield* [1971] P168.

Firstly, by unveiling a holder's true identity, bill of lading cases are categorised into two situations, and different solutions are applied to the respective situations. This separate treatment contributes to forming the legal basis for giving a binding effect to a specifically worded incorporation clause in a bill of lading that is transferred to a third party to the related charterparty. Specifically, because of this classification, the situation in *T W Thomas* is distinct from that in *The Merak*. As a result, the judgement in *T.W Thomas* that an arbitration clause can only be incorporated in by an explicit reference in a bill of lading can be justified as a general rule applied in cases where a holder of the bill of lading is not the charterer. This means that the different judgement in *The Merak* would not be an obstacle preventing the judgment in *T.W Thomas* to be a general rule, as the situation in *The Merak* is in a different category, and its judgement cannot be compared to that in *T. W. Thomas.* After confirming the application scope of the general rule, this research investigated both the practical and theoretical grounds for the strict rule as to 'an explicit reference must be made', which forms the legal basis for the contractual feature of a specifically worded incorporation clause. This conclusion may answer the first question arising from the case of *The Athena*.

Secondly, the contractual effect of a specifically worded incorporation clause also justifies the application of a bill-centric approach, namely that contractual intention is expressed by such an incorporation clause which is contained in the bill of lading. In other words, an intention of the parties to a bill of lading can only be found in the bill of lading, while the clause in the related charterparty is less relevant.[743] This conclusion may clear doubts arising from the judgement in *Annefield*,[744] in which it is suggested that an intention can either be found in a bill of lading or in a charterparty. The main problem of this judgment is that it does not draw different considerations to different situations, as it may make this

[743] Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 391-392.
[744] *The Annefield* [1971] P168.

judgement subject to the argument which is based on the autonomy of arbitration. Specifically, this judgment lacks legal support in cases where a holder of the bill of lading is a third party to the related charterparty, and an intention to incorporate an arbitration clause from the charterparty to a bill of lading can only be identified in the charterparty. A holder of the bill of lading may have a good arguable case, as it can be claimed that this holder neither had knowledge, nor expressed acknowledgment, of the incorporation. Therefore, the new paradigm provide a clear answer to, as well as legal grounds for, the application scope of the bill-centric approach, which may justify the judgement in the line of cases that includes *The Varenna*,[745] and *The Federal Bulker*.[746]

Moreover, the first part of the new paradigm provides instructions about what is a qualified 'agreement in writing', which may justify the judgements in the cases of *The 'Nerano'*,[747] and *The 'Epsilon Rosa'*.[748] On the one hand, an explicitly worded incorporation clause on the reverse of a bill of lading may prevail over a generally worded incorporation clause on the face of the bill. By qualifying an explicitly worded incorporation clause as a contract between the shipowner and the holder of the bill of lading, this clause may legally represent parties' knowledge of such a special incorporation as well as parties' acknowledgement of this incorporation. Comparatively, the fact that such a clause is on the reverse of the bill tends to be less irrelevant. Therefore, a specific contract about an arbitration on the reverse may prevail over a general worded contract of jurisdiction on the face.

On the other hand, the question as to whether or not an incorporation contained in a recap can be qualified as 'agreement in writing' is raised by comparing it with the judgment in *The Heidberg*,[749] especially as the invalidity of an oral arbitration

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[745] *The Varenna* [1983] 1 Q.B. 599.
[746] *The Federal Bulker* [1989] 1 Lloyd's Rep. 103.
[747] *The 'Nerano'* [1996] 1 Lloyd's Rep.1; full discussions of these two cases are in 6.1.3.
[748] *The 'Epsilon Rosa'* [2003] 2 Lloyd's Rep. 509.
[749] *The Heidberg* [1994] 2 Lloyd's Rep. 287.

agreement was confirmed by the leading case of *Aughton Ltd v M.F. Kent Service Ltd*.[750] By referring to s5 of the Arbitration Act 1995, the definition of 'an agreement in writing' is expanded. It is then possible for qualify an arbitration clause which is contained in a telex recap to qualify, since a clear and explicit intention to arbitrate can be identified and using a telex recap is a customary practice in the shipping industry.

An 'agreement in writing' embodies two specific requirements. The first is based on its literal meaning, namely that both a referred arbitration clause and the incorporation clause should be in an ascertainable form, and they cannot be oral agreements. The second meaning is that these clauses should contain the parties' consent. However, such a consent does not have to be verified by a signature, and commercial custom or relevant circumstances can also be used to evidence such consent.

The new paradigm may therefore provide a different perspective to the case of *The Channel Ranger*.[751] Firstly, the solution may provide legal bases justifying a binding effect of the explicitly worded incorporation clause in the transferred bill of lading. Specifically, this clause amounts to a contract between the holder and the shipowner. Because of this contractual effect, the specifically worded incorporation clause in the bill of lading is defined as a renewal of contract if the intention contain in the bill of lading was different from the intention expressed in the referred charterparty. This means that the arbitral estoppel is applied, and consequently the shipowner cannot deny his/her obligation in an arbitration, especially when the holder of the bill of lading has acted in reliance on this specifically worded contract. Therefore, the new paradigm may prevent the shipowner from taking advantage of his/her position (making a specific reference

[750] *Aughton Ltd v M.F. Kent Services Ltd* 1993 WL 963255.
[751] *The Channel Ranger* [2013] 2 CLC 480.

to an arbitration clause, while being fully aware that the related charterparty does not have an arbitration clause) to avoid an arbitration with a third-party holder.

Secondly, the solution suggests an approach to address the conflict between the arbitration clause (in the form of a specifically worded incorporation clause) in a bill of lading and a court jurisdiction clause in the referred charterparty, namely a court playing a supportive role to facilitate an arbitration and enforce an arbitral award. By interpreting a court jurisdiction clause in this manner, the English law and court jurisdiction clause does not necessarily incur conflict with the specifically worded incorporation clause in the bill of lading. In this case, a third-party holder's reasonable expectation based on the clause in the transferred bill of lading still can be legally supported. Therefore, the new paradigm may provide certainties and increase efficiency from both legal and commercial perspectives.

The following chapter focuses on the second part of the new paradigm, and the question to be discussed is that what would be the proper nexus applied to the rest of cases, namely when a holder was not a complete stranger to the referred arbitration clause. For example, this holder is a party to the related charterparty or a holder can know the referred arbitration clause. Together with the discussion in this chapter, a new paradigm would be established.

Chapter 6

The New Paradigm Part II: When the Holder of a Bill of Lading Can Have Access to the Referred Arbitration Clause

6.1. The Legal Effect of the Bill's Incorporation Clause

The fact that the referred arbitration clause is accessible to the holder of a bill of lading is used as a grounding from which to bind the holder, as this access provides the holder with an opportunity to know about an incorporation of an arbitration clause.[752] However, a bill's incorporation clause, which is only a channel of providing information, cannot directly used to establish a nexus which leads to a sufficient incorporation of an arbitration clause.[753] This is because it is crucial for a legally effective nexus to embody the holder's consent to arbitrate when he/she was informed by the bill of lading.[754] Therefore, in order to establish a nexus, facts revealing a holder's intention to incorporate the referred arbitration clause should be additionally considered. This nexus may subsequently have a legal effect of binding the holder of a bill of lading to an incorporation clause which aims to incorporate an arbitration clause from a charterparty to a bill of lading.[755]

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[752] Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 339; Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 391.

[753] See in Chapter 5, a sufficient nexus should be explicitly worded about the incorporation of an arbitration clause, and in order to give legal effect to this explicitly worded clause, certain considerations should be given to principles of implying contract and principle of separability; Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 39, it suggests that a nexus should be established upon three elements and providing a notice of the incorporation of an arbitration clause alone is not sufficient to establish a nexus.

[754] Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 21; Park, 'Non-signatories and International Contracts: An Arbitration's Dilemma' (n 454) 1; Baatz, 'Should third parties be bound by arbitration clauses in bills of lading?' (n 8) 85; Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 393.

[755] An expressed or an implied intention to arbitrate disputes arising from a bill of lading may manifest the legal relationship between a holder of the bill of lading and the shipowner, a holder's knowledge about this kind incorporation and the rights and obligations transferred to a holder. These three factors are essential to

The following sections will examine the relevant facts and establish a nexus which may determine the fate of the incorporation of an arbitration clause from a charterparty to a bill of lading in cases where a holder can have access to the referred arbitration clause.

As discussed in previous chapters, a holder generally cannot be sufficiently informed about the incorporation of an arbitration clause, because bills of lading are the only available shipping documents.[756] However, there are two exceptional situations. Firstly, when a holder of the bill of lading is an original party to the referred arbitration clause. For example, when a sale contract is concluded under FOB terms in which the buyer (holder of the bill of lading) is obliged to arrange the shipment and therefore the holder can have access to the charterparty as he/she is the original party to this contract.[757] The second exception is when the referred charterparty or a related bill of lading is on a standard form in which terms and clauses are written by certain well-known organisation and such form is accessible to the public.[758] The question as to whether these two situations can be a nexus linking an incorporation of an arbitration clause with a holder of the bill of lading will be analysed respectively in the following sub-sections.

6.1.1. When the Holder of a Bill of Lading is an Original Party to the Referred Arbitration Clause

In this category of cases, the proper nexus should be the charterparty's arbitration clause, and this nexus has a legal effect in respect of binding the holder to this

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establish an effective nexus in terms of binding a third-party to an arbitration clause. See in Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 39-40.

[756] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 182.

[757] In The Incoterms® rules 2010, 'Free On Board' means that the seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards.

[758] Baatz, 'Should third parties be bound by arbitration clauses in bills of lading?' (n 8) 86.

arbitration clause.[759] In other words, the holder of a bill of lading and the shipowner shall be bound by the charterparty's arbitration clause, unless this clause is annulled by these two parties.[760] Specifically, the governing contract, including the dispute resolution clause, between the holder and the shipowner is contained in the related charterparty, because the holder is an original party, namely the charterer, in the charterparty. However, an incorporation clause in the related bill of lading is merely an evidential statement.[761] In this case, the legal principle underpinning the binding effect of the charterparty's arbitration clause is within contract law. Therefore, when the wording of the incorporation clause is inconsistent with the wording of the arbitration clause, the modification should generally be made to the bill's incorporation clause,[762] as the legal effect of this incorporation clause is inferior to that of the dispute resolution clause contained in the referred charterparty.

To illustrate, the one-contract doctrine may shed light on bill of lading cases in this situation. A one-contract case refers to one in which the parties to the contract containing the referred arbitration clause are the same parties to the contract containing the incorporation clause.[763] The one-contract doctrine gives effect to an incorporation by examining the wording of the referred arbitration clause, while the wording of the incorporation clause may be less relative.[764] The one-contract doctrine indicates that since the engaged parties remain the same, it would be unnecessary to adhere to the restrictive rule of incorporating an ancillary clause, such as an arbitration clause.[765] The rationale of this doctrine is that the parties'

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[759] Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 533.
[760] McMahon (n 108) 3.
[761] ibid; Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 178.
[762] For example, in *The Merak* [1964] 2 Lloyd's Rep. 527, the incorporation clause in the bill of lading was interpreted in a manner by which the intention expressed in the related arbitration clause was given effect.
[763] *The Athena (No 2)* [2007] 1 Lloyd's Rep. 280, 289; *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2012] 1 CLC 448; *Stellar Shipping Co LLC v Hudson Shipping Lines* [2012] 1 CLC 476; Brekoulakis (n 301) 2.183.
[764] Steingruber (n 7) 9.69.
[765] Allison and Dharmananda (n 470) 277; Tan and Pereira (n 473) 14; Robert Merkin and Louis Flannery, *Arbitration Act 1996* (5th edn, Informa Law from Routledge 2014) 34.

intention to choose an arbitration as the dispute resolution in the latter contract can be evidenced by an arbitration clause (that is explicit in its application to a following contract) in the previous contract concluding between the same parties, and it would be rightful to hold that the parties are fully aware of the arbitration clause as well as its incorporation, and they have also expressed consent to it.[766]

Moreover, it is held that the purpose of an incorporation should be in line with a commercial sense. Specifically, an incorporation clause is used to improve commercial efficiency as it saves the time to re-writing out all the clauses out verbatim.[767] This reasoning would be particularly applicable to one-contract cases, because it is efficient for businessmen to utilise a referential incorporation in order to avoid repeating the referred clauses that have been clearly and carefully drafted in previous contracts with the same counterparty.[768]

The existing authority generally categorised the cases of bills of lading into two-contract cases.[769] However, in conjunction with the rationale of the one-contract doctrine, it seems that this doctrine may be applicable to some bill of lading cases, particularly when the holder of a bill of lading is proved to be an original contractual party to the referred arbitration clause. For example, when a shipment is performed under a sale contract concluded on FOB terms, or when a bill of lading containing an incorporation clause is eventually transferred back to the charterer. In these two situations, the holder of a bill of lading turns out to be an original contractor to the charterparty. Accordingly, if this charterparty contained

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[766] *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS V Sometal SAL*. [2012] 1 CLC 448, 468; Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 391; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 13 and 18; Park, 'Non-signatories and International Contracts: An Arbitration's Dilemma' (n 454) 25.

[767] *Siboti K/S v BP France SA* [2004] 1 CLC 9.

[768] Mankabady (n 456) 54.

[769] The concept of two-contract cases is defined in *The Athena (No 2)* [2007] 1 Lloyd's Rep. 280, and it refers to those situations in which at least one party to the secondary contract is different from the parties to the primary contract. Because of this category, an incorporation clause contained in a bill of lading is generally regarded as the primary clause to be considered for finding the parties' intention to arbitrate: *The Rena K* [1978] Lloyd's Rep. 545; *SKIP A/S Nordheim and Others v Syrian Petroleum Co. Ltd. and Another* [1983] 1 Q.B. 599; *The Federal Bulker* [1989] Lloyd's Rep. 103; *Siboti K/S V BP France SA* [2004] 1 CLC 1; Pietro (n 473) 445; Tweeddale and Tweeddale, 'Incorporation of Arbitration Clauses Re-visited' (n 473) 658; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 108.

an arbitration clause, it would be reasonable to bind the holder to the arbitration clause regardless of the wording of the bill's incorporation clause.[770] There are two grounds supporting this proposition. Firstly, in this situation, the holder of a bill of lading is fully aware of the incorporation of an arbitration clause and the context of the referred arbitration clause in the charterparty. Secondly, the holder's personal commitment to this clause can be evidenced by his/her signature on the charterparty. In cases where the signature on the charterparty does not coincide with the holder's name, this holder's true identity as an original party to the charterparty may be disclosed by referring to the principle of agency or the doctrine of group of companies.[771] The following paragraphs will discuss these two grounds in detail.

Ground 1: The holder can have the knowledge of the incorporation of an arbitration clause.

In other words, when a holder is an original party to that charterparty, such a holder can have a copy of the charterparty. Therefore, the arbitration clause in this charterparty is within the holder's knowledge, and this fact cannot be questioned even the bill's incorporation clause is the generally worded. For this reason, the general wording in a bill's incorporation clause would be construed as a version that is designed to result in an inclusive incorporation.

In *Modern Building Wales Ltd. v Limmer and Trinidad Co. Ltd*,[772] it was held that:

> 'Where parties by an agreement import the terms of some other document as part of their agreement those terms must be imported in their entirety, in my judgment, but subject to this: that if any of the imported terms in any way

[770] McMahon (n 108) 5; Tweeddale and Tweeddale, 'Incorporation of Arbitration Clauses Re-visited' (n 473) 660; Li (n 72) 123.
[771] Courtney (n 351) 586-589; Steingruber (n 7) 144; Brekoulakis (n 301) 27, 46; Bagot and Henderson (n 581) 437 and 447.
[772] *Modern Building Wales Ltd. v Limmer and Trinidad Co. Ltd* [1975] 2 Lloyd's Rep.318.

conflicts with the expressly agreed terms, the latter must prevail over what would otherwise be imported.'

This means that the incorporated contract forms a part of the latter contract, and therefore it will equally bind the contractual parties.[773] Meanwhile, an incorporated clause may be subject to a modification in order to comply with a renewal of contract, when this incorporated term incurs instant conflicts with the clause contained in the latter contract.[774] Therefore, it seems to the judge that the general wording in this case, namely 'in full accordance with the appropriate form for nominated Sub-Contractors', should be sufficient and wide enough to import the referred contract (the green form) as a whole, including its arbitration clause, which means that a specific reference to incorporate the arbitration clause is unnecessary.[775]

Similarly, when a lawful holder is the charterer, the parties to the bill of lading are the same parties to the charterparty. It is then reasonable to hold that the parties have acquainted themselves with the referred contract, and the arbitration clause should be within the parties' knowledge. Therefore, the generally worded incorporation clause may be capable of incorporating an arbitration clause, and it would be persuasive to conclude that parties deliberately used general wording in order to incorporate the referred contract as a whole.[776]

For instance, in *The Merak*,[777] the holder of the bill of lading was the original charterer, and the incorporation clause did not make an explicit and clear reference to the charterparty's arbitration clause. It was held that even though the incorporation clause itself was not sufficient to incorporate an arbitration clause,[778] the fact in this case may demonstrate an implied intention to arbitrate.

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[773] ibid 323.
[774] ibid.
[775] ibid; Merkin and Flannery, *Arbitration Act 1996* (n 765) 34.
[776] Tan and Pereira (n 473) 2; Allison and Dharmananda (n 470) 265, 272.
[777] *The Merak* [1964] 2 Lloyd's Rep. 527.
[778] ibid; Wagener (n 11) 118.

Specifically, the fact that the parties to the bill of lading were also the parties to the charterparty may avail so that the court can conclude that these parties were fully aware of the incorporation and the context of the relevant arbitration clause.[779] Meanwhile, the fact that the wording of the arbitration clause was explicit about its application to bills of lading issued thereunder may disclose a previous agreement about incorporating this charterparty's arbitration clause into bills of lading issued thereunder.[780] Moreover, the generally worded incorporation clause did not expressly deny the previous contract, meaning there was no renewal of contract. Therefore, the arbitration clause was incorporated on the basis that the parties to the bill of lading were fully informed about and acknowledged such an incorporation. In this case, a generally worded incorporation clause is able to incorporate an arbitration clause in a bill of lading and using general wording may be interpreted as an intention to achieve a wide incorporation.[781]

Additionally, the parties' knowledge of the arbitration clause would be evidenced by the fact that a part of the referred contract has been incorporated. In other words, all the terms in the referred contract should be treated equally and they are generally incorporated as a whole, especially in one-contract cases.[782] In one-contract cases, the engaged parties' consent to the incorporation leads to the conclusion that the parties' knowledge about every single clause contained in the referred contract should be the same.[783] This may indicate that one party cannot deny the incorporation of an arbitration clause merely by arguing their limited knowledge of it, while admitting the other terms in the same contract are

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[779] *The Merak* [1964] 2 Lloyd's Rep. 527, 532(Lord Justice Sellers), and 534(Lord Justice Davis); Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 183; Pietro (n 473) 443; Born (n 123) 442-443.
[780] *The Merak* [1964] 2 Lloyd's Rep. 527, 531(Lord Justice Sellers), 533(Lord Justice Davis).
[781] ibid; Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 344; Wagener (n 11) 121-122.
[782] *The Athena (No 2)* [2007] 1 Lloyd's Rep. 280; *Stellar Shipping Co LLC v Hudson Shipping Lines* [2012] 1 CLC 476, 495; *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2012] 1 CLC 448, 468; Robert Merkin QC, *Arbitration Law* (Informa UK plc 2020) 5.37; Tan and Pereira (n 473) 2.
[783] *The Athena (No 2)* [2007] 1 Lloyd's Rep. 280, 290; Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 183.

incorporated.[784] Nevertheless, exceptions would be made to terms which are defined as 'onerous' and 'unusual'.[785]

The following question would be whether or not an arbitration clause is onerous and unusual in one-contract cases. English case law on this point indicates that in one-contract cases an arbitration clause is not within the meaning of onerous and unusual,[786] and therefore it can be incorporated by general wording.

For instance, in *Modern Building Wales Ltd. v Limmer and Trinidad Co. Ltd*,[787] it was argued that since the order (containing the intention to incorporate the green form) was about the supply of labour, plant and machinery, the incorporated terms should be only a part of the green form which is directly related to such supply, and an arbitration clause clearly fell outside of this category.[788] However, it was held that an arbitration clause indeed cannot substantially contribute to the material supply to the construction work, but the present disputes about the incorporation of the arbitration clause, as well as the incorporation of the green form, would have an effect on the further construction work.[789] Therefore, the dispute fell within the above-mentioned category, and the arbitration clause was relevant in order to address the dispute.[790] Moreover, the arbitration clause would be less unusual and less onerous if this incorporation was one of the customary practices within a certain industry or within a regular agreement between the same parties.[791]

It can be concluded that the court's discretion would start from the construction of the incorporation clause, namely whether or not the wording of this clause can give clear instruction that leads a reader to the referred documents and clauses.

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[784] ibid.
[785] ibid; Todd, 'Incorporation of charterparty terms by general words' (n 481) 407.
[786] *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2012] 1 CLC 448, 467.
[787] *Modern Building Wales Ltd. v Limmer and Trinidad Co. Ltd* [1975] 2 Lloyd's Rep.318
[788] ibid 323.
[789] Ibid.
[790] ibid. There is a trend to treat to normalising an arbitration clause, namely a dispute resolution clause shall be regard as a subject-matter of the contract. In this case, an arbitration clause should be able to be incorporated by general words. See in Tan and Pereira (n 473) 8; Allison and Dharmananda (n 470) 277.
[791] Pietro (n 473) 443; Born (n 123) 452.

The clear instruction could be acquired from the literal meaning of the words,[792] and it could also be disclosed by the common practice in a certain field.[793] Either of these two approaches could provide the engaged parties with knowledge of the arbitration clause.[794] Further discretion would be taken on the arbitration clause itself, namely whether or not this clause can fit in the context of the bill of lading.

Generally, in bill of lading cases, an arbitration clause can be onerous and unusual to a holder of the bill of lading, as it is not one of subject-matters regulated by a bill of lading.[795] However, it is theoretically unsound to insist on this point to decline an incorporation when the holder of the bill of lading is the original contractor to the referred arbitration clause.[796] This is because the holder of the bill can be fully informed about the incorporation, and this knowledge can be further verified if the charterparty's arbitration clause is specific about its application to disputes arising from bills of lading issued thereunder.[797]

For instance, in *The Merak*,[798] an arbitration clause which was specific about its incorporation into the bill of lading issued thereunder was incorporated in the bill, even though the bill's incorporation clause was generally worded. The main reason for this incorporation is that the holder of the bill can be fully informed about this incorporation, as he/she was also the charterer.

Firstly, the parties' knowledge about the incorporation is not necessarily blocked by the bill's generally worded incorporation clause, in that the incorporation clause has been wide and clear about incorporating the charterparty into the bill of lading. It seems to Sellers L.J. that under the situation in the present case, the wording of the incorporation clause, whether general or specific, does not

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792 Burton (n 105) 152.
793 ibid 155 and 173.
794 Pietro (n 473) 443; Born (n 123) 452.
795 Debattista, 'Cargo Claims and Bills of Lading' (n 4) 209-210.
796 Baatz, 'Should third parties be bound by arbitration clauses in bills of lading?' (n 8) 91.
797 Tan and Pereira (n 473) 7.
798 *The Merak* [1964] 2 Lloyd' s Rep. 527.

necessarily affect the incorporation of an arbitration clause. The incorporation clause itself is valid, as its wording is wide and clear,[799] and it was capable of notifying the holder of the bill about the incorporation of the charterparty. The holder of the bill of lading should be so informed and directed to read the charterparty and thus select the corresponding terms.[800]

Secondly, the holder of the bill of lading can be sufficiently informed about the incorporation of an arbitration clause, as the charterparty was accessible and the arbitration clause was specific about the incorporation of an arbitration clause. One of the distinct situations in *The Merak* is that the holder of the bill was also the charterer.[801] This means that the charterparty was in the hands of the holder, and the holder can personally read the charterparty in order to ascertain which clauses will be incorporated in the bill of lading.[802] Another distinct circumstance is that the arbitration clause in the charterparty (Clause 32) was specific about its application in the bill of lading issued thereunder,[803] and no inconsistency was incurred when reading this arbitration clause into the bill in extenso. Since the holder was the charterer, the holder's knowledge about the incorporation may also be evidenced by the specific wording in the charterparty's arbitration clause.[804]

Therefore, a charterparty's arbitration clause will be incorporated by a generally worded incorporation clause in bills of lading, when the holder was the original party to the arbitration clause; in addition, this clause was specific about its application in bills of lading issued thereunder. This is because there is adequate

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[799] Merkin, *Arbitration Law* (n 581) 5.37; Robert Merkin, 'The agreement to arbitrate - Incorporation of arbitration clauses' (2004) 4 ALM 2 1; Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 173-174.

[800] *The Merak* [1964] 2 Lloyd' s Rep. 527, 531;

[801] Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 183.

[802] Allison and Dharmananda (n 470) 272.

[803] Merkin, *Arbitration Law* (n 581) 5.29.1; Merkin, 'The agreement to arbitrate - Incorporation of arbitration clauses' (n 799) 1.

[804] 'Construing Bills of lading', Litigation Letter (2014) 34 LIT 01 02a; Tan and Pereira (n 473) 7.

evidence to show that the holder of the bill has been sufficiently informed about the incorporation.[805]

Similar considerations impact decisions in *The 'Athena' (No 2)*,[806] *Stellar Shipping Co LLC v Hudson Shipping Lines* and the case of *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL*.[807] It has been consistently held that in one-contract cases, the ancillary feature, and a potential onerous effect of an arbitration clause, may be irrelevant when it comes to the incorporation of an arbitration clause from a charterparty to a bill of lading.[808] Such an incorporation should bring the referred charterparty into the bill of lading as a whole,[809] unless there is an explicit exclusion in the bill of lading.

Ground 2: The holder's acknowledgement of choosing arbitration as dispute resolution contains in the charterparty.

Specifically, when the holder is the charterer, this holder's consent to such a special incorporation is contained in an arbitration clause in the related charterparty and evidenced by a generally worded incorporation clause in a bill of lading. Such a consent can be especially obvious if the arbitration clause was clear and explicit about extending its application scope to disputes arising from bills of lading issued thereunder. In other words, since bills of lading in this category of cases are evidential instruments, the contractual effect of the arbitration clause between the charterer (the holder of a bill of lading) and the shipowner is not varied by the terms and clauses contained in the bill of lading issued thereunder.

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[805] Pietro (n 473) 443; Born (n 123) 452.
[806] *The 'Athena' (No 2)* 1 Lloyd's Rep. 280.
[807] *The Athena (No 2)* [2007] 1 Lloyd's Rep. 280; *Stellar Shipping Co LLC v Hudson Shipping Lines* [2012] 1 CLC 476; *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2012] 1 CLC 448.
[808] Tweeddale and Tweeddale, 'Incorporation of Arbitration Clauses Re-visited' (n 473) 659; Pietro (n 473) 443; Born (n 123) 442-443; Allison and Dharmananda (n 470) 276.
[809] Tan and Pereira (n 473) 7.

In one-contract cases, applying the charterparty's arbitration clause to disputes arising from a bill of lading can be reinforced by the legal status of bills of lading, namely the legal effect of an evidential document (a bill of lading in the hands of an original contractor to the related charterparty) may be inferior to that of a contract (an arbitration clause in the related charterparty). As was discussed in Chapter 3, it has been established that when the holder of the bill is also the charterer in the referred charterparty, the bill of lading is merely a receipt while the charterparty should be the contract regulating the relationship between the charterer (who becomes the holder after the transfer of the bill of lading) and the shipowner.[810] In this case, an incorporation clause in a bill of lading would be regarded as evidence proving the fact that parties to the bill of lading agreed to continuously abide by their previous agreements in the charterparty, even when bills of lading have been issued.[811] Consequently, the one-contract doctrine is upheld, meaning that the wording of the bill's incorporation clause should comply with that of the charterparty's arbitration clause, unless it can be proved that the parties renewed their agreement in the bill of lading. It follows that the mutual intention to the incorporation of an arbitration clause should be evidenced by a two-step discretion: step one is to reveal a holder's true capacity in the referred charterparty; step two is to confirm the parties' intention to comply with the arbitration agreement in the related charterparty after bills of lading are issued.[812]

For example, in *The Merak*,[813] the fact that the holder of the bill was also a contractual party of the related charterparty was the decisive factor sufficing an incorporation of an arbitration clause, and this fact was used to defeat drawbacks arising from the usage of general wording in the bill's incorporation clause.[814] To

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[810] McMahon (n 108) 3; Allison and Dharmananda (n 470) 268; Melis Özdel, 'The receipt function of the bill of lading: new challenges' (2017) 28(12) I.C.C.L.R., 435; Carriage of Goods by Sea Act 1992, s 4; Ewan McKendrick(ed), *Goode on Commercial Law* (n 704) 980.
[811] ibid.
[812] McMahon (n 108) 6.
[813] *The Merak* [1964] 2 Lloyd's Rep. 527.
[814] Todd, 'Incorporation of charterparty terms by general words' (n 481) 419.

be specific, the charterer should be bound by the arbitration clause in the charterparty, even though he/she became a holder of the bill of lading at a later stage.[815] The following step is to see whether the referred arbitration clause contains the parties' intention to use their previous arbitration agreement to settle disputes arising from the bill of lading. As a matter of construction, the wording of the charterparty's arbitration clause was taken into consideration, and it reads: 'Any dispute arising out of this Charter or any Bill of Lading issued hereunder shall be referred to arbitration' should bind the charterer.' A proper construction of this clause indicates that the charterer as the holder of the bill may remain responsible for the arbitration clause in the charterparty as long as the bill of lading was issued under this charterparty, and the bill of lading in this case was mere a receipt.[816] This means that the legal status of the bill's incorporation clause can only be a piece of evidence which proves the existence of a legally binding contract contained in the related charterparty. Consequently, the general wording in the bill's incorporation clause may be subject to modification in order to suffice contractual terms contained in the charterparty.[817]

To clarify, whether the referred arbitration clause was specific about its application to bills of lading issued thereunder may only constitute a supportive factor. In other words, the legal effect of the holder's identity as an original contractor of the charterparty can be decisive for the application of the arbitration clause to the disputes between the holder (the charterer) and the shipowner, regardless of the wording of the referred arbitration clause. This is because the charterparty is the contract governing the relationship of these two parties, while the bill of lading issued thereunder is a mere receipt.[818]

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[815] Debattista, 'Cargo Claims and Bills of Lading' (n 4) 197.
[816] Todd, 'Incorporation of charterparty terms by general words' (n 481) 419.
[817] David Foxton, Howard Bennett, Steven Berry, Christopher F. Smith and David Walsh, *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2019) 6-002; Wagener (n 11) 118.
[818] Treitel and Reynolds (n 11) 5-048; Todd, 'Incorporation of charterparty terms by general words' (n 481) 413.

For instance, in *The President of India v Metcalfe Shipping Co. Ltd*,[819] it was held that the disputes between the shipowner and the holder of the bill of lading should be settled by an arbitration which was agreed in the charterparty, even though the arbitration clause was limited in its application to the disputes arising from the charterparty and despite the fact that the bill's incorporation clause was generally worded.

The legal principle underpinning this judgement is slightly different from that in a general treatment of an incorporation of an arbitration clause in bill of lading cases. Generally, an incorporation of this kind cannot be successful when the bill's incorporation clause is generally worded on the one hand, and when the charterparty's arbitration clause limited its scope of application on the other.[820] This is because a generally worded incorporation clause cannot represent a clear intention to arbitrate, and such an absence of intention cannot support a manual modification on the inappropriate wording of the charterparty's arbitration clause.[821] However, in this case these two clauses result in an 'incorporation' of an arbitration clause. To clarify, the arbitration clause should not be regarded as 'incorporated' in the bill of lading, as it was held that the only governing contract should be the charterparty, while the bill of lading was merely a receipt in which statements cannot amount to a renewal contract.[822]

The distinct situation in this case is that the holder of the bill of lading was the original charterer. The buyer and the seller concluded a sale contract under FOB terms which requires the buyer to arrange the shipment. Therefore, the buyer was an original party (the charterer) to the charterparty, and the relationship between him and the shipowner was governed by the charterparty.[823]

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819 *The President of India v Metcalfe Shipping Co. Ltd* [1970] 1 Q.B. 289.
820 Wagener (n 11) 120-121.
821 ibid.
822 *The President of India v Metcalfe Shipping Co. Ltd* [1970] 1 Q.B. 289,300.
823 ibid 308 (Lord Denning M.R.).

The buyer's position as the charterer is unlikely to be superseded by the fact that the buyer becomes the holder of the bill of lading, especially when the bill of lading is issued pursuant to the charterparty.[824] In other words, although the bill of lading was issued from the shipowner to the seller (as the shipper at the loading port) and the bill was subsequently transferred to the buyer (as the holder of the bill), the relationship between the shipowner and the buyer was still governed by the charterparty, rather than by the bill of lading.[825] This is because the bill of lading is only a receipt in this category of cases, especially when bills of lading were issued pursuant to the charterparty, and then it was signed by the shipowner 'without prejudice to the terms of the charterparty'.[826] This means that when issuing bills of lading, the authority owed by the master was only to confirm the fact that the goods have been loaded and will be shipped as it was agreed in the charterparty. For this reason, the bill of lading cannot be an independent contract superseding the charterparty, and therefore the charterparty should remain effective in governing the relationship between the shipowner and the buyer in respect of the carriage of goods by sea.

It follows that the wording of the charterparty's arbitration clause as to '… any dispute arising under the charter was to be settled by arbitration in London' cannot be a barrier in applying this clause to the disputes between the holder and the shipowner, as the holder was the charterer and the disputes arising from the bills of lading should be governed by the charterparty.[827]

The evidential effect of bills of lading in this category of cases is confirmed in *The Ardennes*.[828] It was held that even though the antecedent contract regarding the carriage of goods by sea was in the form of an oral agreement, the legal relationship between the shipper and the carrier was still contained in this

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824 Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 339.
825 McMahon (n 108) 4-5.
826 Wilson (n 2) 243; Cooke, Young and Ashcroft (n 101) 70.4, 18.2 and 18.208.
827 McMahon (n 108) 4-5.
828 *The Ardennes* [1951] 1 K.B. 55; Wilson (n 2) 129.

agreement, whereas the bill of lading merely evidenced this legal relationship.[829] This is because the shipper did not 'accept' the bill of lading 'as the bargain for carriage'.[830] According to commercial practice, It is common for merchants to have their rights and liabilities regulated in a particular contract which should be the condition for carriage, whereas the bill of lading has acted as a mere receipt.[831] This evidential instrument is unilaterally issued by the carrier, and the shipper uses this bill as evidence that the goods have been received by the carrier for shipment. It then seems that the negotiation process which should be an essential part of forming a contract is absent during the issuance of bills of lading, and this may make it difficult to find a contract contained in the bill.

Additionally, in the cases where the holder of the bill of lading does not appear as one contractor in the charterparty, the one-contract doctrine may rule when it is proved that the holder actually agreed to the terms contained in the charterparty, for instance when one signatory of the charterparty has a direct relationship with the holder, such as being the holder's agency.[832]

For example, in *Starlight Shipping Co & Anor v Tai Ping Insurance Co Ltd, Hubei Branch & Anor*,[833] the holder of the bill of lading was not an original party to the head charterparty in which the shipowner was one party, while the holder was a party to a sub-charterparty in which terms were essentially identical to the head charterparty. It was held that the holder of the bill of lading was bound by an arbitration clause contained in the head charterparty, as the fact in this case indicates that the holder not only had the knowledge of the referred arbitration clause, but also agreed to this clause.

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829 ibid.
830 ibid.
831 Wilson (n 2) 129, 132 and 247.
832 Foxton, Bennett, Berry, Smith and Walsh, *Scrutton on Charterparties and Bills of Lading* (n 808) 6-003.
833 *Starlight Shipping Co & Anor v Tai Ping Insurance Co Ltd, Hubei Branch & Anor* [2007] EWHC 1893 (Comm) 440.

The holder of the bill of lading sub-chartered the vessel Alexandros T from Transfield ER Cape Ltd who chartered the vessel from its owner under a charterparty (the head charterparty). The sub-charterparty was essentially identical to the head charterparty, including in the law and arbitration clause. Meanwhile, the bill of lading was specific about the incorporation, as on its face a clear reference was made to the head charterparty and on its reverse it was explicit about the incorporation of the arbitration clause from the charterparty that was nominated overleaf. Therefore, it is safe to conclude that by chartering the vessel the holder of the bill entered into an arbitration clause with the Transfield ER Cape Ltd. By reading the bill of lading, the fact only indicates that the holder has knowledge of the incorporation and the referred arbitration clause, but it remains uncertain about his/her consent to arbitrate with the shipowner. In this case, the holder's consent to arbitration may be exposed by his/her conduct in terms of initiating an arbitration proceeding and appointing an arbitrator according to the arbitration clause contained in the charterparties.[834] In this case, although the holder was not the original party who signed the head charterparty with the shipowner, the factual circumstances in this case may bridge this gap and be helpful to disclose the holder's consent to arbitrate.

In *The 'Athena' (No 2)*,[835] it was held that the manager of the vessel *Athena* should be bound by the arbitration clause which was contained in an independent document named 'CONDITIONS: Conditions as Rules to cover War, etc. Subject to Conditions as per Club Certificate' (the Rules). This document was specifically incorporated in the insurance contract which was signed by the agent of the *Athena*'s manager. Since this agent behaved on behalf of the *Athena*'s manager, this manager was a party to the insurance contract as well as the Rules attached

[834] Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 31-32, suggests that the application of the concept of implied contract; Steingruber (n 7) 9.59; Park, 'Non-signatories and International Contracts: An Arbitration's Dilemma' (n 454) 1.10 and 1.11.
[835] *The 'Athena' (No 2)* 1 Lloyd's Rep. 280.

thereto.[836] For this reason, the one-contract doctrine applied, which means that an arbitration clause which is contained in the nominated contract will be incorporated in along with the other clauses contained in the same contract, even though a specific notice about such an arbitration clause is not given by the incorporation clause.[837] In other words, the clause of incorporating the Rules was agreed by the vessel's manager, and therefore the Rules which were accessible to the manager were incorporated as a whole.

This case may illustrate the point that a party's consent to the arbitration clause can be revealed by the exploration of this party's relationship with the signatory. However, it is important to be clear that the legal principle underpinning such an 'incorporation' is the contractual effect of a related arbitration clause, rather than of the principles of incorporation. To clarify, a holder of the bill of lading is bound by the arbitration clause because of his contractor identity to the referred charterparty,[838] rather than because of the contractual effect of an incorporation clause in the bill of lading. For this reason, the wording of the incorporation clause does not necessarily affect the binding effect of a related arbitration clause,[839] unless the wording of the incorporation clause is so clear and explicit that it amounts to a renewal of contract.[840]

It may follow that the parties' intention not to vary the charterparty is crucial to decide that the charterparty remain as the governing contract after the bill of lading is issued. As in the above-mentioned cases, the charterparty was held to be the governing contract because the bills of lading were issued in accordance with the related charterparty, and no specific expression about the superseding effect of the issued bills can be identified. By contrast, bills of lading can be the

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836 Steingruber (n 7) 9.04.
837 Tweeddale and Tweeddale, 'Incorporation of Arbitration Clauses Re-visited' (n 473) 658.
838 Tan and Pereira (n 473) 7.
839 ibid 6.
840 Foxton, Bennett, Berry, Smith and Walsh, *Scrutton on Charterparties and Bills of Lading* (n 808) 6-004.

ruling contract if an expressed or an implied intention to supersede the contract of carriage by a bill of lading was disclosed.[841]

In *Armour & Co. Ltd v Leopold Walford (London) Ltd*,[842] it was held that in this exceptional case, the bill of lading was able to become the governing contract between the shipper and the shipowner. The antecedent contract of carriage was in the form of a booking slip concluded by the shipper and the shipowner. In this booking slip, a supersession clause provided that the bill of lading shall prevail over this booking slip, and the goods were to be shipped under the shipowner's special form of a bill of lading.[843] Meanwhile, there was a piece of evidence to show that there would be a course of dealing between these parties that the goods were carried under this special bill of lading.[844] In this case, the intention to supersede the booking slip by a bill of lading was evidenced by both the expressed and implied intention. For the expressed intention, it was mutually agreed before the issuance of bills of lading, and it is within the knowledge of the shipper that the issued bill of lading will be the contract of carriage. Therefore, accepting the bill of lading means that the shipper accepted the fact that he/she will be bound by the terms in the bill thereafter.[845] For the implied intention, the fact that the parties had a course of dealing on the same terms may facilitate the implication that the parties should have acknowledged the supersession clause and the contractual effect of the bill of lading issued thereunder.[846]

In *Calcutta SS Co Ltd v Andrew Weir & C*o,[847] the bill of lading was transferred to the charterer, and yet it was held that the relationship between the holder of the bill of lading, namely the charterer, and the shipowner was governed by the bills, rather than the charterparty. This is because different from being a receipt

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[841] ibid; Treitel and Reynolds (n 11) 3-00
[842] *Armour & Co. Ltd v Leopold Walford (London) Ltd* [1921] 3 K.B. 473.
[843] ibid.
[844] ibid; *Judgment of 11 October 1989,* XV Y.B. Comm. Arb. 447, 448 (1990) (French Cour de Cassation).
[845] ibid.
[846] Pietro (n 473) 443; Born (n 123) 375; *Judgment of 11 October 1989,* XV Y.B. Comm. Arb. 447, 448 (1990) (French Cour de Cassation).
[847] *Calcutta SS Co Ltd v Andrew Weir & C*o [1910] 1 K.B. 795.

and an evidential document for a claim to the delivery of the goods, the bill of lading in this case was a security for an advance which is not naturally embodied in the bill's function. Therefore, the bill of lading was not used with the charterparty for the carriage of goods, but was instead used as a separate contract and the charterer was entered in this contract with a new identity as a lender. For this reason, the charterer should be bound by the contract of loan contained in the bill of lading, and this independent contact re-introduced the charterer to the bill and gave the charterer a new identity which was independent from its legal status in the related charterparty.

To conclude, when a holder of the bill of lading is one of the original contractors to the related charterparty, the proper nexus sufficing an incorporation of an arbitration from a charterparty to a bill of lading is the charterparty's arbitration clause, and principles underpinning the incorporation include principle of contractual construction and the one-contract doctrine. Accordingly, in this category of cases, a generally worded incorporation clause may be sufficient to incorporate an arbitration clause, especially when the arbitration clause in the related charterparty is specific about its application to the dispute arising from bills of lading issued thereunder. The binding effect of the bill's incorporation clause is actually rooted in the contractual effect of the referred arbitration clause, because the holder is an original party to the referred charterparty containing the arbitration clause.[848] This means that when a holder of the bill of lading is the charterer, the charterparty remains as the governing contract even when bills of lading are issued. Consequently, the arbitration clause contained in the charterparty will continuously be valid, unless the parties made an additional agreement to vary their previous intention to arbitrate.

[848] Li (n 72) 122; Tan and Pereira (n 473) 7; Michael F. Sturley, 'The Modern International Conventions Governing the Carriage of Goods by Sea: The Lonely Exceptions to the Maritime Law's Widespread Preference for Arbitration' in Miriam Goldby and Loukas Mistelis(eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 6.32.

Apart from being an original contractor to the referred arbitration clause, using standard forms of charterparty is also often employed as a ground for binding the holder to the incorporation of an arbitration clause. Specifically, there are two relevant facts. Firstly, an explicitly worded incorporation clause in a bill of lading states an intention to incorporate the charterparty's arbitration clause. Secondly, the related charterparty is in certain standard forms which contain arbitration clauses, such as Gencon Charter.[849] Accordingly, it is claimed that the holder cannot avoid the arbitration by arguing that he/she cannot know the charterparty's arbitration clause. This claim is based on the ground that since standard forms are accessible through public sources, the holder can inform themselves about the incorporation of an arbitration clause even the charterparty was not customarily transferred with the bill of lading.[850] However, it seems that having such a knowledge of an arbitration clause does not necessarily means that the holder expressed a consent to arbitrate. As a result, the holder may refuse to arbitrate by relying on the principle of autonomy.

In order to address this conflict in practice, the following sub-sections will re-examine English case law, and look into the question as to whether using standard forms of charterparty can contribute to a nexus binding the holder to an incorporation of an arbitration clause.

6.1.2. When the Related Charterparty is on a Standard Form

Principle of incorporation may indicate that a party should be bound by the incorporation of an arbitration clause if this party could be sufficiently informed about this incorporation. Accordingly, it seems that the holder of a bill of lading would be bound by the referred arbitration clause, if this holder was sufficiently informed, namely the bill's incorporation clause explicitly referred to an arbitration

[849] Gencon Charter is the code name for a standard charterparty provided by the Baltic and International Maritime Council (BIMCO).
[850] Pietro (n 473) 443; Born (n 123) 446; Merkin and Flannery, *Arbitration Act 1996* (n 756) 34.

clause, and the referred arbitration clause was accessible.[851] However, it is important to note that the condition of applying principle of incorporation is that the incorporation clause has contractual effect, but the discussion in Chapter 3 may indicate that an incorporation clause in a bill of lading does not naturally have a contractual effect on the holder of a bill of lading. Accordingly, the principle of incorporation cannot be directly applied in bill of lading cases. As a result, it is unlikely to establish a nexus between the referred arbitration clause and a holder of the bill of lading on the ground that the referred arbitration clause is contained in a standard form charterparty. This is mainly because a mutual intention to arbitrate cannot be disclosed by an incorporation clause in a bill of lading.[852]

Theoretically, an incorporation clause contained in a bill of lading cannot legally bind a holder of the bill of lading, as the legal status of bills of lading remains as evidential documents.[853] Consequently, the binding effect of such an incorporation clause lacks legal support, and this non-contractual effect of this incorporation clause could be fatal in terms of binding a holder of the bill of lading to an incorporation of an arbitration clause, even though the referred arbitration clause is known to a holder of the bill of lading.[854] Alternatively, an effective nexus should be established upon a contractual effect of the bill's incorporation clause which specifies the incorporation of an arbitration clause, or it can be established by implying a mutual intention on the basis of factual circumstances in each case.[855]

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[851] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 64 and 116.

[852] Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 333, it suggests that the consent should be identified in the bill of lading, rather than the related charterparty; Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 173.

[853] see discussion in Ch 2.

[854] Beale (ed) (n 293) 13-002, where indicates that parties may only be bound by clauses that they contracted to; the consensual nature of arbitration is discussed in Steingruber (n 7) 162; Courtney (n 351) 593; Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 476.

[855] Mankabady (n 456) 60, it was suggested that a contractual effect should be established, while it did not provide legal bases for that contractual effect.

In terms of incorporating an arbitration clause, the first problem incurred by regarding standard forms of charterparty as the nexus is a conflict between this presumption and the current case law on this matter. Specifically, the judicial decisions clearly indicate that a valid incorporation of an arbitration clause in bill of lading cases should be based on the fact that the bill's incorporation clause itself is explicit about an incorporation of a charterparty's arbitration clause.[856] This means that a generally worded incorporation clause cannot bring in an arbitration clause, even though the referred charterparty is on a standard form and contains an arbitration clause.[857]

The leading case is *The Annefield*,[858] in which an arbitration clause was not incorporated in the bill of lading, even though this arbitration clause was contained in a standard charterparty, namely the Centrocon Form, which is well-known in the shipping trade. Clause 39 of the Centrocon form states:

> 'All disputes from time to time arising out of this contract shall …, be referred to the final arbitrament of two arbitrators carrying on business in London who shall be members of the Baltic and engaged in the shipping and/or grain trades …'

The bill's incorporation clause was generally worded, and it was not specific about the incorporation of the arbitration clause (Clause 39). The issue arose in attempting to suffice the incorporation, whether or not the wording in Clause 39, particularly 'arising out of this contract', can be interpreted as 'arising out of this bill of lading' if it was written in the bill of lading. It was held that such a modification to the wording of the arbitration clause cannot be legally supported. This is because, compared to the fact that a standard form of charterparty is accessible to the holder of the bill, the holder's intention to arbitrate is paramount in respect of deciding the legal effect of an incorporation of an arbitration

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[856] Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 193; McMahon (n 108) 5-6; Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 173.
[857] Debattista, 'Cargo Claims and Bills of Lading' (n 4) 209.
[858] *The Annefield* [1971] P.168.

clause.[859] However, the holder's consent to arbitrate cannot be disclosed by available evidence. For instance, on the one hand, a specific reference to Clause 39 was absent in the bill's incorporation clause.[860] On the other hand, the holder of the bill did not have any additional arbitration clauses with the shipowner. Therefore, the common ground to refuse an incorporation of an arbitration clause in bill of lading cases was applied; that is, an arbitration clause as an ancillary clause should be incorporated by explicit reference either in the bill of lading or in the relevant charterparty.[861] Since this explicit reference was absent, a modification of the wording in Clause 39 cannot be supported.[862] As a result, this arbitration clause cannot be incorporated in the bill of lading, as the wording of Clause 39 is not explicit about extending its application scope to disputes arising from a bill of lading.[863]

This decision indicates that when the bill's incorporation clause is silent about an incorporation of an arbitration clause, and in addition the charterparty's arbitration clause is not specific about being applicable to disputes arising from bills of lading issued thereunder, this arbitration clause cannot be incorporated in the bill, even though this clause is contained in a well-known standard form which is accessible to any holder of the bill of lading.[864] This means the format of a charterparty does not necessarily facilitate an incorporation of an arbitration clause, since the basis for supporting such an incorporation is an expressed intention made by a shipowner and a holder of the bill of lading.[865]

The result in *The Annefield* may be in line with the judicial trend, however, after close examination, the judgments in this case still incur legal uncertainties. Since

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[859] ibid; Allison and Dharmananda (n 470) 282.
[860] Wagener (n 11) 119; Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 348.
[861] *The Annefield* [1971] P.168, 173 (Brandon J), 184(Lord Denning M.R.).
[862] *The Annefield* [1971] P.168, 185(Lord Denning M.R.).
[863] ibid.
[864] Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 185-186.
[865] This roots in the autonomy of arbitration, see in Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 378.

it is clearly suggested that an arbitration clause can be incorporated either by an express intention in the bill or by a clear and explicit wording in the charterparty,[866] it remains unclear about the result of a kind of incorporation in which an arbitration clause contained in a standard charterparty. In addition, it is specific about its application to disputes arising from related bills of lading while the bill's incorporation clause is generally worded. This may especially become a problem in two-contract cases where a holder of the bill of lading is less likely to have a contractual relationship with the shipowner, as a third-party holder of the bill of lading cannot be informed about this special incorporation by reading a generally worded bill's incorporation clause and does not have a contract with the shipowner on terms of the charterparty.[867]

Considering the autonomy of arbitration, it would be reasonable to hold that a specifically worded arbitration clause contained in a standard charterparty cannot be incorporated in related bills of lading, when the bill's incorporation clause does not mention the incorporation of an arbitration clause. In other words, in two-contract cases the explicit intention to arbitrate only can be identified or implied from the bill's incorporation clause, and the form of the charterparty hardly can vary in this conclusion.[868] It may follow that the decision in *The Annefield*, in respect of where to find the intention to arbitrate, may only applicable to cases in which a holder of the bill of lading is an original contractual party to the related charterparty.[869] This is because in two-contract cases the intention expressed in the charterparty cannot represent a holder's intention, since a holder of the bill of lading as a third party to the charterparty, never engages in the negotiation, conclusion and performance of this contract.[870]

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[866] *The Annefield* [1971] P.168.
[867] Tan and Pereira (n 473) 7; Brekoulakis (n 301) 2.184 and 2.188; Baatz, 'Should third parties be bound by arbitration clauses in bills of lading?' (n 8) 91-92.
[868] Brekoulakis (n 301) 2.234.
[869] *The Annefield* [1971] P168.
[870] Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 186; Brekoulakis (n 301) 2.232 and 2.233; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 106 and 125; Debattista, 'Cargo Claims and Bills of Lading' (n 4) 209.

For instance, in *The 'Federal Bulker'*,[871] it is held that the incorporation of an arbitration clause failed, as the bill's incorporation clause was not specific about an incorporation of an arbitration clause. The charterparty in this case was on a standard form, Baltimore Berth Grain Form C, and it stated in lines 102 to 103:

> '… this contract shall be completed and superseded by the signing of Bills of Lading … which Bills of Lading shall contain the following clauses …
>
> 11. All disputes … arising out of this contract shall … be referred to the final arbitrament of two Arbitrators carrying on business in London…'

Bills of lading were on a standard form, namely the Baltimore Form C Berth Grain Bill of Lading form. However, the bills were issued partly pursuant to the charterparty, and the bill's clauses were not identical to those stipulated in the related charterparty. Meanwhile, the incorporation clause was generally worded as it stated:

> 'All terms conditions and exceptions as per charter-party dated January 20, 1986 and any addenda thereto to be considered as fully incorporated herein as if fully written.'

The objection of incorporating the charterparty's arbitration clause into bills of lading can be based on two grounds. This bill's incorporation clause was, on the one hand, incapable to bring an arbitration clause into a bill of lading. The rule of construction which is concluded from *T.W Thomas & Co. Ltd. v Portsea Steamship Co. Ltd.* was followed in the present case,[872] and therefore the general words in the above-mentioned incorporation clause, namely 'terms', 'conditions' and 'exceptions', are not sufficient to incorporate an arbitration clause.[873]

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871 *The 'Federal Bulker'* [1989] 1 Lloyd's Rep. 103.
872 *T.W Thomas & Co. Ltd. v Portsea Steamship Co. Ltd.* [1912] AC 1.
873 *The 'Federal Bulker'* [1989] 1 Lloyd's Rep. 103, 106-108; Wagener (n 11) 120 and 123.

On the other hand, the wording of the arbitration clause in the charterparty cannot assist the incorporation, even though this charterparty was on a standard form and a holder can know the existence of an arbitration clause by reading this accessible charterparty. This is because the incorporation of an arbitration clause lacks consent from the holder of the bill of lading. Firstly, this consent cannot be supported by the ambiguous wording, 'arising out of this contract', in clause 11. When reading such general wording in the context of a charterparty, where it appeared, it is plain that 'this contract' means 'this charterparty'. However, when writing Clause 11 verbatim in the bill of lading, it would encounter difficulties in extending its meaning to 'this bill of lading' if there was no concrete evidence in the bill to support such an extension.[874] From this perspective, it is inapt to incorporate Clause 11 in to the bill of lading, as the intention of such incorporation is neither clear in the charterparty nor explicit in the bill of lading.[875]

Secondly, since the bills of lading were not issued in the way that it was stipulated in the referred charterparty (the provision in lines 102 to 103 and the following clauses), the incorporation of clause 11 may require express intention in the bills. The provision in lines 102 to 103 and the following clauses cannot be incorporated in the bill of lading, as they are personal agreements between the shipowner and the charterer concerning the formation of bills of lading issued thereunder, which cannot naturally be regarded as an intention of the parties to the bill of lading.[876] Specifically, only when bills of lading are issued in the form and content stipulated in the charterparty's provision, the charterparty could be superseded by these bills of lading, and subsequently the charterparty's arbitration clause could be incorporated in the bills. However, bills of lading in this case were not issued in pursuant to the charterparty. Therefore, Clause 11 cannot naturally be incorporated in the bill. For this reason, a successful incorporation

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[874] *The 'Federal Bulker'* [1989] 1 Lloyd's Rep. 103, 108; Todd, 'Incorporation of charterparty terms by general words' (n 481) 415.
[875] ibid.
[876] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 134-135.

can only be achieved by following the principle settled down in the *T.W Thomas* case, that is an explicit incorporation clause should be identified in the bill of lading.

This construction of relevant clauses concerning the incorporation issue should be read in conjunction with the judgement in *Siboti K/S v BP France SA*, where a similar situation was under consideration.[877] By comparing these two cases, it is clear that the essential clause determining the destiny of an incorporation should be the bill's incorporation clause, while the wording of relevant clauses in the charterparty and the form of the charterparty may be less relevant.[878] *The 'Federal Bulker'* illustrates that the general words of a standard charterparty do not result in the incorporation of an arbitration clause if the intent to arbitration was not explicit in the bill's incorporation clause.[879] In *Siboti K/S v BP France SA.*, the judgment indicates that the incorporation of an arbitration clause would be unsuccessful even if clauses in a standard charterparty are specific about incorporating its arbitration clause into bills of lading issued thereunder.[880]

The charterparty in this case was on a standard form named ASBATANKVOY, and the clause concerning the governing law and dispute resolution (Clause 49) states: '… (e) All bills of lading under this Charter Party shall incorporate this exclusive dispute resolution clause …' and (a) and (b) of Clause 49 stipulates the jurisdiction of English court and English law as applicable law, while (c) of this dispute resolution clause provides parties with a right to elect arbitration which is further stipulated as a London arbitration under English law.

The incorporation clause in the bill of lading states:

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877 *Siboti K/S v BP France SA.* [2004]1 CLC 1.
878 Todd, 'Incorporation of charterparty terms by general words' (n 481)411; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 141; Lielbarde (n 17) 296.
879 *The 'Federal Bulker'* [1989] 1 Lloyd's Rep. 103; Pietro (n 473) 443; Born (n 123) 446; Lielbarde (n 17) 297.
880 *Siboti K/S v BP France SA* [2014] 1 CLC 1; Lielbarde (n 17) 296.

> ‘This shipment is carried under and pursuant to the terms of the charter dated … and all the terms whatsoever of the said charter apply to and govern the rights of the parties concerned in this shipment.’

It is plain that the bill of lading issued under the aforementioned charterparty was generally worded, as it has been confirmed that the wording ‘all the terms’ and ‘whatsoever’ are insufficient in respect of incorporating an arbitration clause from a charterparty to a bill of lading.[881] Therefore, the dispute resolution clause, namely Clause 49(b) and Clause 49(c), cannot be incorporated in the bill of lading.

The controversial issue is incurred by Clause 49(e). This clause was specific about the form of the bill of lading issued thereunder, which leads to an incorporation of the dispute resolution clause from the charterparty to the bill of lading. The problem is whether or not Clause 49(e) which itself is not a dispute resolution clause can be incorporated in the bill of lading by general wording. It was held that Clause 49(e) cannot be so incorporated, and subsequently the charterparty’s dispute resolution cannot be incorporated in the bill of lading. This is because Clause 49 was mutually agreed by the shipowner and the charterer, and this intention of the original parties is irrelevant to the disputed incorporation.[882] It has been cogently argued by Gross J that the decisive factor for a successful incorporation should be established upon the intention of the parties to the bill of lading, which can only be revealed by the relevant clause in the bill of lading. Since the wording of the bill’s incorporation clause is insufficient to incorporate an arbitration clause, a clear expression in the charterparty cannot be of any assistance.[883] Moreover, Clause 49 provides a potential form and content for bills of lading issued thereunder, and it is merely an agreement

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[881] ibid 18 (Gross J); Todd, ‘Incorporation of charterparty terms by general words’ (n 481) 411 and 421.
[882] Wagener (n 11) 122; Allison and Dharmananda (n 470) 273.
[883] Merkin, *Arbitration Law* (n 581) 5.29.1 and 5.29.2; Todd, ‘Incorporation of charterparty terms by general words’ (n 481) 420.

between the parties to the charterparty.[884] It is therefore illogical to incorporate such a term into a bill of lading to bind parties to a bill of lading.[885]

The decisive effect of the wording of the bill's incorporation clause may derive from the decision in *Miramar Maritime Corporation v Holborn Oil Trading Ltd*,[886] where the wording of the bill's incorporation was highly valued in construing the intention of the parties to the bill of lading, while the relevant clause in the charterparty which was on a standard form was regarded as a factor inferior to the intention revealed by the bill.[887]

The issue concerned in this case is whether a demurrage clause was incorporated from a charterparty to a bill of lading. The charterparty was on Exxonvoy 1969, a standard form of charterparty frequently used in the tanker trade, and it provided that the charterer should be responsible for demurrage. The bill of lading was on the form of the Exxonvoy 1969 bill of lading, and it stated that:

> 'This shipment is carried under and pursuant to the terms of the charter dated 19 May 1980, … and all the terms whatsoever of the said charter except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in this shipment.'

It was argued that since demurrage is directly related to shipment, carriage and delivery, the demurrage clause would be incorporated in a bill of lading by general wording, 'all the terms' and 'whatsoever' in this case, and therefore after the issue of a bill of lading the consignee should replace the charterer and become responsible for the incurred demurrage. This claim was dismissed and the reason for this decision is that the incorporation of the demurrage clause cannot be the mutual intention of the parties to the bill of lading. The analysis of the intention

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884 Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 134-135.
885 ibid.
886 *Miramar Maritime Corporation v Holborn Oil Trading Ltd.* [1984] 1 AC 676.
887 Todd, 'Incorporation of charterparty terms by general words' (n 481) 410.

contained in the bill of lading was not only made upon the semantic meaning of the relevant clause, but also took the commercial practice into consideration. Compared to the fact that the holder may be subject to onerous liabilities if the demurrage clause was incorporated, the fact that the charterparty was on a standard form which has been widely used in practice and accessibility to the holder of the bill was regarded as irrelevant.[888]

To conclude, compared to the fact that a charterparty is on a standard form and readily accessible to any holder of bills of lading, the wording of the relevant clause in bills of lading and relevant factual circumstances are given more weight in terms of ascertaining the intention contained in bills of lading,[889] and this mutual intention plays an essential role in incorporating a clause from a charterparty to a bill of lading. Such a trend has been especially emphasised when the incorporation involves an arbitration clause, as the principle of autonomy is paramount to the validity of an arbitration clause.[890]

It then appears that these judicial decisions contradict decisions in *The Merak*.[891] Decisions in *The Merak* may indicate that a valid incorporation of an arbitration clause should be achieved by an expressed intention as to incorporating an arbitration clause from a charterparty to a bill of lading, and such an expression can be evidenced either in the charterparty or in the bill of lading. By contrast, the above-mentioned cases insisted on a rather strict approach, in which the wording of bill's incorporation clause is decisive. This means that the intention recorded in the referred clause in the charterparty may be subject to the intention expressed by the bill's incorporation clause. In terms of interpreting parties' intention, the wording of the bill's incorporation clause and factual circumstances in each case are both taken consideration. However, under the consideration of

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[888] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 123; Todd, 'Incorporation of charterparty terms by general words' (n 481) 413.
[889] Mankabady (n 456) 60; Wagener (n 11) 122.
[890] Baatz, 'Should third parties be bound by arbitration clauses in bills of lading?' (n 8) 85.
[891] *The Merak* [1964] 2 Lloyd' s Rep. 527.

special situations in *The Merak*,[892] it is reasonable to conclude that the decision in this case is consistent with the others. This is because the special situation in *The Merak* is capable to establish a nexus between the charterparty's arbitration clause and the holder of the bill of lading.[893] Specifically, the special situation, namely the holder was an original party to the charterparty's arbitration clause, may sufficiently evidence the holder's knowledge about and his/her acknowledgement of the incorporation. This means that the charterparty's arbitration clause can be a nexus between the holder and the shipowner, since this clause manifested a contractual relationship between the holder and the shipowner.[894] Moreover, this nexus may alleviate the conflict between judicial decisions in *The Merak* and those in the other cases,[895] as such a consideration of factual circumstances is accepted by the strict approach in terms of interpreting the parties' intention in the bill of lading.

To conclude, using a standard form of charterparty does not necessarily lead to a sufficient incorporation of an arbitration clause in bill of lading cases. In other words, a nexus cannot be established on the only fact that the referred arbitration clause is contained in a standard form charterparty, and a further disclosure of the holder's consent to this special incorporation is the essence of establishing the nexus. Since bills of lading are the only shipping documents that accessible to the holder of a bill of lading, it is agreed that the holder's consent should be

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[892] ibid.

[893] Özdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' (n 12) 193; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 111-112.

[894] Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 533.

[895] The decision in *The Merak* has long been distinguished from the other cases, and it has been argued that a satisfactory resolution on this matter has not been provided, see in Todd, 'Incorporation of charterparty terms by general words' (n 481) 418-419;Tweeddale and Tweeddale, 'Incorporation of Arbitration Clauses Re-visited' (n 473) 657; Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 392.

found in the bills.[896] Therefore, a successful incorporation may heavily depend on an explicit reference in bills of lading.

Since the focus of this chapter is whether using standard forms can lead to a successful incorporation of an arbitration clause from a charterparty to a bill of lading, the following question would be whether or not an arbitration clause can be incorporated in a bill of lading, if a bill's incorporation clause was explicit about this incorporation but it was one of the pre-printed clauses in a standard bill of lading form. This question derives from an observation which indicates that pre-printed clauses in bills of lading does not necessarily reflect the holder's intention, and therefore this observation would challenge the incorporation by referring to the principle of autonomy. Therefore, after discussing the situation in which standard forms of charterparty are used, it is necessary to look into the issue as to whether using standard forms of bills of lading can be used as a nexus to bind the holder to the referred arbitration clause. This issue will be fully discussed in the following sub-section.

6.1.3. When a Bill of Lading is on a Standard Form

Principles of arbitration in respect to autonomy require that a holder's consent to arbitrate should be contained in the clause, and yet pre-printed clauses in a standard form are less likely to contain a holder's personal intent to arbitrate.[897] In other words, it remains questionable as to whether the explicit reference in a bill's incorporation clause truly reflects a holder's intention. This is particularly an issue in bill of lading cases, as a holder generally cannot participate in the process of the issuance bills of lading.[898] This means that what kind of bills of lading is issued is determined by the shipowner and the charterer, rather than the holder.

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[896] It is the bill-centric approach, see in Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 392; Debattista (n 271) 210.

[897] Tudor Marin, 'Rules of Interpretation of the Bills of Lading in Maritime Jurisprudence' (2014) 2014 Int'l Conf. Educ. & Creativity for Knowledge-Based Soc'y 114, 115.

[898] Baatz, 'Should third parties be bound by arbitration clauses in bills of lading?' (n 8) 92.

It seems that the holder of a bill of lading could be instructed by a specifically worded incorporation clause in a standard bill of lading, and then be aware of the incorporation of an arbitration clause.[899] However, it is important to point out that the knowledge of such an incorporation clause is not equal to a personal intention to arbitrate.[900] This is because the transfer of bills of lading is a one-way process, which means that the holder's consent to arbitrate is less likely to be manifested in a bill of lading. Consequently, such a consent needs to be proved by a custom, a course of dealing, or any agreement evidenced by previous contracts.[901]

Moreover, the intention of a holder of the bill of lading may require additional attention in cases where the incorporation clause is pre-printed on the reverse of the bill of lading,[902] and in cases where, apart from the pre-printed clause on the reverse, a written incorporation clause appears on the face of the bill. This is because the printed clause on the reverse is generally regarded as insufficient in incorporating clauses featuring particularly onerous and unusual conditions.[903] Meanwhile, the written clause may supersede the printed one,[904] as a clause in a written form, for example a clause is deliberately written on the face of a bill of lading, is more likely to attract the reader's attention to this special incorporation. Therefore, the parties' intention can be implied.[905]

In *The 'Nerano'*,[906] it was held that the arbitration clause was incorporated in the bill of lading by a standard clause printed on the reverse of the bill of lading. This case follows the decision in previous cases, in that the specific reference in the bill of lading determined the success of incorporating the charterparty's arbitration

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899 Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 180; Allison and Dharmananda (n 470) 281.
900 Allison and Dharmananda (n 470) 281;
901 Born (n 123) 375; *Judgment of 11 October 1989,* XV Y.B. Comm. Arb. 447, 448 (1990) (French Cour de Cassation); Marin (n 886) 115.
902 *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd.* [1987] 1 Q.B. 433, 438-439 (Dillon L.J.).
903 *Homburg Houtimport B.V. v. Agrosin (The Starsin)* [2003] 1 Lloyd's Rep. 571; Burton (n 105) 182.
904 Beale (ed) (n 293) 13-068; Marin (n 886) 115.
905 Li (n 72) 123.
906 *The 'Nerano'* [1996] 1 Lloyd's Rep.1.

clause.[907] However, this decision may be questionable with regards to giving full effect to a pre-printed clause in the bill, since it remains arguable whether the printed clause is the holder's true intention or not.

To illustrate, the arbitration clause in the charterparty was not on its own wording applicable to disputes between the holder of the bill and the shipowner, as it stated:

> 'That should any dispute arise between the Owners and the Charterers the matter in dispute should be determined in London, England, according to the Arbitration Acts, 1950 to 1979 and any amendments or modifications thereto and English law to govern.'

The specific reference was contained in the printed clause on the reverse of the bill of lading, and it was clear as to the name of the referred clause and the intention to incorporate this arbitration clause into the bill of lading. By contrast, an incorporation clause on the face of the bill was generally worded as it stated: '… English Law and Jurisdiction Applies …'

The holder of the bill of lading refused to arbitrate by arguing the inconsistency incurred by the wording of the charterparty's arbitration clause, namely that 'between the Owners and the Charterers' is not fit in the context of a bill of lading. The holder's argument was made upon the well-recognised rule on this matter, that is, an incorporation of an arbitration clause shall fail if an intention to arbitrate disputes arising from a bill of lading can be neither identified in the bill nor found in the referred charterparty.[908] Therefore, when reading the referred arbitration clause with the generally worded incorporation clause on the face of the bill of lading, it seems that the aimed incorporation shall be unsuccessful, especially

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[907] Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 174.
[908] *The Merak* [1964] 2 Lloyd' s Rep. 527, *The Annefield* [1971] P.168.

when the holder is not the charterer.[909] However, in Lord Justice Saville's view, the incorporation clause on the reverse should be weighed more than the clause on the face. In conjunction with the specific reference in the printed incorporation clause, the holder's claim was objected, and the arbitration clause was incorporated.

However, it is unclear as to why the clause on the back of the bill of lading is capable of superseding the clause on the face, since it has been widely accepted that the pre-printed clause could be binding only if there was no expressed intention provided otherwise.[910] This kind of expressed intention is normally in a written form and appears on the face of the bill, and it will supersede the intention expressed by the standard clauses on the reverse.[911] The reason for requiring such clarification is that although the general wording 'English Law and Jurisdiction Applies' does not necessarily incur conflict with the specific reference to 'arbitration clause',[912] it is still necessary to make the distinction when these two clauses simultaneously appear on a bill, as different combinations of clauses may produce opposite results.[913]

To be specific, when the charterparty's arbitration clause is read with the generally worded incorporation clause that was on the face of the bill, the incorporation of arbitration clause may not be achieved. This is because the wording of the charterparty's incorporation clause may add difficulties in such an incorporation, especially when the intention in the bill's incorporation clause is not so specific.[914] By contrast, supported by the incorporation clause on the reverse of the bill of

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[909] *The Athena (No.2)* [2007] 1 Lloyd's Rep. 280; *Stellar Shipping Co LLC v Hudson Shipping Lines* [2010] EWHC 2985 (Comm); *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL.* [2010] EWHC 29 (Comm); Pietro (n 473); Tweeddale and Tweeddale, 'Incorporation of Arbitration Clauses Re-visited' (n 473); Tan and Pereira (n 473); Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 186.

[910] *Homburg Houtimport B.V. v. Agrosin (The Starsin)* [2003] 1 Lloyd's Rep. 571; Wilson (n 2) 129, and 247.

[911] *Homburg Houtimport BV and others v Agrosin Private Ltd and another* [2004] 1 AC 715.

[912] *Siboti K/S V BP France SA* [2014] 1 CLC 1, 11.

[913] Wagener (n 11) 120.

[914] A combination of a generally worded incorporation clause and an inapplicable arbitration clause cannot result in an incorporation of an arbitration clause. See in the *T W Thomas* line of case.

lading, a successful incorporation will be guaranteed, and the inconsistent wording in the charterparty will be subject to modification in order to fit the context of the bill of lading.[915]

Therefore, the question as to which clause should prevail needs to be clarified, and this may especially be an issue in bill of lading cases, as in the perspective of a holder who has no access to the referred charterparty, a slight difference in the wording may result in different dispute resolutions which may incur different legal consequences.

In *The 'Epsilon Rosa'*,[916] an arbitration clause was incorporated in the bill of lading, while the referred arbitration clause was initially contained in a recap (an informal agreement about chartering the vessel). The reason for the incorporation is that a specific reference to the charterparty's arbitration clause was identified in the bill of lading. However, it is necessary to note that the bill of lading was on the Congenbill form 1994 (a standard form of bill of lading),[917] and an incorporation clause which contains a specific reference to an arbitration clause is generally stated in this kind of standard bills of lading.

The decision in this case indicates that a standard clause which specified about an incorporation of an arbitration clause from a nominated charterparty to the bill of lading will result in a sufficient incorporation.[918] However, such incorporation may lack legal support, specifically a holder's consent to using this kind of standard form of bill of lading and to arbitrate cannot be disclosed.[919] Although a mercantile practice can be indicated by a fact that an incorporation of an arbitration clause has been a standardised clause on a widely used form of bill of

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[915] Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 124-125.
[916] *The 'Epsilon Rosa'* [2003] 2 Lloyd's Rep. 509.
[917] Congenbill is the code name which refers to standard bill of lading for general tramp shipping drafted by the Baltic and International Maritime Council (BIMCO); Allison and Dharmananda (n 470) 268.
[918] Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 175-176.
[919] Wilson (n 2) 3-4 and 130.

lading,[920] it is unclear as to whether or not a holder of bill of lading agreed to use such a standard form.[921] As a result, using this standard bill of lading may arise an awareness of a holder of the bill in respect of this special incorporation upon receiving of this bill, and this knowledge of the incorporation does not necessarily equivalent to a consent to arbitrate. Therefore, the problem in this case is that the existence of an arbitration clause was only acknowledged by the shipowner and the charterer, but the holder of the bill of lading was dragged into this clause by a pre-printed clause on the reverse of the bill of lading. This means that the holder's autonomy was not realised and guaranteed by legal practice. However, it should be noted that the principle of autonomy is highly valued in arbitration, and it is an essential principle to validate an arbitration clause.

For instance, in *The 'St. Raphael'*,[922] the disputed incorporation clause was contained in a broker's note and this note was under the title of 'Contract 30287/BSS 1029'. In this note, Special Condition 3 stated:

> 'All other terms and conditions not in contradiction with the above terms as per GAFTA Contract No.14 (of which both parties admit that they have knowledge and notice…)'

In addition, an arbitration clause was contained in that standard contract. It was argued that the arbitration clause cannot be incorporated because the broker's note was not signed. This appeal was dismissed, as the factual circumstance in this case indicates that both parties at the time of concluding the sale contract (in the form of a broker's note) agreed to arbitration, and the absence of a signature cannot be a sufficient counter- argument. It was held that the paramount principle of validating an arbitration clause which exists in a separate document is to see

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[920] ibid 176; Baatz, 'Should third parties be bound by arbitration clauses in bills of lading?' (n 8) 86.
[921] Tweeddale and Tweeddale, *Arbitration of Commercial Disputes International and English Law and Practice* (n 123) para. 21.19, and in *Modern Building Wales v Limmer & Trinidad Co Ltd* [1975] 2 Lloyd's Rep. 318. It is suggested that choosing a particular contract containing an arbitration clause or an incorporation clause with an equal effect may evince parties' intention to arbitrate.
[922] *The 'St. Raphael'* [1985] 1 Lloyd's Rep. 403.

'whether or not there is a written, signed document recognising, incorporating, or confirming the existence of an agreement to submit'.[923] The meaning of 'signed document' may not be limited to 'a document verified by parties' signatures', and it refers to parties' mutual intention which can also be implied by the factual circumstances.[924] This means that it does not matter whether or not an arbitration clause and/or an incorporation clause are on certain standard form: the core factor that must be ascertained should be the intention of the parties to the bill of lading.[925]

To conclude, using a standard form, either for a charterparty or for a bill of lading, does not form a nexus in respect of binding a holder of the bill of lading to an arbitration clause contained in a related charterparty. This is mainly because any pre-printed clause does not necessarily contain the parties' genuine intention to arbitrate disputes arising from bills of lading, while an expressed agreement is essential to validate an arbitration clause.[926] It is then illogical to bind a holder of a bill of lading to an arbitration clause which the holder has never expressly agreed to, even if this clause is part of a certain standard form and accessible to the public.[927] It therefore follows that such a pre-printed arbitration clause or incorporation clause is not naturally binding, and these clauses may be superseded by any variation which are expressed by parties to bills of lading.

In other words, using a standard form of contracts could constitute a supportive ground for incorporating an arbitration clause from a bill of lading to a charterparty. For instance, when it can be proved that a holder of the bill of lading is an original party to a related charterparty, or that the holder has a course of dealing with the charterer and the shipowner which customarily involves an incorporation of an

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[923] ibid 409.
[924] *The 'St. Raphael'* [1985] 1 Lloyd's Rep. 403,409-411.
[925] Merkin, *Arbitration Law* (n 581) 5.21; Bagot and Henderson (n 581) 434.
[926] Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 415.
[927] Burton (n 105) 182.

arbitration clause from a bill of lading to a charterparty.[928] Otherwise, a nexus should be established on other grounds, which is fully discussed in Chapter 5.

After deciding the legal effect of the bill's incorporation clause in these three circumstances, the ensuing step is to ensure the bill's incorporation clause and the referred charterparty can cooperate with each other and produce a unified result concerning the incorporation. This additional examination on both relevant clauses is important, as in commercial practice the meaning of these two clauses often incur conflicts and ambiguity. This examination, namely the consistency test, will be fully discussed in below.

6.2. The Consistency Test

When disputes are about extending the application scope of a charterparty's arbitration clause to disputes arising from a bill of lading, the consistency test is widely applied after a separate discretion on the bill's incorporation clause.[929] Since inconsistency are often incurred by the wording of a bill's incorporation clause and the wording of the referred arbitration clause, this test is used to modify those conflicting and ambiguous expressions and to produce a consistent and reasonable result.[930] It is then important to decide whether the bill's incorporation clause should be modified in order to suffice the intention expressed in the referred clause in a charterparty or vice versa. However, judicial decisions upon this issue are not unified. For instance, a bill-centric approach coexists with a flexible approach (the bill's incorporation clause may be subject to modification in order to suffice the intention contained in the clause referred charterparty).[931]

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[928] *The Athena (No 2)* [2007] 1 Lloyd's Rep. 280; Mankabady (n 456) 60; Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 176; Bagot and Henderson (n 581) 436.

[929] Özdel, *Bills of Lading Incorporation Charterparties* (n 11) 143-144.

[930] ibid 157.

[931] The decision in *The Annefield* [1971] P. 168 may represent a flexible approach, where an explicit intention to incorporate an arbitration clause from a charterparty to a bill of lading can be either identified in a bill of lading or in a charterparty. Meanwhile, the decision in *The Varenna* [1983] 1 QB 599 may represent a bill-centric approach, where it was held that the contractual intention must be found in the bill of lading, while the intention in the charterparty does not have a contractual force on the parties to the bill of lading. Also see Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 392.

This situation may result in uncertainty both in law and commerce. Therefore, it is necessary to conclude a consistent rule in terms of how to make a modification.

It seems that the nexus established at the first stage (determines the legal effect of the bill's incorporation clause) can be used to justify the modification. This is because a nexus is established on facts which can evidence a mutual intention to arbitrate, especially a consent from a holder of the bill of lading.[932] Such a consideration of parties' intention to arbitrate is also the core criterion of modifying the conflicts between the relevant clauses. Since a nexus may firstly determine which clause should be the governing clause, it would be obvious in terms of which clause should be modified. For example, a clause (clause A) should be modified and comply with the intention contained in the other clause (clause B), if the established nexus can prove that the intention expressed by clause B is legally binding and prevails over that in clause A. Therefore, a nexus may provide the consistency test with a unified rule of modification, that is the modification should be made in order to suffice a contractual intention.

However, situations in bill of lading cases are rather complex and therefore the proper nexus may be varied according to different categories of cases. In this chapter, the category of cases is when the holder of a bill of lading can have knowledge of the incorporation of an arbitration clause, and these cases are further divided into two sub-categories. Accordingly, analyses of using the established nexus to direct the consistency test will be elaborated in the following sub-sections.

6.2.1. When the Holder of a Bill of Lading is an Original Party to the Referred Arbitration

As discussed in 6.1.1, the legal status of the bill's incorporation clause under this situation may be limited to a piece of evidence, and the clause having the

[932] Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 32.

contractual effect is the arbitration clause in a relevant charterparty.[933] For this reason, the sufficient nexus in this category of cases is the arbitration clause. Accordingly, when it comes to the consistency test, a bill's incorporation clause should be subject to modification in order to comply with an arbitration agreement in the charterparty.[934]

In *The Merak*,[935] due to the fact that the holder of the bill of lading was also the charterer in the referred charterparty, the construction of the bill's incorporation clause was made to suffice the explicit intention expressed by the charterparty's arbitration clause. In this case, the bill's incorporation clause incurred ambiguity, as it did not correctly make a specific reference to the arbitration clause in the charterparty. It was firstly argued that the arbitration clause should be incorporated, as the incorporated clause provided that a bill of lading issued thereunder should incorporate the arbitration clause.[936] This argument was rejected on the basis that a clause which regulates how the bill of lading should be formed cannot be incorporated in the bill, as it was not the mutual intention of the parties to the bill of lading.[937] However, the arbitration clause was still incorporated in the bill of lading, and it was achieved on an alternative ground. That is, by considering the distinct facts in this case,[938] the governing contract between the shipowner and the holder of the bill of lading should be the charterparty, and the arbitration clause in this contract clearly expressed the parties' intention to arbitrate their disputes arising from the charterparty as well as from the bill of lading.[939] Therefore, although the wording of the bill's incorporation can hardly lead to an incorporation of an arbitration clause, the

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933 *The Merak* [1964] Lloyd's Rep. 527; *Starlight Shipping Co & Anor v Tai Ping Insurance Co Ltd, Hubei Branch & Anor* [2007] 2 CLC 440; Treitel and Reynolds (n 11) 5-048; Todd, 'Incorporation of charterparty terms by general words' (n 481) 413; Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 178.

934 ibid.

935 *The Merak* [1964] 2 Lloyd' s Rep. 527.

936 ibid.

937 ibid 536 (Russell L.J,); Wagener (n 11) 122; Allison and Dharmananda (n 470) 273; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 134-135.

938 The holder of the bill of lading was the charterer.

939 *The Merak* [1964] 2 Lloyd' s Rep. 527, 534 (Davies L.J.).

disputes between the shipowner and the holder may still be addressed by an arbitration, as the factual circumstances in this case and the explicitly worded arbitration clause supported a modification to the incorporation clause.[940]

In *The Athena (No 2)*,[941] it was confirmed by Langley J that when the clause aimed to be incorporated is well-known and easily accessible to the businessperson in a certain market, namely when the situation in the case can be categorised as a one-contract case, this clause can be incorporated by a generally worded incorporation clause.[942] More importantly, this rule does not exclude the situation where the aimed incorporation involves an arbitration clause.[943] This means that an arbitration clause can also be incorporated without an explicit expression, if this incorporation was known to the engaged parties. It follows that in bill of lading cases, when a bill of lading is transferred to an original contractor of the charterparty, the mutual intention to arbitrate in the referred charterparty can be incorporated in a related bill of lading, even if the bill's incorporation clause does not specifically state 'an arbitration clause is incorporated in'.[944] This means that in such a situation, a generally worded incorporation clause is subject to modification in order to suffice the contractual intention in the charterparty, namely extending the application scope of an arbitration clause to disputes arising under a related bill of lading.

Similarly, in *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL.*,[945] it is clear from the judgement given by Christopher Clarke J that there are some reasonings which are used to decline an incorporation clause using general words and that are inapplicable in one-contract cases. These include: (1) arbitration is not a subject-matter naturally included in a bill of lading, (2) an

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940 Allison and Dharmananda (n 470) 270.
941 *The Athena (No 2)* 1 [2007] Lloyd's Rep. 280, 289.
942 ibid; Allison and Dharmananda (n 470) 276.
943 Steingruber (n 7) 9.69; Allison and Dharmananda (n 470) 277; Tan and Pereira (n 473) 14; Merkin and Flannery, *Arbitration Act 1996* (n 756) 34.
944 ibid; Tweeddale and Tweeddale, 'Incorporation of Arbitration Clauses Re-visited' (n 473) 659.
945 *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL.* [2012] 1 CLC 448, the decision in this case also considered in *Stellae Shipping v Hudson Shipping Lines* [2012 1 CLC 476.

arbitration clause is an ancillary clause due to its separability and autonomy in nature, (3) the effect of an arbitration clause in terms of ousting the jurisdiction of the courts, and (4) uncertainties derived from the transferability of bills of lading.[946] The rationale is that all of these concerns can be solved by the simple fact that the parties to the bill of lading have reached an agreement of arbitration in their contract of carriage, such as the charterparty. By contrast, the issued bills of lading in this situation are merely receipts and evidence of the relevant charterparty, which means that the terms and clauses in the bills cannot vary the agreements in the contract of carriage.[947] Therefore, a modification would need to be made to the bill's clause in order to give effect to the parties contractual intention contained in their contract of carriage.[948]

This may indicate that when the holder of a bill of lading is the charterer, one-contract doctrine may be applied, and principles in contract law may sufficiently support an incorporation of an arbitration clause from the charterparty to the bill of lading. Accordingly, a generally worded incorporation clause may be modified in order to accommodate an arbitration clause.[949]

To clarify, when a holder of the bill of lading is an original contractor to the related charterparty, the bill of lading in this situation is merely a receipt, while the contract is contained in the relevant charterparty.[950] This means that a bill's incorporation clause in this case does not amount to renewal of a contract, when the parties' intention of renewal is not expressed in the bill. For this reason, it is reasonable to adjust a bill's incorporation clause in order to suffice a contractual agreement in the charterparty if an ambiguity was incurred by a conflict between a specifically

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[946] Tweeddale and Tweeddale, 'Incorporation of Arbitration Clauses Re-visited' (n 473) 659-660.

[947] *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL.* [2012] 1 CLC 448; *Stellae Shipping v Hudson Shipping Lines* [2012 1 CLC 476.

[948] Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 178; McMahon (n 108) 3.

[949] Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 391; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 116; Park, 'Non-signatories and International Contracts: An Arbitration's Dilemma' (n 454) 25.

[950] Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 178; McMahon (n 108) 3; Özdel, 'The receipt function of the bill of lading: new challenges' (n 801) 435.

worded charterparty's arbitration clause and a generally worded bill's incorporation clause. A typical example of this is the case of *The President of India v Metcalfe Shipping Co. Ltd*,[951] in which it was held that when the holder of a bill of lading is the charterer, the governing contract is the relevant charterparty and the bills of lading issued in pursuance of the charterparty were mere evidential instruments.[952] According to this judgement, there was not an issue of an incorporation of an arbitration clause in this case,[953] as the charterparty's arbitration clause continuously bound the charterer and the shipowner, even though the charterer became the holder after the issuance of bills of lading.[954] Therefore, the fact that the charterparty's arbitration clause limited its application to disputes 'under this charter' cannot invalidate its binding effect between the shipowner and the holder of the bill of lading.

However, in a one-contract cases, an incorporation clause in the bill of lading may amount to a renewal of or a variation to the charterparty, if an explicit intention to vary the previous agreement in the charterparty can be identified.[955] It therefore follows that the modification should be made to the referred arbitration clause in order to suffice an expressed intention in the bill of lading.[956] The necessity to recognise such a renewal of contract is that it is possible for parties to renew their agreement at any stage of their transaction, and such a renewal results in a new agreement with a superseding effect.

For example, in *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL.*,[957] it is suggested that:

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951 *The President of India v Metcalfe Shipping Co. Ltd* [1970] 1 Q.B. 289.
952 ibid 305 (Lord Denning M.R.); Andrea Lista, *International Commercial Sales: The Sale of Goods on Shipment Terms* (1st edn, Informa Law from Routledge 2017) 140.
953 Todd, 'Incorporation of charterparty terms by general words' (n 481) 412.
954 Wilson (n 2) 243; Cooke, Young and Ashcroft (n 101) 492-493.
955 Wilson (n 2) 243.
956 Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 121.
957 *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL.* [2012] 1 CLC 448.

> ‘But, if a contract between A and B incorporates all the terms of a previous contract between them other than the terms newly agreed in the later contract, there should be no lack of clarity of what is to be incorporated.’[958]

This means that the incorporated terms should be subject to the intention clearly expressed in a newly concluded contract in bills of lading.[959] It may follow that in cases in which a special wording was provided by the bill’s incorporation clause, English law may give legal effect to a specific intention in the bill, as it may be held that a new contract is contained in the bill of lading.[960] However, the contractual effect of this ‘new contract’ is merely fact-supported, namely supported by specific wording of the bill’s incorporation clause, while the legal basis for such a binding effect is absent.[961] This is because bills of lading in this situation are legally recognised as merely evidential documents which cannot attach a contractual effect to an explicitly worded incorporation clause. The difficulty of supporting the contractual effect of the incorporation clause also lies in the fact that the shipper at the loading port does not have to be the charterer. In this case, this specifically worded incorporation clause could be the additional agreement between the shipper and the charterer. In other words, the parties to the incorporation clause are not the parties to the charterparty’s arbitration clause, which means cases of this kind cannot be classified as one-contract cases.

For these two reasons, a new nexus needs to be established in order to bind a holder of the bill of lading to the specifically worded incorporation clause. This nexus is therefore the same as in a situation which a holder of the bill of lading is a third party to the related charterparty, as in both of these situations an incorporation clause in the transferred bill of lading is the only link between the

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[958] ibid 467.
[959] Wilson (n 2) 243; Cooke, Young and Ashcroft (n 101) 17.8 and 17.9.
[960] *The Federal Bulker* [1989] 1 Lloyd’s Rep. 103.
[961] G H Treitel, ‘Bill of lading and implied contract’ (1989) L.M.C.L.Q. 162, 164.

holder and the shipowner concerning an incorporation of an arbitration clause.[962] Consequently, the legal principle underpinning such an incorporation may derive from a nexus which envisages the contractual effect of the explicitly incorporation clause. In other words, a mutual consent to an incorporation of an arbitration should be expressed by the holder of the bill of lading and the shipowner.[963]

To conclude, when the holder of a bill of lading is the charterer, the nexus should be the charterparty's dispute resolution clause. Consequently, when it comes to the consistency test, due modification should be made on the bill's incorporation clause, and therefore the contractual intention contained in the charterparty can be supported by law. However, exceptions should be made to cases in which it can be proved that there is a renewal of contract. In these cases, the proper nexus is unlikely to be the charterparty's dispute resolution clause, and therefore issues related to the ensuing consistency test should refer to the discussion in section 5.5.

Apart from the situation in which the holder of is the charterer, this chapter also considers the situation in which standard forms of charterparties or bills of lading are used,[964] because the current legal practice and academic discussion normally regard cases in this situation as one-contract cases. However, in light of the discussion in Chapter 3, it is suggested that using standard forms of documents cannot contribute to establish a nexus in the charterparty's arbitration clause. Accordingly, the consistency test would be carried out on a different basis, and this will be fully discussed in below.

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[962] In other words, the legal relationship between the holder and the shipowner is absent, but such a disclosure of contractual commitment is vital for a nexus, see in Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 533.
[963] Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 39-40; Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 533. This nexus is fully discussed in Chapter 5.
[964] See in 6.1.2 and 6.1.3.

6.2.2. When a Standard Arbitration Clause Conflicts with a Bill's Incorporation Clause or When a Standard Incorporation clause Conflicts with the Referred Arbitration Clause

As discussed above, it is unsound to vest a contractual effect in a bill's incorporation clause based merely on the fact that a standard form is readily accessible to a holder of the bill of lading. This is essentially because a pre-printed clause can hardly represent the genuine intention of the engaged parties in a specific case,[965] but a mutual consent to arbitrate is a mandatory requirement in terms of validating an arbitration clause.[966] In other words, since the legal status of the bill's incorporation clause remains uncertain,[967] the question as to whether an arbitration clause contained in the referred charterparty can be applied to disputes arising from a relevant bill of lading should be answered by a further examination of the parties' intention. This means an arbitration clause can be incorporated in a bill of lading, if a specific intention expressed by a shipowner and a holder of the bill of lading can be identified.[968] This expressed intention should be evidenced by an arbitration clause in a charterparty if the holder was an original contractor to the charterparty,[969] or by a specifically worded incorporation clause in a bill of lading or relevant conducts of the engaged parties.[970] This means that it is crucial to establish a nexus that can disclose an agreement between the shipowner and the holder of the bill of lading, especially when the wording of the bill's incorporation clause and the wording of the charterparty's arbitration clause are inconsistent with each other. By applying this nexus, a chosen dispute resolution can be confirmed and a modification, whether

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965 Wilson (n 2) 247.
966 Todd, 'Arbitration, privity of contract and carriage of goods by sea' (n 16) 378.
967 Mankabady (n 456) 60.
968 Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 124; McMahon (n 108) 6; Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 193; Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 339; Goldby, 'Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments' (n 386) 147; Wagener (n 11) 121; Allison and Dharmananda (n 470) 277; Goldby and Mistelis (eds) (n 470) 89.
969 See discussion in Section 6.1.1.
970 ibid; Mankabady (n 456) 54.

made to the charterparty's arbitration clause or to the incorporation clause, would be instructed.

In consistence with the previous discussion, this nexus should be based on a two-step inspection, namely of both the knowledge and the acknowledgement of the chosen dispute resolution clause.[971] It is then important to point out that using a standard form can hardly be a propriate nexus,[972] and subsequently when an inconsistency is incurred, it is unreasonable to support a specific intention contained in a standard form without confirming the parties' intention. This means that when it comes to an incorporation clause from a charterparty to a bill of lading, a standard form plays a supportive role, as a standard form may provide a holder of the bill of lading with a notice of such a special incorporation. The decisive factor remains as the parties' mutual intention to the incorporation, because the parties' acknowledgement is crucial to suffice an arbitration clause.[973] It follows that if any modification is required in order to adjust the inconsistency between two clauses, it is insufficient to make a manual modification merely on the basis of a pre-printed clause.

For instance, the decisions in the cases of both *The Annefield* and *The Federal Bulker* indicate that even though the wording of an arbitration clause (in a standard form of charterparty) did not incur instant inconsistency in context of the bills of lading, the incorporation of such arbitration clauses cannot be supported by law if an incorporation clause in a bill of lading is generally worded.[974] This is because an intention to arbitration was not expressed by the parties to the bill of lading.[975]

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[971] Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 39-40.
[972] Discussed in 6.1.2 and 6.1.3.
[973] Park, 'Non-signatories and International Contracts: An Arbitration's Dilemma' (n 454) 1; Steingruber (n 7) 162; Courtney (n 351) 593; Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (n 7) 476.
[974] *The Annefield* P.168; *The Federal Bulker* [1989] 1 Lloyd's Rep. 103.
[975] Lielbarde (n 17) 296.

The core issue in these two cases was whether the wording in the referred arbitration clause, namely 'this contract', incurred any inconsistency if this clause was written in the bill of lading. It seems that the criteria set by the leading case of *Hamilton & Co. v Mackie & Sons* can be of little help, since it only provided that a clause can be incorporated in a bill of lading if this clause can 'be read verbatim into the bill of lading as though they were there printed in extenso…'.[976] To illustrate, this criteria can be instructive when the wording of the referred charterparty expressly limited the scope of an arbitration clause, such as 'this Charterparty'.[977] However, it remains unclear whether a charterparty's arbitration clause can be incorporated in bills of lading if the relevant wording was 'this contract', as such wording does not necessarily incur instant inconsistency in a context of a bill of lading.

According to the judgements in *The Annefield* and *The Federal Bulker*,[978] it was held that the wording 'this contract' only means 'this charterparty' and cannot be interpreted as 'this bill of lading', and therefore the referred arbitration clause cannot be incorporated in bills of lading.[979] This is because a modification of the wording should be supported by an expressed intention to arbitrate, but such a special intention cannot be evidenced by a generally worded incorporation clause in the bill of lading.[980] It follows that merely using a charterparty on a standard form cannot help the arbitration clause to pass the consistency test, and certain efforts still need to be made in proving a mutual intention (between the shipowner and the holder of the bill of lading) to incorporate a related charterparty's arbitration clause. This mutual intention can be easily implied in a one-contract situation,[981] but it may encounter some difficulties when a bill of lading is

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976 *Hamilton & Co. v Mackie & Sons* (1889) 5 TLR 677.
977 Wagener (n 11) 118.
978 *The Annefield* P.168; *The Federal Bulker* [1989] 1 Lloyd's Rep. 103.
979 ibid.
980 McMahon (n 108) 6-5; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 123.
981 *The Athena (No. 2)* [2006] 2 CLC 710, para 18 (Bingham LJ) and para 65 (Langley J); Brekoulakis (n 301) 2.183; Allison and Dharmananda (n 470) 277; Tan and Pereira (n 473) 14; Merkin and Flannery, *Arbitration Act 1996* (n 765) 34.

transferred to a third party to the related charterparty because a holder's consent to this standardised incorporation clause is unknown.[982]

However, it remains questionable as to whether a referred arbitration clause should be modified in order to comply with a standardised incorporation clause in a bill of lading, if this pre-printed clause was specific about the incorporation of an arbitration clause. Such a modification may greatly depend on the legal effect of such an incorporation clause, and the difficulty of this matter is that a holder of a bill of lading does not customarily respond to terms and clauses contained in a bill of lading.[983] It follows that using a bill of lading on a standard form cannot be a nexus to enforce the incorporation, as a further discretion of the parties' intention needs to be carried out.[984] This means that the related arbitrations clause may be modified if a mutual intention to arbitration could be implied.

Therefore, the fact that either a charterparty or a bill of lading is on a standard form cannot form a nexus to bridge the gap between the shipowner and a holder of the bill of lading in the matter of incorporating an arbitration clause from a charterparty to a bill of lading, especially when the holder of the bill of lading turns out to be a third party to the referred charterparty. Consequently, the consistency test may be conducted as it is used in cases where a holder of the bill of lading is a third party to the referred charterparty, which falls into the category that is fully discussed in Chapter 5.

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[982] *The Annefield* P.168; *The Federal Bulker* [1989] 1 Lloyd's Rep. 103; Todd, 'Incorporation of charterparty terms by general words' (n 481) 413.

[983] Park, 'Incorporation of Charterparty Terms into Bill of Lading Contracts - A Case Rationalisation' (n 11) 186; Brekoulakis (n 301) 2.232 and 2.233; Özdel, *Bills of Lading Incorporating Charterparties* (n 5) 106 and 125.

[984] Lista, 'International commercial contracts, bills of lading, and third parties: in search for a new legal paradigm for extending the effects of arbitration agreements to non-signatories.' (n 123) 39-40; Lista, 'Knocking on heaven's door: in search for a legal definition of the bill of lading as a document of title' (n 4) 275.

6.3. The New Paradigm Part II: When One-contract Doctrine Applied

Since a contractual relationship between a holder of the bill of lading and a shipowner is not naturally contained in a bill of lading, it is then necessary to establish a nexus between these two parties in order to reveal their intention to arbitrate disputes arising from the bill of lading in a way that it stipulated in the related charterparty. The nexus may be established on two factors: one is based on a ready access to the referred arbitration clause, and the other is solely on the incorporation clause in a bill of lading when a ready access cannot be found. In this chapter, the discussion has focussed on whether a ready access to an arbitration clause can contribute to establish a nexus. In this thesis, the ready access is further divided into two categories, namely when a holder of the bill of lading is an original party to the related charterparty, and when a charterparty or a bill of lading is on a standard form.

In the first category of cases, it is suggested that the fact that the holder is the charterer can contribute to establishing a nexus, and this nexus should be the charterparty's arbitration clause. This is because the relevant charterparty is the contract between the holder and the shipowner, while the bills of lading issued thereunder are only evidential instruments. This means that the contractual effect of the charterparty would not be affected by the issuance of bills of lading. As a result, the charterparty's arbitration clause may continuously bind the charterer and the shipowner, even the charterer is identified as a lawful holder of the bill of lading. In other words, in this category of cases, the incorporation of an arbitration clause is supported by one-contract doctrine and contract law. The recognition of the contractual effect of a charterparty's arbitration clause in this category of cases may subsequently aid the consistency test. To illustrate, an incorporation of the charterparty's arbitration clause would not be dismissed on the ground that the intention expressed by the generally worded incorporation clause is inconsistent with the specific intention to arbitrate contained in the charterparty. This is because the contractual agreement in the charterparty prevails over, and

consequently the general-worded incorporation clause should be interpreted in a way that is in line with the consent expressed by the charterparty. However,

it is possible for a specifically worded incorporation clause to incorporate an arbitration clause, and it is does not matter how this arbitration clause is worded. This is because any wording incurring inconsistency may be subject to modifications in order to comply with an expressed intention to arbitrate in the bill's incorporation clause.[985]

Comparatively, in terms of the cases in which the relevant bills of lading or the relevant charterparty is in a standard form, this thesis proposes that these cases cannot be categorised in one-contract cases. This is because the knowledge of the incorporation of an arbitration clause does not equal to the acknowledgement of such an incorporation. Indeed, the use of a standard form of contract may illustrate the fact that a holder of a bill of lading can have access to the referred arbitration clause. However, the legal effect of such an access should be distinguished from the cases where a holder of the bill of lading is an original contractor of the charterparty. This because parties' intention of choosing dispute resolution is not necessarily disclosed by a standardised clause,[986] and this is especially the case for a holder who generally does not engage in the negotiation, conclusion and performance of a charterparty and in the issuance of bills of lading. Therefore, it is suggested that using standard forms cannot contribute to establishing a nexus, and it would be propriate to disclose the parties' intention before applying the consistency test.

Therefore, parties' intention to arbitrate is the preliminary issue that should be confirmed in this situation, and it has a direct and decisive impact on the primary

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[985] This specifically worded incorporation clause may be amount to a renewal of the previous agreement concerning the arbitration, and the legal principle underpinning the renewal of contract will be discussed in the next chapter in respect of the legal status of the incorporation clause.

[986] Standardised clauses are pre-printed, and therefore they do not necessarily contain a mutual (and especially a holder's) intention to arbitrate.

decision about the incorporation of an arbitration clause as well as subsequently affecting how the consistency test will be applied.

In light of the suggested paradigm, case law on this category of cases may be well-supported and certain issues can be clarified.

The second part of the new paradigm firstly justifies the judgment in *The Merak*. By applying this solution, it is legitimate to make an exception to the general rule of incorporating an arbitration clause under the situation similar to that in *The Merak*. That is, when the holder of the bill of lading is the original contractor of the referred charterparty, a holder of this kind generally should be bound by the arbitration clause that he/she previously agreed in the charterparty. The distinguished judicial decision in *The Merak* is reasonable, but it imposed challenges to a well-established rule of incorporating an arbitration clause, especially of incorporating an arbitration clause from a charterparty to a bill of lading.[987]

The problems arising from this case are twofold. Firstly, it is uncertain as to whether this decision can be justified by legal principles, since it is apparently against the general principle of incorporation. Specifically, this fact-based decision did not directly address certain vital issues, such as why the bill-centric approach is discarded (related to the legal status of the bill of lading) and why a sufficient notice about incorporating an onerous and unusual clause,[988] namely the arbitration clause, is not required. It is also questionable as to whether this decision can have an effect on other similar cases, since the underpinning principle is unclear.

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[987] Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 348, where it is suggests that the case of *The Merak* 'alone stands in the way of the general conclusion that arbitration clauses, whatever their wording, can be incorporated only by explicit words in the bill of lading.'; Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 392, it suggests that 'The Merak is generally considered as one on its specific facts and not setting out any binding rule regarding the application of the description test.'.

[988] Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 392.

The second part of the new paradigm tries to resolve these issues by clarifying the legal status of a bill's incorporation clause in the first place, which provides basis for categorising the cases in which the holder of a bill of lading is the charterer into one-contract cases. Consequently, the one-contract doctrine may be applicable to this special kind of scenario in bill of lading cases. Specifically, such an incorporation is given legal effect on the basis of the binding effect of a specifically worded arbitration clause (it literally extends its application scope to disputes arising from bills of lading issued thereunder) in the relevant charterparty. This means that a holder of this kind is sufficiently notified about the incorporation and the context of the referred arbitration clause, since this holder expressed his/her agreement to this clause in the charterparty as a charterer. As a result, the aimed incorporation can be achieved, even when the bill's incorporation clause did not specifically make a reference to the charterparty' arbitration clause. Moreover, the debate over the question as to whether or not the mistaken reference contained in the bill's incorporation clause should be corrected under the judicial construction,[989] may be resolved by applying the one-contract doctrine. To elaborate, by applying the suggested paradigm, the incorporation of the arbitration clause in this case is not achieved by the construction of the bill's incorporation clause. This means that the wording of the bill's incorporation cannot make much of a difference to the outcome of the disputed incorporation. Instead, the incorporation is given legal effect because of the valid contractual relationship between the holder of the bill of lading and the shipowner. This clear and obvious contractual relationship may underpin the binding effect of the charterparty's arbitration clause between the holder and the shipowner in this case.

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[989] It has been long discussed about whether it is legit to regard the mistake as a surplus: see in Todd, 'Incorporation of arbitration clauses into bills of lading' (n 358) 439; Todd, 'Incorporation of charterparty terms by general words' (n 481) 419; Felix W.H. Chan, 'Specific words of incorporation in bills of lading' (2015) 131(Jul) L.Q.R.372, 374-375; Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 393; Wagener (n 11) 122.

Since a legal foundation for the incorporation has been formed by applying the second part of the new paradigm, the decision in *The Merak* may be able to be applied to cases that have similar circumstances.[990] Moreover, this new paradigm also supports cases in which the wording of the referred arbitration clause does not perfectly fit in the context of a bill of lading. After the case of *The Merak*, it is questionable as to whether or not the referred arbitration clause should precisely provide that this arbitration clause shall be incorporated in bills of lading issued thereunder, if the incorporation clause did not specifically refer to the arbitration clause. This question may impose difficulties in *The President of India v Metcalfe Shipping Co. Ltd*,[991] as this case's arbitration clause in this case did not literally extend its application to disputes arising from any bills of lading. The first part of the new paradigm resolves this problem by reinforcing the evidential function of bills of lading in this category of cases and pointing out that the charterparty is the only contractual documents in this situation.

This means that the difficulty in this case can be addressed by applying principle of contract. That is, in this category of cases, the arbitration clause remains contractual between the charterer and the shipowner, while being named as a holder of the bill of lading cannot not vary this person's contract with the shipowner. This is because bills of lading in these cases are only evidential instruments affiliated to the relevant charterparty, and the disputes arising from the bill of lading are those arising from the charterparty. As a result, it is not a requirement for a referred arbitration clause to fit the context of a bill of lading, since the parties' consent is obvious and legally binding in their charterparty. This means that it is unnecessary to find any support, such as a specific reference in the bill of lading, to modify the ill-fitting wording in the referred charterparty. Therefore, when the holder is the charterer, it is legitimate to bind the holder to

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990 The binding effect of the judgment of the case of *The Merak* are always facing criticizing, for example in Özdel, 'Is the devil in the detail? A Maritime perspective on incorporating charterparty arbitration clause: the fifth annual CIArb Roebuck Lecture 2015' (n 102) 392.

991 *The President of India v Metcalfe Shipping Co. Ltd* [1970] 1 Q.B. 289.

the arbitration clause in the charterparty, even though the incorporation clause is generally worded, and the referred arbitration clause framed its scope to disputes arising from charterparty.

It is then clear that the first part of the new paradigm is designed to disclose the true identity of a holder of the bill of lading in this category of cases. In other words, the essence of this paradigm is to validate the referred arbitration clause in a situation in which the parties' consent to arbitrate can be exposed by relevant facts. This may overcome the difficulties embodied in bills of lading, namely that bills of lading are customarily transferrable, and a holder does not necessarily sign the bill of lading. Consequently, by applying the first part of the new paradigm to cases in which the holder of the bill of lading is the charterer, it is then less likely for such a holder to deny his/her commitment in an arbitration clause by arguing that he/she did not personally sign the bill of lading containing the incorporation clause, as relevant facts have indicated that this party actually knew about and acknowledged the incorporation of the charterparty's incorporation clause. Therefore, this new paradigm may further support cases, such as the case of *Starlight Shipping Co & Anor v Tai Ping Insurance Co Ltd, Hubei Branch & Anor*,[992] and the case of *The 'Athena' (No 2)*.[993]

The reinforcement of a party's autonomy in arbitration also clears doubts about the role played by standard forms of a charterparty and bill of lading. Specifically, the new paradigm distinguishes the fact of having access to the referred arbitration clause from an expression of consent to the referred arbitration clause. The situation in which standard forms of charterparties or bills of lading may only demonstrate the former, rather than the latter. Under this first part of the new paradigm, the referred arbitration clause can be binding only in cases in which relevant facts are sufficient to demonstrate a consent to arbitrate from the holder

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[992] *Starlight Shipping Co & Anor v Tai Ping Insurance Co Ltd, Hubei Branch & Anor* [2007] EWHC 1893 (Comm) 440.
[993] *The 'Athena' (No 2)* 1 Lloyd's Rep. 280.

of the bill of lading. Therefore, the first part of the new paradigm may justify judicial decisions of the case of *The Annefield*,[994] *The Federal Bulker*,[995] and *Siboti K/S v BP France SA*.[996] Specifically, the proposed solution provides reasons as to why the generally worded incorporation clause will not be modified in order to suffice a clear intention to arbitrate contained in the charterparty which is in a standard form. To elaborate, since in these three cases holders of bills of lading were not charterers, it is clear that these holders did not engage in an arbitration clause with shipowners. In other words, these cases cannot be categorised as one-contract cases, and consequently the first part of the new paradigm is inapplicable. As a result, the general rule of the incorporation of an arbitration clause shall be the proper principle, which means that the wording of the bill's incorporation clause may have a dominant effect and that only a specific reference to an arbitration clause can lead to a successful incorporation. It is then reasonable to hold that the incorporation in these three cases is insufficient.

Similarly, a consent to arbitrate may also be absent in cases in which bills of lading are on standard forms, and therefore it is problematic to bind a third party holder to the charterparty's arbitration clause only on the ground that the standard bill of lading is specific about incorporating from a charterparty to this bill of lading. On the one hand, the mere fact that the bill of lading is on a standard form cannot make this case a one-contract case. Consequently, a holder's consent is not naturally contained in the referred arbitration clause. On the other hand, a pre-

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[994] *The Annefield* [1971] P168, 184; Also, in the cases of *The Varenna* [1984] Q.B. 599, 608(Hobhouse J), it was held that an arbitration clause should be a collateral provision which means that it cannot be a condition in a bill of lading; *The Federal Bulker* [1989] 1 Lloyd's Rep. 103, 107(Bingham L.J), It is true that a wide range of clauses could be covered by the wording 'all terms, conditions and exceptions', and yet an arbitration clause cannot be categorised in any of these words; *The 'Delos'* [2001] 1 Lloyd's Rep. 703, the different legal effects between using general wording and specific wording were well-illustrated by this case, as there were two incorporation clauses to be considered, one made a specific reference to a charterparty's arbitration clause while the other was general-worded. The judgement of this case is that an arbitration clause can be incorporated in the bill which made a specific reference, and the attempt to incorporate an arbitration clause by general reference was failed; *Siboti K/S V BP France SA* [2014] 1 CLC 1. In a construction case, *Aughton Ltd v M.F. Kent Services Ltd* 1993 WL 963255, Sir John Megaw clearly stated that an arbitration clause as a 'self-contained contract' should be incorporated by explicit wording, and any general words, such as terms and conditions, are insufficient to achieve such incorporation.

[995] *The Federal Bulker* [1989] 1 Lloyd's Rep. 103.

[996] *Siboti K/S v BP France SA.* [2004]1 CLC 1.

printed clause in a standard bill of lading does not necessarily express a holder's consent to this clause. This means that such a specifically worded incorporation clause cannot represent a holder's consent to this incorporation. Because of these concerns, the judicial decisions in *The 'Nerano'*,[997] and of *The 'Epsilon Rosa'*,[998] may lack supporting legal principles. This is because these two cases' judgments were only made on the ground that specific references were contained in the relevant standard bills of lading, and it remains unclear whether a holder's consent to arbitrate was contained in that explicitly worded incorporation clause. Therefore, this thesis suggests that this category cases should be classified as two-contract cases, and the paradigm for these cases is discussed in Chapter 4.

Finally, the first new paradigm accommodates the possibility in which the holder (who is at the same time the charterer) and the shipowner renew their agreement in the bill of lading, and such a renewal of contract clarifies why in certain situations the clause in the bill of lading prevails over the referred clause in the charterparty. The intention of a renewal of contraction can be achieved by the parties' expressed or implied intention to treat the bill of lading as a new contract. To recognise a renewal of contract is to suffice the parties' autonomy, as it is common for the parties to adjust their previous agreements during the transaction.[999] This flexible approach may enable the principle of autonomy to be realised in the most feasible way.

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997 *The 'Nerano'* [1996] 1 Lloyd's Rep.1.
998 *The 'Epsilon Rosa'* [2003] 2 Lloyd's Rep. 509.
999 Todd, 'Incorporation of charterparty terms by general words' (n 481) 423.

Chapter 7

The Workability of the New Paradigm: setting the scene in Chinese Legal System

7.1. Applying the New Paradigm to Chinese Law

This research aims to establish a legal paradigm by applying which an incorporation of an arbitration clause from a charterparty to a bill of lading can be legally supported. Additionally, this research paid special attention on the workability of the new paradigm in Chinese legal system. This consideration derives from two facts. One is that China is increasingly active in international commerce and international commercial arbitration, while distinctive features of Chinese legal system may restrict its engagement in international commercial arbitration. The other fact is that the incorporation of an arbitration clause from a charterparty to a bill of lading is a problematic issue in both English law and Chinese law.

Considering the leading role that the United Kingdom played in carriage of goods by sea and the international commercial arbitration, the previous chapters focus on establishing the new paradigm for the incorporation of an arbitration clause from a charterparty to a bill of lading by taking English law as the prototype. The core issue existing in English law and Chinese law is that the binding effect of the incorporation clause in bills of lading may lack legal support, because the holder's consent to incorporate a charterparty's arbitration clause is absent in bills of lading. However, parties' consent to arbitrate is essential to validate an arbitration agreement. As discussed before, this is especially the case when a shipping is arranged according to a CIF contract, as a CIF buyer (the holder of the bill of lading) neither engages in drafting the bill's incorporation clause nor have access to the referred arbitration clause. This research starts from analysing the legal nature of bills of lading, in order to answer the question as to whether the binding

effect of the bill's incorporation clause can find its legal base in the legal effect of the document that contains this incorporation clause. Considering the customary nature of merchant law, this research answers this question from a historical perspective. This historical research suggests that arbitration clauses or incorporation clauses with the same effect are not naturally contained in bills of lading, and therefore these clauses cannot automatically bind the lawful holder of bills of lading. This means that the binding effect of these clauses should be established on other legal bases. As a result, the ensuing analysis is about whether the traditional legal base sufficing an extension of the scope of an arbitration clause can be applied to bill of lading cases. This analysis indicates that legal devices, namely incorporation and assignment, are potentially applicable, but it is crucial to establish the binding effect of the bill's incorporation clause in the first place. In other words, the bill's incorporation clause should be able to incorporate an arbitration clause in the bill of lading, and then it can be assigned to and bind a holder of the bill of lading.

The thesis established the contractual effect of bill's incorporation clauses by dividing bill of lading cases into two categories, because applicable legal principles are varied according to factual circumstances in each category of cases. In cases in which a holder of the bill of lading is a third party to the related charterparty, such as a CIF buyer, the requirement for incorporation clauses in bills of lading to be contractual is that these clauses should be explicit about incorporating arbitration clauses. The underpinning principles are the principle of separability and the requirement as to an arbitration clause should be an agreement in writing. By giving contractual effect to explicitly worded incorporation clauses in bills of lading, these incorporation clauses may subsequently be assigned to and bind holders of bills of lading. This means that explicitly worded incorporation clauses are contracts between the shipowner and the holder of bills of lading. It follows that if the wording of referred arbitration clauses is inconsistent with that of explicitly worded incorporation clauses, those

arbitration clauses are subject to modifications. These modifications are made to suffice the contractual intention to arbitrate expressed by the incorporation clause.

Comparatively, in cases in which a holder of the bill of lading is the charterer, such as an FOB buyer, incorporation clauses in bills of lading are not required to be explicit about incorporating arbitration clauses, because the contract of dispute resolution should be found in the related charterparty rather than the bill of lading. This is because the charterparty between the shipowner and the charterer does not terminated after issuing bills of lading. This means that the relationship between the shipowner and the charterer should be continuously governed by the related charterparty, even the charterer becomes a lawful holder of the bill of lading. In this case, bills of lading remain as evidential documents, unless it can be proved that the shipowner and the charterer renew their contract in the bills of lading. The underpinning principles are one-contract doctrine and contract law. Therefore, in this category of cases, when conflicts are incurred by incorporation clauses in bills of lading and related arbitration clauses in charterparties, modifications should be made to incorporation clauses. Additionally, this thesis looks into the question as to whether one-contract doctrine can be applied in cases in which standard forms of bill of lading or chartereparty is used. This thesis suggests that using standard forms is unlikely to be used as a ground to bind a third-party holder to a charterparty's arbitration clause. This is because although using standard forms of bill of lading or charterparty could enable a third-party holder to know about the incorporation, the knowledge of the incorporation of an arbitration clause does not equal to an acknowledge of such incorporation. Besides, a third-party holder is unlikely to give his/her permission about whether standard forms of bill of lading or charterparty should be used and which standard forms should be used. This means that a third-party holder's consent to arbitrate is absent, even standard forms are used. It follows that the one-contract doctrine cannot be applied in these cases. Alternatively, these cases should be classified

in the first category, and underpinning principles for the incorporation should be principles of separability, an agreement in writing, incorporation, and assignment.

Since similar problems exist in Chinese law, and since there is a trend of using such an incorporation clause in bills of lading,[1000] it is then necessary to apply this proposed paradigm in Chinese law. Therefore, this chapter focuses on two questions under Chinese law: (1) whether the new paradigm can provide legal bases for incorporating an arbitration clause from a charterparty to a bill of lading; and (2) whether the incorporation clause can be subsequently assign to a holder of the bill of lading. Specifically, the discussion is based on a three-step analysis: step 1 is to confirm the evidential effect of a bill's incorporation clause, step 2 is to establish the contractual effect of this clause between the shipper and the carrier, and step 3 is to give legal effect to the transfer of the contract established in step 2 and therefore binding the holder of the bill of lading. Additionally, this research also analyses the challenges imposed by distinctive features in Chinese law. This analysis not only tests the workability of the new paradigm, but also provides reform suggestions for Chinese law in order to promote the international commercial arbitration in China.

7.2. Step 1: The Incorporation Clause - An Evidential Document between the Charterer and the Carrier

In the situation where a holder of the bill of lading is the charterer or where a bill of lading is transferred back to the charterer, Chinese law is on the same page with attempted solution one. To illustrate, it has been regulated in Chinese law that in this kind of situation, bills of lading are mere evidential documents,[1001] and the contract between the carrier and the holder (the charterer) remains in the

[1000] Qiao Xin, 'The 'Long-Arm Effect' of an Arbitration Clause: Breakthrough and Extension' (2009) Judicial Reform Review 20; Wang Xiaoju, 'The Efficiency Value of Arbitration and its Improvement' (2006) 4 Arbitration Study 25.

[1001] Article 71 and Article 77 of Maritime Code of the People's Republic of China provide that bills of lading are evidential instruments.

related charterparty.[1002] This means that the dispute resolution clause should refer to the charterparty, while a bill's incorporation clause shall be subject to the relevant clause in the charterparty. In addition, in the case *China Pacific Insurance(Group) Co.,Ltd. Beijing Branch v COSCO Shipping Logistics Co.,Ltd*, *Tianjin Zhen Hua International Shipping Agency Co., Ltd. and Nile Dutch Africa Line B.V.*,[1003] the Supreme Court confirmed that a party should not be bound by an arbitration clause if this party was not an original contractual party to that arbitration clause. This judgement indicates that a party will be bound by a charterparty's arbitration clause, if he/she was the charterer. As a result, part II of the new paradigm is applicable to Chinese law.

7.3. Step 2: The Incorporation Clause - An Independent Contract between the Shipper and the Carrier

As discussed above, when the holder of the bill of lading is not the charterer, the relevant bill of lading would be the contract of carriage between the carrier and the holder. However, this provision (Article 95 of the Maritime Code of the PRC) does not shed much light on the incorporation of an arbitration clause from a charterparty to a bill of lading as it is obvious that Chinese legal practice on this matter does not provide a consistent judgement. Therefore, this section aims to analyse whether part I of the new paradigm can be applied in Chinese law and to help Chinese law to produce a consistent judgement on such a special incorporation.

[1002] Article 95 of Maritime Code of the PRC provides that where the holder of the bill of lading is not the charterer in the case of a bill of lading issued under a voyage charter, the rights and obligations of the carrier and the holder of the bill of lading shall be governed by the clauses of the bill of lading, which means that when the holder is the charterer, the rights and obligations of the carrier and the holder of the bill of lading shall be governed by the clauses of the charterparty.

[1003] Letter of Reply of the Supreme People's Court on Request for Instructions Re Arbitration Clause Validity in the Dispute over Insurance Subrogation under Contract for Carriage of Goods by Sea in the case Beijing Branch of China Pacific Insurance (Group) Co., Ltd. v. China COSCO Logistics Co., Ltd., Tianjin Zhenhua Shipping Agency Co., Ltd. and Nile Dutch Africa Line B.V. (issued in March 31, 2009,No. 11 [2009] of the Civil Division IV of the Supreme People's Court).

In order to bind a holder of the bill of lading with the referred arbitration clause, the preliminary task is to establish a binding effect of the incorporation clause in a bill of lading.[1004] Part I of the new paradigm established such a binding effect by resorting to the separability of an arbitration clause, since the legal status of bills of lading under English law cannot vest a contractual effect in an incorporation clause in a bill of lading.[1005]

To test the workability of part I of the new paradigm, it is important to look into the question of how Chinese law interprets principles of autonomy and of separability. Specifically, whether or not the Chinese interpretation of these principles is in line with that in English law. The reason is as follows. Firstly, it remains necessary to establish the binding effect of the incorporation clause in a bill of lading under Chinese law, as it remains controversial in Chinese law as to whether the contractual effect of the terms and clauses in a bill of lading can be extended to an incorporation clause with an effect of an arbitration clause.[1006] Secondly, these principles are bases of international commercial arbitration, and therefore an analysis of Chinese law's interpretation of these basic principles is helpful to evaluate China's acceptance and engagement in international commercial arbitration. Finally, the attempted solutions are mainly concluded on the English interpretation of these principles. This means that attempted solutions can only work in a legal system where these principles are adopted in its domestic law, and in which they are interpreted in a similar manner as they are in English law.

The second task is to establish the validity of an incorporation clause in a bill of lading.[1007] Specifically, supported by the new paradigm and under the consideration of incorporation rules under Chinese law, an incorporation clause

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[1004] Li (n 72) 117.
[1005] See in Chapter 3, where provides that neither the commercial practice nor the legislation can provide a bill of lading with a contractual effect.
[1006] See in above Chapter 2.
[1007] Li (n 72) 119.

should be able to bring in the referred arbitration clause into the relationship between the holder of the bill of lading and the carrier. The workability of the new paradigm will be tested in terms of whether or not the Chinese law of incorporation would impose challenges on the incorporation.

7.3.1. The Independent Legal Status of an Incorporation Clause

In Chinese law, the independent legal status of a bill's incorporation clause which specifically refers to an arbitration clause, can be illustrated from two aspects. Firstly, interpretations of the principle of autonomy and the principle of separability under Chinese law resemble those in English law. This means that an arbitration clause is potentially an independent contract, and therefore an incorporation clause with an equivalent effect can have the same legal status. Secondly, Chinese law adds a separate inspection over the validity of an incorporation of an arbitration clause in bills of lading. This means that the validity of an arbitration clause as well as an incorporation clause with an equivalent effect are subject to rules in specific areas of law, and this separate treatment may demonstrate the independent legal nature of those clauses.

(1) <u>An incorporation clause referring to an arbitration clause is ready to be an independent contract</u>

The principle of separability has been recognised in Chinese law;[1008] it can be illustrated by three judicial opinions. Firstly, an arbitration clause amounts to a specific contract for dispute resolution, since this clause evidences parties' autonomy in respect to settling disputes. Parties' autonomy of nominating an arbitration can be evidenced and supported by provisions which give parties legal rights to decide the forum,[1009] the process of hearing, and the procedure of the

[1008] Schwebel, Sobota, and Manton (n 530) 64; Zhu and Li (n 62) 632.
[1009] Article 6 of the Arbitration Law of the PRC; Wang Shengzhang, 'The Recognition of the Legal Effect of An Arbitration clause' (2002) 2 China's Foreign Trade 22.

chosen arbitration.[1010] Such a parties' autonomy has been broadened by CMAC Arbitration Rules 2015. For example, Article 30(2) provides parties with the right to nominate arbitrators from outside CMAC's Panel of Arbitrator; Article 7 and Article 40 respectively provide parties liberty in choosing the place of arbitration and the place of the oral hearing; Article 39 allows parties to decide how their case will be examined; Article 44(3) allows parties to hire a stenographer to make a stenographic record of an oral hearing; and CMAC allows parties to choose the fees and expenses to be calculated based on an hourly rate.

This means that an arbitration clause itself can be a well-functioning contract.[1011] This is because initiating an arbitration may depend on an expressed intention contained in this clause,[1012] and the execution of a chosen arbitration also exclusively relies on agreements contained in this clause. This independent nature of an arbitration clause is confirmed by Article 19 of the arbitration law of the PRC, and it explicitly regulates that the legal effect of an arbitration clause is independent from the main contract.[1013] Meanwhile, this special feature of an arbitration clause is also recognised in Chinese maritime arbitration. For instance, Article 5(4) of CMAC Arbitration Rules states that an arbitration clause shall be regarded as an independent contract, and its validity shall not be affected by any modification, cancellation, termination, transfer, expiry, invalidity, ineffectiveness, rescission, or non-existence of the main contract.[1014]

[1010] China Maritime Arbitration Commission (CMAC) Arbitration Rules [amended in 2015]; Jing and Dong (n 55) 156.
[1011] Jiang Jinye, 'The Legal Effect of an Arbitration Clause under the Assignment of Liabilities' (2001) 5 Arbitration and Law 64, 67.
[1012] Letter of Reply of the Supreme People's Court on Request for Instructions Re Objection over Jurisdiction in Dispute over Contract for Carriage of Goods by Sea in the case *China Beijing Ailisheng Import & Export Co., Ltd. v. Singapore Songjia Shipping Service Co., Ltd.* (29th Sept. 2007); and also in Letter of Reply of the Supreme People's Court on Request for Instructions Re Arbitration Clause Validity in the Dispute over Insurance Subrogation Claim under Contract for Carriage of Goods by Sea in the case *Dalian Branch of China Ping An Insurance (Group) Co., Ltd. v. COSCO Shipping Co., Ltd., and Guangzhou Ocean Shipping Co., Ltd.* (26th Jan. 2007); Huang Weiqing, 'On Some Legal Issues Relating to Charter Party Arbitration Clause Incorporated in the Bills of Lading' (2000) 11 Chinese Journal of Maritime Law 58.
[1013] Article 19 of the Arbitration Law of PRC; Jing and Dong (n 55) 166; Reply of the Supreme People's Court on the Request for Instructions on the Case of Objection to Jurisdiction between Appellants Dorval Kaiun K.K. and Hachiman Shipping S.A. and Appellee Shanghai Senfu Industrial Co., Ltd. (7th Sept. 2010).
[1014] Also see in Article 5(4) of CIETAC Arbitration Rules.

Secondly, when an arbitration clause constitutes a clause in a contract, the legal effect of an arbitration clause is severable. This means that an arbitration clause can remain legally binding, even though the main contract turns out to be null and void.[1015] For example, in the case *Nanxia No.9*,[1016] one of the disputes was whether or not the arbitration clause in the contract of salvage can be legally binding, if the contract of salvage turns out to be invalidated. The CMAC Shanghai Branch held that since Clause 9 of this contract of salvage specifically provided that disputes under this contract shall be submitted to the CMAC's Shanghai Branch, this arbitration commission has jurisdiction over this case. Therefore, according to Article 19 of the PRC's arbitration law, this arbitration clause remains valid.[1017]

Thirdly, when an arbitration clause is contained in non-contractual documents, such as e-mail exchanges,[1018] the binding effect of this clause can still be established, if the parties' joint intention to arbitration is clear and explicit.[1019] Bill of lading cases are in a similar situation, as the legal status of bills of lading remains controversial.[1020] It then seems that if the parties' intention to arbitrate

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[1015] Zhao Jian, *Judicial Supervision over International Commercial Arbitration* (Law Press China 2000) 77; Luo Huijie, 'Recent Developments in Chinese Maritime Law' (2010) 16(2) JIML 150,158.
[1016] This case is recorded in Jing and Dong (n 55) 159.
[1017] Zeng (n 51) 99-100.
[1018] Jing and Dong (n 55) 139 and 141.
[1019] Article 19 of the Arbitration Law of the PRC; China Maritime Arbitration Commission (CMAC) Arbitration Rules [amended in 2015]; Luo (n 1015) 158.
[1020] Maritime Code of the People's Republic of China [in force since 1992], Article 77 indicates that a bill of lading can be a prima facie evidence: Except for the note made in accordance with the provisions of Article 75 of this Code, the bill of lading issued by the carrier or the other person acting on his behalf is prima facie evidence of the taking over or loading by the carrier of the goods as described therein. Proof to the contrary by the carrier shall not be admissible if the bill of lading has been transferred to a third party, including a consignee, who has acted in good faith in reliance on the description of the goods contained therein; Maritime Code of the People's Republic of China [in force since 1992], Article 71 only adds another evidential function to a bill of lading: A bill of lading is a document which serves as an evidence of the contract of carriage of goods by sea and the taking over or loading of the goods by the carrier, and based on which the carrier undertakes to deliver the goods against surrendering the same. According to Article 95 of this law, the contractual effect of a bill of lading only can be established when disputes were between a holder of a bill of lading and a shipowner. However, it is unclear whether such a contractual effect can be extended to an arbitration clause or an incorporation clause with an equivalent effect. Consequently, the rights and liabilities contained in a bill of lading and then transferred to a holder of a bill of lading are the decisive factor in deciding the legal status of a bill of lading. Such rights and liabilities are illustrated as a holder with the right to request the delivery and a shipowner's liability to release the goods to the lawful holder. According to Guo Yu, *The law of Bills of Lading* (Beijing University Press 1997) 109-110, the source of the right to request the delivery should be statutory law, namely Article 71 of the Maritime Code of the People's Republic of China. This means that it can be found neither in the assignment of the contract of transport nor in the contract of

is clearly and explicitly expressed in a bill's arbitration clause, Chinese courts or arbitration commissions may support the binding effect of this arbitration clause.[1021] This may form a basis for applying the attempted solutions in Chinese law, as according to the attempted solutions, the binding effect of an explicitly worded incorporation clause is established upon the independent binding effect of an expressed intention to arbitrate.

The distinct effect of an expressed intention to arbitrate may be verified by comparing to cases where an intention to arbitrate is less obvious. For instance, in the case *Yiwu Kate Import and Export Company v CMA CGM S.A. and ANL Singapore Pre Ltd*,[1022] the dispute was whether the shipper (*Yiwu Kate Import and Export Company*) should be bound by an arbitration clause printed on the reverse of the bill of lading. It was firstly held by Zhejiang Superior People's Court that a bill of lading is merely a document evidencing three facts: (1) the existence of a relevant contract of carriage, (2) the fact that the goods have been accepted or loaded by the carrier, and (3) the carrier's promise that the goods will only be released against a presentation of the relevant bill of lading. Therefore, printed clauses on the reverse of a bill of lading do not necessarily constitute a part of the relevant contract of carriage, unless the shipper and the carrier agreed upon a supplement agreement which indicated that these printed clauses, including the arbitration clause, shall be incorporated in their contract of carriage. Since the disputed arbitration clause in this case was one of printed clauses on the reverse, and since no written evidence evinced that the shipper and the carrier agreed

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transport itself. There is another prevail opinion about the legal status of a bill of lading. According to Yao Hongxiu, Wang Qianhua, 'On the Nature of Rights Evidence by Marine B/L' (1997) 8 Chinese Journal of Maritime Law 23; Li Xuelan, 'On the Securitization of the Right Relating To B/L' (2002) 17(6) Legal Forum 61, 62; Cheng Fang, 'The Origin of the Right Evidenced by Bills of Lading' (2013) 3 Law Science 44,45; Liu Xin, 'Comparative Study Between Bill of Lading and Instruments' (2001) 12 Chinese Journal of Maritime Law 147, 150, and Lü Laiming, *Analysis of Principles Underpinning the Negotiable Instruments Law of the People's Republic of China* (China Legal Publishing House 2003) 45, it is a trend to define a bill of lading as a security. However, this discussion has not reached to an agreement, and it is unreasonable to conclude that a bill of lading is a contract between a holder and a shipowner.

[1021] Li (n 72) 117.

[1022] No. 6 [2012] of the Zhejiang Province Higher People's Court.

upon an additional agreement to incorporate this pre-printed arbitration clause, it was held that the shipper was not bound by the referred arbitration clause. This judgement was approved by the Supreme People's Court, and its reply was confirmed the position that standard clauses on the reverse of bills of lading cannot automatically be binding, and their contractual effect can only derive from an expressed intention to incorporate them into the contract of carriage between the carrier and the shipper.[1023]

According to this judgement and the reply, it is important to note that Chinese law takes a rather rigid approach to the legal status of bills of lading, in that even between the shipper and the carrier, the issued bills of lading are not necessarily recognised as a contract as a whole.[1024] The rationale for such a rigid attitude is that the process of issuance process of bills of lading does not satisfy the requirements to qualify as the conclusion of a contract.[1025] Specifically, receiving bills of lading from the carrier does not mean that the shipper or the holder of the bill of lading accept all terms and clauses in those bills.[1026] This is because bills of lading are solely signed by the carrier, and a shipper or a holder of the bill of lading normally cannot change or modify the bill's terms and clauses. This can especially be the case when bills of lading are in a certain standard form, as those terms and clauses on its reverse are pre-printed without asking for an approval from engaged parties. Consequently, the binding effect of those pre-printed terms only can derive from a supplemental agreement, in which it is clearly provided that both parties have agreed to incorporate these terms into the relevant contract of carriage.

[1023] No.10 [2012] of the Civil Division IV of the Supreme People's Court; Han (n 76) 233.

[1024] Different attitudes are taken when evaluating the terms on the face and the terms pre-printed on the reverse. It is importance to note that an arbitration clause or an incorporation clause with an equivalent effect is generally pre-printed on the reverse, and the face of a bill of lading only contains information directly related to the carriage, shipment and delivery, such as the name of parties, the quality and quantity of the goods, and the name of loading port and unloading port.

[1025] Zhang, 'A Case Study: The Validity of Incorporation Clause in Bill of Lading' (n 51) 119-120.

[1026] Han (n 76) 233; Fei (n 98) 101.

This judgement indicates that when evaluating the validity of an arbitration clause or an incorporation clause with an equivalent effect, the parties' genuine intention to this clause is separately considered, and a Chinese court or an arbitration commission is willing to suffice an expressed intention to arbitrate, even though this intention is recorded in a non-contractual document, namely a bill of lading. This means that principle of separability is adopted in Chinese law. Therefore, the effective approach for parties to a bill of lading in order to manifest such an intention is to make a supplemental agreement, namely an incorporation clause which clearly stipulates an incorporation of an arbitration clause from a charterparty to a bill of lading. Consequently, a specific intention expressed by such a supplemental agreement vests legal effect in such an incorporation clause. In other words, the core principle of arbitration, namely the parties' autonomy, is well-demonstrated. Specifically, the legal effect of an arbitration clause or an incorporation clause with an equivalent effect is not affected by the controversial legal status of a bill of lading; the legal effect of such clauses therefore completely depends on the parties' expressed intention. Meanwhile, in order to safeguard the parties' autonomy, Chinese arbitration law allows parties to make supplemental agreements concerning nominating an arbitration as the dispute resolution.

From the perspective of legislation, the principle of separability can be demonstrated by the compulsory rule of Chinese law, that is that the validity of an arbitration clause only derives from parties' free will to arbitrate their disputes only.[1027] For example, Articles 4 and 5 of the PRC's arbitration law provides that an arbitration must be a joint intention, and an absence of one party's intention to arbitrate will invalidate the arbitration clause.[1028] Meanwhile, a court will not accept cases in which all parties' consent to arbitrate is clear and explicit, and

[1027] Jing and Dong (n 55) 139 and 141; Han (n 76) 233; Tan Bin, 'Reflection on China's Arbitrate System and its Perfection' (2004) 4 The Jurist 139, 140.
[1028] Article 4 of the Arbitration Law of PRC.

this case will be directed to the chosen arbitration commission.[1029] This means that it is crucial for a valid arbitration clause to include all the parties' expressed consents to arbitration. It also indicates that once the parties' consent to arbitrate their disputes is clearly expressed, this consent will be vested with legal effect. Such legal effect includes: (1) excluding a court jurisdiction; and (2) the chosen arbitration being carried out according to the regulations in the arbitration clause.[1030] Meanwhile, the legal results caused by this clause cannot be easily varied by other clauses in the same document. This means that an arbitration clause constitutes the sole dispute resolution for certain disputes arising from a relationship.

Another driven force of recognising the principle of separability derives from the paramount principle in contract law, that is to fulfil parties' rightful intentions.[1031] Specifically, if the validity of an arbitration clause stands hand-in-hand with the legal effect of the document containing this clause, it would result in a situation in which an arbitration clause becomes null and void because of the frustration of a contract. Consequently, disputes between these parties are addressed through litigation, even though an arbitration clause is clear and explicit about the original preference of dispute resolution. In order to avoid this conflict, the legal effect of an arbitration clause has been given a separate consideration, and the validity of this clause derives from an expressed choice, rather than from the legal effect of the document containing this clause.

It then can be concluded that under Chinese law an arbitration clause itself is separable from the other terms contained in the same contract, which means that it can be an independent contract. Moreover, since an incorporation clause referring to an arbitration clause is concluded in order to achieve an intention of

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[1029] Article 5 of the Arbitration Law of PRC.
[1030] Jing and Dong (n 55) 139 and 141.
[1031] Article 4 of Contract of law of the PRC, it states: The parties have the right to lawfully enter into a contract of their own free will in accordance with the law, and no unit or individual may illegally interfere therewith.

arbitration, it is then reasonable to vest the separability of an arbitration clause to such a special incorporation clause.[1032]

Meanwhile, the fact that an arbitration commission is endowed with independent jurisdiction over arbitration-related disputes may enhance the independent legal status of an arbitration clause. It is important to note that the principle of parties' autonomy and the independent jurisdiction of an arbitration commission were not recognised under Chinese judicial system before 1950.[1033] This situation was changed since 1950, and since then the Chinese arbitration commission can have its independent jurisdiction over arbitration-related disputes.[1034] This change evidences the recognition of the principle of *Kompetenze-Kompetenze* under Chinese law, and this recognition further evinces the fact that the Chinese judicial system increasingly values the independence character of arbitration. In other words, the principle of autonomy not only has an effect on the independent nature of an arbitration clause, it also impacts the jurisdiction of Chinese arbitration commissions.

As a result, an arbitration commission can independently hear a case and make a judicial decision if the dispute was submitted to this commission.[1035] Meanwhile, a court does not have jurisdiction over issues which are agreed to be addressed by an arbitration.[1036] It follows that if a dispute was submitted to an arbitration commission, this commission can decide the inspection, collection and legal

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[1032] Han, Yuan and Yi (n 76) 243.

[1033] Chi, *Certain Problems and Improvements of the International Arbitration Regime: A comparative Study of Chinese and Foreign Arbitration Rules* (n 58) 13, it states that before 1950, Chinese arbitration commission was attached to industrial and commercial administration at different levels, an arbitral award was not final, the jurisdiction of an arbitration commission was decided by local administrations rather than parties' autonomy, parties cannot appoint arbitrators, and arbitrators were constituted by government officials rather professionals and lawyers.

[1034] ibid.

[1035] Jing and Dong (n 55) 141. Article 8 of Arbitration Law of PRC: Arbitration shall be conducted in accordance with the law, independent of any intervention by administrative organs, social organizations or individuals. Article 54(9) of CMAC Arbitration Rules; Article 10 of Decision of the State Council of the People's Republic of China Concerning the Establishment of A Maritime Arbitration Commission within the China Council for the Promotion of International Trade.

[1036] Wang Shengzhang, 'The Recognition of the Legal Effect of An Arbitration clause' (2002) 2 China's Foreign Trade 22.

effect of the relevant evidence, and it can decide the law applicable to the substantial issue. Lastly, its award is final and binding for the engaged parties.[1037] Moreover, when an arbitration has been commenced, the role played by a court is merely a supportive one. For example, an arbitral award is enforced by a court, or a court can only engaged in it when a clear intention as to the repeal of the arbitration has been expressed by the involved parties.[1038]

However, problems still exist in terms of whether an arbitration commission can have an exclusive jurisdiction if the dispute was about the validity of an arbitration clause. This problem is unsolved, because Chinese law on this matter is obscure. On the one hand, it provides that an arbitration commission can have jurisdiction on this issue, but on the other it does not devest a court's jurisdiction on this matter. Specifically, Article 4 of the PRC's arbitration law provides that arbitration commissions only accept cases in which an arbitration clause is valid. Meanwhile, Article 5 provides that a court does not accept cases in which valid arbitration clauses exist, and a court accepts cases in which the relevant arbitration clause turned out to be invalid. These two clauses merely indicate that an arbitration commission shall have an exclusive jurisdiction over submitted disputes when an intention to arbitrate has been expressed and the validity of an arbitration clause has been confirmed.[1039] This means that an invalid arbitration clause results in a court's exclusive jurisdiction.[1040] It then remains uncertain as to what would be the proper forum to decide the validity of an arbitration clause.

Nevertheless, it may be reasonable to argue that an arbitration commission would be the proper forum to decide the validity of an arbitration clause. Firstly, it has been an international trend that an arbitration commission can independently

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[1037] Jing and Dong (n 55) 141. Article 8 of Arbitration Law of PRC; Article 54(9) of CMAC Arbitration Rules; Article 10 of Decision of the State Council of the People's Republic of China Concerning the Establishment of a Maritime Arbitration Commission within the China Council for the Promotion of International Trade.

[1038] ibid.

[1039] Jing Yongheng, 'Analysis of an arbitration's jurisdiction' (2005) 3 Journal of Shanxi University (Philosophy and Social Science Edition) 82-85.

[1040] ibid.

address a dispute concerning its jurisdiction.[1041] As a participant of international trade and international commercial arbitration, it is necessary for Chinese law to follow this trend. For example, Article 6 of the CMAC Arbitration Rules 2018 suggests that the Chinese maritime arbitration commission shall decide the validity of an arbitration clause,[1042] and that the decision made by an arbitration commission is final and binding upon the parties.[1043] Secondly, the Supreme People's Court of China's reply to the issues related to deciding the validity of an arbitration clause may further dilute the jurisdiction of a court. This conflict was incurred by Article 20 of PRC's arbitration law, as this article indicated that a people's court may accept a dispute concerning the validity of an arbitration clause and make the final decision.[1044] This means that arbitration commissions cannot have any jurisdiction over such an arbitration-related dispute, because when there is a parallel proceeding, the law vests jurisdiction to the court only. It follows that the autonomy of an arbitration commission cannot be guaranteed and therefore the conflict was between Article 20 and principle of *Kompetenz-Kompetenz*.

The reply tried to alleviate such conflict by re-allocating jurisdiction. The standard for the reallocation is the issuing time of an award. Specifically, if an award was issued before the time that a court accepted the dispute, the award is final and binding. If an award was not issued when a court accepted the dispute, the court will take over the case and make the final decision; and meanwhile the arbitration

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[1041] For example, Article 21 of UNCITRAL Arbitration Rules, Article 16 of UNCITRAL Model Law, Article 30(1) of Arbitration Law 1996 and Article 15 of American Arbitration Association International Arbitration Rules; Qiao Xin, *Study of Arbitration Right* (Law Press China, 2001) 180-181.

[1042] Article 6 of CIETAC Arbitration Rules, and an identical provision can be found in Article 6 of CMAC Arbitration Rules 2018.

[1043] Jing and Dong (n 55) 172.

[1044] Arbitration Law of PRC was effective since 1995, and Article 20 states: If the parties object to the validity of the arbitration agreement, they may apply to the arbitration commission for a decision or to a people's court for a ruling. If one of the parties submits to the arbitration commission for a decision, but the other party applies to a people's court for a ruling, the people's court shall give the ruling. If the parties contest the validity of the arbitration agreement, the objection shall be made before the start of the first hearing of the arbitration tribunal.

proceeding shall be terminated.[1045] Subsequently, CMAC made the according supplement to its arbitration rules in 2001, and it confirmed that the arbitration commission's decision shall be final and binding, if this decision was made before a court accepted the same dispute.[1046]

To conclude, both the interpretation of separability and *Kompetenz-Kompetenz* indicates that an arbitration clause should be independent from the other clauses contained in a same document.[1047] The word 'independent' should be understood from two perspectives: (1) the matter governed by such a clause is different from the others; and (2) in order to ensure the enforceability of such a clause, it is necessary to give a legal effect to this clause on a separate consideration. In other words, an arbitration clause should be regarded as an independent contract, and therefore the validity of this contract should primarily be based on the parties' expressed intention on this matter. Moreover, since an arbitration clause in a bill of lading should be treated separately, and since the disputed incorporation clause functions as an arbitration clause in a bill of lading, it is then reasonable to conclude that an incorporation clause which brings an arbitration clause from a charterparty to a bill of lading should be endowed with the independent legal nature from an arbitration clause.[1048]

(2) <u>The separate source of legal effect</u>

The independent nature of an incorporation clause under consideration is also illustrated by its separate legal source. Specifically, although the legal effect of terms and clauses contained in a bill of lading is generally governed by maritime

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[1045] The people's Supreme Court's Reply to issues about how to confirm the validity of an arbitration clause [issued on 21st Oct. 1998]
[1046] Article 4 of CMAC Arbitration Rules 2001.
[1047] Zeng (n 51) 100.
[1048] Song (n 52) 30: An incorporation clause bringing an arbitration clause from a charterparty to a bill of lading is recognised as an arbitration clause, because it works as an arbitration clause; According to Jing and Dong (n 55) 144, this practice has been widely used in sea commence and has been observed by Chinese legal practice, and Article 78 of the *Maritime Law of People's Republic of China* does not preclude the possibility that a bill of lading can contain an arbitration clause or an incorporation clause of this kind.

law of the PRC, the legal effect of an arbitration clause is at the same time subject to compulsory rules in the country's arbitration law. Since this law requires an expressed consent to an arbitration clause, and given the fact that a holder of the bill of lading can hardly express his/her intention to arbitrate, a holder of the bill of lading is not naturally bound by an arbitration clause in the transferred bill of lading.[1049]

Firstly, under Chinese law a holder of the bill of lading may only be automatically bound by terms and clause which are directly germane to shipment, carriage and delivery,[1050] and yet an arbitration clause or an incorporation clause with an equivalent effect does not fall within that category. To provide the terms and clauses in a bill of lading with a binding effect is to protect the holder's rightful interests in the goods.[1051] This is because a bill of lading is the sole document evidencing the underlying carriage of goods by sea owned by a holder of the bill of lading.[1052] This means that the holder of the bill of lading can only rely on the terms and clauses in the bill of lading to claim his/her rightful interests in the goods. It is common that the terms and clauses that concern the holder are those directly related to the carrier's performance in terms of shipment, carriage and delivery, as these terms may determine whether or not a holder can receive the goods as they expected. To illustrate, in the Maritime Law of the PRC, Article 73 particularly

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[1049] Liang and Li (n 75) 652.

[1050] Maritime Code of the People's Republic of China [in force since 1992], Article 73: (1) Description of the goods, mark, number of packages or pieces, weight or quantity, and a statement, if applicable, as to the dangerous nature of the goods; (2) Name and principal place of business of the carrier; (3) Name of the ship; (4) Name of the shipper; (5) Name of the consignee; (6) Port of loading and the date on which the goods were taken over by the carrier at the port of loading; (7) Port of discharge; (8) Place where the goods were taken over and the place where the goods are to be delivered in case of a multimodal transport bill of lading; (9) Date and place of issue of the bill of lading and the number of originals issued; (10) Payment of freight; (11) Signature of the carrier or of a person acting on his behalf. In a bill of lading, the lack of one or more particulars referred to in the preceding paragraph does not affect the function of the bill of lading as such, provided that it nevertheless meets the requirements set forth in Article 71 of this Law; Han (n 76) 233.

[1051] Similar considerations can be found in international conventions, such *Hague-Visby Rules* in 1924 and *Hamburg Rules* in 1978; Han (n 76) 233, it suggests that the transferred rights are those directly related to the shipment, carriage and delivery.

[1052] On the one hand, holders of bills of lading cannot have a direct control over goods during the voyage. On the other hand, a holder of the bill of lading does not has a contract with the carrier, since a holder does not necessarily to be the charterer (an original party to the contract of carriage). Consequently, the bill is the only material evidencing the relationship between a shipper and a holder.

provides that terms and clauses in this category should be contained in a bill of lading.[1053] Article 78 clearly vests a binding effect to those terms and clauses, namely that the holder of the bill of lading and the carrier are bound by these terms in a bill of lading.[1054] However, it is inappropriate to add an arbitration clause or an incorporation clause with an equivalent effect into that category, as it provides a dispute resolution between the charterer and the shipowner, rather than providing regulations about the substantive performance of the underlying carriage of goods by sea.[1055]

Secondly, it is not in line with mandatory rules in Chinese arbitration law to add an arbitration clause or an incorporation clause with an equivalent effect into the subject-matters of a bill of lading. It is required by Chinese arbitration law that parties' consent to arbitrate should be clearly expressed in an arbitration clause. Article 4 of Arbitration Law of the PRC provides that a valid arbitration agreement should be made on a mutually voluntary basis, and therefore an arbitration commission will not accept cases in which a counterparty's consent to arbitrate is absent. Article 16 provides that an expressed consent to arbitrate is one of facts contributing to a valid arbitration clause.[1056] Moreover, Article 17 provides that an arbitration agreement is invalid if this agreement was signed by means of duress. Additionally, CMAC Arbitration Rules have been increasingly valued principle of autonomy.[1057] For instance, compared to the 2004 version of this rule, the rule confirms that the agreement must be in a written form, and give a specific

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[1053] Article 73 of Maritime Law of the PRC.

[1054] Article 78 of Maritime Law of the PRC, and it states: The relationship between the carrier and the holder of the bill of lading with respect to their rights and obligations shall be defined by the clauses of the bill of lading. Neither the consignee nor the holder of the bill of lading shall be liable for the demurrage, dead freight and all other expenses in respect of loading occurred at the loading port unless the bill of lading clearly states that the aforesaid demurrage, dead freight and all other expenses shall be borne by the consignee and the holder of the bill of lading.

[1055] Letter of Reply of the Supreme People's Court on Request for Instructions Re Objection over Jurisdiction in Contract Dispute for Carriage of Goods by Sea in the case *Shanghai Branch of China Pacific Property Insurance Co., Ltd. (Plaintiff) v. Sunglide Maritime Ltd., Ocean Freighters Ltd. and the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited (Defendants)* (24th Feb. 2009); Han, Yuan and Yi (n 76) 239, 233; Han (n 76) 233.

[1056] Zhu and Li (n 62) 634.

[1057] Jing and Dong (n 55) 156; Chu Beiping, 'The New Future of Maritime Arbitration under 2015 CMAC Arbitration Rules' *Legal Daily* (25/11/2004).

interpretation of 'a written form'.[1058] This improvement is to ensure an arbitration clause is made upon free will. Moreover, the current version gives more liberty to parties in term of deciding preliminary issues and procedure issues concerning the chosen arbitration. Similar provisions also can be found in the CIETAC Arbitration Rules.[1059] It is then clear that an expressed consent from engaged parties is essential to validate an arbitration clause.

According to the Supreme People's Court's reply to the case of *China Pacific Insurance(Group) Co.,Ltd. Beijing Branch v COSCO Shipping Logistics Co.,Ltd*, *Tianjin Zhen Hua International Shipping Agency Co., Ltd. and Nile Dutch Africa Line B.V.*,[1060] a party should not be bound by an arbitration clause if this party was not an original contractual party to that arbitration clause. In this reply, the submitted question was whether or not the insurer should be bound by an arbitration clause contained in the related contract of carriage if the insurer subrogated the insured's right against the carrier for the compensation of the goods damage. The Supreme People's Court replied that the insurer was not bound by the arbitration clause, because the insurer was not a party to this arbitration clause and his/her intention to arbitrate cannot be found in this clause. This arbitration clause can only be binding if the insurer additionally expressed his/her consent to this clause. This reply indicates that parties' intention to arbitrate is the basic requirement in respect to validating an arbitration clause under Chinese law.[1061]

[1058] Article 5 (1) and (2) of China Maritime Arbitration Commission (CMAC) Arbitration Rules [effective in 2015], this rule has been revised and these provisions maintained in current rules [effective in 2018].
[1059] Article 5 (1) and (2) of China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules [effective in 2015]
[1060] Letter of Reply of the Supreme People's Court on Request for Instructions Re Arbitration Clause Validity in the Dispute over Insurance Subrogation under Contract for Carriage of Goods by Sea in the case Beijing Branch of China Pacific Insurance (Group) Co., Ltd. v. China COSCO Logistics Co., Ltd., Tianjin Zhenhua Shipping Agency Co., Ltd. and Nile Dutch Africa Line B.V. (issued in March 31, 2009,No. 11 [2009] of the Civil Division IV of the Supreme People's Court).
[1061] Li (n 72) 119; Fei (n 98) 102.

Consequently, compulsory rules in Chinese statutory law may invalidate an arbitration clause or an incorporation clause with an equivalent effect contained in transferred bills of lading, because a clear and explicit consent to arbitrate is absent.[1062] Such a restrictive rule derives from a consideration of parties' autonomy in arbitration. Specifically, it is uncertain about a shipowner's consent to arbitrate disputes between him/her and a holder of the bill of lading, as a shipowner issues a set of bills of lading to a shipper while a shipper does not necessarily have to be a transferee of the bill of lading. Additionally, it is more difficult to ascertain a holder's commitment to such clauses, because a holder may not participate in the negotiation and the conclusion of the bill's arbitration clause.[1063]

To conclude, under the current Chinese law, an explicitly worded incorporation clause does not necessarily bind a holder of the bill of lading, because the legal effect of an arbitration clause or an incorporation clause with the same effect, is not affected by the legal status of the bill of lading containing the clause. In other words, even though Chinese law regulates that the relationship between a shipowner and a holder of a bill of lading should be governed by the terms contained in the related bill of lading, a holder is not necessarily be bound by an explicitly worded incorporation clause in a bill of lading. Specifically, special considerations are attached to such clauses, owing to the recognition of the principle of autonomy and separability. Specifically, since an arbitration clause does not belong to the subject-matters of a bill of lading, a specific reference is required.[1064]

However, it is still very difficult for a specific reference to achieve an incorporation of an arbitration clause under Chinese law. This is because the validity of such

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[1062] ibid; Song (n 52) 30.
[1063] Zhang, 'A Case Study: The Validity of Incorporation Clause in Bill of Lading' (n 51) 116; Liu and Hjalmarsson (n 83)1.
[1064] ibid 122.

an arbitration clause is solely governed by the Arbitration Law of the PRC, rather than by the binding effect of the bill of lading. The Arbitration Law of the PRC provides that the validity of an arbitration clause is exclusively related to the intention of the parties to the arbitration clause. Therefore, an arbitration clause in the bill of lading may only bind the shipowner and the shipper, since these two parties are the presented parties when the bill of lading is issued. This means that whether or not a holder of the bill of lading should be bound by such clauses may depend on the question as to whether or not the holder expressed his/her intention to this arbitration.

From this perspective, it seems that attempted solutions can provide a legal basis for the binding effect of an explicitly worded incorporation clause, as the principle of separability is adopted in Chinese arbitration law. The following issues will be divided into a two-step test. The first is whether or not Chinese law can recognise the binding effect of a specifically worded incorporation clause between the shipper and the carrier as is proposed in the attempted solutions. The second is whether or not Chinese law recognises a transfer of such an incorporation clause to a third party holder by applying the attempted solutions.

7.3.2. A Valid Incorporation Clause Between the Shipper and the Carrier

Before binding a holder of the bill of lading by transferring an incorporation clause, it is important to establish the binding effect of the incorporation clause in the first place. This preliminary issue will be addressed according to principles of incorporation under Chinese law. This section aims to demonstrate the distinct requirements imposed by Chinese law, as these different requirements may challenge the attempted solutions. As a result, the workability of the solutions will be tested.

Chinese law recognises the practice of incorporating an arbitration clause from one contract to another contract. Article 11 of The Interpretation of the Arbitration Law of the PRC provided that:[1065]

> 'Where a contract stipulates that an effective arbitration clause in another contract or document shall apply in order to settle the disputes, the parties concerned shall, when a contractual dispute arises, resort to arbitration according to the said arbitration clause.
>
> Where a relevant international treaty applicable to contracts involving foreign interests contains an arbitration provision, the parties concerned shall, when a contractual dispute arises, resort to arbitration in accordance with the arbitration provision in the international treaty.'

According to this article, a sufficient incorporation under Chinese law needs to fulfil two requirements. Firstly, the wording of the incorporation clause should be clear and explicit about three facts, namely: (1) the name of the contractual parties, (2) the application scope of the referred arbitration clause, and (3) the location of the referred arbitration clause.[1066] Secondly, the referred arbitration clause should be legally binding. Considering the principle of parties' autonomy in arbitration, the first requirement is vital to the destiny of an incorporation clause and it constitutes the major threshold. This is because using different formations of wording may have a direct effect on parties' expectations of the aimed incorporation during the negotiation and conclusion of a contract,[1067] and these expectations are closely related to the question as to whether or not the aimed incorporation includes a dispute resolution clause. The answer to this question consequently determines the validity of an arbitration agreement, as parties'

[1065] Article 11 of The Supreme People's Court's Interpretation on Arbitration Law of the People's Republic of China [effective in 2008]
[1066] Li (n 72) 119.
[1067] Xu and Chen (n 95) 70.

autonomy is paramount. It is then reasonable for a court or an arbitration commission to employ a strict rule of interpretation. Compared to English law, Chinese law not only requires that the exact wording, namely 'arbitration clause', should be literally contained in an incorporation clause, it also requires that an explicit nomination of the related charterparty should be contained in this clause.[1068]

For example, In the case *China Light Resource v Sino Port Shipping Co., Ltd*,[1069] The incorporation clause in this case was specifically worded and it clearly indicated that an arbitration clause would be incorporated in the bill of lading, and it stated:

> 'All Terms and Conditions, Liberties and Exceptions of The Charter Party, Dated ___ as Overleaf, Including the Law and Arbitration Clause, Are Herewith Incorporated.'[1070]

However, the clause on the face of the bill of lading did not indicate which charterparty is incorporated, and therefore it was held that an arbitration clause was not incorporated. The reasoning was that the referred arbitration clause cannot be found, and it was therefore hard to ascertain the content of the referred arbitration clause, since the gap for filling in the date of the incorporated charterparty was left in blank.[1071]

It is also important to note that the court did not reject the incorporation on the ground that the incorporation clause was a pre-printed clause on the reverse of the bill of lading. This may support the above-mentioned point as to the separability of an arbitration clause, namely in the sense that its legal effect was

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[1068] Li (n 72) 117; Liang and Li (n 75) 651.
[1069] No.7 (2012) of Wuhan Maritime Court; and No. 18 [2012] of the Civil Division IV of the Supreme People's Court.
[1070] ibid.
[1071] ibid.

not closely related to the legal nature of a bill of lading. It may follow that a specifically worded incorporation clause can bind the carrier and the shipper when the shipper can locate the referred arbitration clause by reading the incorporation clause. This means that such a specifically worded incorporation clause can be treated as an independent contract; the appropriate legal reasoning is based on the principle of separability. Therefore, in order to apply the principle of separability to support the binding effect of such an incorporation, it is necessary for an incorporation clause to be qualified as an arbitration clause in the first place. In order to achieve this, specific wording indicating that an arbitration clause is incorporated is required.

It is then clear that such an incorporation may only be impeded by an unclear instruction about the location of the referred arbitration clause. This unclear instruction may sabotage the aimed incorporation on two grounds. Firstly, it is unpersuasive for one party to claim that such an incorporation has been agreed by the counterparty, since it is unlikely for a party to engage in an agreement that he/she did not know.[1072] Secondly, it is difficult to execute a non-existing arbitration clause, as the seat, the forum, and the procedure for the arbitration are unknown. Therefore, unlike English courts, Chinese courts tend to interpret the wording of an incorporation clause in a rather strict manner. [1073]

The following question is whether or not Chinese courts or arbitration commissions would be willing to imply a proper charterparty if the wording of an incorporation clause is incomplete and uninformative about the referred charterparty, namely the incorporation clause itself was silence about the name

[1072] Han (n 76) 230 and 231.
[1073] Treitel and Reynolds (n 11) 3-033, and 3-034 suggest that without specific wording about incorporating an arbitration clause, the incorporation does not necessarily include the arbitration clause in the related charterparty; para 3-035 and 3—036 suggest that with an express reference, namely the incorporation clause specifically referred to a charterparty's arbitration clause, such an incorporation will be given legal effect, and verbal manipulation would be granted if the intention of such an incorporation is clear and explicit.

or the date of the referred charterparty. According to the judgment to the above-mentioned case, it seems that Chinese courts may follow a rigid rule of implication.

To illustrate, it was held that the claimed arbitration clause cannot be incorporated in the bill of lading, as the charterparty containing this clause cannot be implied to be the proper charterparty referred to by the incorporation clause. The fatal fact in this case is that the charterer and the shipper were not the same party. Specifically, in this case the charterer in the charterparty containing the arbitration clause was named Brihope Enterprise S.A., while the shippers named in the relevant bills of lading were Niugini Lumber Merchant Ltd. and Island Forest Resources Ltd. For this reason, it was held that the bills were not issued pursuant to the charterparty, since the charterer was not the shipper. Consequently, the charterparty cannot be incorporated in the bill of lading, and thus the arbitration clause contained in this charterparty cannot bind the parties to the bill of lading.

The legal principle underpinning this rigid implication is the rule of incorporation. Under the Chinese rule of incorporation, the incorporated charterparty should be a voyage charter that and has a direct connection with the bill of lading, namely the bill of lading should be issued pursuant to this voyage charter.[1074] Limiting the incorporated charterparty to a voyage charter is due to the commercial practice. In practice, disputes as to whether or not an arbitration clause is incorporated from a charterparty to a bill of lading generally arise from cases in which voyage charterparties are involved.[1075]

Meanwhile, limiting the identity of the charterer and the shipper is done in order to bridge the knowledge gap. Abiding by the principle of autonomy in arbitration, a valid incorporation of an arbitration clause in bill of lading cases should be established upon the ground that the shipper and the carrier agreed to arbitrate

[1074] Liang and Li (n 75) 653.
[1075] Han, Yuan and Yi (n 76) 239, 243.

their disputes according to a charterparty's arbitration clause.[1076] This ground should be illustrated by two facts. One is that both these parties can have the knowledge of the referred arbitration clause, and the other is that both parties agreed to refer this arbitration clause. The first fact lies in the situation in which parties to the bill of lading should be the same parties to the incorporated voyage charter. The other facts may be illustrated by a specifically worded incorporation clause in a bill of lading.

Therefore, in Chinese law, it is legitimate to imply a proper charterparty to suffice the aimed incorporation, and yet the implication should be made according to the rule of incorporating a charterparty to a bill of lading. Specifically, when the incorporation clause is silent about the location of the referred arbitration clause, Chinese courts may make an implication by the evaluating facts in each case. The evaluation is to ensure that the shipper and the carrier knew and recognised such a special incorporation. The reason for this strict rule is that when a holder of the bill of lading is not the charterer, other facts which can indicate an implied consent shall be considered. These facts may include those indicating whether a holder can be sufficiently informed about such a special incorporation, and whether a referred arbitration clause can be ascertained by a holder.

Moreover, as is the case with English law, Chinese law requires that the arbitration clause should be written in a manner which can sufficiently inform a holder of the bill of lading about such special incorporation. For example, the clause should be written in bold or in a different colour.[1077] In the case *Yiwu Kate Import and Export Company Ltd. v CMA CGM S.A. and ANL Singapore Pte Ltd*,[1078] the incorporation of an arbitration clause was rejected by the court on the ground that a holder of the bill of lading cannot be informed about such special

[1076] Liang and Li (n 75) 656.
[1077] Guo Ping, 'Research on Principles and Methods of the Interpretation of Maritime Law' (2006) China Oceans L. Rev. 318, 333- 334.
[1078] No.6 (2012) of Zhejiang Province Higher People's Court.

incorporation, since the disputed arbitration clause was not highlighted among the terms and clauses on the reverse of the bill of lading.

To conclude, between the shipper and the carrier, an arbitration clause or an incorporation clause with an equivalent effect can be effective when these clauses are specific about a consent to arbitrate disputes arising from the bills of lading. From this perspective, the attempted solutions may be applicable, as the first step taken by the solutions is to prove that the legal effect of an arbitration clause or an incorporation clause with the equivalent effect shall not be affected by the non-contractual nature of bills of lading. The underpinning legal principle is the separability of arbitration, and this basic principle has also has been widely recognised in Chinese law.[1079] This means that, theoretically and practically, an arbitration clause or an incorporation clause with the equivalent effect, can be legally recognised as an independent contract between the shipper and the carrier, and consequently this clause shall be a supplement agreemental attached to the relevant contract of carriage.

7.4. Step 3: The Transfer of an Incorporation Clause - An Independent Contract between the Holder of a Bill of Lading and the Carrier

After establishing the validity of an incorporation clause in a bill of lading, the next issue is to extend the legal effect of such incorporation clause to a holder of the bill of lading. In other words, the pre-condition of this section is that an arbitration agreement has been reached between a shipper and a carrier, and the issue requiring discussed is whether or not a shipper can transfer his/her arbitration agreement with a carrier to a holder of the bill of lading.

7.4.1. Theoretical Support

[1079] ibid.

Since Article 11 of the Interpretation of Arbitration Law of the PRC does not provide a detailed requirement as to validating an incorporation of an arbitration clause, it is then necessary to look into other sources of law.[1080] Considering an incorporation clause which aims to bring an arbitration clause from another contract into a new relationship should be regarded as an independent contract, extending the legal effect of such an incorporation clause may be equal to transferring a contract. In this case, provisions concerning the transfer of a contract are taken into consideration, which may be instructive in order to ascertain under what circumstances a contract can be transferred to a third party.

It seems that an arbitration clause can be transferred to a third party. Specifically, Article 11 and Article 8 of the Interpretation of the Supreme People's Court concerning Some Issues of the Application of the Arbitration Law of the PRC allows a transfer of an arbitration agreement.[1081] In addition, Article 88 of the Contract Law of the PRC provides that: 'Upon the consent of the other party, one party may transfer its rights together with its obligations under contract to a third party.' Article 80 and Article 84 deal with the transfer of rights and transfer of obligations respectively.[1082] Accordingly, a shipper can transfer his/her rights in an arbitration to a holder after the carrier agreed to such transfer, and a shipper can transfer his/her obligations in an arbitration after the carrier agreed so.[1083] It follows that rights and obligations under an arbitration agreement can be

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[1080] Chu (n 79) 664.

[1081] Article 8: Where a party concerned is merged or divided after concluding an agreement for arbitration, the agreement for arbitration shall be binding upon the successor of its rights and obligations. Where a party concerned has died after concluding an agreement for arbitration, the agreement for arbitration shall be binding upon the inheritor who inherits his rights and obligations in the matter to be arbitrated. The circumstances prescribed in the preceding two paragraphs shall not be applicable if the parties concerned have otherwise agreed between each other when concluding the agreement for arbitration.
Article 11: Where a contract stipulates that an effective arbitration clause in another contract or document shall apply in order to settle the disputes, the parties concerned shall, when a contractual dispute arises, resort to arbitration according to the said arbitration clause.

[1082] Article 80 of Contract Law of the PRC Where the obligee assigns its rights, it shall notify the obligor. Such assignment will have no effect on the obligor without notice thereof. A notice by the obligee to assign its rights shall not be revoked, unless such revocation is consented to by the assignee.
Article 84 Where the obligor delegates its obligations under a contract in whole or in part to a third party, such delegation shall be subject to the consent of the obligee.

[1083] Yang Xiuqing and Wei Xuanshi, 'The Extension of an Arbitration Clause' (2007) 01 Arbitration Study 20.

transferred to a holder of a bill of lading, and the shipper merely has to inform the carrier about such transfer and then acquire the carrier's acknowledgement about this transfer.

Considering the process of issuing bills of lading and the commercial practice, it is reasonable to imply a carrier's acknowledgement of the transfer of an arbitration agreement. To illustrate, a carrier and a shipper firstly agree to enter into an arbitration clause, if an incorporation clause with an effect of an arbitration clause is contained in the bill of lading issued by the carrier. Secondly, it is common practice for a shipper to transfer negotiable bills of lading to a third party, and it is within the knowledge of a carrier as to whether the issued bills of lading are negotiable or not. This means that before a transfer of bills of lading, the shipper and the carrier agree that the shipper's rights and obligations under the arbitration clause (referred to by an incorporation clause in the bill of lading) will be transferred to the transferee (the holder of the bill of lading). Subsequently, a holder's agreement to the contract of incorporating a charterparty's arbitration clause may be manifested by his/her acceptance of the bill of lading.[1084] Therefore, it is theoretically feasible for an arbitration clause to be automatically transferred from the shipper to the holder of the bill of lading. In addition, this theoretical presumption is in line with the current commercial practice.[1085]

7.4.2. The Judicial Trend in China

Even with the above-mentioned theoretical support, a successful incorporation of an arbitration clause from a charterparty to a bill of lading is scarce in Chinese legal practice.[1086] This situation may derive from an absence of a solution in terms of how to ascertain a holder's consent to an arbitration in Chinese statutory law. On the one hand, according to the fundamental principle of autonomy in

[1084] Han (n 76) 234; Chu (n 79) 671-672.
[1085] Zhao (n 89).
[1086] Liu and Hjalmarsson (n 83).

arbitration, it is crucial for a valid arbitration clause to be established upon engaged parties' expressed consent.[1087] On the other hand, Chinese statutory laws are generally worded, and they have not specifically addressed the issue as to how to ascertain a third party's consent to arbitrate disputes arising from a transferred contract.[1088] However, the importance of a holder's consent to an arbitration agreement transferred from a shipper is reinforced by the Supreme People's Court.[1089] As a result, Chinese courts or the arbitration commission tend to reject to extending the application of an arbitration clause to a third party, especially when such an extension is attempted by an incorporation clause in a bill of lading.[1090]

Nevertheless, such an extension would be granted, if both a carrier's and a third-party holder's intention of the incorporation was difficult to be denied. In the Reply of the Supreme People's Court on the Request for Instructions Re. Arbitration Clause Validity in the Bill of Lading in *Fujian Shengchan Ziliao Corporation v Golden Pigeon Shipping Co. Ltd.*,[1091] it was held that the corporation in Fujian (the holder of the bill of lading) is bound by the referred arbitration clause, even though this holder of the bill of lading was neither an original party to the referred arbitration clause in the related charterparty, nor party to its incorporation clause in the bill of lading. In this case, two facts played a decisive role in the court's judgment. Firstly, an incorporation clause on the transferred bill of lading was clearly and explicitly about incorporating an arbitration clause from a charterparty to this bill of lading. Secondly, the holder of the bill of lading expressly agreed to this incorporation. It is obvious that these two facts can sufficiently disclose both parties', and especially the holder's,

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[1087] Fei (n 98) 101.
[1088] Trappe (n 47) 338; Li (n 72) 118; Fei (n 98) 100.
[1089] Li (n 72) 117.
[1090] No. 130 [2012] of the Civil Division IV of the Supreme People's Court, see also in Zhong Jianpin (ed) *China Maritime Trial* (Guangdong People's Publishing House, 2014) 7-8; Fei (n 98) 99.
[1091] Reply of the Supreme People's Court on the Request for Instructions Re Arbitration Clause Validity in the Bill of Lading in *Fujian Shengchan Ziliao Corporation v Golden Pigeon Shipping Co. Ltd.* No.135 [1995] 135 of the Supreme People's Court.

acknowledgement of the incorporation of an arbitration clause, and this expressed intention can form the ground for granting the validity of the incorporation.[1092]

Comparing the law concluded from this exceptional case with the above-mentioned Chinese judicial trend, it can be implied that in Chinese law facts which can directly evidence parties', and especially a third party's, consent to an incorporation of an arbitration clause play an essential role in supporting the binding effect of such an incorporation clause.[1093] This strict rule about disclosing parties' consent to arbitrate may impose challenges upon applying the attempted solutions; this issue is addressed in below.

7.5. Challenges: A Strict Interpretation of 'An Agreement in Writing'

This section aims to demonstrate the distinct requirements imposed by Chinese law on the matter of incorporating an arbitration clause from a charterparty to a bill of lading, as these different requirements may challenge the attempted solutions to some extent. Therefore, the workability of the new paradigm will be tested, and the paradigm will be applicable if those potential challenges can be overcome.

Since the binding effect of an arbitration clause derives from 'a written arbitration agreement', the legal effect of an incorporation clause with the same effect should also derive from an expressed intention to incorporate an arbitration clause. For example, it has been widely recognised that an arbitration clause and an incorporation clause with an equivalent effect should not be in an oral form, and such an incorporation clause should be clear and explicit about the incorporation of an arbitration clause.[1094] However, the challenges may be imposed by

[1092] Han (n 76) 229, Luo (n 1015)159-160; Fei (n 98) 100-101.
[1093] Li (n 72) 117-118; Fei (n 98) 102.
[1094] Han (n 76) 229.

different interpretations of ‘a written agreement’ in certain specific aspects, as there is no unified rule about how clear and explicit an arbitration clause should be.[1095] Therefore, the following analysis will begin by focussing on the Chinese interpretation of ‘an agreement in writing’.

The essential requirement of qualifying a written agreement in Chinese law is similar to that in English law and international conventions: namely the parties’ consent to arbitrate should be clearly and explicitly recorded in a written agreement,[1096] because only a written form can evince a joint intention in the most convincing manner.

For example, in the People’s Supreme Court’s reply to an application for enforcing the award made by the Hong Kong Maritime Arbitration Group,[1097] it was held that since an arbitration clause did not exist in the first place, an arbitration award cannot be enforced, and no arbitration clause can be incorporated in the issued bills of lading. In this case, the relevant facts are as follows. (1) A letter of intention recorded the fact that the sub-charterer (a company located in Shengyang) chartered a vessel, BUDVA, from the charterer (a company located in Hong Kong) to carry goods from North Korea to China. In addition, it recorded that issues related to dead freight and demurrage shall refer to the charterparty, and the remaining issues referred to provisions in the Gencon Charter. (2) The charterparty, which was modified based on the Gencon Charter, remained unsigned, because an agreement concerning dead freight and demurrage was not reached. Additionally, an arbitration clause was contained in

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[1095] ibid 227; Yang Rongxin, *The Theory and Application of Arbitration Law* (China Economic Publishing House, 1998) 43.

[1096] Article 16 of Arbitration Law of PRC states: 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. The following contents shall be included in an arbitration agreement: 1. the expression of the parties' wish to submit to arbitration; 2. the matters to be arbitrated; and 3. the Arbitration Commission selected by the parties. Micheal Moser and John Choog (eds), *Asia Arbitration Handbook* (Oxford University Press 2015) 3.79.

[1097] Reply of the Supreme People's Court to the Request for Instructions on the Enforcement of a Hong Kong Maritime Arbitration Award applying by Hong Kong Dong Feng Shipping Co., Ltd. (issued in June 2, 2006, No.12 [2010] of the Civil Division IV of the Supreme People's Court).

this unsigned charterparty. (3) Bills of lading were issued and transferred to the buyer (a third party to the charterparty) and an incorporation clause on the reverse provided that the charterparty's arbitration clause was incorporated in the bill of lading. (4) When the vessel arrived at the unloading port, the unloading process was prevented by the charterer, and it was on the ground that the dispute concerning dead freight and demurrage was not addressed. (5) The charterer gained an award in its favour from a Hong Kong Maritime Arbitration, and sought to enforce this award in mainland China. Finally (6) the buyer sued the charterer in court on the ground that the charterer's retention of the goods was unlawful. However, the charterer questioned the court's jurisdiction on the ground that the charterparty's arbitration clause was incorporated in the bill of lading.

Two points should be highlighted in the Reply, as these two specific decisions may expose Chinese law's interpretation of 'a written arbitration agreement'. Firstly, in the relationship between the charterer and the sub-charterer, an unsigned contract cannot amount to a 'written' agreement. It follows that a valid arbitration clause not only should be in a written form, but also should include an expressed consent to this written clause.[1098] In this case, an arbitration clause was in a written form, as it was one of the printed clauses in the Gencon Charter. However, the fatal fact is that the parties' intention to arbitration was not expressed in the charterparty, as the charterparty was unsigned. In addition, this intention cannot be implied according to the factual circumstances in this case, namely the generally worded reference in the letter of intention cannot legally be used as an expression of intention to arbitrate. Specifically, it is clear that the letter of intention between the charterer and the sub-charterer did not exclude a reference to the arbitration clause contained in the Gencon Charter, as the letter

[1098] Similar judgement can be found in Reply of the Supreme People's Court to the Request for Instructions on the Recognition and Enforcement of the FOSFA No. 3948 Arbitration Award, available at http://www.cnarb.com/Item/3372.aspx.

only specifically provided that issues related to dead freight and demurrage should be different from those addressed in that standard contract.

It is then reasonable to imply from this case's judgement that if this letter of intention contained a clear and explicit intention to arbitration, the charterer and the sub-charterer would be bound by this expressed intention, even if the letter of intention and the charterparty were both legally non-contractual. This binding effect of such a specifically worded incorporation clause may verify the discussion in 6.2.1, namely the principle of separability is adopted by Chinese law, and by applying this principle, the legal effect of an arbitration clause or an incorporation clause with an equivalent effect is not affected by the legal status of the document containing this arbitration clause. As a result, an arbitration clause can independently be contractual among other non-contractual statements. Such a treatment of an arbitration clause and an incorporation clause with an equivalent effect is in line with the development in other domestic arbitration laws and international conventions, namely that an expressed consent to arbitration shall be given legal effect, and the non-contractual nature of the document that contained such an expressed intention will not affect the legal effect of an arbitration agreements.[1099]

It follows that the failure to imply an intention to arbitration in this case derives from the combination of a non-contractual effect document and a generally worded reference. On the one hand, it was held that the printed arbitration clause in the charterparty was invalid. This is because the charterparty was unsigned as a whole, which means that the parties' consent to this clause was absent. Therefore, the referred arbitration clause did not amount to 'a written agreement'. On the other hand, although the letter of intention may represent parties' joint

[1099] Article 5(2) of CIETAC Arbitration Rules 2015; Article 5(2) of CMAC Arbitration Rules 2018; Arbitration Act 1996; UNCITRAL Model Law. Yang Liangyi, *International Commercial Arbitration* (China University of Political Science and Law Press, 1997) 121.

intentions, the charterer and the sub-charterer may not be responsible for those intentions, because a letter of intention is not recognised as legally binding contract in Chinese law. Meanwhile, a written arbitration clause cannot be found in this letter. Consequently, the charterer in this case was not bound by the arbitration clause, and the relevant arbitration award was unenforceable.

The second point is that a holder of a transferred bill of lading is not bound by an incorporation clause (making reference to an invalid or non-existed arbitration clause), although this clause was explicit about bringing an arbitration clause from a charterparty to this bill of lading. In this case, the People's Supreme Court repeal of the charterer's claim was not on the ground that a holder's consent to arbitration was absent on the transferred bill of lading,[1100] but instead was based on the decision that the referred arbitration clause did not exist. This means that an incorporation clause of this kind could only bring in a valid arbitration agreement, rather than an ineffective arbitration clause even if it was in a standard form of contract.

It is then reasonable to conclude that when it comes to examining the validity of an arbitration clause, both English law and Chinese law provide that a disclosure of the parties' intention to an arbitration is decisive,[1101] and such an intention shall either be clearly expressed in an arbitration clause, or it can be easily implied from relevant facts.[1102] Therefore, in the attempted solutions, it is required that an incorporation clause in a bill of lading should make explicit reference to a valid arbitration clause, as such an explicit reference may be helpful for a court or an arbitration tribunal to justify parties' true intention. This specific requirement results from the principle of separability, and this principle

[1100] In term of how to disclose a holder's consent to arbitration, it is discussed in 7.4.
[1101] Article 16 of Arbitration Law of the PRC, Article 5 of Arbitration Act 1996; similar provisions can be found in Option I, Article 7 of UNCITRAL Model Law, and Article II (2) of the New York Convention.
[1102] Zhang, 'A Case Study: The Validity of Incorporation Clause in Bill of Lading' (n 51) 121; Zhao (n 89). Wang Zuxin and Zheng Xia, *Autonomy and Intervene – Research on the International Commercial Arbitration Consensus* (Law Press China 2016) 179; Qiao (n 1000) 21; Han (n 76) 228.

then underpins the legally binding effect of such an expressed intention to arbitration.

However, the situation discussed above is only a general interpretation, and the attempted solution still faces challenges, as Chinese law is rather cautious in interpreting an incorporation clause in a bill of lading. In other words, the threshold qualifying a written agreement in English law is lower than that in Chinese law,[1103] and the main reason for this difference derives from a different understanding of 'explicit'. To illustrate, Chinese law sets up a rather specific and strict rule in terms of the information that should be contained in an arbitration clause.[1104] Generally, the wording of an incorporation clause should be able to directly disclose the parties' intention to an arbitration, and no more implication is required. To achieve this, a mere demonstration of a consent to arbitrate, namely a holder of the bill of lading and the carrier agreed to extend the application of the referred arbitration clause to disputes arising from the bill of lading, is not sufficient.

In order to ensure that a holder of a bill of lading indeed agreed to an incorporation of an arbitration clause, it is additionally required by Chinese law that such an intention of incorporation shall be on the face of a bill of lading, and the date of the referred charterparty should be clearly stated on the bill of lading.

Another challenge posed by Chinese law is its strict rule in qualifying an arbitration clause, as the validity of the referred arbitration clause is crucial to the incorporation. This is because, apart from disclosing parties' intention to such an incorporation, the validity of the referred arbitration clause constitutes the other limbs supporting the successful incorporation of an arbitration clause. Different from English law and international conventions, Chinese law additionally requires

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[1103] Yang and Hjalmarsson (n 83); Fei (n 98) 102.
[1104] Zhang, 'A Case Study: The Validity of Incorporation Clause in Bill of Lading' (n 51) 124; Han (n 76) 227-228.

that the name of the chosen arbitration commission should be contained in the arbitration clause.[1105] These challenges will be fully discussed in the following.

7.5.1. A Different Treatment to Clauses on the Face and the Reverse

In order to imply a consent to arbitrate disputes arising from a bill of lading, it is crucial for courts to be assured that a holder of the bill of lading can have knowledge of an incorporation of an arbitration clause. This knowledge depends on two facts. One is the location of such an incorporation clause, and the other is the wording of the incorporation clause. Unlike English law, Chinese law tends to strictly require that an intention of incorporating an arbitration clause from a charterparty to a bill of lading should be stated on the face of a bill of lading.[1106]

Article 30 of Provisions of the Supreme People's Court on Several Issues concerning Dealing with Foreign-Related or Foreign Arbitration Cases (Draft) provides that an incorporation clause must be stated on the face of a bill of lading.[1107] Moreover, in the of Reply of the Supreme People's Court on the Request for Instructions Re. the Arbitration Clause Validity in the Contract of Carriage of Goods by Sea in *Angang Group International Trade Corporation v. Garlingford Limited*,[1108] the Court rejected an incorporation of an arbitration clause from a charterparty to a bill of lading on the ground that the incorporation clause was not stated on the face of the bill of lading.

[1105] Article 6, and Article 16 of Arbitration Law of PRC.
[1106] Li (n 72) 117; Luo (n 1015)159; Fei (n 98) 100.
[1107] Article 30 of Provisions of the Supreme People's Court on Several Issues concerning Dealing with Foreign-related or Foreign Arbitration Cases (Draft): By meeting the following requirements, an arbitration clause can be incorporated from a charterparty to a bill of lading, and therefore binds a holder of the bill of lading: (1) on the face of the bill of lading, it is clearly and explicitly stated that an arbitration clause is incorporated from a charterparty to a bill of lading, and (2) the referred arbitration clause is valid. See in https://www.chinacourt.org/article/detail/2003/12/id/98431.shtml, also in Han, Yuan and Yi (n 76) 248.
[1108] Reply of the Supreme People's Court on the Request for Instructions Re Arbitration Clause Validity in the Contract of Carriage of Goods by Sea in Angang Group International Trade Corporation v. Garlingford Limited (issued on 22/12/2010) [Effective].

The rationale behind this judicial trend is that a pre-printed incorporation clause concerning incorporating an arbitration clause on the reverse does not naturally contain a consent from the holder of the bill of lading.[1109] The contract of carriage between the holder of a bill of lading and the carrier can be in a standard form printed on the reverse, and a related charterparty can become a supplement to the contract of carriage by an incorporation clause on the bill. Largely, using a generally worded incorporation clause can only bring in clauses and terms directly related to the performance of a carriage of goods by sea.[1110] To incorporate an arbitration clause, it is required that the holder of the bill of lading should be sufficiently informed. However, it is unreasonable to imply that a holder has been sufficiently informed, if this special incorporation clause is buried in other clauses and terms cannot arouse a holder's attention.[1111] Therefore, an intention to incorporate an arbitration clause is required to be clearly stated on the face of the bill of lading.[1112]

The challenge faced by the attempted solutions is that it is not required by the solutions that the incorporation clause should be stated on the face of the bill. However, by applying the principle of separability and a later judicial decision, the binding effect of a pre-printed clause could be established if this clause is specifically worded.

Theoretically, by highlighting the principle of separability, it is feasible for Chinese courts to recognise the legal effect of a specifically worded incorporation clause

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[1109] Han (n 76) 233-234, where *the contra proferentem* was considered, and this principle of construction is well-recognised in Chinese law: Guo (n 1066) 318.

[1110] Letter of Reply of the Supreme People's Court on Request for Instructions Re Arbitration Clause Validity in the Dispute over Insurance Subrogation Claim under Contract for Carriage of Goods by Sea in the case Dalian Branch of China Ping An Insurance (Group) Co., Ltd. v. COSCO Shipping Co., Ltd., and Guangzhou Ocean Shipping Co., Ltd. [issued and effective on January 26, 2007], it was held that the arbitration clause was not incorporated in the bill of lading. This is because the incorporation clause on the face of bill of lading only stated that the terms and clauses, conditions, and exceptional clause were incorporated from the charterparty dated 19/04/2004, and it did not specifically mention about an arbitration clause is incorporated, also see in Fei (n 98) 100.

[1111] Fei (n 98) 100.

[1112] Li (n 72) 117; Liang and Li (n 75) 654; Fei (n 98) 100.

on the reverse of a bill of lading. This is because according to the judgement in the above-mentioned case, the location of the clause was not the actual reason for the court to reject the incorporation. To illustrate, the incorporation clause on the reverse was clear and explicit about an incorporation of an arbitration clause, and the judgement denying the incorporation was actually on the ground that the location of the incorporation clause cannot form its contractual basis. This means that the essential reason for the court to reject the incorporation was their doubts as to parties' contractual intention concerning the incorporation of an arbitration clause. The difficulty to ascertain the parties' intention was increased by the inferior legal effect of the terms and clauses on the reverse of the bill of lading. This inferior legal effect would derive from a common knowledge as to the limited subject-matters covered by a bill of lading. This line of reasoning merely indicates that a Chinese court tends to stand in a negative position when it cannot have a clear judgement as to whether engaged parties agreed to an incorporation of an arbitration clause or not.

However, the doubts faced by the Chinese court may be cleared by the specific wording in the clause and the application of the principle of separability. Firstly, such specific wording is already a sufficient notice to the holder of the bill of lading. Since a holder can have access and read the other terms on the reverse, it is reasonable to hold that the holder will be informed about such a special incorporation. Secondly, by mentioning 'arbitration clause' in the incorporation clause, this clause will be endowed with the independent nature embodied in an arbitration clause, namely this incorporation clause is an independent contract. As a result, such an incorporation clause should be independently considered as a contract, and its legal status is equal to the rest of the terms and clauses on the reverse of a bill of lading. Given the fact that Chinese law has recognised the principle of separability, it is then reasonable to require it to recognise the legal effect of a specifically worded incorporation clause on the reverse of a bill of lading.

Practically, a recent judgement indicates that Chinese courts are starting to take the incorporation clause into consideration, even if it is on the reverse of a bill of lading. In the case *Tianjin Iron & Steel Group Co., Ltd., PICC Tianjin Branch v Niagara Maritime S.A*,[1113] an incorporation of an arbitration clause was rejected, because the holder's consent to the incorporation cannot be implied. This judgement was made on two grounds. Firstly, a holder could not know about the referred arbitration clause, as it was unclear which charterparty was incorporated. Secondly, the incorporation clause was not contractual, because it was on the reverse of the bill of lading.[1114] Specifically, the arbitration clause in the claimed charterparty can only demonstrate a consent reached by the carrier and the charterer, and this clause can only be applicable to disputes concerning chartering a vessel. Comparatively, the disputes between the carrier and the holder of the bill of lading are about the carriage of goods by sea. Consequently, the arbitration clause which is contained in the claimed charterparty is not naturally applicable to disputes between the carrier and the holder, unless a causal link, namely a clear instruction of incorporating this charterparty, is manually added in the bill of lading. However, such a causal link was missing in this case, and therefore the arbitration clause cannot bind the holder of the bill of lading. The reason for holding that a causal link was missing is that the court did not regard the specifically worded incorporation clause on the reverse as an independent contract.

After giving this judgement, Tianjin Superior People's Court asked for instruction from The Supreme People's Court. It is important to note that in the Superior People's Court's reply, the reason for rejecting the incorporation was not made due to the location of the incorporation clause, and it was heavily relied on the defective wording used by the incorporation clause. This indicates that the

[1113] No.1 (2011) of the Civil Division IV of the Tianjin Province Higher People's Court and confirmed by No. 12 [2011] of the Civil Division IV of the Supreme People's Court.
[1114] No.1 (2011) of the Civil Division IV of the Tianjin Province Higher People's Court.

location of a clause, on the face or the reverse, may merely constitute a supplemental ground, rather than a decisive one. In addition, as it was discussed above, the separability of an arbitration clause may vest a legal effect on this specifically worded incorporation clause.

Therefore, the judicial trend in Chinese law may merely suggest that an arbitration clause cannot be incorporated by a generally worded incorporation clause. It may follow that if an incorporation clause aimed to bring an arbitration clause into a bill of lading, it is necessary for this incorporation clause to be specifically worded. On the one hand, it should be clear about which charterparty contains the referred arbitration clause. On the other hand, it should distinct itself from the other terms on the reverse by clearly stating that an arbitration clause is referred. This is because an independent consideration is resulted from the principle of separability, and this principle is only underpinning an arbitration clause. In other words, a clear and explicit wording may directly link this incorporation clause to an arbitration clause, and consequently the principle exclusively applied to an arbitration clause would be applicable to this incorporation clause.

7.5.2. A Strict Rule of Locating the Referred Charterparty

In addition to demonstrating the aimed incorporation in an attractive manner, it is also essential for an incorporation clause to provide a holder of the bill of lading with the practical means to know about the referred arbitration clause. In other words, the referred arbitration clause should be ascertainable, namely the date or the specific name of the related charterparty should be clearly stated on the face of the bill of lading.[1115] This is because a holder's consent to such a special incorporation can only be implied based on the fact that a holder is fully aware of the rights and liabilities in an arbitration that he/she is facing.

[1115] Liang and Li (n 75) 654; Fei (n 98) 101.

According to the current judicial trend, a workable incorporation clause should identify the referred charterparty clause.[1116] Otherwise, the Chinese courts will imply a proper charterparty under its strict rule, and the carrier is highly likely to be exposed to a risk of a failure of incorporation. Generally, when an incorporation clause was silent about which charterparty should be incorporated, and there was a chain of charterparties, Chinese courts or arbitration commissions tend to invalidate the incorporation clause.[1117]

For example, in the case *Tianjin Iron & Steel Group Co., Ltd., PICC Tianjin Branch v Niagara Maritime S.A*,[1118] both sides of the bill of lading stated: 'To be used with charterparty', while it was not clear about which charterparty it should be used with. Meanwhile, on the reverse of the bill, Clause 1 indicated that an arbitration clause should be incorporated in the bill from the named charterparty, but the gap for filling the date of the referred charterparty was left blank.

It was firstly held that the incorporation of an arbitration clause from a charterparty to a bill of lading was unsuccessful. Since the wording of the incorporation clause is unclear about which charterparty shall be incorporated in the bill of lading, it is then unable to imply a consent as to the claimed charterparty that shall be incorporated in the bill and become a part of the contract of carriage between the carrier and a holder of the bill of lading. This case was submitted to the Supreme People's Court for instruction, and it was confirmed that the absence of the date of the referred charterparty brought difficulties to the incorporation. Moreover, this court considered the question as to whether or not it is possible to incorporate the claimed charterparty to the bill of lading, since according to the principle of

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[1116] Fei (n 98) 101.
[1117] No.23 (2002) of the Civil Division IV of the Supreme People's Court; Letter of Reply of the Supreme People's Court on Hanjin Shipping Co . Ltd.'s Request for recognizing and enforcing an English arbitral award [issued and effective on December 13, 2005] (No.53 (2005) of the Civil Division IV of the Supreme People's Court); Yang (n 50) 153; Liu and Hjalmarsson (n 83) 1.
[1118] No.1 (2011) of the Civil Division IV of the Tianjin Province Higher People's Court, confirmed by No.12 (2011) of the Civil Division IV of the Supreme People's Court.

autonomy it is crucial for a court to suffice an expressed intention to incorporate an arbitration clause. However, the court held that by reading the incorporation clause on the reverse alone, the relevant charterparty should be a voyage charter, while the claimed charterparty was a time charter. Such a conflict cannot sufficiently support the claimed incorporation, and therefore the referred charterparty cannot be the time charter provided by the *Niagara Maritime S.A*.[1119]

According to this judgment, it is obvious that a clear identification of the incorporated charterparty plays a significant role when the carrier tries to bind a holder of the bill of lading to the charterparty,[1120] and Chinese courts follows a strict rule to make the implication if a clear nomination of the incorporated charterparty is absent.[1121] Unlike the English courts' approach,[1122] Chinese courts generally do not take a time charter into consideration,[1123] even though this charter may have a close connection with the bill of lading.

It seems that this specific requirement may pose a challenge to the attempted solution, since nominating a specific charterparty does not constitute a necessity in validating an incorporation clause. However, this challenge may be overcome by two considerations. One is that Chinese courts are increasingly willing to imply a proper charterparty based on the factual circumstances in each case. The other is that after establishing the contractual effect of a specifically worded incorporation clause, the contractual intention to incorporate an arbitration clause may constitute a force and a legal base in terms of implying a proper charterparty.

7.5.3. Distinct Requirements in Substantive Validity: Nominating an existing arbitration commission is a necessity to a valid arbitration clause

[1119] Liang and Li (n 75) 653.
[1120] Li (n 72) 117.
[1121] Fei (n 98) 101.
[1122] Yang (n 50) 153; Han (n 76) 231.
[1123] Liang and Li (n 75) 653.

Apart from the above-mentioned challenges posed by requirements concerning an incorporation clause itself, another challenge faced by the attempted solutions is posed by a requirement to validate an arbitration clause. In order to suffice an incorporation of an arbitration clause, it is equally important to ensure that the referred arbitration clause is valid in the first place, as it is illogical to incorporate an invalid arbitration clause.[1124] The specific challenge is imposed by validating an arbitration clause under Chinese law, as it is uncommon for domestic arbitration laws to require an arbitration clause to be clear and correct about the name of the chosen arbitration commission.[1125]

For instance, definitions of an arbitration agreement in English arbitration law and UNCITRAL Model Law indicate that a valid arbitration clause should be explicit about the parties' free will in terms of choosing arbitration as the dispute resolution for disputes arising from a legal relationship between them.[1126] This definition does not force the parties to nominate an arbitral tribunal. Moreover, it is common for English courts to imply a proper arbitral tribunal based on the factual circumstances in each case if parties did not nominate a seat or a forum for the arbitration. The rationale for such an implication is to fulfil parties' autonomy in dispute resolution. In other words, compared to a clear and explicit expression about choosing an arbitration, an absence of the choice of an arbitral tribunal is trivial and can be amended or implied.[1127] However, it is difficult to enforce an arbitration clause which is silent about the name of the chosen arbitration commission under Chinese law, as nominating an arbitration

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[1124] Article 11 of The Interpretation of Arbitration Law of the PRC; Han (n 76) 233.

[1125] Article 16 of Arbitration Law of the PRC provides that it is a request for a valid arbitration clause to include the nomination of an arbitration commission; Article 6 of Arbitration Act 1996; similar provisions can be found in Option I, Article 7(1) of UNCITRAL Model Law, and Article II (1) of the New York Convention; Chi, *Certain Problems and Improvements of the International Arbitration Regime: A comparative Study of Chinese and Foreign Arbitration Rules* (n 58) 71; Moser and Choog (eds) (n 1096) 3.81; Luo (n 1015)158.

[1126] ibid.

[1127] Article II of the New York Convention, Option 1, Article 7(2) – (6) of UNCITRAL Model Law, and s5 of Arbitration Act 1996 provides that an arbitration clause is valid if it embodies with an expressed consent to arbitrate, and such expressed consent does not have to be supported by a clear nomination of a chosen seat or an arbitral tribunal. In the cases in which there are no expressed choice of applicable law or seat, English law may imply parties' intention by referring the closest connection, see in Article V (1)(a) of the New York Convention, and Article 34(2)(a)(i) of UNCITRAL Model Law.

commission is a requirement in Chinese arbitration law and it has been strictly followed in legal practice.[1128]

The first example may illustrate a judicial trend in which the absence of a clear nomination of an arbitration commission can be fatal to the validity of an arbitration clause, even though a consent to an arbitration can be disclosed by expressions in the clause. The disputed arbitration clause in this case stated:

> 'Any disputes arising from the execution of, or in connection with, this contract shall be settled amicably through negotiation. In case no settlement can be reached through negotiation, the case shall then be submitted to an arbitration commission and be settled in according with its rules of procedure…'

There is no doubt that the parties' intention to arbitrate disputes is clear and explicit. However, in the reply to an application for affirming the validity of this arbitration clause,[1129] it was held that this disputed arbitration clause is invalid, because this clause does not nominate a specific arbitration commission; additionally, there is no further agreement to make such a nomination.[1130]

However, according to Article 18 of Arbitration Law of the PRC,[1131] lacking the clear nomination of an arbitration commission does not necessarily result in the complete invalidity of an arbitration clause.[1132] This provision provides parties a

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[1128] Zhu and Li (n 62) 634.
[1129] Reply of the Supreme People's Court on the Request for Instructions Concerning the validity of an Arbitration Clause in the dispute over the termination of the contract between Yantai Lvfeng Environmental Protection Equipment Co., Ltd. and Rongsheng Group (Hong Kong) Co., Ltd., (No. 48 [2011] of the Civil Division IV of the Supreme People's Court),
[1130] Similar judgment can be found in the Reply of the Supreme People's Court on the Request for Instructions Concerning the validity of an Arbitration Clause in the sale contract between Tangshan Boao Coal Industry Co., Ltd., Shengmei Securities Private Limited v Qingdao Xinyong'an Industrial Co., Ltd. (No.3 [2011] of the Civil Division IV of the Supreme People's Court), this Reply confirms the judgment delivered by the Shandong Province Higher People's Court (No. 30 (2010) of the Shandong Province Higher People's Court).
[1131] Article 18 of Arbitration Law of PRC states: If the arbitration matters or the arbitration commission are not agreed upon by the parties in the arbitration agreement, or, if the relevant provisions are not clear, the parties may supplement the agreement. If the parties fail to agree upon the supplementary agreement, the arbitration agreement shall be invalid.
[1132] Zhu and Li (n 62) 634.

second chance to made up their previous mistake. In other words, when a court finds that the disputed arbitration clause is invalid on the ground of lacking a clear consent to arbitrate disputes between parties, or lacking the explicit nomination of an arbitration commission, this court would instruct the involved parties to make a supplemental agreement to modify their previously problematic arbitration clause, if settling their disputes by an arbitration was the parties' true intention.[1133] If the parties refused to do so, or did not submit a modified arbitration clause, the arbitration clause may be judged as invalid and any dispute between the parties should be addressed by litigation.

For example, in one case of the contract of goods by sea, the disputed arbitration clause was contained in a charterparty, and it simply stated: 'the place of arbitration: Beijing, Chinese law is the applicable law.' One party noticed the flaw in this clause, namely an arbitration commission was not nominated, and subsequently they sent a notice to the counterparty before the execution of their charterparty. In this notice, it was proposed that disputes arising from the charterparty should be submitted to the China Maritime Arbitration Commission in Beijing. It also requested that a reply to this proposal should be made within three days after this notice had been received, otherwise an implied consent would be deemed. The counterparty did not reply. Nevertheless, it was held that the arbitration clause is invalid, because an arbitration commission was not nominated, and the supplemental agreement was invalid on the ground that the counterparty did not expressly agree to this modified arbitration clause.[1134] It follows that because of Article 18 of the Arbitration Law of the PRC, parties to an invalid arbitration clause have a second opportunity to adjust their agreement of

[1133] ibid.
[1134] Letter of Reply of the Supreme People's Court on Request for Instructions Re Arbitration Clause Validity in the case Panyu Chu Kong Steel Pipe Co., Ltd. (Applicant) v. Shenzhen Fanbang International Freight Forwarder Co., Ltd. (Respondent) (No. 7 [2009] of the of the Civil Division IV of the Supreme People's Court).

dispute resolution, and yet in order to suffice the supplemental agreement both parties have to express a consent to this modified agreement.

Secondly, the named arbitration clause should officially exist, otherwise an arbitration clause remains invalid. For instance, in an application to confirm the decision about the validity of the arbitration clause, the reply indicates that the arbitration clause under concern is invalid, as this clause did not nominate an existing arbitration commission and there was no further supplemental agreement to clear doubts about the name of the chosen arbitration tribunal.[1135] The relevant clause in this case was under the name of The Jurisdiction of Courts, and it was stated: 'If any disputes arise from this agreement, the competent court shall be in the China International Arbitration Commission.' The problem in this case is twofold. Firstly, there is an obvious conflict within the wording, namely on the one hand 'a competent court' means that a court shall have the jurisdiction, and yet the wording 'China International Arbitration Commission' indicates that disputes shall be addressed by an arbitration. Secondly, the nominated arbitration commission does not exist. Therefore, the legal effect of this dispute resolution clause may greatly depend on the court's interpretation.

According to the judgment, it is important to note that an interpretation made by a Chinese court tends to be rather rigorous. In other words, if the clause itself did not express an affirmative choice of arbitration, it is less likely for a court to imply an intention to arbitration. For example, in this case, when dealing with the conflicting wording, the court held that since the intention to an arbitration cannot be affirmed because of such a conflict, it is safe to conclude that the parties did not come into an agreement of arbitration.[1136] Additionally, it was held that 'China International Arbitration Commission' in the disputed clause cannot be interpreted

[1135] Letter of Reply of the Supreme People's Court on Request for Instructions Re Arbitration Clause Validity in the case Fang Jinshen (No. 37 [2011] of the Civil Division IV of the Supreme People's Court).
[1136] Judgement delivered by Beijing Second Intermediate People's Court.

as ‘China International Economic and Trade Arbitration Commission’.[1137] This means that nominating a non-existent arbitration commission may be interpreted as no arbitration commission being nominated, even though there might have been a mistake in the drafting. Moreover, without a supplemental agreement to clarify the parties’ intention,[1138] the court was refused to make any implication. Consequently, even though the word ‘arbitration’ was stated in the disputed clause, this court decided that there was no valid arbitration agreement between the parties. This decision is confirmed by the Supreme People’s Court in its reply, and therefore such a decision and its reasoning are binding upon other judicial decisions.

However, an exception may be made to cases in which an arbitration commission can be properly implied as the chosen tribunal.[1139] To illustrate, there was a dispute about the validity of an arbitration clause in an agency contract.[1140] The arbitration clause nominated the Guangzhou City Arbitration Commission as the forum of an arbitration. However, this nominated arbitration commission does not exist in Guangzhou, and instead the existing arbitration commissions are the Guangzhou Arbitration Commission, the Guangzhou Labour Arbitration Commission, CMAC Guangzhou Branch and some other arbitration commissions. It was argued that since this arbitration commission does not exist, this arbitration clause is invalid. However, it was held that it is reasonable to imply that the Guangzhou Arbitration Commission is in line with the true intention of the parties, as the name of this arbitration commission does not have substantial differences from the name of the nominated one.[1141] Meanwhile, it is obvious that the other

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[1137] Judgement delivered by Beijing Higher People’s Court (No. 281 (2011) of Beijing Higher People’s Court).
[1138] ibid; Article 18 of Arbitration Law of PRC states: If the arbitration matters or the arbitration commission are not agreed upon by the parties in the arbitration agreement, or, if the relevant provisions are not clear, the parties may supplement the agreement. If the parties fail to agree upon the supplementary agreement, the arbitration agreement shall be invalid.
[1139] Moser and Choog (eds) (n 1096) 3.82; Luo (n 1015) 158.
[1140] Liu Nianfu, *China Maritime Judgement Annual (2008-2009)* (Law Press China 2010) 445, and it refers to a case of U&U Group v Shenzhen Yongxin Xingye International Freight Agency Co., Ltd.
[1141] ibid.

existing arbitration commissions in Guangzhou are not suitable for the disputes arising from a contract of agency.[1142] Therefore, according to Article 3 of the Interpretation of the Arbitration Law of the PRC,[1143] the arbitration clause is valid, and Guangzhou Arbitration Commission shall accept the parties' disputes.

Moreover, if a contract has a Chinese version and a foreign language version, it is important to ensure that both versions state the correct name of the nominated arbitration commission and such a nomination should be consistent with each other. For example, in the case *Salzgitter Mannesmann International Gmbh v Jiangsu Overseas Group Co., Ltd*,[1144] the relevant arbitration clause was in two languages, Chinese and English. The wording in each language was explicit about an intention to arbitrate disputes arising from the relevant contract, but it was different in respect of the name of the chosen arbitration commission. The issue concerned is twofold. (1) In the Chinese version, the named arbitration commission does not exist in Beijing (the named seat of an arbitration), and this situation leads to the question as to how to interpret this false nomination, specifically, whether this mistake should be interpreted literally, or whether this mistaken nomination can be modified. (2) There is a question as to how to interpret the different information conveyed by the two versions of the arbitration clause: is it a matter of translation or is it an expression of different intentions about the forum for an arbitration?

According to the judicial decision and the reply, in terms of the first question, it is possible for the court to make modifications to an obvious mistake, but the ground for such modification should be solid. In this case, the Chinese version of the

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[1142] ibid.

[1143] Article 3 of the Interpretation to Arbitration Law of PRC in full: Where the name of an arbitration institution as stipulated in the agreement for arbitration is inaccurate, but the specific arbitration institution can be determined, it shall be ascertained that the arbitration institution has been selected.

[1144] Court: Jiangsu Higher People's Court, Case No: (2011) Jiangsu Foreign-related Commercial Arbitration No. 0003. This case was firstly accepted by Nanjing Intermediate People's Court, and it was appealed and then accepted by Jiangsu Superior People's Court. Subsequently, this superior people's court sent an application to the Supreme People's Court for suggestion and confirmation.

disputed arbitration clause indicated that the nominated arbitration tribunal is the International Chamber of Commerce Arbitration Commission,[1145] and this arbitration commission is located in Beijing, China. However, there is no official arbitration commission exactly under this name in Beijing. The Jiangsu Superior Court held that this false expression is an obvious mistake, and it should be modified and interpreted as the China International Chamber of Commerce Arbitration Commission, which refers to the China International Economic and Trade Arbitration Commission (CIETAC).[1146] Therefore, the Chinese version of the arbitration clause is valid, as an intention to arbitrate disputes between the parties and the name of the chosen arbitration tribunal are clear and explicit.

The flexible interpretative approach in this case may be compared to the judicial interpretation of the arbitration clause in the case *Fang Jingxian v Li Meiyu*, in which both the Beijing Superior People's Court and the Supreme Court refused to interpret 'China International Arbitration Commission' as 'China International Economic and Trade Arbitration Commission'.[1147]

The reason for the flexible approach taken by the Jiangsu Superior Court would lie in the wording of the arbitration clause, which can provide a solid ground for an implication. Specifically, the implication can be made upon two key facts: (1) a clear nomination of the seat of the arbitration; and (2) China International Chamber of Commerce Arbitration Commission is the nickname of CIETAC. The first fact, namely that the nominated arbitration commission is located in Beijing, China, may indicate that the so-called International Chamber of Commerce Arbitration Commission shall also be located in China. The second fact may link

[1145] This name is a merely translation from Chinese to English, and the 'international chamber of commerce' does not mean ICC.
[1146] China International Chamber of Commerce Arbitration Commission is the nickname of CIETAC.
[1147] No. 281(2011) of Beijing Higher People's Court, and it was confirmed by the Supreme People's Court in No. 37 (2011) of the Civil Division IV of the Supreme People's Court.

the International Chamber of Commerce Arbitration Commission to the China International Chamber of Commerce Arbitration Commission.

By contrast, in the case *Fang Jingxian v Li Meiyu*, the seat of the chosen arbitration tribunal was not mentioned, and in addition 'China International Arbitration Commission' does not resemble any name of an existing arbitration commission in China. According to this comparison, it is clear that Chinese courts only modify an obvious mistake when the information surrounding the mistake and relevant common knowledge can directly support the implication.

If an arbitration clause is in multiple languages, it is also important to note that the Chinese courts weigh different versions of the arbitration clause equally, and therefore they are interpreted separately. In other words, the admissible evidence for the interpretation of the arbitration clause in one language may not include its counterparty in the other language. It might be argued that in order to clarify and correct the false information in one version of the clause, a cross-reference between different versions shall be allowed, since providing different language versions of a contract is only for each parties' convenience, rather than to vary an agreement between the parties. However, it tends to be more persuasive that one party only engaged in the contract that he/she read and signed. Moreover, Article 125(2) of the Contract Law of the PRC indicates that different language versions of one contract shall be equally weighed, unless it was agreed that the version in one language shall prevail over the version in the other language.[1148]

[1148] Article 125(2) of Contract Law of PRC in full: If any disputes arise between the parties over the understanding of any clause of the contract, the true meaning thereof shall be determined according to the words and sentences used in the contract, the relevant provisions in the contract, the purpose of the contract, the transaction practices and the principle of good faith.
Where a contract is concluded in two or more languages and it is agreed that all versions are equally authentic, the words and sentences in each version are construed to have the same meaning. In case of any discrepancy in the words or sentences used in the different language versions, they shall be interpreted in light of the purpose of the contract.

Therefore, in the present case when interpreting the Chinese version of the arbitration clause, the Jiangsu Superior People's Court did not make reference to the English version of this contract. If a cross-reference had been made, a different judgement would have been given. To illustrate, according to the wording of the clause in the English version, the chosen arbitration tribunal can be easily implied and confirmed as an ICC Arbitration Tribunal, and the seat of the arbitration is Beijing, China. Meanwhile, in the Chinese version, the chosen forum was a certain international chamber of commerce that was originally set up in Beijing, China. If the court referred to the English version to clear doubts arising from the Chinese version, it might be held that the translator mistakenly understood the meaning of the seat of the arbitration, and it was translated into a meaning which indicates that this tribunal was originally set up in Beijing. In this case, the Chinese version would be modified according to the arbitration clause in English, and then a consent to submit disputes to an ICC Arbitration Tribunal can be implied. As a result, the arbitration clause is valid, as a consent to an arbitration and a consistent choice of arbitration tribunal was clearly made.

However, the judgement was not made on this line of reasoning, and the interpretation of the arbitration clause in the Chinese version was made solely on the wording of this clause. Consequently, it was held that the chosen arbitration tribunal expressed by the arbitration clause in Chinese is the China International Economic and Trade Arbitration Commission (CIETAC), rather than an ICC Arbitration Tribunal. As a result, there was an inconsistent choice of arbitration tribunal. Additionally, when the case was first accepted by Nanjing Intermediate People's Court, this court suggested that the involved parties to agree upon an supplemental agreement, but both parties waived their right under Article 18 of the Arbitration Law of the PRC.[1149] Therefore, the Supreme People's Court replied that the disputed arbitration clause is invalid on the ground that an

[1149] Article 18 of Arbitration Law of PRC.

inconsistent choice of arbitration tribunal cannot indicate a consent to an arbitration. It follows that when a contract is concluded in multiple languages, it is necessary for each version of the contract to have a clear and explicit nomination of the arbitration tribunal, and it is also important to ensure a consistent nomination among different versions.

After examining these judgements and the Replies, it is safe to conclude that naming an existing arbitration commission is greatly weighted by Chinese law in terms of validating an arbitration clause. Specifically, when an arbitration clause does not contain a clear expression about the nominated arbitration commission, this clause can hardly be recognised as a valid arbitration agreement under Chinese law, even if an intention to arbitrate disputes and the seat of an arbitration can be identified in the clause.[1150] Nevertheless, this does not mean that Chinese law will invalidate any arbitration clause which does not name an existing arbitration commission. This is because it is unrealistic to require every businessperson, especially foreigners, to have full knowledge of the exact names of Chinese arbitration commissions, and therefore if this rule was strictly followed, a true intention to arbitrate would be hindered.

It is then reasonable for Chinese law to allow a degree of interpretation, but such an interpretation should not vary from the above-mentioned rule. Consequently, the interpretation is made on a rather cautious basis, namely an implication of the chosen arbitration commission can only be made in cases in which the name of the chosen arbitration commission is expressed in an inaccurate manner, rather than when the name of the chosen arbitration commission is completely absent.[1151] In other words, the implication should be supported in two ways: (1) there is an expressed intention to submit disputes to a certain arbitration commission, and (2) the name of the chosen arbitration commission is inaccurate,

[1150] Jing and Dong (n 55) 164; Moser and Choog (eds) (n 1096) 3.81-3.85.
[1151] ibid.

but it can provide instructive information, such as the place of an arbitration. Additionally, in cases in which a nomination of an arbitration commission is absent and an implication of the chosen arbitration commission cannot be made, the parties shall save their arbitration agreement from invalidity by referring to Article 18 of the Arbitration Law of the PRC. This means that the parties' intention to arbitrate their disputes would be utmost protected by law.

The major reason for this special requirement in Chinese law is that the ad hoc arbitration has not been officially recognised by Chinese law yet.[1152] Specifically, Article 16 of the Arbitration Law of the PRC provides a compulsory rule in which a valid arbitration clause must contain a nomination of the chosen arbitration commission. This compulsory rule is enhanced by Article 18, as it provides that in the case where a clear nomination was not made, parties can agree into a supplemental agreement to make up their mistake (an omission or an unclear nomination of an arbitration commission) in the arbitration clause. If such a supplemental agreement can be made, an arbitration clause will remain valid. Otherwise, an arbitration clause will be invalid. As a result, arbitrations commenced under Chinese law are limited to institution arbitrations, since valid arbitration clauses all provide a clear nomination of an arbitration commission. This means that Chinese law eliminates ad hoc arbitration by means of denying the validity of arbitration clauses envisaging an ad hoc arbitration. [1153] Meanwhile, Chinese legal practice cannot carry out an ad hoc arbitration, since there is no statutory law that can provide rules and instructions in terms of deciding a proper arbitration commission, the composition of an arbitration tribunal and the procedure of an ad hoc arbitration.[1154]

[1152] Zhu and Li (n 62) 633.

[1153] Chi, *Certain Problems and Improvements of the International Arbitration Regime: A comparative Study of Chinese and Foreign Arbitration Rules* (n 58) 79.

[1154] Jing and Dong (n 55) 160; Xu and Chen (n 95) 63, it is suggested that the fact that the Arbitration Law of PRC does not have specific provisions for ad hoc arbitrations does not necessarily mean that China does not accept ad hoc arbitrations. This is because some international conventions that China engaged include provisions concerning ad hoc arbitrations, and Chinese law recognise awards made by a foreign ad hoc

It also derives from the legal nature of an arbitration clause in Chinese law. As it was discussed in 6.2.1, an arbitration clause is an independent contract which includes a disclosure of intention to arbitration and an instruction of the procedure of the chosen arbitration. Therefore, an enforceable arbitration clause should be instructive about how the chosen arbitration will be conducted, and such instruction must include the intention to arbitrate, the issue to be arbitrated and the arbitration commission to hold the chosen arbitration.

This special situation in Chinese arbitration can be a burden to international commercial arbitration, as it adds another requirement to the attempted solutions; that is a workable incorporation clause should refer to an arbitration clause which clearly and correctly nominates a Chinese arbitration commission if parties to the incorporation of an arbitration clause aimed to have an arbitration in China. However, this challenge is unlikely to hinder the workability of the attempted solutions, as it is reasonable to argue that current Chinese arbitration law and practice is experiencing a revolution on this matter, which can be illustrated by three aspects as follows.

Firstly, Article 16 and Article 18 may incur conflicts with UNCITRAL Arbitration Rules and ICC Arbitration Rules. Specifically, if parties agreed to submit their disputes to an arbitration according to the UNCITRAL Arbitration Rules, this arbitration clause may be invalid under Chinese law. This is because UNCITRAL is not an arbitration institution and its Arbitration Rules do not contain any instruction about the nomination of an arbitration commission. The similar issue also exists in the situation in which ICC Arbitration Rules are chosen as the applicable law. However, UNCITRAL Arbitration Rules and ICC Arbitration Rules

tribunal. The lack of statutory law on this matter merely leads to a situation in which it would face certain difficulties when parties try to actually carry out an ad hoc arbitration in China.

are widely used in international commercial arbitration. Therefore, Articles 18 and 16 of the Arbitration Law of the PRC are in conflict with the current trend.

Secondly, difficulties exist in executing the compulsory rule in the Arbitration Law of the PRC. Since Article 16 and Article 18 require a specific nomination, and since Chinese courts follow a rather rigid rule to modify the parties' mistaken nomination, Chinese law imposes a heavy burden on parties, especially those unfamiliar with the names and structures of Chinese arbitration commissions. This difficulty can be illustrated from two angles.

In terms of the first aspect, it is difficult to translate the name of Chinese arbitration commissions into English, and the translation may incur ambiguity. For example, Chinese law uses the phrase 'arbitration commission', rather than phrases such as 'arbitral tribunal' or 'forum', which are widely used in international commercial arbitration.[1155] Moreover, the phrase 'the Court of Arbitration of the China Chamber of International Commerce' can be confused with the phrase 'the International Chamber of Commerce (ICC)'.[1156]

As for the second aspect, these two articles are barely be feasible, as arbitration clauses used by merchants may include various flaws in terms of nominating an arbitration commission. For instance, the names of Chinese arbitration commissions are generally complex and similar to each other. As a result, it is common for merchants to mistakenly leave out one or two characters, but such a mistake may either invalidate an expressed intention to arbitrate or direct an arbitration to a different arbitration commission.[1157] It is also common for an

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[1155] Chi, *Certain Problems and Improvements of the International Arbitration Regime: A comparative Study of Chinese and Foreign Arbitration Rules* (n 58) 80; Tao Jingzhou, and Clarisse von Wunschheim, 'Article 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions' 23 (2) *Arbitration International* (2007), 311, in this article it is suggested that such a difference may increase foreigner's burdens in terms of how to drafting a valid arbitration clause under Chinese law.

[1156] The Court of Arbitration of China Chamber of International Commerce is another name of China International Economic and Trade Arbitration Commission (CIETAC).

[1157] Reply of the Supreme People's Court to Request for Instructions Re Arbitration Clause Validity in the Agency Contract Dispute in the case Mashan Group Co., Ltd. v. Korea Chengdong Shipbuilding Ocean Co., Ltd. and Rongcheng Chengdong Shipbuilding Ocean Co., Ltd. （issued on October 30, 2008, No. 26 [2008]

arbitration clause to only provide the seat of the arbitration, while there are more than two arbitration commissions in the nominated place of arbitration.[1158] Additionally, an arbitration clause may only nominate the applicable institutional rules or nominate multiple arbitration commissions.[1159] It is obvious that Articles 16 and 18 alone cannot provide the Chinese courts or arbitration commissions a solution to address these existing flaws. Although the Interpretation of the Arbitration Law of the PRC provides a certain supplement, this supplement tends to be unsatisfactory. For instance, arbitration clauses have been decided to be invalid by a two-step reasoning: (1) the nominated arbitration commission does not exist, and (2) it was held that a supplemental agreement was unlikely to be made between the parties, since one party sued in this court to object to the validity of the arbitration clause.[1160] The problem is that the current Chinese law provides parties with an opportunity to deny their promise to arbitrate. This opportunity is unjust when one party tries to take the advantage of Articles 16 and 18 to avoid the arbitration that he/she has previously agreed to. This problematic situation may highlight the importance of recognising ad hoc arbitration under Chinese law.

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of the Civil Division IV of the Supreme People's Court). In this case an arbitration clause was decided as invalid, because the nominated arbitration commission does not exist.

[1158] Letter of Reply of the Supreme People's Court on Request for Instructions Re Arbitration Clause Validity in the Dispute over Jurisdiction of a Joint Venture Contract in the case CECT (Subsidiary of ShenZhen HuiTimes Technology) v KT Corporation, and Ossen Group Shanghai Ossen Investment Co.,Ltd.（issued on July 20, 2006, No. 19 [2006] of the Civil Division IV of the Supreme People's Court), in this case it was held that the arbitration clause is invalid, since the arbitration clause only provides that the seat of the arbitration is Beijing, while the parties did not agree into a supplement agreement about the chosen arbitration commission.

[1159] Letter of Reply of the Supreme People's Court on Request for Instructions Re Arbitration Clause Validity in the Dispute over Transfer Contract for Land-Use Rights in the case Hong Kong Ace Medical Packaging Co., Ltd. v. Dongguan Metal Product Factory Ltd. and Virgin Islands New Guanyu Industrial Co., Ltd.（issued on April 5, 2008, No. 45 [2007] of the Civil Division IV of the Supreme People's Court), see also in Letter of Reply of the Supreme People's Court on Request for Instructions Re Acceptance by the People's Court of Sales Contract Dispute in the case RENT CORPORATION v. Complant Ningbo Imp. & Exp. Co., Ltd. and Dongguan Jianhua Construction Machinery Co., Ltd.（issued on March 18, 2008, No. 4 [2008] of the Civil Division IV of the Supreme People's Court) these two cases suggested that if parties cannot choose one arbitration commission among their nominations, the arbitration clause is invalid.

[1160] Letter of Reply of the Supreme People's Court on Request for Instructions Re Arbitration Clause Validity（issued on December 1, 2005, No. 52 [2005] of the Civil Division IV of the Supreme People's Court).

Thirdly, there is a judicial trend of Chinese courts recognising foreign awards which are made by ad hoc arbitrations. This trend derives from the fact that China is a signing party of the New York Convention, which means that China has committed to recognising and enforcing foreign arbitration awards. Such a commitment makes encountering arbitration awards made by an ad hoc arbitration inevitable. The recognition of these awards means that Chinese law recognises the validity of the relevant arbitration clauses, even if those clauses did not nominate specific arbitration tribunals and the disputes were addressed by ad hoc arbitrations.[1161] It follows that to be a participant in international commercial arbitration may enforce China being involved in ad hoc arbitration; validating arbitration clauses which did not nominate arbitration commissions is a prerequisite to this.

Therefore, it is of practical necessity for Chinese law to make supplemental provisions as to ad hoc arbitration, and the New York Convention may increase the possibility of this. As a result, the attempted solutions would be workable under Chinese law.

7.6. Conclusion

The attempted solutions are workable under Chinese law, even though some distinct rules in Chinese law may impose certain challenges. This is largely because Chinese law tends to adapt its rigid approach from the perspective of validating an arbitration clause and transferring an incorporation clause in line with the international trend of commercial arbitration. In other words, China's traditionally rigid rules may be subject to a clear and explicit consent to arbitrate, and this means that the above-mentioned challenges will be alleviated by the emerging judicial trend in which the parties' autonomy in arbitration is paramount

[1161] Jing and Dong (n 55) 160; Xu and Chen (n 95) 63.

in sufficing an arbitration agreement. As a result, the attempted solutions can be workable under Chinese law in four ways.

Firstly, the attempted solution one can be applied in Chinese law, as the Chinese Maritime Code clearly and specifically provides that the relevant charterparty shall be the governing contract when the holder of the bill of lading is the charterer.

Secondly, the attempted solutions provide a legal basis for the binding effect of the incorporation clause in a bill of lading. The application of the principle of separability enables a specifically worded incorporation clause to have an independent legal status among the other terms on a bill of lading. As a result, it is legitimate to vest a binding effect in such an incorporation clause, even though the legal effect of a bill of lading under Chinese law cannot be extended to an arbitration clause or an incorporation clause with an equivalent effect. In other words, the independent legal status of such an incorporation clause forms the legal basis for extending the application scope of the referred arbitration clause to a holder of a bill of lading.[1162]

To illustrate, the independent nature of an explicitly worded incorporation clause can support the incorporation under Chinese law from four aspects. (1) An argument which insists that an arbitration clause cannot be incorporated from a charterparty to a bill of lading due to the legal status and customary usage would not be a good argument.[1163] This is because by applying attempted solution two, this incorporation clause can have a separate contractual effect, and this effect is not restrained by the legal status and customary usage of bills of lading. (2)

[1162] The validity of the incorporation clause shall be examined by a two-step test. The first question is whether or not an arbitration clause can be incorporated in a bill of lading, and the second question is whether such an incorporation clause can be transferred to a holder of the bill of lading. Subsequently, a workable incorporation clause should firstly be able to bind a shipper and a shipowner under Chinese rules of incorporating an arbitration clause, and secondly to bind a holder of the bill of lading by meeting requirements about transferring a contract to a third party under Chinese law.

[1163] Letter of Reply of the Supreme People's Court on Request for Instructions Re Arbitration Clause Validity in the Dispute over Insurance Subrogation Claim under Contract for Carriage of Goods by Sea in the case Dalian Branch of China Ping An Insurance (Group) Co., Ltd. v. COSCO Shipping Co., Ltd., and Guangzhou Ocean Shipping Co., Ltd. [issued and effective on January 26, 2007].

Such an independent contractual effect may be used to justify the legal status of such a clause on the reverse of a bill of lading. Specifically, an explicitly worded incorporation clause on the reverse will not stand in the way of an incorporation, since the special wording of this clause may distinguish itself from other clauses. By endowing it with an independent legal nature, this clause will be given different consideration. (3) An independent contractual nature may enable a judicial implication as to the proper charterparty and the proper arbitration commission. In conjunction with the principle of autonomy, trivial mistakes in a referred arbitration clause do not necessarily affect the incorporation adversely. The new judicial trend in Chinese law may indicate that a court or an arbitration commission may be willing to modify these mistakes to suffice a contractual intention to arbitration. Therefore, after qualifying the incorporation clause as a contract of arbitration, the same flexible approach may be applicable to this incorporation, namely even though the referred arbitration clause is defective in its wording, a judicial modification would be applied in order to suffice an expressed intention to arbitration contained in the incorporation clause. (4) Regarding an explicitly worded incorporation clause as an independent arbitration agreement may also solve the dilemma as to which is the proper forum for deciding the validity of such an incorporation clause. It is then clear that supported by the principle of *Kompetenz-Kompetenz*, an arbitration commission would be the proper forum, rather than a court.

Thirdly, the attempted solutions provide a legal basis for transferring a specifically worded incorporation clause to a holder of a bill of lading. In other words, the attempted solutions may mitigate those challenges posed by Chinese rules of transferring a contract and transferring an arbitration clause. On the one hand, the attempted solution may bridge the gap caused by Chinese legislation. Specifically, it is unnecessary to discuss whether a right or a liability is transferred to a holder of the bill of lading. This is because, based on the first point, a specifically worded incorporation clause can be an independent contract, and

under Chinese law a contract embodying both rights and liabilities can be transferred to a third party to this clause under a consent from the parties to this contract. Consequently, a specifically worded incorporation clause can be transferred to a holder of the bill of lading if the shipper and the carrier agreed.

On the other hand, attempted solution two may be of great importance to address the difficulties arising from the claim that a holder's consent to the incorporation is absent. There are a number of cases, such as *He De Group Co. Ltd. v Cherry Valley Shipping Co. Ltd.*,[1164] in which an explicitly worded incorporation clause failed to bind a third-party holder, as it was held that a holder's consent was not expressed. By applying attempted solution two, a holder's consent to this independent incorporation contract would be implied from his/her compliance to the transferred bill of lading.[1165] By implying such a consent, an explicitly worded incorporation clause may be decisive in terms of addressing the consistency issue. This means that the wording of the referred arbitration clause, especially those that limit or are silent about the scope of its application, may not hinder an incorporation. Instead, because of the contractual effect of an explicitly worded incorporation clause, the inapt wording in the referred arbitration clause would be modified in order to suffice the expressed intention to arbitration in the incorporation clause.

Finally, challenges are imposed by the rigid Chinese rule of interpreting an incorporation clause. Traditionally, it is strictly required that a valid arbitration clause should specifically name a chosen arbitration commission, and meanwhile an incorporation clause should be clear about the date of the relevant charterparty (the charterparty containing the referred arbitration clause). However, there has been a judicial trend in which Chinese courts or arbitration commissions

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[1164] *He Dei Group Co., Ltd* v *Cherry Valley Shipping Co., Ltd.*, referred by Si Yuzhuo in *Case Book of Maritime Law* (Intellectual Property Publishing House Co., Ltd. 2003) 65.
[1165] Han (n 76) 234.

adopt a flexible interpretation rule,[1166] which means that they are increasingly willing to imply an proper charterparty and a proper arbitral tribunal in order to suffice the parties' expressed intention to arbitrate their disputes arising from the bill of lading.[1167]

It follows that these challenges imposed by Chinese law may either be addressed by the principles underpinning the attempted solutions, or they can be alleviated by a flexible approach in validating an incorporation of an arbitration clause from a charterparty to a bill of lading. This approach may enable the courts to imply a relevant charterparty or an appropriate arbitration commission, if relevant nominations were absent from the bill's incorporation clause. More importantly, this approach is increasingly accepted and consistently attempted by Chinese court or arbitration commissions.

To conclude, the attempted solutions can be adopted in Chinese law on the bases that both the principle of separability and the principle of autonomy are accepted in Chinese legislation and have been put into recent legal practice. It is also clear that by applying the attempted solutions into Chinese law, the issue as to incorporating an arbitration clause from a charterparty to a bill of lading can be guided to a more favourable situation, in which parties' expressed intention to arbitration can be sufficed and safeguarded. In addition, the solutions supplement the oversimplified legislation,[1168] and therefore a consistent and unified judicial decision on this matter can be formed.

[1166] Zhao (n 1015) 58.
[1167] Song Hang, *Recognition and Enforcement of a Foreign Arbitration Award* (Law Press China 2000) 141.
[1168] Han (n 76) 227; Liang and Li (n 75) 652-651.

Chapter 8

The Findings: A New Paradigm

The findings of this research may contribute to establishing a new paradigm for binding the holder of a bill of lading to an incorporation clause which incorporates an arbitration clause from a charterparty to a bill of lading. This paradigm would be especially helpful when a holder of a bill of lading is a non-signatory to the bill of lading, for instance, a buyer in a sale contract under CIF terms. In this paradigm, an explicitly worded incorporation clause in a bill of lading is, in the first place, an independent contract between the shipper and the shipowner. Subsequently, under the shipowner's approval, the shipper assigns this contract to a holder of the bill of lading based on their contract for certain purposes, such as a sale contract. Consequently, a holder of the transferred bill of lading shall be bound by this assigned right and liability in an arbitration, if the holder's commitment to the incorporation clause can be implied by factual circumstances in each case, for example, the holder paid for the freight and claimed the delivery of the goods,[1169] or the holder sued the shipowner under the bill of lading.[1170]

The motivation of this research is based on the observation that binding a holder of a bill of lading to an arbitration clause by an incorporation clause is poorly supported. The missing piece of the puzzle is the binding effect of the incorporation clause. On the one hand, the legal status of bills of lading remains controversial, which increases doubts about the legal effect of an incorporation clause contained in a bill of lading. Meanwhile, the questionable legal status of such an incorporation clause will affect its subsequent assignment, namely whether or not such a clause can be assigned and therefore bind an assignee.

[1169] *The 'St. Raphael'* [1985] 1 Lloyd's Rep. 403.
[1170] Carriage of Goods by Sea Act 1992, s 3; Özdel, 'Enforcement of Arbitration Clauses in Bills of Lading: Where Are We Now?' (n 51) 168.

On the other hand, the validity of an arbitration clause (incorporated by an incorporation clause in a bill of lading) may be challenged by a third-party holder on the ground that he/she did not enter into any agreement of incorporating an arbitration clause, in that his/her signature cannot be found in the bill of lading.

For this reason, it is essential to establish the contractual effect of an incorporation clause of this kind in the first place. Such a contractual effect is supported in two ways: firstly, an explicitly worded incorporation clause should be contractual between the shipper and the shipowner; secondly, such an incorporation clause should be able to bind a third-party holder of a bill of lading, namely being a legally binding arbitration clause between the shipowner and the holder.

In order to discover whether or not the binding effect of the bill's incorporation clause can be established on the legal nature a bill of lading, Chapter 3 analysed the legal nature of bills of lading. Since the legal nature of bills of lading remains controversial (current legislation does not define the legal nature of bills of lading, and the literature does not answer this question), and since commercial law derives from merchant practice, this research analyses this issue from a historical perspective. The history of bills of lading indicates that they are no more than evidential documents, and a transferred bill of lading cannot sufficiently convey any contractual rights and liabilities to the lawful holder of the bill of lading. Specifically, a bill of lading is used as a receipt of goods, evidence of contract of carriage and evidence of the title for a lawful holder to claim the delivery. It follows that in bills of lading terms and clauses with a binding effect are limited to those directly related to shipment, carriage and delivery. This means that since an arbitration clause, or an incorporation clause with an equivalent effect, are not naturally contained in a bill of lading, such clauses cannot automatically bind a lawful holder of the bill of lading. As a result, the legal effect of such clauses

should be based on other legal principles by applying other appropriate legal devices.

Based on this historical research of the legal nature of bills of lading, Chapter 4 re-examined the workability of the traditional legal bases for extending the referred arbitration clause to a lawful holder of bills of lading. It seems that legal bases, such as incorporation and assignment, are potentially applicable. In other words, it is true that the path for binding a third-party holder of the bill of lading is guided by principles underpinning an incorporation and an assignment. However, the challenge faced by the current literature is that the defective legal effect of a bill's incorporation clause cannot facilitate an incorporation and an assignment. Specifically, based on the discussion in Chapter 3, an arbitration clause or an incorporation clause with an equivalent effect, in a bill of lading is not naturally binding. In other words, it is questionable as to whether or not a charterparty's arbitration clause can be successfully incorporated in a bill of lading in the first place. Subsequently, an invalid incorporation can hardly be assigned to the lawful holder of the bill of lading, as the principle of assignment indicates that only a valid contract can be assigned.[1171] Therefore, it is of great importance to establish the binding effect of the bill's incorporation clause before applying the principles of incorporation and assignment.

Accordingly, establishing the legal effect of the bill's incorporation clause was a preliminary issue discussed in Chapter 5 and Chapter 6. In the new paradigm of incorporating an arbitration clause from a charterparty to a bill of lading, bill of lading cases are categorised in two situations. The reason for a separate analysis is that the legal status of bills of lading is different in each situation. Specifically, in Chapter 5, the situation under discussion is that in which a holder of bills of lading is not the charterer. The principle aim of this chapter is to establish the

[1171] *Tido v Waddell* [1977] 1 Ch 106, 302.

legal effect of the bill's incorporation clause by referring to other legal principles, as the legal natural of bills of lading and the relationship between the holder and the shipowner cannot be grounds for the binding effect of such an incorporation. The legal principle under consideration here was the separability of an arbitration clause. Specifically, when an incorporation clause specifically refers to an arbitration clause, it functions as an arbitration agreement between the parties to the contract or the document containing such an incorporation clause. In this case, the legal effect of such an incorporation clause will not be affected by the legal status of the document containing this clause. This means that in bill of lading cases, their legal nature cannot prevent such an incorporation clause in a bill of lading from being a contract between the parties to the bill. In addition, such an incorporation clause can amount to a contract, as an expressed consent to incorporate an arbitration clause is clear and explicit. As a result, such an incorporation clause is an independent contract between the shipper and the shipowner in the first place. Subsequently, this incorporation clause will be able to be assigned to a third party, regardless of the evidential nature of bills of lading.

Additionally, the argument that the holder's consent to arbitration cannot be found in the bill of lading cannot frustrate the incorporation. On the one hand, an assignment of a contract will be given effect if the original parties to this contract agreed to assign the contract. Since bills of lading are prepared by the shipper and acknowledged by the shipowner, it is then reasonable to imply that both the shipper and the shipowner express consent to incorporating a charterparty's arbitration clause to the underlying bill of lading. Meanwhile, since the negotiability of bills of lading is well-recognised by any businessperson practicing in this field, it is then reasonable to imply that both original parties to a transferrable bill of lading can foresee the subsequent assignment. Therefore, a consent to assign the incorporation clause can be implied, unless specific wording provides otherwise on the bill of lading. On the other hand, the holder's

approval may be affirmed by the fact that he/she accepts the bill of lading and claims the delivery without additional objections to the terms contained in the bill.

In order to ensure the independent status of the bill's incorporation clause, this clause should be specifically worded. The principle reason for this is that only when the clause makes explicit reference to an arbitration clause can the principle of separability be applied to this clause. Meanwhile, when such an incorporation clause is inconsistent with the referred arbitration clause, the judicial interpretation shall be made based on the bill's incorporation clause. This is because, in this situation, the contract between the holder of the bill of lading and the shipowner is the specifically worded incorporation clause, rather than the referred arbitration clause.

In Chapter 6, the situation under discussion was that in which a holder of a bill of lading has access to the referred arbitration clause. This situation was sub-divided into two categories: when the holder is the charterer and when standard forms of charterparty or bill of lading are used. The question here was whether or not a lawful holder who has knowledge of the referred arbitration clause can contribute to the incorporation of an arbitration clause from a charterparty to a bill of lading.

In the first category, the answer is positive. However, it is important to note that the decisive factor is that a lawful holder has an arbitration agreement with the shipowner in their charterparty, while the fact that such a lawful holder has access to the related charterparty is only supportive evidence disclosing the true relationship between the lawful holder and the shipowner. Consequently, the clause that should be taken into consideration is the arbitration clause in the related charterparty; the incorporation clause in the bill of lading would be interpreted in a manner sufficing the contract contained in the charterparty. This means that when the bill's incorporation clause is generally worded or incurs

conflicts with the charterparty's arbitration clause, the judicial interpretation should be made based on the charterparty's arbitration clause.

However, in the second category of cases, the answer is negative, as the fact of the accessibility of the relevant clauses cannot leads to the contractual effect of those clauses. Compared with the cases in the first category, it is obvious that the lawful holder of the bill of lading is bound by an arbitration clause on the ground of a valid arbitration agreement between her/him with the shipowner; this arbitration agreement encompasses both knowledge and acknowledgement. However, using standard forms merely contributes to the knowledge of the incorporation of an arbitration clause, and the specific acknowledgement of such an incorporation cannot be sufficiently supported. As a result, a lawful holder of the bill of lading shall not be bound by an arbitration clause, as his/her acknowledgement is absent from the relevant clauses. Therefore, it is necessary to clarify that only using standard forms cannot contribute to establishing the contractual effect of the bill's incorporation clause. As a result, cases should be re-categorised into the cases discussed in Chapter 5 if the fact in these cases only indicates that standard forms are used while a holder of the bill of lading is not the charterer.

By separating the incorporation issue into different situations, the new paradigm could be presented in a clear and instructive manner. Because of the paramount principle in arbitration, namely the principle of autonomy, the standard for the division is the parties' consent to arbitrate, rather than the accessibility of the referred arbitration clause. Therefore, the one-contract doctrine is only applicable to cases where the holder is the charterer. Special attention is given to cases where standard forms are used; these cases cannot be categorised as one-contract cases, as a holder's intention to arbitration still needs to be verified.

The remaining cases, along with those using standard forms, are consequently categorised as two-contract cases. In this category, the contractual effect of an explicitly worded incorporation clause is highlighted, because bills of lading are not qualified as contracts. As a result, making a clear and explicit reference to an arbitration clause becomes a compulsory requirement, as this clear and explicit reference forms the ground for giving a contractual effect to this incorporation clause. Specifically, a clear and explicit reference enables a bill's incorporation clause to be regarded as an arbitration clause, and therefore the principle of separability is applied.

Moreover, such a separation may be especially be helpful in terms of the consistency test. By distinguishing the contractual clause between the shipowner and the holder of a bill of lading in different situations, the attempted solutions provide legal grounds for judicial modification when inconsistency occurs between an explicitly worded incorporation clause and the referred clause. This may justify the different judgements between *The Merak* and *The T W Thomas* line of cases. It is also worth noting that since cases using standard forms are categorised as two-contract cases, a charterparty's clause may be subject to modifications in order to suffice a pre-printed incorporation clause in a standard bill of lading. This may especially provide a new perspective for dealing with problems in the case *The Channel Ranger*. That is, it may be inappropriate to incorporate an English Court jurisdiction clause to substitute an incorporation of arbitration clause, since the intention to arbitrate is explicit and legally binding between the shipowner and the holder.

After establishing the new paradigm by dividing the situation into two specific situations, this research moved on to test the workability of the attempted solutions proposed in Chapter 7. Since international trade may lead to a situation in which English law is not the applicable law to an incorporation clause in a bill of lading and to a referred arbitration clause, the validity of such an incorporation

may be subject to the laws of other jurisdictions. Therefore, a workable paradigm must be tested against a world-wide background. Moreover, since China would be one of the jurisdictions that has the most different laws and regulations compared with English law, and since there is an increasing trend to choose Chinese law or Chinese arbitration commissions in international commercial arbitration, Chapter 7 tested the workability of the proposed paradigm under the context of Chinese law.

It has been observed by this research that the attempted solutions may encounter certain challenges under Chinese law, but they will be alleviated and addressed by a new trend in Chinese legal practice. The major challenge faced by the attempted solutions derives from stricter Chinese requirement of validating an arbitration agreement. Chinese law specifically requires that a valid and enforceable arbitration agreement should contain the clear and correct nomination of an arbitration commission, but this requirement does not exist in English law or in the attempted solutions. Nevertheless, a flexible approach is being taken by Chinese courts. Because of this approach, they are increasingly willing to imply an appropriate arbitration commission to suffice an intention to arbitrate, if the arbitration clause under consideration made a mistaken nomination or was silent about the nomination.

Moreover, the courts are obliged to take a flexible approach as China is a signing member of the New York Convention. This Convention requires members to recognise and enforce an award made by any member country. Therefore, it is China's obligation to recognise and enforce a foreign award, even this award is made based on an arbitration clause or an incorporation clause with an equivalent effect which cannot be 'a perfect arbitration clause' under Chinese law. This means that by recognising such an award, Chinese courts have to recognise the validity of the relevant arbitration clause, even when this clause is silent about the name of the chosen arbitral tribunal. In other words, in order to accommodate

such an obligation in the New York Convention, it is a judicial trend to take a flexible approach to interpret arbitration agreements.[1172] It follows that the requirement of nominating an arbitration commission will not be an issue that needs to be considered. Therefore, the attempted solutions will be workable under Chinese law.

Additionally, the attempted solutions also fill the theoretical gap of incorporating an arbitration clause from a charterparty to a bill of lading under Chinese law. Although Chinese maritime law defines bills of lading as contracts of the carriage of goods by sea between the shipowner and the holder of the bill of lading, this contractual effect cannot necessarily can be extended to an arbitration clause or an incorporation clause with an equivalent effect. In this case, it is important to apply the principle of separability to the incorporation clause in order to attach a contractual effect to this clause, and then to facilitate the subsequent assignment.

Overall, this research addressed the incorporation of an arbitration clause from a charterparty to a bill of lading based on a three-step analysis. Firstly, a historical research about the legal status of bills of lading ascertained the legal nature of bills of lading as being evidential instruments, and it also laid down a foundation for establishing the new paradigm. By re-considering the legal nature of bills of lading from the perspective of the bill's development history, it is clear that an incorporation clause which brings an arbitration clause from a charterparty to a bill of lading is not customarily contained in a bill of lading. It is also clear that the legal nature of a bill of lading cannot endow a contractual effect to an incorporation clause of this kind. Therefore, the binding effect of such an incorporation clause may be formed on other grounds.

[1172] Liang and Li (n 75) 652-653; Liu and Hjalmarsson (n 83) 1, it suggests that Chinese court has taken a rather strict and cautious approach in terms of refusing the enforcement of a foreign award.

After ascertaining the legal nature of bills of lading, legal principles underpinning the incorporation of an arbitration clause from a charterparty to a bill of lading can were narrowed down to three major categories: (1) an incorporation of an arbitration agreement, (2) the separability of an arbitration agreement, and (3) assignment. Supported by these principles, the new paradigm (including two attempted solutions) would be able to bind a holder of a bill of lading to the referred arbitration clause, even if this holder does not have access to the referred charterparty, and even if this holder does not sign the bill of lading to demonstrate his/her approval of the incorporation clause in the bill of lading. Specifically, since the incorporation clause, bringing an arbitration clause into a new contract, functions as an arbitration clause in this contract, the principle of separability is applied to such an incorporation clause. Therefore, an incorporation clause of this kind is an independent contract between the shipper and the shipowner. Because it is an independent contract, this incorporation clause can be assigned to a third party. However, an exception should be observed in the cases in which a holder of the bill of lading is one of the contractors of the referred charterparty, namely a holder of the bill of lading is the charterer. In this category of cases, the charterparty is the functioning contract regulating the relationship between the shipowner and the holder of the bill of lading throughout the transaction.

Finally, this new paradigm has practical applications, as the workability of attempted solutions has been tested using one of the most different jurisdictions to English law, namely Chinese law. As a result, this new paradigm can not only solve the incorporation issues governed by English law, but can also be applied to international cases, especially those interrelated with Chinese law.

To conclude, this research enhances the legal certainty in this area of law, as it fills the theoretical gap of the legal nature of bills of lading and the legal principles underpinning the incorporation of an arbitration clause from a charterparty to a bill of lading. Specifically, the contractual effect of an explicitly worded

incorporation clause has been established on an analysis which takes both the contractual elements in, and the factual circumstances of, bill of lading cases into consideration. In addition, it also increases the commercial efficiency by providing a new paradigm to suffice such an incorporation. This paradigm provides businessmen with a specific guide as to how to draft a sufficient incorporation clause in order to bring an arbitration clause from a charterparty to a bill of lading. This guidance also notifies the holder of the bill of lading about such a special incorporation. Specifically, the holder is subject to an arbitration if the bill's incorporation clause's intention was specifically worded as such, and he/she received the bill of lading and claimed the delivery without voicing an objection to this specifically worded incorporation clause. Additionally, the application scope of this paradigm is not limited to contracts governed by English law, as this research also take Chinese law into consideration.

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