

**ENFORCEMENT OF ARBITRATION CLAUSES IN BILLS OF LADING:**  
**WHERE ARE WE NOW?\***

*Arbitration is consensual, and this brings with it the questions of what should be understood by "consent" and how it should present itself to justify enforcement of an arbitration agreement to a third party. In the context of bills of lading, the issue of consent has various dimensions, all of which can be best understood with reference to the enforcement of arbitration clauses in bills of lading. This paper discusses how effectively arbitration clauses in bills of lading can be enforced against the bill of lading holders in light of English case law, the decisions of the European Court of Justice and the Rotterdam Rules.*

[NOTE – this is a highly interesting article and walk through of jurisdiction issues in a maritime context. Given that it is of general interest and has relevance which goes well beyond maritime/ English law arbitration practitioners, it may be worth briefly explaining the essential elements of charterparties, bills of lading etc. in a footnote so general practitioners (and civil law lawyers) can understand the "quirky" approach in maritime contracts and the rationale behind.]

International arbitration is usually the preferred method for resolution of cross-border commercial (particularly maritime) disputes, as it provides a neutral forum for parties to resolve their disputes. The justification, or lack thereof, for this private and binding dispute resolution method mainly rests on 'consent'. Arbitration agreements give rise to some form of waiver as to each party's right to invoke the jurisdiction of otherwise competent courts. Against this backdrop, the issue of 'consent' generally presents itself as the key jurisdictional issue in international arbitration. In the context of maritime arbitration, the question of consent has an additional dimension. An obligation to arbitrate can be imposed on those cargo interests who have not actually consented to arbitrate with their

respective carriers. Under English law, it is possible for a cargo interest to be deemed to have consented to arbitrate, despite the absence of actual consent. In particular, this happens in cases where the contract of carriage between the cargo interest and the carrier is contained in a bill of lading or a similar transport document.

From the perspective of bill of lading holders, their inability to negotiate the terms of carriage in the bill of lading is only one of the challenges they face. Where a bill of lading contains an incorporation clause, as it generally does in tramp trade, the holder is no longer able to see the terms of carriage in their entirety. The main difficulties are that a copy of the charterparty referred to in the bill of lading seldom travels with the bill of lading and that the holder hardly ever has the chance and the right<sup>1</sup> to see the charterparty.<sup>2</sup> Under English law, a bill of lading holder can be bound by a charterparty arbitration clause through the words of incorporation in the bill of lading, so long as the bill of lading and the relevant charterparty overcome a set of hurdles, which are popularly known as the rules of incorporation.<sup>3</sup>

There is great value in the enforcement of arbitration clauses in bills of lading for two main reasons. Firstly, one incident during the carriage of goods by sea may affect several cargo interests holding bills of lading as their contract of carriage. Common sense dictates that, in such cases, all the claims of these cargo interests

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<sup>1</sup> See *Finska Cellulosaforeningen v. Westfield Paper Co Ltd* [1940] 2 All ER 473, where it was held that the seller was not obliged to tender a copy of the charterparty referred to in the bill of lading to the buyer. However, see the views of Donaldson J in *SIAT di dal Ferro v. Tradax Overseas SA* [1978] 2 Lloyd's Rep 470, at 492, which suggest that the buyer will be entitled to sight of the relevant charterparty where the incorporated charterparty terms affect the rights of the buyer. Charterparty is a contract under which the shipowner lets his vessel to the use of the charterer. The charterparty may be for a defined voyage (or voyages) or for a fixed period of time. International conventions on carriage of goods by sea do not apply to charterparties by force of law. The main reason behind this is that the parties to the charterparty are considered to have equal bargaining power. A contract of carriage may alternatively be contained in or evidenced by a bill of lading. When this is the case, the shipper of the goods covered by the bill of lading is considered to have less bargaining power than the carrier. Thus, most bills of lading are governed by the Hague or the Hague-Visby Rules by force of law. For more discussions on these issues, see M.Ozdel, "The EU and the Carriage of Goods by Sea under Private Law and EU Regulation", in H Jessen and MJ Werner, *Brussels Commentary on Transportation Law, Vol 1: EU Maritime Transport Law* (Hart-Nomos-Beck, 2016)

<sup>2</sup> For further discussions on this topic, see M Ozdel, 'Incorporation of Charterparty Clauses into Bills of Lading: Peculiar to Maritime Law?' in MA Clarke, *Maritime Law Evolving* (Hart Publishing, 2013), p. 181.

<sup>3</sup> On the rules of incorporation under English law, see M. Ozdel, *Bills of Lading Incorporating Charterparties* (Hart Publishing, 2015).

should be dealt with in one forum pursuant to one legal system provided in the bill of lading.<sup>4</sup> [NOTE – query whether this is a real advantage. The commonly used rules – LMAA – etc. do not provide for consolidation/ joinder so there is a real risk of 10s (or 100s) of overlapping and contradictory awards as between different parties. Arguably litigation would be a far more effective way to resolve this if this was the sole rationale for international arbitration agreements being included in charterparties/ bills of lading] If this cannot be achieved, there is no doubt that much expense will be wasted on litigation in a number of different jurisdictions, with the obvious risk of irreconcilable judgments over the same incident. Secondly, given the way in which these transferable contracts operate, the terms of carriage in the bill of lading cannot be negotiated between the carrier and the subsequent holder to whom the bill of lading is transferred.

This paper discusses the recent developments in the enforcement of arbitration clauses in bills of lading under English law. In this paper, the reader's attention is also drawn to the impact of the international conventions on this matter. [NOTE – it may be worth noting that this paper mainly focuses on the position under English law although certain other international conventions etc are addressed]

The discussion is based on five key questions:

- Who decides whether the bill of lading contains a valid and binding arbitration clause?
- Should an anti-suit award rendered by an arbitral tribunal be enforced by the courts pursuant to the New York Convention 1958?
- Is there an arbitration clause in the bill of lading?
- Is the arbitration clause in the bill of lading valid?
- Is the arbitration clause in the bill of lading binding upon the holder?

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<sup>4</sup> However, where the cargo claims are subject to arbitration, it is possible to have contradictory awards over the same incident, unless the related arbitrations are consolidated. In this context, it is also worth noting that the LMAA terms do not give the arbitrators any power to consolidate separate arbitration proceedings. Nonetheless, where the seat of the related maritime arbitrations is London and where all the cargo disputes are governed by English law, the risk of contradictory awards is arguably less significant than it might at first appear, as the awards can in principle be challenged for error of law.

## **1) Who decides whether the bill of lading contains a valid and binding arbitration clause?**

The kompetenz-kompetenz principle is widely accepted around the world. Also widely accepted is the principle that the arbitrators' power to rule their own jurisdiction is not absolute;<sup>5</sup> it would appear that the courts in almost every jurisdiction are allowed to some form of judicial review of the arbitrators' jurisdictional decisions.<sup>6</sup> Arbitration awards can be challenged for lack of jurisdiction before the courts located at the seat of the arbitration,<sup>7</sup> and the enforcing courts can refuse enforcement on the grounds that there is no valid and binding arbitration agreement between the parties.<sup>8</sup> It may be necessary for national courts to determine the validity of an arbitration agreement at a much earlier stage. There are two main situations where the decision of national courts on the question of validity is usually sought:

- where a party who has been sued before a national court objects to the jurisdiction of that court on the grounds that there is a valid and binding arbitration agreement between the parties;<sup>9</sup> and
- where a party applies to a national court to obtain an interim relief in support of arbitration proceedings<sup>10</sup> and/or for the purposes of enforcement of an arbitration agreement.<sup>11</sup>
- [NOTE – Query whether to include s.32 1996 Act here or continue to omit as not used that regularly and is an English peculiarity?]

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<sup>5</sup> *Dallah Real Estate and Tourism Holding Co v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

<sup>6</sup> See *Dallah Real Estate and Tourism Holding Co v. The Ministry of Religious Affairs, Government of Pakistan*, above, particularly paras 20–22 and 25–26. On this matter, see also Article 34 Model Law.

<sup>7</sup> See s. 67 of the English Arbitration Act 1996 ("the 1996 Act").

<sup>8</sup> See Article V(1)(a) of the New York Convention 1958 and s. 103(2)(b) of the 1996 Act.

<sup>9</sup> See s. 9(4) of the 1996 Act, which provides that "the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed". See also, Art 8(1) Model Law

<sup>10</sup> See s. 44 of the 1996 Act.

<sup>11</sup> Where a party brings litigation proceedings before a foreign court in breach of an arbitration agreement, the court can grant an anti-suit injunction against that party for the purposes of enforcement of the arbitration agreement. See s. 44 of the 1996 Act and s. 37 of the Senior Courts Act 1981. See also *AES Ust-Kamenogorsk Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, where the Supreme Court held that an English court can grant an anti-suit injunction to restrain a party from continuing or commencing foreign proceedings in breach of an arbitration agreement, even in cases where no arbitration is commenced or is contemplated.

The question of validity is determined with reference to the law governing the arbitration agreement,<sup>12</sup> which may be different from the law governing the underlying contract.<sup>13</sup> The answer to this question can vary significantly depending on the legal system governing the arbitration agreement.<sup>14</sup> The divergence between the views taken under different legal systems and the ability of arbitral tribunals to rule their own jurisdictions naturally give rise to parallel litigation and arbitration proceedings in multiple fora.

The risk of parallel proceedings brings with it the question of which court can effectively decide the issue of validity. Where the court of an EU/EFTA Member State gives a decision on the validity of an arbitration agreement, such a decision is naturally expected to fall outside the scope of the European regulations on jurisdiction and enforcement of judgments in civil and commercial matters. The reason for this is that arbitration is excluded from the scope of the Regulation,<sup>15</sup> and the same exclusion is also preserved under the Recast Regulation.<sup>16</sup> The decisions of the European Court of Justice (ECJ) suggest that when determining whether any proceedings are within the scope of the arbitration exception, “the nature of the subject-matter of the proceedings” is decisive.<sup>17</sup>

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<sup>12</sup> Here, the reference should, in fact, be made to the “putative proper law of the arbitration agreement”, i.e. the law that would govern the arbitration agreement, if the agreement were valid, see the decision *the Atlantic Emperor* [1989] 1 Lloyd’s Rep 548.

<sup>13</sup> Where the contract contains an implied or express choice of law, the arbitration agreement is considered to be governed by the same legal system in the absence of any indication to the contrary. Nonetheless, the parties’ choice of London as the seat of the arbitration can be a persuasive, but not decisive, factor for holding that the arbitration agreement is governed by English law, see *XL Insurance Limited v. Owens Corning* [2000] 2 Lloyd’s Rep 500, *C v. D* [2008] 1 Lloyd’s Rep 239 (CA), *Sulamerica CIA Nacional de Seguros SA and others v. Enesa Engenharia SA and others* [2012] EWCA Civ 638. Currently, there is a trend towards the use of an express choice of law governing the arbitration agreement. For instance, see the amended HKIAC model clause.

<sup>14</sup> While national courts determine the law governing the arbitration agreement by reference to the conflict of laws rules of the forum, arbitrators are usually given discretion to select the conflict of laws rules that they consider applicable to the arbitration agreement. See for instance s. 46(3) of the 1996 Act. The 1996 Act does not, however, vest arbitral tribunals with such discretion in the case of an implied or express choice of law by the parties. Arbitration agreements seldom have their own express choice of law provisions, although it is possible for the courts to take the view that the seat of the arbitration designated in the arbitration agreement indicates an implied choice of law in favour of the law at the designated seat. See the decision in *XL Insurance Limited v. Owens Corning*, above.

<sup>15</sup> See Article 1(2)(d) of the Regulation.

<sup>16</sup> See Article 1(2)(d) of the Recast Regulation.

<sup>17</sup> See para. 107 of the Heidelberg Report.

In *Van Uden Maritime B v. Kommanditgesellschaft in Firma Deco-Lin*,<sup>18</sup> the question was whether it was possible for a party to obtain interim relief by the court of a Member State where there was an arbitration agreement binding upon the parties. The ECJ held that the court had jurisdiction to hear an application for interim relief even in cases where the parties had effectively excluded the jurisdiction of the courts by providing for disputes to be referred to arbitration. The ECJ took the view that “the person seeking a measure intended to preserve a factual or legal situation must be able to apply to his nearest court”.<sup>19</sup>

Different considerations arose in *the Atlantic Emperor*,<sup>20</sup> where a purchaser resorted to English courts for the appointment of an arbitrator following the refusal of its supplier to cooperate. Prior to the application of the purchaser to English courts, the supplier had commenced legal proceedings in Italy for a declaration that it was not liable to the purchaser. The ECJ held that ancillary measures such as the appointment of an arbitrator fell outside the scope of the Regulation by reason of the arbitration exception under Article 1(2)(d). The court also went on to hold that the arbitration exception also covered the preliminary dispute as to the existence of an arbitration agreement.

In the *Wadi Sudr*, bill of lading holders initiated Spanish litigation proceedings against the carrier under the bill of lading. After the Spanish proceedings, the carrier commenced arbitration in London for a declaration of non-liability, as well as an action in the Commercial Court seeking a declaration that the substantive dispute was subject to an arbitration agreement. Through the eyes of English courts, the dispute was subject to arbitration in London, with the bill of lading effectively incorporating the charterparty arbitration clause pursuant to English law, which was the putative applicable law of the bill of lading.<sup>21</sup> However, the Spanish court, as the court first seised, made a preliminary

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<sup>18</sup> (C-391/95)[1998] ECR I-7091.

<sup>19</sup> *Ibid.*, para. 135. Decisions of arbitrators regarding the scope and validity of the arbitration agreement fall outside the scope of the Regulation, see *West Tankers v. Allianz SpA* [2012] EWHC 854 (Comm). The Recast Regulation gives this proposition more strength.

<sup>20</sup> *Marc Rich & Co AG v. Società Italiana Impianti PA* (Case C-190/89) [1991] ECR I-3855.

<sup>21</sup> On the issue of what law governs the question of incorporation, see M. Ozdel, “Presumptions on the Law Governing the Incorporation of Forum Selection Clauses: Should the Putative Applicable Law Lead the Way?” (2011) 4 *Journal of Business Law*, 357-370. See also M. Ozdel, *Bills of Lading Incorporating Charterparties* (London: Hart Publishing, 2015), Chapter 1.

decision that the arbitration clause was not incorporated into the bill of lading and that they had jurisdiction to rule on the merits.

In the Court of First Instance,<sup>22</sup> Gloster J held that, given the arbitration exception under the Regulation, the Spanish court's preliminary decision on incorporation was not binding upon the English courts. She further held that the bill of lading incorporated the arbitration clause providing for arbitration in London. The Court of Appeal in *the Wadi Sudr*<sup>23</sup> overturned the judgment of Gloster J, holding that the preliminary ruling of the Spanish court on incorporation fell within the scope of the Regulation,<sup>24</sup> and that the English court was precluded from examining for itself whether the clause was incorporated.<sup>25</sup> One of the main foundations for this decision was the opinion of the Advocate General in *The Front Comor*.<sup>26</sup> There, the Advocate General took the view that the questions of validity and incorporation of arbitration agreements do not fall outside the scope of the Regulation where the subject matter of the dispute, which is tied up with the preliminary ruling on arbitration, falls within the scope of the Regulation.

On the question of whether the judgment of the Spanish court was binding in the London arbitration proceedings, Moore-Bick LJ in *The Wadi Sudr* said:

It is quite true that the Regulation itself does not apply to arbitral tribunals and that arbitrators are not therefore bound by the Regulations themselves to recognise judgments of the courts of member states of the EU, but it does not follow that foreign judgments, whether of the courts of member states or other countries, can be disregarded in arbitration

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<sup>22</sup> [2009] 1 Lloyd's Rep 666.

<sup>23</sup> [2010] 1 Lloyd's Rep 193 (CA).

<sup>24</sup> See ss 33 and 34 of the Regulation on the rules of enforcement and recognition of judgments.

<sup>25</sup> See paras 62 and 125.

<sup>26</sup> (Case C-185/07) [2009] ECR I-663). See the House of Lords decision in *West Tankers Inc v. Ras Riunione Adriatica di Sicurtà SpA and Others (The Front Comor)* [2007] UKHL 4. There, it was held that the charterer's subrogated insurers were bound by the arbitration clause in the charterparty. The question of whether English courts could compel the subrogated insurers to arbitrate by granting an anti-suit injunction was referred to the ECJ. On this question, the ECJ held that it was not consistent with the Regulation for a court of a Member State to grant an anti-suit injunction against a party who brought litigation proceedings in another Member State on the grounds that such proceedings were in breach of an arbitration agreement, see Case C-185/07 [2009] ECR I-663.

proceedings. A judgment of a foreign court which is regarded under English conflicts of laws rules as having jurisdiction and which is final and conclusive on the merits is entitled to recognition at common law: see *Dicey and Morris and Collins on the Conflict of Laws*, 14th Edition, paras 14-027 to 14-029. It follows, therefore, that arbitrators applying English law are bound to give effect to that rule. There is nothing new in this; it has long been recognised that a judgment of a foreign court can give rise to estoppel by res judicata — see, for example, *The Sennar (No 2)* ... and the principle is routinely applied in arbitration proceedings.<sup>27</sup>

Mr Justice Flaux in *West Tankers Inc v. Allianz Spa and Another* refused to extend this line of thought in such a way as to circumscribe arbitrators from granting equitable damages for breach of the obligation to arbitrate. He took the view that an award for such damages was not an illegitimate interference with the foreign court given the Advocate General's opinion in *The Front Comor* to the effect that a decision on the merits by the arbitral tribunal can potentially be inconsistent with any decision on the merits that a court first seised might reach.<sup>28</sup>

However, the ECJ decision in *The Front Comor* made it clear that it was not consistent with the Regulation for a court of a Member State to grant an anti-suit injunction against a party who brought litigation proceedings in another Member State in breach of an arbitration agreement.<sup>29</sup> The combined effect of this decision and that in *The Wadi Sudr* was that the enforcement of arbitration clauses in bills of lading was significantly undermined under the Regulation. A carrier who wished to compel a bill of lading holder to arbitrate in London pursuant to a London arbitration clause in the bill of lading was left with one strategy: to initiate arbitration proceedings, to obtain an award and to have the award entered as a judgment under section 66 of the 1996 Act before a judgment

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<sup>27</sup> See para. 118 of the judgment.

<sup>28</sup> See the opinion of Advocate General Kokott delivered on 4 September 2008, Case C-185/07

<sup>29</sup> Case C-185/07 [2009] ECR I-663.

on the merits is given in another Member State.<sup>30</sup> [NOTE – or successfully seek a stay in the litigation forum]

### **Who can effectively decide the question of validity under the Recast Regulation?**

Recently, the Regulation has been subject to reform, and its reformed version, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Recast Regulation) applies from 10 January 2015.<sup>31</sup> The Recast Regulation removes the effects of *The Wadi Sudr* by expressly providing that the decision of the court of a Member State on the validity of an arbitration agreement will not be subject to the rules of recognition and enforcement under the Recast Regulation.<sup>32</sup> Recital 12 of the Recast Regulation provides that:

*"This regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law."*

In addition to this emphasis on the enhanced separation of arbitration from the scope of the Recast Regulation, Recital 12 further provides that:

*Where a court of a Member State exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the*

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<sup>30</sup> [2012] 1 Lloyd's Rep 398 (CA). An alternative solution for the carrier is to seek a stay in the litigation forum.

<sup>31</sup> See note 14.

<sup>32</sup> See Recital 12 of the Recast Regulation.

*matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June ('the 1958 New York Convention'), which takes precedence over this Regulation."*

The passage above suggests that where the court of a Member State is asked to enforce an award pursuant to the New York Convention, the court can enforce the award irrespective of an adverse judgment obtained in a different Member State. In *West Tankers*, there were both sets of London arbitration and Italian litigation proceedings running concurrently with the risk of conflicting decisions on the merits. The Arbitral Tribunal sitting in London rendered an award in favour of the shipowners, and the shipowners in turn applied to the English Commercial Court to have the declaratory award entered as a judgment under section 66 of the 1996 Act. At the time the court was dealing with this application, the unsuccessful party, the subrogated insurers of the charterers, did not have an inconsistent judgment obtained in a different Member State. With the Recast Regulation, it now seems that English courts can enforce an award pursuant to the New York Convention, even in cases where there is an inconsistent judgment by the court of another Member State. With this new change, the solution to keep arbitration clauses in bills of lading effective will again be a practical one: in addition to the central concern of obtaining an award before a court judgment, it will also be essential for the winning party to have the award recognised and enforced pursuant to the New York Convention in the place where the assets of the losing party are located. This suggestion is also supported by the last paragraph of Recital 12, which provides that:

This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment

concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

## **2) Should an anti-suit award rendered by an arbitral tribunal be enforced by the courts pursuant to the New York Convention 1958?**

The discussions above raise the further question of whether an arbitration award should be enforced by the courts of Member States under the New York Convention even in cases where the award constitutes an anti-suit injunction. In other words, where a tribunal renders an award prohibiting a party from bringing certain claims before the court of a Member State that has jurisdiction to hear the dispute pursuant to the Recast Regulation, does the court of a Member State have the right to refuse to enforce such an award? The decision of the ECJ in *The Front Comor* makes it clear that anti-suit injunctions are not compatible with the Regulation. Can this line of thinking be extended in such a way as to prohibit the courts of Member States from refusing recognition of such awards?

In the *Gazprom* case,<sup>33</sup> the Advocate General's view was that the prohibition established by the decision in *The Front Comor* only applied to those injunctions issued by a court of a Member State against proceedings pending before a court of another Member State. Thus, the enforcement of an award containing an anti-suit injunction was considered to be compatible with the Regulation. On the question whether the enforcement of such awards would be compatible with the Recast Regulation, the Advocate General took an equally liberal view, stating:

Since an anti-suit injunction is among the measures which the court of the seat of the arbitral tribunal may order in support of the arbitration with the aim of ensuring the proper conduct of the arbitral proceedings and in that sense constitutes "ancillary proceedings relating to, in particular, ...

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<sup>33</sup> See the opinion of Advocate General in *Gazprom* case, Case C-536/13, para 153.

the conduct of an arbitration procedure”, its prohibition can no longer be justified on the basis of the Brussels I Regulation (recast).<sup>34</sup>

It is true that the Recast Regulation now purports to exclude arbitration completely from its scope. The upshot of this is that any action or ancillary proceedings relating to, in particular, recognition and enforcement of arbitration awards, including those containing anti-suit injunctions, does not fall within the scope of the Recast Regulation. Thus, it will be for the enforcing courts to determine whether the award should be enforced pursuant to the New York Convention.

Under the New York Convention, recognition and enforcement of an arbitral award may be refused if the enforcing court finds that “the recognition and enforcement of the award would be contrary to the public policy of that country”.<sup>35</sup> The concept of “public policy” does not have a uniform meaning amongst the Contracting States of the New York Convention, although the Contracting States tend to interpret the public policy exception restrictively. Despite the restrictive interpretation of the public policy exception amongst the Contracting States, can the enforcement of an arbitration award containing an anti-suit injunction be refused on the basis of public policy? Although some of the European instruments are considered to form part of European public policy,<sup>36</sup> the jurisdictional rules contained in the Regulation and those in the Recast Regulation are not such matters of public policy for the purposes of the New York Convention.<sup>37</sup> This is mainly because of the restrictive interpretation of the public policy exception, which is generally considered to embrace “the principles that form part of the very foundations of the legal order”<sup>38</sup> and the states’ “most basic notions of morality and justice”.<sup>39</sup> The Advocate General in the *Gazprom* case took this line of thought.

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<sup>34</sup> *Ibid*, at para 140.

<sup>35</sup> See Art. V(2)(b) of the New York Convention.

<sup>36</sup> See the ECJ decision in *Eco Swiss China Time Ltd v Benetton International BV* (Case C-126/97)[1999] 2 All ER (Comm) 44

<sup>37</sup> The same line of thought was also taken by the Advocate General in the *Gazprom* case Case C-536/13.

<sup>38</sup> See the opinion para 177.

<sup>39</sup> See *Parsons and Whittemore v RAKTA*, 508 F.2d 969, 974 (2d Cir. 1974). See also, *Laminoirs-Trefileries-Cableries de Lens v Southwire Co*, 484 F.Supp. 1063 (ND Ga 1980). On the application of the public policy

On 13 May, the ECJ finally handed down the decision in the *Gazprom* case. Following the view of the Advocate General, they held that the Regulation did not preclude a court of a Member State from recognising and enforcing an arbitral award in the form of an anti-suit injunction. In support of this, the Grand Chamber said:

*"it should be remembered first of all that ... arbitration does not fall within the scope of Regulation No 44/2001, since the latter governs only conflicts of jurisdiction between courts of the Member States. As arbitral tribunals are not courts of a State, there is, in the main proceedings, no such conflict under that regulation."*

Given the strong emphasis on the separation of arbitration from the rules of conflicts of jurisdiction in the Recast Regulation, it is clear that it will be for the Member States to decide whether to enforce an award in the form of an anti-suit injunction pursuant to the New York Convention. With these new developments, it is true that the barriers to enforcement of arbitration agreements under the Regulation have now been removed. However, one must not lose sight of the fact that there is no uniform treatment of arbitral awards under the New York Convention and that the courts can revisit the question of validity of arbitration agreements at the enforcement stage under the New York Convention. This was the lesson learnt from the recent Supreme Court decision in *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*.<sup>40</sup> Consequently, it is still possible for recalcitrant parties to effectively avoid arbitration agreements.

### **3) Is there an arbitration clause in the bill of lading?**

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exception under English law, see the decision of Philips J (as he then was) in *Lemenda Trading Co. Ltd v African Middle East Petroleum Co Ltd.* [1988] QB 448, at 459, where he said that some heads of public policy were based on universal principles of morality. See also the decision of Colman J in *Westacre Investments v Jugoimport SDPR Holdong Co* [1999] QB 740, at 775, where he said: "Outside the field of such universally-condemned international activities as terrorism, drug-trafficking, prostitution and paedophilia, it is difficult to see why anything short of corruption or fraud in international commerce should invite the attention of English public policy in relation to contracts which are not performed within the jurisdiction of the English courts."

<sup>40</sup> [2010] UKSC 46

The answer to this question will be simple where an arbitration clause is expressly provided in the bill of lading. However, the answer is often not that simple, particularly in tramp trade, where bills of lading generally contain an incorporation clause. In such cases, the answer usually boils down to the issue of whether the bill of lading incorporates an arbitration clause from a charterparty. On the question of incorporation, this paper concentrates on the recent judicial developments in the wake of the Court of Appeal decision in *The Channel Ranger*.<sup>41</sup>

The decision in *The Channel Ranger* is an important decision on incorporation, as it has introduced flexibility in the description test, which was established more than a century ago with the leading House of Lords decision in *Thomas & Co v. Portsea Steamship Ltd*.<sup>42</sup> On the issue of what words are apt to incorporate which charterparty provisions, the test, as established by the decision in *Thomas & Co v. Portsea Steamship Ltd* is: general words of incorporation are, *prima facie*, apt to incorporate only those charterparty provisions that are germane to shipment, carriage and discharge of the cargo. Put another way, the general incorporation wording, which does not contain any specific reference to a charterparty provision, is taken to describe only those charterparty provisions relating to the subject matter of the bill of lading as a contract of carriage.

It is well established under case law that arbitration and jurisdiction clauses are not considered to be germane to shipment, carriage and discharge of the cargo. What is not so clear is what other types of charterparty provision are also ancillary.<sup>43</sup> Do charterparty choice of law and time-bar provisions require special or general words of incorporation? A choice of law clause applies even to disputes as to the validity of the contract, as with forum selection clauses. Because of this nature of choice of law clauses, it is tempting to think that they are ancillary to the subject matter of the contract. However, the main difficulty with this view is that the choice of law clause governs the mode of parties'

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<sup>41</sup> [2014] EWCA Civ 1366.

<sup>42</sup> [1912] AC 1.

<sup>43</sup> For more discussions on this issue, see M. Ozdel, *Bills of Lading Incorporating Charterparties* (Hart Publishing, 2015), Chapter 3.

performance under the contract of carriage. For this reason, a choice of law clause is probably one of the most suitable provisions for incorporation into the bill of lading, and therefore general words of incorporation should be considered as apt to incorporate such a clause. This view is judicially recognised under English law.<sup>44</sup> On the question of whether a charterparty time-bar provision is germane to the subject matter of the contract, it is essential to see how the clause operates in the charterparty, as well as its probable effects in the bill of lading when its incorporation is assumed.<sup>45</sup>

On the incorporation of arbitration clauses into bills of lading, there is no doubt that special words of incorporation are needed. What needs to be discussed is what should be understood by “special words of incorporation”. At this juncture, the Court of Appeal in *The Channel Ranger* is of great assistance.<sup>46</sup> There, the reference in the bill of lading was to the “Law and Arbitration” clause of the charterparty, although the relevant charterparty provided for English law and jurisdiction. Following the decision of Males J in the first instance, the Court of Appeal found this reference apt to incorporate the charterparty English jurisdiction clause. The following conclusions can be drawn from the decisions:

- As long as the reference in the bill of lading alerts the holder as to the possible incorporation of at least one kind of dispute resolution clause, it can be read as extending to the other type of dispute resolution clause in the charterparty. This flexibility is perhaps necessary given that the particular dispute resolution method provided in the relevant charterparty may not coincide with the reference in the incorporation clause.
- In light of the reasoning above, a reference to “litigation” in a bill of lading incorporation clause should equally be treated as a proper reference to

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<sup>44</sup> See *The San Nicholas* [1976] 1 Lloyd's Rep 8, 12 (CA).

<sup>45</sup> On this issue, see the decision in *OK Petroleum Vitol Energy SA* [1994] 2 Lloyd's Rep 160, where Colman J held that a charterparty time-bar clause could not be incorporated into a sale contract that referred to “demurrage as per charterparty”. For present purposes the decision must be treated with caution given that the cases on incorporation in the context of bills of lading are “materially” different from those in the context of sale contracts.

<sup>46</sup> [2014] EWCA Civ 1366.

arbitration where the relevant charterparty contains an arbitration clause, as opposed to a jurisdiction clause.

- The question of the required degree of specificity in the reference to the dispute resolution clause of the charterparty is one of construction. In this context, the courts and tribunals should consider “what a reasonable person would have understood the parties to have meant from the words of incorporation in the bill of lading”, with due consideration of business common sense and commercial purpose of the incorporation clauses.

It is also important to highlight what conclusions should not be drawn from these decisions:

- The question of incorporation should not be looked at afresh and purely pursuant to the aids to construction under general contract law. The rules of incorporation are peculiar to maritime law, and they should be applied to the question of incorporation.
- The recognised flexibility in making specific reference to forum selection clauses should not be treated as tantamount to rectification of the reference in the bill of lading. Rectification entails reframing the contract pursuant to the actual intention of the parties, and this does not sit comfortably with the nature of bills of lading, as transferable instruments. Bills of lading usually pass through the hands of numerous traders. This makes it necessary for the courts to give effect only to the intention of the original parties to the bill of lading that can objectively be ascertained from the wording of the incorporation clause.<sup>47</sup>

#### **4) Is the arbitration clause in the bill of lading valid?**

As will be recalled, the question of validity of an arbitration agreement is decided with reference to the putative proper law of the arbitration agreement.<sup>48</sup> The

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<sup>47</sup> See the decision in *The Merak* [1965] P 223 (CA), where the bill of lading mistakenly referred to “clause 32” of the relevant charterparty instead of “clause 30”, which was the arbitration clause. The court refused to correct the mistake and treated the reference merely as surplus.

<sup>48</sup> See note 11.

question of validity has two aspects: formal validity and material validity.<sup>49</sup> For arbitration agreements to fall within the scope of the 1996 Act, they must be in writing within the meaning of section 5 of the Act.<sup>50</sup> Under section 5 of the 1996 Act, the writing requirement is satisfied where the arbitration agreement (a) is concluded in writing, whether or not it is signed by the parties,<sup>51</sup> (b) is made by exchange of communications in writing, such as exchange of faxes, telexes or emails,<sup>52</sup> or (c) is evidenced in writing.<sup>53</sup>

In *The Nerarno*, the bill of lading holder unsuccessfully argued that the incorporated arbitration agreement referring to the disputes between the owner and charterer was not an arbitration agreement in “writing” as between the carrier and the holder.<sup>54</sup> The main contention of the holder was that when the wording of the agreement was adapted to that of the bill of lading, the arbitration agreement should not be treated as “in writing” as been the parties to the bill of lading. The court dismissed these submissions, holding that the incorporated arbitration agreements with such adapted wording was still considered to be “in writing” and would be binding upon the holders.

### **Validity of arbitration clauses under the conventions governing carriage of goods by sea**

Contracts of carriage contained in or evidenced by bills of lading are mainly regulated by a patchwork of different sets of mandatory rules contained in various international conventions and national legislation. It is too soon to tell whether these disparate liability regimes will finally give way to a uniform liability regime within the EU and EFTA, although it is rather unlikely that a worldwide standardisation will ever be reached. Nonetheless, the good news is that most states around the world have adopted either the Hague or the Hague-Visby Rules. Despite the differences in their application by states, the Hague or

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<sup>49</sup> On the element of material validity, see the decisions in *Pagnan SpA v Feed Products* [1987] 2 Lloyd's Rep 601; *Compare Birse Construction Ltd v David Ltd* [2000] 78 Con LR 121

<sup>50</sup> See also s. 6(2) of the 1996 Act, which provides that “the reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement”.

<sup>51</sup> See s 5(2)(a) and 5(3) of the 1996 Act.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid. See also, the decisions in *Zambia Steel & Building Supplies v James Clark* [1986] 2 LLR 225 (CA); *Arab African Energy v Olieproducten Nederland* [1983] 2 Lloyd's Rep 419; *Jayaar Impex Ltd v Toaken Group* [1996] 2 Lloyd's Rep 437.

<sup>54</sup> [1996] 1 Lloyd's Rep 1.

the Hague-Visby Rules govern most of the bills of lading in practice, and this brings harmony to some extent to the international carriage of goods by sea.

For present purposes, it is important to highlight the fact that the Hague and Hague-Visby Rules do not, in principle, regulate the issues of enforcement of arbitration clauses in bills of lading. [NOTE – would be helpful to have a lead in / introduction to the Hamburg Rules] The Hamburg Rules introduce severe limitations to carriers' rights to enforce their forum selection clauses under bills of lading on cargo interests.<sup>55</sup> In many jurisdictions where parties are traditionally allowed to designate the forum for resolution of their disputes,<sup>56</sup> this limitation is highly objectionable. Given that the Hamburg Rules have failed to replace the pre-existing conventions, namely the Hague and the Hague-Visby Rules,<sup>57</sup> these limitations have never become a great concern to the users of arbitration for maritime disputes arising under bills of lading.

In *The Hollandia*,<sup>58</sup> Article III(8) of the Hague-Visby Rules was applied to invalidate a clause that required that disputes be resolved under Dutch law, and exclusively before the courts of Amsterdam. The reasoning of the House of Lords was that upholding the forum selection clause would result in carriers being subject to a lower amount of limitation than that provided under the Hague-Visby Rules. Thus, the court refused to stay the action on the grounds that the courts of the Netherlands, which would apply the Hague Rules, would give the cargo interests a significantly lower amount for damages than the English courts.<sup>59</sup>

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<sup>55</sup> Following the promulgation of the Hague-Visby Rules, there had been some negative responses to the Hague-Visby Rules, and this prompted a search for a new convention. Shortly afterwards, steps were taken under the auspices of the United Nations Commission on International Trade Law (UNCITRAL) for a new carriage convention. After the drafting process, the Hamburg Rules were adopted in 1978. As with the Hague and Hague-Visby Rules, the Hamburg Rules were not free from controversy: the latter rules received even more criticism, especially from the major shipping and trading nations, thereby failing to provide a widely accepted replacement for the Hague and the Hague-Visby Rules. The Rules failed to replace the pre-existing Conventions, namely the Hague and the Hague-Visby Rules, and therefore brought about even more fragmentation to the international carriage of goods by sea.

<sup>56</sup> This is the case under English law; see *The El Amria (CA)* [1981] 2 Lloyd's Rep. 119, where it was held that English courts would enforce the foreign jurisdiction clauses unless there are strong reasons for not doing so. See also *The Eleftheria* [1969] 1 Lloyd's Rep. 237 and *Donohue v. Armco* [2002] 1 Lloyd's Rep. 425.

<sup>57</sup> As of today, only 34 countries are signatories to the Hamburg Rules, five of which are EU Member States, namely the Czech Republic, Hungary, Austria, Romania and Slovakia.

<sup>58</sup> [1982] 1 AC 565.

<sup>59</sup> See *ibid.*, at 571.

In the wake of *The Hollandia*, could it be said that Article III(8) necessarily overrides all foreign forum selection clauses, including arbitration clauses in bills of lading, merely because they designate foreign courts or tribunals? As has been made clear in the decision itself, the decision does not support mechanical invalidation of foreign forum selection clauses.<sup>60</sup> It suggests that the courts should forecast the possible outcome of the dispute when resolved in the selected forum.<sup>61</sup> Hence, the effect of *The Hollandia* is limited to those cases where the possible outcome of the dispute in the chosen forum has the effect of relieving the carrier of more liability than is allowed by the Hague-Visby Rules.<sup>62</sup>

Under section 9(4) of the 1996 Act, an English court shall stay proceedings brought in breach of an arbitration agreement, unless the agreement is “null and void, inoperative or incapable of being performed”. An arbitration agreement can be considered as null and void by reason of public policy. When this is considered together with the statutory force of the Hague-Visby Rules, the question is: should a court refuse to stay proceedings because the arbitration agreement is null and void, where the resolution of the dispute at the seat of the arbitration might offend Article III(8) of the Hague-Visby Rules due to the mandatory rules at the seat of the arbitration? Given the United Kingdom’s obligation under the New York Convention to give effect to arbitration agreements, it would appear that the grounds for refusal to stay proceedings must be applied restrictively. For this reason, it is submitted that the application of the decision in *The Hollandia* should not be extended to arbitration clauses in bills of lading, despite the fact that Lord Diplock’s reasoning for the decision was also targeted at arbitration clauses in bills of lading.<sup>63</sup>

### **Validity of arbitration clauses under the Rotterdam Rules**

The latest international attempt to unify the rules governing bills of lading, which are embodied in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules),

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<sup>60</sup> *Ibid.*, at 574.

<sup>61</sup> *Ibid.*, at 575.

<sup>62</sup> *Ibid.*

<sup>63</sup> For more discussions on this issue, see M. Ozdel, *Bills of Lading Incorporating Charterparties* (Hart Publishing, 2015), Chapter, 5(II)(C).

shows a tendency to protect cargo interests against forum selection clauses. It is important to note that the chapters on arbitration and jurisdiction only bind those contracting states that have made a declaration to that effect.<sup>64</sup> When the chapters are operative, cargo interests will be entitled to institute court proceedings against carriers in any of the jurisdictions listed in Article 66. These include the competent courts situated in the domicile of the carrier and those designated in the exclusive jurisdiction agreements made between the respective shippers and carriers. Under Article 75, these parties also have the right to commence arbitration proceedings in the places identical to those provided in Article 66.

In the case of non-liner transportation, the rules considerably relieve carriers of having to satisfy a chain of conditions when they seek to enforce an arbitration clause that is incorporated from a charterparty, or a similar contract, into a transport document such as a bill of lading. According to Article 76(2), carriers may thus avoid the requirements stated above and enforce the charterparty arbitration clauses against the holders if (1) the parties to the charterparty and the date of its making are stated under the transport document and (2) the charterparty arbitration clause is expressly specified in the transport document.<sup>65</sup> Where the transport document does not have the required content, the arbitration agreement in that document will be subject to the conditions of Article 75 of the Rotterdam Rules.

Adopting an exceptional solution for non-liner transportation is best understood by the fact that exclusive jurisdiction clauses are popular in the liner trade, whereas arbitration clauses are frequently used in the non-liner trade.<sup>66</sup> In non-liner transportation, the contractual relationships between the carriers and cargo interests are usually governed by charterparties or similar contracts.<sup>67</sup> In liner trade, on the other hand, the contract of carriage is usually contained in bills of lading or a similar transport document, and parties in such cases do not

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<sup>64</sup> See Arts 74 and 78 of the Rotterdam Rules.

<sup>65</sup> See Art 76. The same rules apply also in cases where an electronic transport document is issued.

<sup>66</sup> See note 62.

<sup>67</sup> *Ibid.* It here proves valuable to note that these agreements are also outside the scope of the Rotterdam Rules, see Art. 6.

usually have equal negotiating power. Perhaps due to these differences, the Rotterdam Rules envisage stricter requirements in the case of liner transportation and adopt a liberal approach regarding non-liner transportation.

In practical terms, it is difficult to understand why cargo interests who hold bills of lading as their contract of carriage in non-liner transportation are different from those in liner transportation. Generally, neither type of cargo interest has any means of negotiating, or even knowing, the terms of the charterparty referred to in the bill of lading. If the carrier's right to enforce arbitration clauses in bills of lading needs to be curbed vis-à-vis the cargo interests holding bills of lading as a contract of carriage, why is a cargo interest in liner trade treated differently from a cargo interest in non-liner trade?

Above all, from the perspective of the countries that have a long tradition of enforcing forum selection clauses, the Rotterdam Rules are open to criticism principally for restricting the applicability of these clauses to certain cases. From the standpoint of the cargo interest, however, this particular feature may well constitute a compelling reason to support the rules.

The discussions during the preparations of the Rotterdam Rules<sup>68</sup> have demonstrated, yet again, that these jurisdictional issues will in the future remain to attract debates in the international arena. The solutions suggested under the rules attest that there is an enduring historical scepticism surrounding the forum selection clauses, and there remains also a belief that these clauses can be used to circumvent the rules favouring cargo interests. In assessing whether forum selection clauses should be enforced, one must consider the importance of these clauses to carriers, who run the risk of being sued in various jurisdictions.

It also proves valuable to consider that giving the cargo interests the option of choosing from a number of fora, the Rotterdam Rules may lead to multiple proceedings brought against the same carrier by several claimants in different

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<sup>68</sup> See generally MF Sturley, "Overruling Sky Reefer in the International Arena: A Preliminary Assessment of Forum Selection and Arbitration Clauses in New UNCITRAL Transport Law Convention" (2006) *JMLC* p. 1.

jurisdictions. This could, evidently, result in conflicting judicial decisions over the same incident.<sup>69</sup> Thus, in order to avoid parallel proceedings and uncertainty, a strong presumption in favour of enforcement of arbitration agreements is more desirable than the restrictions under the Rotterdam Rules.

## **5) Is the arbitration clause in the bill of lading binding upon the holder?**

When the rights and obligations under a bill of lading are transferred, is the arbitration clause binding upon the subsequent bill of lading holder (whether a consignee, endorsee or bearer)? By virtue of the English Carriage of Goods by Sea Act 1992 [NOTE –need to cite COGSA full name for non-English/ maritime lawyers], “the lawful<sup>70</sup> holder of a bill of lading”, to whom the bill of lading has been transferred, is deemed to have succeeded to “all rights of suit” under the bill of lading as if he/she had been a party to that contract.<sup>71</sup> For consignees/endorsees to be treated as a lawful holder, they must have the bill of lading in their possession.<sup>72</sup> By COGSA 1992, the word “holder” is used to refer to endorsees to whom the bill of lading has been transferred either in full or blank, as well as consignees.<sup>73</sup>

While the lawful holders succeed to “all rights of suit” on transfer of bills of lading, liabilities therein are transferred to these parties when they take a step, as defined under section 3(1) of COGSA 1992, to enforce the contract of carriage.<sup>74</sup> Bills of lading referred to in COGSA 1992 do not include “straight bills of lading”.<sup>75</sup> Nonetheless, this type of bill of lading is treated as a seawaybill for the purposes of application of COGSA 1992.<sup>76</sup> The upshot of this is that consignees of such bills of lading can equally succeed to the rights and obligation of the shipper under the bill of lading.<sup>77</sup> Under English law, it is therefore possible for the consignees/endorsees to succeed to the rights and obligations of

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<sup>69</sup> For a similar view see *Carnival Cruise Lines Inc v. Shute*, 499 US 585, 594–595 (US 1991).

<sup>70</sup> See s. 5(2).

<sup>71</sup> See in particular ss 1(2), 2(1) and 5(2) of COGSA 1992.

<sup>72</sup> See s. 5(2).

<sup>73</sup> *Ibid.*

<sup>74</sup> See *The Berge Sisar* [1998] 2 Lloyd's Rep 475 (CA).

<sup>75</sup> See s. 1(2)(a).

<sup>76</sup> See *AP Moller-Maersk v. Sonaec Villas* [2011] 1 Lloyd's Rep 1.

<sup>77</sup> However, on transfer of a straight bill of lading, the shipper's rights under the bill of lading do not extinguish, see s. 2(5). This situation is diametrically opposed to that of the shipper who has transferred an order bill of lading to the consignee, see s. 2(5)(a). See also *AP Moller-Maersk v. Sonaec Villas*.

shippers under the bill of lading. When this happens, it will be possible for the carrier to compel the holder to arbitrate pursuant to the arbitration clause in the bill of lading.

As will be recalled, the mere fact that the bill of lading holder was not the actual signatory to the charterparty does not prevent the carrier from enforcing an incorporated charterparty arbitration clause against the holder. As will be recalled, in the English decision in *The Nerarno*, a charterparty arbitration clause incorporated into a bill of lading was treated as binding upon the holder who was not a party to the relevant charterparty.

## **CONCLUSION**

Given the peculiar nature of contracts of carriage contained in or evidenced by bills of lading, the enforcement of arbitration clauses in such contracts raises particularly challenging and diverse issues. These issues range from the question of incorporation, through to the validity of such clauses under the mandatory rules of the applicable conventions governing these contracts of carriage. At the heart of this sophistication lies the fact that bills of lading are transferable instruments, and that traders around the world rely heavily on these instruments. Arbitration has become the “norm” for the resolution of maritime disputes. Of the recent developments, the Recast Regulation and *The Channel Ranger* are most welcome, whilst the arbitration provisions in the Rotterdam Rules would create a significant set-back for arbitration, if they were to enter into force.