

Recognition of the Incorporation of Arbitration Clauses into Bills of Lading under PRC law and its Practical Implications

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ABSTRACT

Under English law, an arbitration clause in a charter party may validly be incorporated into a bill of lading which has provided that an arbitration agreement under a charter party would be incorporated into such bill of lading. However, it appears that the PRC maritime courts have taken a very different approach in this regard. There have been a number of recent important Chinese maritime courts' decisions which have been approved by the Supreme People's Court of the PR China, the final appeal court in PR China. This paper will review these decisions and discuss their practical implications, particularly on anti-suit injunctions filed in English or Hong Kong courts to restrain proceedings in the China, and the enforceability of London or Hong Kong arbitral awards in the PRC.

KEYWORDS

Incorporation; arbitration clause; bill of lading; PRC law; anti-suit injunction; recognition and enforcement of arbitration awards

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To avoid any doubt, please note that the views expressed in this article are only those of the author and do not represent the views or advice of Reed Smith Richards Butler on any particular cases.

I. Introduction

Incorporation of arbitration clauses of charter parties into bills of lading is an important area of law in the shipping trade.

Under a charter party, the legal relationship between an owner and a charterer is governed by the charter party while under a bill of lading the cargo receiver and the carrier's legal relationship is usually governed by the terms and conditions of the bill of lading. Most ship owners are anxious to ensure that their liability as a carrier is not extended by issuing bills of lading by the charterers. In order to avoid this, they insist on the inclusion of a clause incorporating the terms of the charter party in such bills.¹

In addition, another reason for bills of lading to incorporate terms from charter parties is to bind receivers or purchasers to pay freight and demurrage, even if they are not parties to the charter party. Such incorporation may also provide ship owners with a lien enforceable against the cargo receivers.

Incorporation of an arbitration clause into a bill of lading is extremely important, since it may decide which jurisdiction the case is to be referred to and may have certain levels of impact on the final result of the disputes.

After disputes have arisen, cargo receivers will typically seek to commence proceedings against the carriers in the jurisdiction where the goods are delivered, while the carriers might bring an objection to the jurisdiction and argue that an arbitration agreement exists between the parties. Arbitration clauses are rarely found in bills of lading themselves, and hence, by incorporating the arbitration clause of the charter party into the bills of lading, it is possible for a ship owner to challenge the jurisdiction of the local court.

Many standard charter parties include an arbitration clause. For example, in Gencon 1994, the London arbitration clause is a default arbitration clause in the absence of any other choices². Frequently, there are words or phrases printed on the face or back of bills of lading to incorporate the arbitration clause into bills of lading, such as Congenbill 1994. On the front of the Congenbill 1994, it clearly prescribes that the bill of lading is "*to be used with charter parties*" and on the back (in fact, page 1 of the bill of lading), it states "*All terms and conditions, liberties and exceptions of the Charter Party dated as overleaf, are herewith incorporated.*"³ Apart from Congenbill 1994, the Cementvoybill 2006 and Bimchemvoybill 2008 also provides for the incorporation of dispute resolution clauses.

The question of whether an arbitration clause in a charter party can be successfully incorporated into bills of lading is also an important issue to the cargo receivers. However, it seems that the courts' attitude is to apply a relatively strict interpretation to

¹ John F Wilson, *Carriage of Goods by Sea*, Edition 7, 2010, London, at page 247

² Gencon 1994, Clause 19(a), Law and Arbitration Clause

³ Congenbill 1994, Condition of Carriage, clause(1)

such incorporation clause, as they are reluctant to enforce the terms of a charter party which are unlikely to have been seen by a third-party shipper.⁴

There are a few leading English cases in this area. Once the requirements are satisfied, the relevant clauses in a charter party may be successfully incorporated into a bill of lading.

In contrast, under Chinese law, the circumstance is more complicated and uncertain.

This issue has been raised and considered by Chinese courts in the last decade.

China is a contracting party to the Convention on the Recognition and Enforcement of Foreign Arbitral Award (the “**New York Convention**”). Under the Directions of the Supreme People’s Court (the “**SPC**”), if a lower court intends to decide not to enforce an arbitration award made in other contracting parties, the lower courts have to report to the Supreme People’s Court before such decisions are published. If it agrees, the lower courts will decide not to enforce such awards. Otherwise, the lower courts have to enforce such awards.

If a Chinese court seizes a case such as by arresting a vessel and the receivers commence the court proceedings in China, the Owners may challenge the court’s jurisdiction based on the allegation of an arbitration agreement. In such case, if the lower courts decide to reject the challenging of the jurisdiction, effectively, not to recognise an arbitration clause, in practice the lower courts have to report to the SPC for a direction. The Supreme People’s Court usually gives its decision in the form of a reply to the lower court’s enquiry (the “**Reply**”). China is not a common law country and the judicial precedents including these Replies will not bind the courts in their future cases. However, the SPC’s Replies will take an important role in Chinese judicial practice. When reviewing this area of Chinese law, these Replies of the Supreme People’s Court need to be taken into considerations.

This article will first examine the Chinese statutes relating to incorporating arbitration law and these Replies. And then, we discuss how practically these issues may be dealt with.

II. An overview of English law on the incorporation of arbitration clauses bills of lading

English law in this area of law plays an important role in China shipping. Many bills of lading used in the trade are those issued under charter parties which apply English law. Therefore, it is important to examine English law’s position first.

Under English law, there are several requirements which need to be followed in order to ensure the effectiveness of such incorporation⁵.

⁴ John F Wilson, *Carriage of Goods by Sea*, Edition 7, 2010, London, page 248

The first requirement relates directly to the words used to incorporate a certain clause in a charter party. This principle is set out in the case *The Varenma*⁶, where the effective words of incorporation must be found in the bills of lading itself without reference to the provisions of the charter party. Even if the ship owners and charterers clearly specify in the charter party that the arbitration clause will be incorporated into the bill of lading issued later, this intention is irrelevant to the holder of the bill of lading because his contract should be found exclusively in the bill of lading.

The second requirement is its description, which requires that the words of incorporation must be apt to describe the charter party clause sought to be incorporated.⁷ Since an arbitration clause is always considered ancillary to the main purpose of a contract of carriage, it will thus not be incorporated in the absence of a specific reference to the clause itself, such as “*all conditions and exception*”⁸ or “*all terms whatsoever*”⁹.

The third requirement is the “consistency rule”, which means that the charter party clause, when incorporated, must be consistent with the remainder of the bill of lading.¹⁰ If the word used in the incorporated clause is “*any dispute under the charterparty shall be referred to arbitration*”, then the word “*charterparty*” would prohibit the disputes related to bills of lading to be submitted to arbitration.

As to this third requirement, there is a relevant rule known as “manipulation”, it seems that there are also strict restrictions on manipulating words in a charter party in order to fit a bill of lading. As to the incorporation of a demurrage clause, the general principle is set out in *The Miramar*¹¹, where it was held by Lord Diplock that there is no rule of incorporating the clauses in the charterparty which are directly germane to the shipment, carriage or delivery of goods, which use the word “*charterer*” into the bill of lading without substituting the word “*charterer*” with “*bill of lading holder*”.

However, different considerations might apply to arbitration clauses compared to demurrage clauses. *The Nerano*¹² is the authority for incorporating arbitration clauses into bills of lading, in which it was held that if an arbitration clause covering disputes under the charterparty is expressly incorporated, the word will be “manipulated” so as to cover disputes under the bill of lading. The reason why arbitration clauses would be treated differently from demurrage clauses is that manipulating a demurrage clause would change pre-existing and agreed contractual liabilities by transferring the obligation to pay demurrage from the charterer to the consignee, while incorporating an arbitration clause would result in no such alteration of the parties’ pre-existing contractual obligation.

⁵ I have a privilege to read Mr. Ian Grunt’s paper in respect of incorporation of an arbitration clause into the bills of lading under English law which is to be submitted to this Conference for which I thank Ian very much for his kindness.

⁶ *Skip A/S Nordheim v. Syrian Petroleum Co (The Varenma)* [1983] 2 Lloyd’s Rep 592

⁷ John F Wilson, *Carriage of Goods by Sea*, Edition 7, 2010, London, page 248

⁸ *Supra* note 5

⁹ *Siboti v. BP France* [2003] 2 Lloyd’s Rep 364

¹⁰ John F Wilson, *Carriage of Goods by Sea*, Edition 7, 2010, London, page 249

¹¹ *Miramar Maritime Corporation v. Holborn Oil Trading Ltd* [1984] AC 676

¹² *Daval Aciers D’Usinor et de sacilor v. Armare SRL (The Narano)* [1996] 1 Lloyd’s Rep 1

III. Incorporation of arbitration clause into bills of lading under Chinese law

1. Validity of arbitration agreement under Chinese arbitration law

Under Chinese law, the validity of arbitration agreement is governed by the *Arbitration Law of People's Republic of China* (the “**Arbitration Law**”) and relevant Judicial Interpretations of the Supreme People's Court (the “**Interpretations**”).

The Arbitration Law provides that a valid arbitration agreement must contain three elements, namely there must be an expression of intention to refer the disputes for arbitration, matters for arbitration have to be capable for arbitration and a designated arbitration commission has been chosen either before or after the disputes have arisen.

However, this will not automatic apply to a foreign related arbitration agreement. The preliminary issue is the determination of the law to be applied for deciding the validity of arbitration agreement.

According to Article 16 of *Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China*¹³, the examination of the effectiveness of an agreement for arbitration which involves foreign interests shall be governed by the laws agreed upon between the parties concerned; if the parties concerned did not agree upon the applicable laws but have agreed upon the place of arbitration, the laws at the place of arbitration shall apply; if they neither agreed upon the applicable laws nor agreed upon the place of arbitration or the place of arbitration is not clearly agreed upon, the laws at the locality of the court shall apply.

The issue as to whether an arbitration clause has been successfully incorporated into a bill of lading appears an issue of effectiveness of arbitration agreement in China practice. In a charter party or contract dispute, Chinese courts usually decide the validity of an arbitration clause based on the law of the place of the alleged arbitration. An arbitration clause such as arbitration in London will be recognised by the Chinese courts. However, a similar arbitration clause without a chosen arbitration institution will not be valid in domestic arbitration.

2. Relevant provisions on the incorporation of arbitration clause into bill of lading under Chinese maritime law

The Maritime Code of People's Republic of China (the “**CMC**”) is the most important piece of legislation governing maritime disputes in China. We need to review it.

The issue of incorporating charterparty clauses into bills of lading is provided in Article 95 of CMC, which provides that “*Where the holder of the bill of lading is not the*

¹³ Came into force on 8 September 2006

charterer in the case of a bill of lading issued under a voyage charter, the rights and obligations of the carrier and the holder of the bill of lading shall be governed by the clauses of the bill of lading. However, if the clauses of the voyage charter are incorporated into the bill of lading, the relevant clauses of the voyage charter party shall apply.”

This provision simply states that if the clauses of a voyage charter are incorporated into a bill of lading, the charterparty clauses shall govern the relationship between the carrier and bill of lading holder. It does not mention under what circumstances a clause in the charterparty can be successfully incorporated into the bill of lading. Further, according to the CMC, it appears that only the clauses of voyage charter are allowed to be incorporated into a bill of lading. There is no such provision in the chapter on time charterparty in the CMC.

Apart from legislation, the issue of validity of arbitration clause incorporated into the bill of lading has been stated in the *Explanations concerning Relevant Issues of Foreign Related Commercial and Maritime Trail Practice* published by the Fourth Civil Court of the SPC (the “**Explanation**”)¹⁴. According to Article 98 of the Explanation, after the clauses of the charterparty incorporated into the bill of lading, the relation between the carrier and the holder of the bill of lading shall be regulated by the bill of lading, instead of the charterparty; unless the incorporation clause expressly states that the arbitration clause, jurisdiction clause and applicable law clause shall be incorporated into the bill of lading, those clauses shall not bind the holder of the bill of lading.

It seems that the Explanation provides a clear guidance about the issue of when an arbitration clause can be successfully incorporated into the bill of lading. However, in practice, it seems that the courts have applied a much strict approach.

3. Judicial precedents and the Replies of the Supreme People’s Court

As mentioned before, China is not a common law country. The courts will not be bound by the previous judgements of their own or other courts. However, the courts would consider the Replies made by the SPC in the previous cases. The SPC also issue practice guidance from time to time. The practice guidance will also play an important role in judicial practice.

In this area, the SPC published *Notice of the Supreme People’s Court Concerning Some Issues on Disposal of Foreign-related Arbitration and Foreign Arbitration*¹⁵ (the “**Notice**”) which provides that:-

“As to all the foreign related, Hong Kong, Macau or Taiwan related commercial, maritime or admiralty disputes, in the event that the contract contains an arbitration

¹⁴ The Fourth Civil Court of Supreme People’s Court is especially in charge of supervising and guiding the foreign related commercial and maritime trail in the country. The court published several Guidance and Explanation on the issues related to the practice of commercial and maritime trail.

¹⁵ Fa Fa [1995] No. 18, published on 28th August 2015

clause or the parties reach an arbitration agreement after the disputes has arisen, and the People's Court considers that the arbitration clause is invalid, ceases to be valid or cannot be performed due to uncertainty, it shall be reported to the High People's Court for a review first; if the High People's Court agrees with the lower courts, the High Court is then required to report to the Supreme People's Court for its confirmation. Without the confirmation from the Supreme People's Court, the court shall not exercise its jurisdiction."

The second section of the Notice also requires the lower courts to report their decisions of refusing to recognise and enforce arbitration award to the higher courts and SPC. It seems that since China is a contracting state of the New York Convention, and the judicial decisions made by PRC court should strictly follow the requirements of the Convention and such decisions of refusal to recognise and enforce an award should only be reviewed and finally decided by the SPC based on this regime. This procedural requirement can effectively reduce the mistakes and inconsistencies of the decisions of lower People's Courts regarding this issue, as well as protect the interests of the parties which agree on an arbitration clause. This also helps ensure the performance of New York Convention in China.

In the last decade there have been many Replies published by the SPC regarding the issue of whether the arbitration clause of charterparty can be incorporated into the bill of lading.

Although the Reply of the SPC only applied to specific cases, it reflects the policy of the Supreme People's Court on the issue of incorporation of arbitration clause into bills of lading and the validity of arbitration clauses.

4. An overview on the requirements of incorporation set out in previous judgements

As mentioned above, Chinese courts have taken a very restrictive view on the issue of incorporation of arbitration clauses into bills of lading in the past. We review recent cases below.

4.1 Incorporated from voyage charters rather than time charters

It appears that the SPC takes the view that a bill of lading cannot incorporate the clauses in a time charter.

In *Tianjin Iron and Steel Group Co., Ltd and PICC Tianjin v. Niagara Maritime S.A.*¹⁶, the defendant Niagara Maritime S.A. (the "Niagara") entered a time charter with the Vale International S.A.(the "Vale") for the vessel MV Jiayun (the "Vessel"). The time time charter provides that all disputes arising from this time charterparty shall be

¹⁶ [2011] Min Si Ta Zi No.12, published on 19 April 2011

submitted to London Maritime Arbitration Committee and the charterparty is governed by English law.

For this particular voyage, the receiver was Tianjin Iron and Steel Group (the “**Tianjin Iron**”). The master of the vessel signed a Congenbill which was marked with “*to be used with charterparties*” on the face of the bill of lading. In addition, on the back of the bill of lading, it stated that “*All of the terms, conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.*”

A dispute arose and then Tianjin Iron and its insurer PICC Tianjin commenced the proceedings before the Tianjin Maritime Court. The defendant Niagara challenged jurisdiction of the Tianjin Maritime Court. Niagara argued that the arbitration agreement in the time charter was incorporated into the bill of lading, thus any dispute should be decided by arbitration in London.

The Tianjin Maritime Court held that the arbitration clause in the time charter was not successfully incorporated into the bill of lading. According to the Notice mentioned above, it was submitted for the Supreme People’s Court’s review.

In the Reply of SPC, the “charterparty” mentioned on the front page of the Congenbill1994 should refer to a voyage charter, instead of a time charter. Further, in the front page of the bill of lading neither expressly indicates the date of the charterparty, nor the incorporation of a specific arbitration clause. As a result, the arbitration clause in the time charterparty was not duly incorporated into the bill of lading and thus Tianjin Maritime Court had jurisdiction of the case.

4.2 General statement of incorporation of a charterparty and an arbitration clause in the reverse side are not enough

In the case *Chongqing Xinpei Food Co. Ltd v. Strength Shipping Corporation, Liberia*¹⁷, the front page of the bill of lading was marked with that “*the bill of lading to be used with charterparties*” and “*Charterparty dated 30th March 2004*” is incorporated. On the revised side of the bill of lading, the bill of lading stated that “*All terms and condition, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.*”

In the Reply of the SPC regarding this case, the SPC took the view that the incorporation of arbitration clause stated in the reverse side of the bill of lading and the general wording “*to be used with charterparties*” in the front page of the bill of lading cannot successfully incorporate the arbitration clause. Thus the SPC held that Wuhan Maritime Court had jurisdiction to the case.

¹⁷ [2006] Min Si Ta Zi No.26, published on 21 December 2006

This principle in the above case was later reaffirmed by the Supreme People's Court in the cases *Hangzhou Longda Differential Polyester Co. Ltd v. Yongji Shipping Co. and Zhoushan Yongji Shipping Co. Ltd*¹⁸, *Beijing Zhonggang Tiantie Trading Co. Ltd and Tanshan Baigong Industrial Development Co. Ltd v. Cosco Shipping Co. Ltd*¹⁹.

4.3 The date of the charterparty and the party names shall be mentioned

In the case *China Pacific Property Insurance Co. Ltd Shanghai Branch v. Sunslide Maritime Ltd., Ocean Freighters Ltd. and the United Kingdom Mutual Steam Ship Assurance Association*²⁰, it was marked on the face of the bill of lading that “*All terms, (including arbitration clause) conditions as incorporated herein as if fully written, anything to the contrary contained in this bill of lading notwithstanding.*”

It appears that an arbitration clause in the front page of the bill of lading had met with the requirements set out in the previous Replies of the SPC mentioned in the above. However, the Supreme Peoples Court takes the view that the date and the parties' names should be stated and hence it is uncertain which charterparty shall be incorporated into the bill of lading. Accordingly, the arbitration clause was deemed as not successfully incorporated.

This requirement was reaffirmed by the Supreme People's Court in another case *Sinochem Group v. Haili Company*²¹. In a recent judgment given in October 2014 by the Shanghai Maritime Court, the Shanghai Maritime Court also relied on this reason to dismiss the objection to jurisdiction.²²

4.4 The arbitration clause in a bill of lading does not bind the subrogated insurer

The SPC held in the case *PICC Xiamen Branch v. Chinese Polish Joint Stock Shipping Company*²³ that an arbitration clause in a bill of lading does not bind the subrogated insurer although this case did not relate to the incorporation of the arbitration clause into bill of lading.

In this case, the clause on the reverse side of the bill of lading provided “*That should any dispute arise under this Bill of Lading between Shippers, Carrier, Charterer and/or Consignees, the matter in dispute shall be referred to arbitration in London, in accordance to Arbitration Act 1979, as amended from time to time and it is hereby agreed, Mr. Alan Burbidge to act as sole arbitrator. Any and all claims to be presented and arbitrated, if so required, within twelve months of final discharge.*” The court held that an action brought by the insurer based on the right of subrogation was not subject to such arbitration clause.

¹⁸ [2008] Min Si Ta Zi No.33, published on 25 November 2008

¹⁹ [2009] Min Si Ta Zi No.13, published on 28 April 2009

²⁰ [2008] Min Si Ta Zi No. 50, published on 24 February 2009

²¹ [2009] Min Si Ta Zi No. 13, published on 24th April 2009

²² *China Industrial and Commercial Bank of China Company Limited v. Lupus I Special Maritime Enterprise* (2014) Hu Hai Fa Shang Chu Zi No. 1099

²³ [2004] Min Si Ta Zi No. 43

The SPC takes the view that an arbitration clause was a clause independent from the main terms of the contract, and the independent arbitration clause should have been negotiated between the relevant parties of the bill of lading. The right of subrogation simply transfers the substantive right of the bill of lading to the insurer. The procedural issue, i.e. the applicability of the arbitration clause, does not bind the insurer, unless the insurer expressly accepted this clause.

This principle was also reconfirmed in *PICC Shenzhen Branch v. Guangzhou Ocean Shipping Co. Ltd*²⁴, *China Pacific Property Insurance Co. Ltd Beijing Branch v. Cosco Logistics (Beijing), Tianjin Zhenhua International Shipping Agency Co. Ltd and Niledutch Africa Line B.V.*²⁵

It seems that the Chinese courts do not consider the insurer as in the same position of the cargo receiver as to the issue of the effectiveness of an arbitration clause.

4.5 The arbitration clause in a bill of lading does not bind the holder of the bill of lading

In the case *Beijing Ellison Import Export Co. Ltd v. Solar Shipping Angrading S.A. and Songa Shipholding Pte Limited*²⁶, the bill of lading was marked with that “*The Owner shall have an absolute lien on the cargo for all freight, dead freight, demurrage/detention and costs/expenses including attorney’s fees, of recovering the same, which lien shall continue after delivery of the holders of any bill of lading covering the same, or of any storeman. In the event the charter party is not sufficiently incorporated above, any and all disputes arising out of this bill are to be arbitrated in London or New York, at Owner’s/Carrier’s option, subject to the SHELLVOY 84.*”

The issue in this case was whether the arbitration clause in the bill of lading bind the consignee. The SPC gave a negative answer. It was held by the SPC that a valid arbitration agreement must represent the parties’ true intention, but the arbitration agreement in the bill of lading was only the intention of the carrier. Since the bill of lading holder did not participate in the negotiation of the arbitration agreement, the arbitration agreement would not bind the consignee.

It appears that an arbitration agreement would not be capable to be incorporated into the bill of lading no matter how thorough the wording of incorporation was drafted unless it is proven that the bill of lading holder participated in the negotiation of the arbitration clause and agreed to be bound by such arbitration clause.

However, it shall be noted that this Reply of the SPC was published in 2007. There have been several other cases regarding incorporation of arbitration clause into bill of lading later and the Supreme People’s Court did not use this reason to dismiss the objection of

²⁴ [2005] Min Si Ta Zi No.29, published on 9th October 2005

²⁵ [2009] Min Si Ta Zi No.11

²⁶ [2007] Min Si Ta Zi No. 14

jurisdiction in those cases. However, it would not be unexpected that if the requirements of validly incorporation are all satisfied, the SPC might use this reason, i.e. lack of intention to arbitration, to dismiss the objection to the jurisdiction of the Chinese courts over a dispute in respect of the bill of lading.

4.6 Comments

It appears that under Chinese law, an arbitration clause in the charterparty might not be successfully incorporated into the bill of lading unless all the conditions have been satisfied:

- a. The words of incorporation of an arbitration clause are marked in the front page of the bill of lading; and
- b. The date of charterparty and the name of the parties shall also be expressly mentioned in the front page of the bill of lading.

It appears that even if the above requirements are satisfied, the SPC may find some other reasons not to recognise the validity of the arbitration clause, such as that the holder of the bill of lading did not participate in the negotiation of the arbitration agreement and thus the clause does not bind him.

In China, the court's jurisdictions are laid down in the relevant statutes unless there is a clear arbitration clause. In international trade, the holders of the bills of lading would not be able to negotiate the terms of the bills of lading.

Therefore, it is believed that there is a policy reason for the Chinese courts not to give up the courts' jurisdictions of the bills of lading.

IV. The practical implications of Chinese law

1. Anti-suit Injunction to restrain the receivers from continuing the proceedings in the PRC

In practice, in order for a foreign carrier to proceed with the London arbitration proceedings as per the bill of lading, attempt to apply for an anti-suit injunction from English courts has been regularly considered. Such attempt was also made in Hong Kong given that the Mainland and Hong Kong are in one country but have two systems of law.

The English court has the power to grant an anti-suit injunction to restrain a party in breach of an arbitration agreement from commencing or continuing the foreign proceeding. This power is granted by Section 37(1) of the Senior Courts Act 1981, which prescribes that:

“The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.”

When exercising its discretion under s. 37, the court has to take into account of s.44 of the Arbitration Act 1996 which lists the courts’ powers to make orders in relation to arbitral proceedings. Under s.44(3), the court may make such orders as it thinks necessary for the purpose of preserving assets when it is urgent.²⁷ In a jurisdiction or arbitration clause case, there is no requirement that there be actual or intended local proceedings and if the court is satisfied that the applicant is entitled to a contractual right not to be sued in the foreign country, then he is entitled, prima facie, to relief via an anti-suit injunction to restrain a breach of that right.²⁸

As to the discretion of the court, there is a principle that it will enforce an arbitration agreement where it is satisfied to the requisite high degree of probability that there is such an agreement which it should enforce, unless a strong reason to the contrary can be shown²⁹. The “strong reason” mentioned in this principle might include the interests of other parties in the litigation who are not bound by the clause, or obvious injustice in being exposed to a particular type of claim in the foreign jurisdiction.³⁰ The conduct of the applicant is also relevant, for instance, delay in seeking relief and, consequently, allowing the foreign proceedings to progress, or voluntarily submitting to the foreign jurisdiction.

Similarly, the Hong Kong court may also prohibit parties over whom it has jurisdiction from pursuing or continuing proceedings in another jurisdiction by way of anti-suit injunction based on section 21L and 21M of Hong Kong High Court Ordinance.

It is very likely that if a Chinese court does not recognise the incorporation of an arbitration clause into bill of lading, the defendant will seek such remedy. This happened in *Niagara Maritime SA v. Tianjin Iron & Steel Group Company Limited (The “Good Luck”)*.³¹

In that case, the claimant owner applied to English court for an anti-suit injunction to restrain proceedings commenced by the cargo interests in China in breach of a London arbitration clause incorporated into a bill of lading. It was held by the English court that under English law there was no restriction that the words of incorporation must be expressed on the face of the bill of lading. Thus the arbitration clause was deemed to have been successfully incorporated into the bill of lading. It was also held that, as a matter of English Law, subrogated insurers were also bound by the arbitration clause in

²⁷ S. 44(3) of Arbitration Act 1996: *“If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or asset.”*

²⁸ *AES Ust- Kamenogorsk Hydropower Plant LLP v. UST- Kamenogorsk Hydropower Plant JSC* [2010] EWHC 772

²⁹ *Starlight Shipping v. Tai Ping* [2008] 1 Lloyd’s Rep

³⁰ *Donohue v. Armco* [2001] UKHL 64, para 29

³¹ *Niagara Maritime SA v. Tianjin Iron & Steel Group Company Limited* [2011] EWHC 3035 (Comm)

the bill of lading because the duty to arbitrate is an inseparable component of the claim transferred to the insurers as part of the subrogated rights.³²

Having found that the owners could show to the requisite standard that there was an enforceable arbitration agreement, the court considered whether there was any strong reasons not to grant the injunction. The only reason put forward by the cargo interests was that the owners had delayed in seeking relief from the court and that this should count against the grant of relief. However, the court held that on a proper analysis of the chronology, no real criticism could be laid against the owners for any delay in bringing the application. As a result, delay was not a strong or good reason why as a matter of discretion, the court should not have granted an injunction to protect the owners' rights.

Based on the reasoning mentioned above, the English court finally granted the anti-suit injunction.

The question is whether such injunction would have any impact on the Chinese receivers and/or the insurers.

If the Chinese receivers/insurers have assets in England, they may concern that the Owners may bring an action against them in London for a claim which could be equal to the amount of the judgement given in China because the receivers have breached the arbitration agreement.

If the directors of the receivers/insurers have some associations with England, they may also have some concerns that breach of an injunction order could be a contempt to the court and subject to a criminal sanction.

If the receivers/insurers have no assets in England or the company's directors have no association with England, the English court's injunction order may be ignored.

China and England have no treaty to mutually recognise the judgments of each country. Therefore, it is not impossible to enforce any English judgements relating to the anti-suit injunctions.

If an arrest has been made by the Chinese receivers and a security has been put up in China, it would be very difficult for a foreign owner to decide to proceed with the anti-suit injunction proceedings unless the security for the release of the vessel is subject to a competent court's jurisdiction. In such case, the Chinese judgements may not be recognised in England because of the receivers' breach of the anti-suit injunction.

Some carriers have also attempted to commence the arbitration proceedings to apply for an interim injunctive relief from the arbitration tribunal. The interim injunctive relief is unlikely to be recognised by the Chinese courts since it is not an award under the New York Convention.

³² The Jay Bola [1997] 2 LLR 279, at page 286

2. The enforceability of London arbitral awards in PRC

As mentioned above, although the Chinese court will unlikely recognise that there is a valid arbitration clause in the bill of lading, the carrier may still initiate an arbitration proceeding based on the incorporated arbitration clause in the bills of lading and attempt to obtain an arbitration award. The next issue is whether the arbitration award can be recognised and enforced in China.

As mentioned in the above, China is a contracting state to the New York Convention and should follow the requirements of New York Convention when deciding whether arbitration award can be recognised and enforced in China.³³

Article II of the New York Convention provides that there must be an agreement in writing and Article IV also requires that the party applying for recognition and enforcement shall supply the original agreement referred to in Article II or a duly certified copy.

Further, Article V of the New York Convention listed seven reasons of when recognition and enforcement of the award may be refused, and following two reasons quoted below are related to current issue:

*“1(a) The parties to the agreement referred to in article 2 where, under the law applicable to them, under some incapacity, or the **said agreement is not valid** under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*

.....

2(a) The recognition or enforcement of the award be contrary to the public policy of the country.”

When an arbitration award is made based on an arbitration clause incorporated into the bill of lading, it is possible for the bill of lading holder to argue that there is no valid arbitration agreement between the parties, thus the court might refuse to recognise and enforce the arbitration award in China based on Article II or Article V of the New York Convention.

In the case *Hanjin Shipping Co. Ltd v. Guangdong Fuhong Oil Co. Ltd*³⁴, the applicant Hanjin Shipping Co. Ltd (the “**Hanjin**”) obtained an arbitration award in London and applied to the Guangzhou Maritime Court for recognition and enforcement of the

³³ China accession to the New York Convention took effect in 1987. In 1987, the Supreme People’s Court issued a *Circular on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China (Fa (1987) No.5)*. This Circular expressly provides that China will recognise and enforce awards made in other contracting state. Also, Article 267 of the Civil Procedural Law require the People’s Court to follow the any international convention entered by China in dealing with applications for recognition and enforcement of foreign arbitral awards.

³⁴ [2005] Min Si Ta Zi No. 53, published on 2nd June 2006

arbitration award. This case was reported to the SPC for review based on the requirement of the above-mentioned Notice³⁵.

In the Reply of the Supreme People's Court, the application was dismissed and the court refused to recognise and enforce the arbitration award. This ruling was not based on the exception mentioned in Article V of the New York Convention. Instead, it relied on Article II and Article IV which requires a written arbitration agreement between the parties to be submitted. The Supreme People's Court held that the applicant Hanjin failed to prove that the charterparty which contained the arbitration clause was the charterparty referred to in the bill of lading, thus the arbitration clause was not incorporated into the bill of lading and there was no written arbitration agreement between the parties.

In another case³⁶, the application to recognise and enforce an arbitration award of a London Arbitration was also refused based on the reason that there was no arbitration agreement between the parties. In this case, it seems that if it had been decided in a previous Chinese judgement that the arbitration clause was not incorporated into the bill of lading, the court will rely on such judgment to hold that there was no valid arbitration agreement between the parties. Thus the arbitration award would not be recognised and enforced.

It seems that the Chinese court will not refuse to enforce the arbitration award based on the reason of "contrary to public policy". In *Future E.N.E. v. Shenzhen Cereals Group Co. Ltd*³⁷, the court also refused to enforce the arbitration award, however, the court did accept the defendant's argument that the enforcement would be contrary to public policy of China. The defendant argued that if the arbitration award was enforced, the parallel proceeding in Qingdao Maritime Court shall stop and that would undermine the judicial sovereignty of China. The court did not accept this argument and stated that Chinese courts have an obligation to recognise and enforce the arbitration awards made by contracting states of the New York Convention and that would not be contrary to public policy even if there was a parallel proceeding in China.

V. Conclusion

It seems from the Chinese judicial practice that a valid incorporation of the arbitration clause from a charter party under English law will unlikely be recognised by the Chinese courts because they would not take the view that there was a valid incorporation because the holders of the bills of lading did not participate in the negotiation and concluding the arbitration agreement between the owners and the charterers.

Even if a carrier can obtain an arbitration award in London, it would be difficult for such an award to be recognised and enforced in China. The Chinese courts take the view that an arbitration clause in the charterparty cannot be incorporated into the bill of lading by

³⁵ Supra note 15

³⁶ (2009) Xia Hia Fa Ren Zi No.2

³⁷ (2004) Guang Hai Fa Ta Zi No.1

general words and this impacts their decisions on both the objection to jurisdiction and the application to recognise and enforce the arbitration awards in China.

Any anti-suit injunction granted by the English courts would have only some limited use in China if the bill of lading holder does not have any assets in England or the company's directors have no association with England. In the circumstances, the Carrier may have to deal with the claims in China if Chinese proceedings have been commenced by the receivers and/or insurers regardless of the existence of a valid incorporation of the arbitration agreement in the charter parties under English law.

References:

1. John F Wilson, *Carriage of Goods by Sea*, Edition 7, 2010, London:Pearson
2. Si Yuzhuo, *Maritime Law Monograph*, Edition 2, 2010, Beijing: Renmin University Press
3. Dr Raymond H M Leung, *China Arbitration Handbook*, 2011, China: Sweet & Maxwell
4. Andrew Tweeddale, *Arbitration of Commercial Disputes*, 2010, Oxford University Press