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VIỆN DẪN ĐIỀU KHOẢN TRỌNG TÀI Ở HỢP ĐỒNG TÀU CHUYẾN VÀO VẬN ĐƠN ĐƯỜNG BIỂN: KINH NGHIỆM TỪ ANH VÀ TRUNG QUỐC VÀ BÀI HỌC KINH NGHIỆM CHO CÁC DOANH NGHIỆP VIỆT NAM

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Tóm tắt

Song hành với sự phát triển của thương mại quốc tế trong lĩnh vực hàng hải, việc đưa ra một khuôn khổ giải quyết tranh chấp hoàn thiện hơn nhằm giúp các doanh nghiệp Việt Nam giải quyết các vấn đề phát sinh từ việc sử dụng hai văn bản là hợp đồng thuê tàu chuyến và vận đơn là vô cùng cấp thiết. Điều khoản trọng tài được đưa vào hợp đồng thuê tàu vốn là thông lệ phổ biến; tuy nhiên, việc đưa nó vào B/L dường như không được quy định rõ ràng trong luật pháp các quốc gia cũng như các công ước quốc tế. Trong nghiên cứu này, chúng tôi sẽ xem xét các quy định để đảm bảo hiệu lực và việc thực thi việc đưa các điều khoản trọng tài từ vận đơn và hợp đồng tàu chuyến ở Trung Quốc và Anh bằng cách tiến hành phương pháp luật so sánh. Trong nghiên cứu này, dựa trên các nghiên cứu khác của các học giả và chuyên gia trong lĩnh vực, nhóm tác giả sẽ tổng hợp và rút ra kinh nghiệm thực tế cho các doanh nghiệp Việt Nam nhằm biết cách soạn thảo và kết hợp điều khoản trọng tài từ hợp đồng thuê tàu vào vận đơn một cách hợp lý và hiệu lực thi hành.

INCORPORATION OF ARBITRATION CLAUSE FROM CHARTER PARTY INTO BILL OF LADING: FROM THE PERSPECTIVES OF ENGLAND AND CHINA AND LEARNINGS FOR VIETNAM ENTERPRISES

Abstract

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Along with the development of international trade in the maritime, it is critical to have a more complete framework of dispute resolutions to help Vietnamese companies deal with issues arising from the usage of the two most necessary documents, the charter party and the bill of lading. An arbitration clause incorporated in a charter party is a common custom as it is regulated in the CONGENBILL; however, incorporating it into B/L seems to be not very clearly stated either in national law or international conventions. In this study, we will examine the requirements to fully take advantage of the validity and enforcement of arbitration clauses in China and England to find out the key to establishing a unified set of requirements by conducting a comparative law method. Throughout this study, based on other research conducted by other scholars and experts in the field, we will summarize and infer practical experience for Vietnamese enterprises so that they can know how to draft arbitration clauses from the charter party into the bill of lading in a reasonable and enforceable manner.

Keywords: charter party, bill of lading, arbitration clause, English law, Chinese law

1. Introduction:

The charter party regulates the legal relationship between the ship owner and the charterer (or the carrier), while the legal relationship between the carrier and the buyer or the seller is regulated by the bill of lading. In case the carrier has the intention to bind the effect of the arbitration clause from the charter party to the bill of lading, he has to leave some special notation on the bill of lading so as to indicate the legal binding for the third parties who are unaware of the presence of that negotiated arbitration clause. On the other hand, English law and Chinese law are two different outstanding law systems which play an important role in the maritime dispute resolution process. Each system has its own characteristics which are suitable for the specific situation. In the English approach, the common law system with case law is dominant, whilst in the Chinese approach, the civil law system with juridical interpretation as well as replies and guidance are dominated. Because of these differences, there are many arguments about unclear resolution when there are foreign-related maritime disputes occurring in the incorporation of arbitration clauses contained in the charter party into the bill of lading. The objectives of this research are to compare the enforcement and validity of the incorporation in two prominent laws from two different law systems and give some learnings, implications and suggestions for Vietnamese companies to successfully incorporate arbitration clauses from charter party to bill of lading.

2. General theory:

From Article 1 of the Hamburg Rules, 1978 bill of lading is defined as " *a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking".* The bill of lading has three main functions in international trade: receipt of shipment, a document of title to goods and evidence of a carriage contract.

A Charter party is defined as a contract between the shipowner and the charterer which provides the terms and conditions under which a ship is let or hired wholly or principal partly for the conveyance of goods in a specified period of time.

Throughout the development of international trade, especially in the maritime industry, both BL and charter parties play important roles in providing evidence and binding involved parties to make them fulfill their duties. However, the incorporation of arbitration clauses from a charter party into a B/L is extremely crucial in reducing any arising risks.

3. Learnings and comparison of an arbitration clause in the Arbitration Act 1996 of England and Arbitration Law of the People's Republic of China 1994

The validity of the arbitration itself serves as the founding step to analyse the arbitration clause under 2 laws.

In this chapter, we will mainly discuss the Arbitration Act 1996 of England and the Arbitration Law of the People's Republic of China to compare the difference in the 3 factors: (1) The valid format of the arbitration agreement (2) The proof of intent and other requirements in arbitration clause and (3)The enforceability of the arbitration award

3.1. The valid format of the arbitration agreement:

The English Arbitration Act 1996 is one of the most progressive principles and practices of arbitration thanks to its comprehensiveness. This could be demonstrated clearly through the definition of an arbitration agreement.

Under the Arbitration Act 1996 of England law, the sole requirement of format is that the arbitration agreement must be in writing. Notwithstanding the looseness of the arbitration agreement article, English law has a separate Article 5 to govern the definition of what is "agreements to be in writing" to avoid the vagueness of the law. According to Article 5, we could take typing, photography or any forms that produce the words into visible form into consideration. Subsection 6 of the article also accepts any form that results in agreement and then being able to be written down as a visible form, for example, a digital recording of an oral agreement, or a recording of an oral offer

To sum up, the non-rigid nature of Article 6 - Definition of Arbitration Agreement goes tightly hand in hand with a detailed Article 5 - Agreements to be in writing, to create a valid format of an arbitration agreement under English law to be of much comprehensiveness.

Contrary to that, Chinese Arbitration Law has a lot of vagueness in its law although complying with the global practice of writing format as the New York Convention regulates. The Arbitration Law of the PRC does not state clearly what is "written". The term "in other written forms" is the most non-rigid point that creates the vagueness for arbitration validity under this law. Moreover, it is not stipulated in any other articles under the Law regarding the terms. Therefore, to make sure it complies with the law, the arbitration clause under the Arbitration Law of PRC should seek for writing on paper instead over email or other visible electronic means.

3.2. The proof of intent and other requirements in the arbitration clause:

Another reason why the English law of arbitration is more progressive than its Chinese counterpart is its relaxed requirement of proof of intent in the arbitration clause. This non-rigid is necessary and matching with current modern forms of communication between parties. No signs or stamps are needed for the arbitration clause to be considered valid. This means both parties only need proof that the other parties did not disagree with the arbitration clause, which can also be considered an agreement.

On the other hand, in China, they have a very strict requirement for a signature. This creates a barrier to modern forms of communication such as emails. It is very abnormal to make both parties sign on every email they exchange information. Therefore, it is still best to use writing on paper with a signature to prove the intentions and the will of the agreement.

However, there is one point worth mentioning about this requirement which is the transferring of rights of contracts. In theory, both parties must sign for the arbitration clause to be considered valid under Chinese law. In practice, there was a case where one party named the import-export Co of Liaoning Bohai (Party A) signed a sale contract AL0606/98 with Xinquan Trade Ltd (Party B) which stated that the dispute shall be resolved by Arbitration: FTAC of China. There was also another contract between Party A with China Henan Import-export Co. (Party C) to transfer the rights under the sales contract, including the rights to arbitrate. Therefore, after Party C and Party B had a dispute, the Supreme Court (SPC) saw this as clear intent to arbitrate therefore the dispute has the right to arbitrate. This decision of SPC is considered thoughtful and right to do relating to the signature requirement.

Besides the signature requirement, under Articles 16 and 12 of the Arbitration Law of PRC, there is a strict requirement to incorporate the commission of the arbitration for the clause to be considered valid. This out scopes the terms to see the evidence of the parties' intent to arbitrate. Although the government has stipulated that both parties could do the supplement clause after the dispute happens, it hinders a risk for foreign investors because a Chinese party can show disagreement with the supplement of arbitration to invalidate the arbitration clause in the contract.

All in all, English law is progressive, adaptive to the modern practice of contracts and more arbitration-favoured between the parties compared to the Chinese counterparts.

3.3. The enforceability of the arbitration award

Last but not least, enforceability is a crucial part. Because we want to avoid the frustration of parties after going through all of the expensive arbitration to receive the news that the award cannot be enforced. The respondent wants compensation and money for default, not a piece of paper

Under the English law of arbitration, the enforcement of an arbitration award has the same jurisdictional power as the court's, as stated in Article 66. However, under Article 64 of Chinese law, if parties disagree with the enforcement of the award, they could apply to the people's court for an appeal. This immediately has a suspending effect of the procedure of enforcement. Moreover, in the Arbitration law of the PRC, there is mention of Article 260 in Civil Procedural Law on the court's power to not allow the enforcement of the award for a contract that has foreign involvement. This is considered as discrimination between foreign investors and domestic ones and therefore creates a loophole in the legal system of this country relating to arbitration jurisdiction.

One famous case of SPC's failure to protect legally the right party who is a foreign investor is the RevPower case between a foreign party and a Chinese party in 1988. The Chinese party has created a default leading to a termination of a contract. As the foreign investor sought arbitration in Stockholm rules as stated in their arbitration clause, the Chinese counterpart filed a counterclaim with Shanghai Court in 1993. The court did not do anything about the case nor had any interim relief to seize the assets of the Chinese party. This escalated to the US. Embassy, U.S. Congress and Ministry of Foreign Trade & Economic Cooperation (MOFTEC) officials' involvement to pressure the Shanghai Court. In the end, the Shanghai Intermediate Court accepted the case in 1999 and recognized the foreign

award the following month. By that time, the Chinese party has already transferred its assets to other companies, making it impossible for foreign investors to claim the money back. The delay in enforcement proceedings in China is having a tremendous effect on foreign investors.

4. Validity of incorporation of an arbitration clause into the B/L:

B/L often does not have arbitration clauses but they can be incorporated into B/L from other main carriage contracts (usually the charter party). But invalid incorporation will make the arbitration agreement invalid and not bind all parties, then they can not enjoy the interests of an arbitration clause from the B/L when disputes arise.

In this case, different approaches to English Law and Chinese Law will be applied with different conditions and different final awards. Therefore, in this section, we will consider the conditions for the incorporation of an arbitration clause into the B/L to be valid on the basis of English and Chinese law: Writing requirements about content printed on B/L (words, consistency rule, and the intentions of all parties)

4.1. Required words, phrases and wording for valid incorporation:

For both English and Chinese laws, it is required to print a few words and phrases on the front or back of B/L to show the successful incorporation of the arbitration clause into B/L. For example, on the front of the Congenbill 1994, it is stated "to be used with charter parties" and on the back, "All terms and conditions, liberties and exceptions of the charter party dated as overleaf, are herewith incorporated"

English law requires that the incorporation words be appropriate so that the arbitration clause from the charter party could be incorporated: Specific words such as "including arbitration clause". These clauses will only be successfully incorporated into a B/L when the incorporation clause printed on the bill specifically states that the arbitration clause of the charter party is incorporated. For example, clause 1 of the Congenbill 2007, states as follows: "*All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause/Dispute Resolution Clause, are herewith incorporated* ".

By contrast, arbitration clauses couldn't be successfully incorporated by generic expressions, like "all conditions and exceptions", "all terms", and so on. Generic words or phrases are enough to incorporate all clauses (except the arbitration clauses) from the charter party like those connected with the insurance, or payment of freight, but never enough to incorporate an arbitration clause into the B/L. Because in fact, the arbitration clauses are not directly related to carriage, payment, and so on, even words and phrases with a broader range of meanings ("anything") are not sufficient for valid incorporation of arbitration clauses into the B/L.

Chinese law requires that the incorporation clause be written on the face of the B/L, whereas English law leaves it unclear exactly where it must be written on the B/L. Compared to English law on incorporation, Chinese law applies more restrictive regulations. Unlike English law, Chinese law clearly stipulates that the name of the parties as well as the time of signing the charter party should be indicated on the front side of the B/L. At the Shanghai Branch, China Pacific Property Insurance Co., Ltd. v. Sunglide Marine Ltd., Shipping Ltd. and UK Mutual Steamboat Insurers Association Limited (Bermuda), the words "All terms (including arbitration clauses) and the conditions are included herein as if written in full, notwithstanding anything to the contrary contained in this B/L"

stated on the front of the relevant B/L. It seems that the incorporated clause on the front side of B/L met the requirements outlined above. However, SPC considers it necessary to specify the date and name of the parties; if not, it is not sure which charter party was incorporated in the B/L. Therefore, the arbitration clause appeared to have failed to be successfully incorporated.

Meanwhile, in the UK, it is common for standard forms of B/L, such as the Congenbill, to identify the charter party involved with a clear reference to it on the side of this B/L. The wording "freight payable under the charter party dated..… (blank space)" on the side of the B/L clearly identifies the charter party. In the "San Nicolas" case in 1976, the charter party date, the terms of the incorporation, and the names of the parties are left blank in the clause. The court stated that the failure to fill this blank didn't make the incorporation clause void. Because according to English law, in the cases where no charter party is identified on the B/L, the court will decide which charter party to include, depending on the wording of the B/L and other factors.

4.2. The consistency rule:

The consistency rule is required in both English and Chinese law. The consistency rule means that the terms from the charter party once incorporated should be consistent. This case belongs to "inconsistency". There are two types of inconsistency errors:

The first case is when the wording of the incorporated arbitration clause is inconsistent and can limit the scope of application of the arbitration clause. For example, if the word is "any dispute under the charter party shall be submitted to arbitration", disputes relating to B/L can have the risk of being prohibited from being submitted to arbitration. This will result in the parties to the B/L being bound only by the clauses stated in the B/L. Therefore, the charter party does not have any effect on the parties to the B/L. Accordingly, the arbitration clause of the charter party does not naturally affect the rights and obligations of the parties with respect to the B/L.

The second case is that the arbitration clause incorporated in the B/L does not exist in the charter party. It is the case of "CHANNEL RANGER" in 2012. The B/L is issued under the charter party stating "All terms and conditions, liberties and exceptions of the Charter party, dated as follows, including the Law and Arbitration clauses are included here." However, the B/L incorporates the arbitration clause from the charter party, but there is no arbitration clause in the charter party. The dispute settlement clause in that charter party is subject to English law and the jurisdiction of the courts instead of the arbitration. When the dispute arose, the claimants stated that the clause in the charter party could not be considered, as it was not precisely mentioned in the B/L. However, the trial court decided otherwise. It contends that in spite of the error in the wording, the parties showed the intention to incorporate mentioned in the charter party. Therefore, the error in wording cannot make the incorporation invalid.

4.3. The intention of parties showed:

The intention of the parties to the B/L can only be evidenced by expressed clauses and terms in the bill. The English court is the one that has the right to recognize the valid incorporation of arbitration clauses from charter parties into B/L. The effectiveness of the incorporation is mostly based on the intentions of the parties involved. When the parties expressly show the intention to incorporate, the courts can modify the relevant wording of the clause to meet the actual intent of the parties.

It is the case of the Varenna case in 1983. Wherein, the effective establishment words must be written in the B/L without the necessity of the reference to the clauses of the charter party. Even when the shipowner and charterer explicitly stipulated in the charter party that an arbitration clause would be incorporated in the B/L, the incorporation was still invalid because the intention of this arbitration clause agreement is not relevant to the B/L holder, as the B/L is the only contract he holds.

Chinese Law also has similar provisions on this issue. In the case of Beijing Ellison Import Export Co Ltd v Solar Shipping And Trading S.A. and Songa Shipholding Pte Limited, 32 B/L stated: "The shipowner shall have an absolute lien over the goods for all costs ... for which the lien shall continue after delivery of the goods to those persons who hold any B/L...". SPC states that a valid arbitration clause has to represent the true intentions of all parties. However, because the arbitration agreement in the B/L is only the intention of the carrier and the holder of the B/L as consignee is not involved in the negotiation of the arbitration clause, this agreement will not be binding on the consignee. From this case, it seems unlikely that an arbitration agreement would be included in the B/L no matter how perfect the wording was unless it could be demonstrated that the holder of the B/L took part in the negotiation and determined the arbitration clause as well as agreed to be bound by that arbitration clause.

Therefore, the B/L holder must be made aware of both the charter party and the B/L incorporating the charter party. However, the criteria that determine whether the B/L holder must actually accept the B/L or merely pretend to be aware of the incorporated arbitration clause are not mentioned in either English or Chinese law. Applying this standard essentially prompts a closer consideration of the request to accept the arbitration clause. For instance, the Hubei High Court argued to the Supreme Court in the case of Chongqing Xinpei Food Co., Ltd. versus Strength Shipping Corporation, Liberia, emphasizing that the B/L holder does not expressly indicate that he accepts the arbitration clause. In this situation, the arbitration clause only applies when it is shown that the B/L holder has accepted the arbitration clause.

5. The objects that an incorporated arbitration clause can or cannot bind (the subrogated insurer, the third party,..) and the binding effect on them

The main discussion about the binding effect of the arbitration clause to the third party of the B/L arises because of the fact that when the contract of carriage is transferred to other holders, whether or not the contractual rights and obligations stated by the B/L are transferred at the same time. This applicability against the third-party holders is still dubious, even in the cases of the CONGENBILL - a standard form of B/L, which has caused large numbers of disputes among the involved parties.

Both English law and Chinese law are facing the same basic questions regarding:

+ whether the obligations in the arbitration clause can be naturally transferred to the B/L holders

+ whether an arbitration clause/ an incorporation clause with the equivalent effect can be transferred together with other clauses in B/L

To some extent, it is unfair to enforce the arbitration clauses in B/L against third-parties. When transferring, the assignee can access all terms included in B/L and recognizes the existence of an arbitration clause. It leads to a situation when the binding effect of the arbitration clause on third parties is hard to challenge. On the other hand, the B/L holder might not be aware and subsequently lack litigation authority.

This is the fact that the Hague and the Hague- Visby Rules are being used popularly while the Hamburg Rules are not. It is because under Article 22 of the Hamburg Rules 1978, *"when an arbitration clause is included in a charter-party and the bill of lading is issued due to the charter-party without making any explicit reference to the arbitration clause of the latter in order to be enforced to the third party holder of the bill, the carrier cannot commence the arbitration proceedings against the third party holder".*

Under Chinese law:

In general, there is no integrated system to protect a third party in the Chinese civil legal system. It is stated that the privity of the contract is broken where the terms of C/P are incorporated into a B/L. In practice, the judges usually utilize Civil Laws or any other Commercial Law, such as Contract Law instead of the Maritime Code because of some gaps and defects in the depiction of the international conventions.

There are many kinds of reasons for the Court to deny the validity of the incorporating arbitration clause. For example, the Tianjin Higher Court stated that the front of B/L did not show the names of the parties and the date of the C/P, even though it stated: "to be used with the charter party". Or in another case, the arbitration clause on the reverse side, being only in a standard form, could not bind the B/L holder, because there was no express stipulation to that effect in the front.

As for the **subrogated insurer**, the incorporated arbitration clause does not bind over. The SPC state that the arbitration clause is totally independent of the main terms of the contract. Therefore, it should be negotiated between the relevant parties of B/L. Unless the insurer expresses clear acceptance of the clause, the arbitration clause then can applicably bind the insurer. This is because the right of subrogation simply transferred the substantive right of B/L to the insurer.

Art. 127 of 'Minutes of the Second National Working Conference on the Trial of Foreign-Related Commercial and Maritime Cases' proclaimed by the SPC in 2005 states that *'After the insurer actually pays insurance compensation to the insured and obtains the right of subrogation in respect of the compensation claim, the agreement on jurisdiction and arbitration reach by and between the insured and the third party for settling disputes shall not be binding on the insurer'.*

Under English law:

An incorporated arbitration clause in B/L can bind upon the holder as long as it states an explicit reference to the charter party arbitration clause. The English courts intend to protect the B/L holders by requiring the original parties to expressly incorporate the arbitration clause in B/L and thus can provide the B/L holders with the notice of the arbitration clause. The reason for it is:

+ The B/L holders are the non-original parties to the contract of carriage

+ The arbitration clause is an ancillary dispute resolution provision that is not directly relevant to the main subject matter of the C/P

Under English law, the third party to B/L shall be bound by the arbitration clause if it was incorporated into the C/P. Therefore, the interpretation of incorporation clauses should be subject to recognising the factual intentions of the involved parties. On the other hand, the courts should not go beyond the parties' intentions by the automatic application of interpretation of the words on the documents. To be clearer, the consent of the parties should be clear enough on the face of the B/L to express obviously that there is a valid arbitration agreement among the involved parties.

Article 22 of the Hamburg Rules states that "Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith". In general, the English Rules are in line with the above Hamburg Rules.

According to the UK Carriage of Goods by Sea Act 1992, the person to whom all rights of suit under the contract of carriage are transferred will become the lawful holder of the B/L as if a party of that contract. Therefore, it is necessary for the B/L to be bound by the terms and conditions including the incorporated arbitration clause from the C/P.

Regarding the rectified C/P, the courts are absolutely cautious to grant the rectification to avoid certainty in the sales of the contract. It is just only when the actual intention of the involved parties is not expressed exactly in the sales contract due to some mutual mistakes, the court will rectify a written contract. This aims to ensure that the parties can not dodge their contractual obligations. And the key question here is whether the recipient C/P can bind over the third parties. It is widely acknowledged that the contract cannot be rectified to the detriment of a third party, because in most cases, the third parties rely on the contract provisions in good faith and do not even receive the notice of the mistake. But in the B/L cases, To the English courts' point, the B/L can only be afforded to the original parties of the B/L. Then, the English court refuses to grant the rectification of the B/L that has been negotiated with the third party.

As for the **subrogated insurer**, English law, which is different from Chinese one, states that the arbitration clause in the bill of lading may bind the insurer. All the rights subrogated to the insurer under the B/L can only be enforced by arbitration, the insurer shall be bound by the arbitration clause.

Nowadays, the UK continues to enforce any English or foreign decision of court agreement, binding any third party after the expiry of the transition period.

To sum up, the legal conclusion in terms of the incorporation of an arbitration clause in B/L and the binding effect of the clause on the third party can be viewed differently by different courts. However, in the positive aspects, most of the courts recognize the importance of commercial efficiency in the maritime industry and the avoidance of the lengthy litigation of disputes arise.

Despite the effectiveness of the utilization of the standard carriage contract, it is advisable to use it with extreme caution. If not, the clause may cause potential inconsistencies in the understanding and implementation of the contract. The form and scope of the arbitration agreement must be taken into account to ensure its validity and smoothness of the arbitration process if necessary.

6. Conclusion and Learnings for Vietnam Enterprises:

Given the differences in the approaches of the two world's leading maritime jurisdictions in the UK and China, it would be difficult to conclude some common rules regarding the incorporation of arbitration clauses from the charter party into the B/L. Therefore, the cases to be settled by arbitration on disputes related to the incorporation of the arbitration clause on this bill of lading are still controversial. Since the UK is a country based on common law, Vietnamese enterprises will feel more ambiguous and risky when applying its jurisdiction and Arbitration Law because of many precedents and exceptions to be enforced. In contrast, from the perspective of China - a country with the same

civil law system as Vietnam, our group believes that Vietnamese enterprises will still face many difficulties when settling disputes under arbitration in this country. Because, although the Chinese arbitration will not give any ruling in favor one party, they will cause many difficulties for foreign enterprises during the review process, leading to foreign parties not fulfill the obligation. Therefore, the decision on which Arbitration Law is most appropriate depends on each specific case and various factors, including the law and the interests of the Parties. Vietnam Enterprises need to carefully consider and learn carefully before choosing the appropriate Arbitration Law to ensure that their rights are protected to the fullest extent.

First of all, we need to take the validity of the arbitration clause in the charter party into consideration. It is of much importance because there are no legal agreement terms about arbitration clauses that could be written on the back of the Bill of Lading. The authors suggest that Vietnamese companies communicate the terms and conditions for arbitration agreement or clause with the carrier beforehand via email, fax or telex. Since there will be no signature of both sides on the same bill of lading, the act of communication forms an agreement to ensure that both sides are aware and agree on the arbitration clause under which the charter party shall be incorporated. Under English law and those countries with arbitration-favor regimes, an email or fax with proof of agreement from both sides could be understood as an “in writing” format requirement.

In terms of the validity of incorporation clauses, the approach taken by the English and Chinese courts in dealing with this matter can be seen as strict, since in general an arbitration clause can only be incorporated into the bill of lading if there is a unambiguous reference. specifying the incorporation in both the contract and the bill of lading, under a clear "include arbitration clause". We also have to consider issues such as the intention of both parties, the date written on the terms of incorporation, determining the main character party, etc. At the present time, our group considers that Vietnam enterprises still lack interest in these rules due to a lack of knowledge of the law and arbitration process, or simply because they have never encountered these disputes related these issues and have not realized the importance of setting an arbitration clause in the B/L. Therefore, our group suggested that when wanting to implement the incorporation clause, Vietnamese enterprises could use the “Congenbill 1994” form. This is a recognized B/L form that meets the incorporation rules under Chinese and English laws. When using this template, the arbitration clause will automatically be incorporated into the B/L, ensuring their interests in any dispute. However, learning and absorbing more knowledge about the arbitration clause and incorporating them into B/L is still an urgent responsibility of Vietnamese enterprises.

According to Article 176 Section 3 of Viet Nam Maritime Code 2015 about the transfer of rights in the voyage C/P, the shipper may transfer his contractual rights to the third party in the absence of the carrier's consent but still remains responsible for executing the signed contract. However, in practice, it is absolutely complicated to secure these binding effects. Therefore, the involved parties must be aware of a number of necessary and sufficient requirements to ensure a smooth process when disputes arise.

Despite the popularity of utilizing CONGENBILL 1994 as a security standard form of contract, this commercial practice still needs to be considered and adjusted for different specific cases to ensure the validity and binding effects of this corporation clause.

In the process of signing contracts, especially in the arbitration terms, the involved parties have to show the evidence of an agreement in the involvement of the third parties because the binding

effects are not automatically applied. This means that the involved parties cannot implicitly jump to the conclusion that when the dispute arises, arbitration is the obvious solution. The parties are allowed to use any means of communication such as telex, telegraph,… as long as the corporation of arbitration clause in the original contract is easily shown.

References

Channel Ranger. (2013), "Caresse Navigation Ltd v. Office National de L'Electricite & others", *EWHC 3081 (Comm).*

Chrysoula Olympia Papageorgiou. (2017), *The incorporation of a charter party arbitration clause into a bill of lading*, School of Economics, Business administration & Legal studies, Greece.

Kim, L. (2006), "The Comparative Analysis of the Existing Chinese and English Arbitration Systems from Arbitration Agreement Perspectives", *US-China Law Review 38*, Vol. 3 No. 4.

Liang, Z. & Lianjun, L. (2017), *Maritime law and practice in China*, Informa Law from Routledge, NY.

Llp, C. & C. (2023), "Common Issues in Foreign-Related Dispute Resolution in China", *Clyde&Co*, Available at: https://www.clydeco.com/en/insights/2023/01/common-issues-in-foreign-related-dispute-resolutio

Ministry of Commerce People's Republic of China. (n.d.), "Arbitration Law of China", Available at: http://english.mofcom.gov.cn/aarticle/policyrelease/internationalpolicy/200705/20070504715852.html

Peter, T. & Huawei, S. (2018), "Arbitration Guide IBA Arbitration Committee: China", *International Bar Association*.

Practical Law. (n.d.), "Arbitration Procedures and Practice in China: Overview", Available at: https://ca.practicallaw.thomsonreuters.com/3-520-0163?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a410483.

Randall, P. (2001), "Seek Truth From Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC", *The American Journal of Comparative Law*, Vol. 49 Issue. 2, pp. 249-328.

Sandra, L. (2010), *The incorporation of a charter party arbitration clause in the bill of lading: binding effect of a contract without consent*, Faculty of law Lund University.

Shipping and Trade Law. (n.d.), "Arbitration clauses: incorporation in China", Available at: https://www.shippingandtradelaw.com/practice-and-policy/arbitration/arbitration-clauses-incorporation-in-china--1.htm.

Supreme People's Court. (2002), *Supreme People's Court's Regulation on Several Matters Concerning the Jurisdiction of Foreign-Related Litigations*, Fa Shi No. 5.

Supreme People's Court. (2017), *Supreme People's Court's Notice of 2017 on the Clarification of the Hierarchical Jurisdiction of the First Trial of the Foreign-Related Disputes and Several Issues concerning Belongings of Cases*, Fa No. 359, para. 2.

Supreme People's Court. (2017), *Supreme People's Court's Notice of 2017 on Several Issues concerning Belongings of Judicial Review of Arbitration*, Fa No. 152, para. 2.

Supreme People's Court. (2022), *Supreme People's Court's Regulation on Several Matters Concerning the Jurisdiction of Foreign-Related Disputes*, Fa Shi No. 18.

Tegou, E. (2022), *Arbitration Clause in a Bill of Lading: Binding Effect to Third Parties*, PhD Thesis, University Center of International Programmes of Studies.

Wei, Li. (1997), "Judicial interpretation in China", *Willamette Journal of International Law and Dispute Resolution*, Vol. 5 No. 1, pp. 87–112.

Yaghoubi, E. & Dadkhah, M. (2021), "A Comparative Study on Incorporation of Charterparty Arbitration Clauses into Bills of Lading (Selective Countries: England, China, Germany and Iran)", *Comparative Law Biquarterly*, Vol. 5 Issue. 1, pp. 221-236.

Yilmaz, S. (2016), "Three Problems Caused by Arbitration Clauses Incorporated into Bills of Lading", Available at: https://dergipark.org.tr/en/download/article-file/853264 (Accessed 23 Mar. 2023)