Three Problems Caused by Arbitration Clauses Incorporated into Bills of Lading*

Konişmentolara Atıf Yolu ile Dahil Edilen Tahkim Klozlarının Neden Olduğu Üç Sorun

Serpil Yılmaz**

Abstract

Standard charter party forms and bills of lading are used for the carriage of goods by sea in the international trade. It is also common to refer in the bills of ladings to the charter party terms and conditions including, inter alia, arbitration clauses. The charterer may endorse the bill of lading and transfer it to a third party who is not party to the charter party. In that case, if a dispute arises in the course of the voyage the issue of whether or not arbitrators have the authority to rule on the dispute should be resolved.

In this paper, three issues, how to determine the applicable law to the validity and existence of the arbitration clause in case of an incorporation; as to whether third parties bound by the arbitration clause incorporated into a bill of lading and whether or not arbitration clauses should be treated differently and what could be the reason for the different treatment, will be examined and addressed.

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** Lawyer, Member of Istanbul Bar Association; LLM, The London School of Economics and Political Science; syilmaz@serpilyilmaz.av.tr

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Özet

Uluslararası ticarette malların deniz yolu ile taşınmasında standart çarter parti formları ve konişmentolar kullanılmaktadır. Konişmentolarda tahkim klozu da dahil olmak üzere çarter partide yer alan hüküm ve şartlara atıf yapılması da yaygındır. Çartererin konişmentoyu cirolayarak çarter partinin tarafı olmayan bir üçüncü kişiye devretmesi mümkündür. Bu durumda, deniz yolu ile yük taşınması esnasında bir ihtilaf doğar ise hakemlerin bu uyuşmazlığı çözmeye yetkili olup olmadığı meselesinin çözümlenmesi gerekmektedir.

Bu çalışmada, atıf halinde tahkim klozunun varlığı ve geçerliliğine uygulanacak hukukun nasıl belirleneceği; üçüncü kişilerin konişmentoda atıfta bulunulan çarter partide yer alan tahkim klozu ile bağlı olup olmayacağı ve tahkim klozunun atıf yapılan diğer çarter parti hükümlerinden farklı olarak incelenip incelenemeyeceği ve tahkim klozunun diğer hükümlerden farklı olarak ele alınıp incelenmesinin nedeninin ne olabileceğine ilişkin üç sorun ele alınıp incelenecek ve cevaplanacaktır.

Anahtar kelimeler: Konişmento, Çarter Parti, Tahkim Klozu, Atıf, Geçerlilik.

Introduction

Goods, which are sold to a buyer who is located abroad, could be carried by road, air or sea or multimodal transport might be preferred where necessary. Although there are several transportation methods, carriage of goods by sea is widely used in international trade. The nature of the disputes and diversification of the foreign parties involved in the disputes of carriage of sea requires a neutral, prompt dispute resolution system conducted by experts in this field. Therefore, arbitration, as a pri-

vate dispute settlement mechanism, is commonly used for the resolution of the disputes in carriage of goods by sea.

Carriage of goods by sea might be evidenced by bills of lading. "Three common characteristics of a bill of lading are that (a) it constitutes a receipt for the goods shipped or received by the carrier, (b) it constitutes a document of title for such goods and (c) it contains or evidences the contract of carriage by sea relating to the goods".[1] A bill of lading may be transferred through several traders who rely on it without negotiating its terms and conditions and having seen it.[2] Referring to the charter party terms and conditions in the bills of lading is also common practice in international trade.[3] The reason why incorporation clauses are adopted in the bills of lading is the ship owners' desire to be subject to identical terms and conditions under both charter parties and bills of lading for "business efficacy".[4]

Similarly, as bills of lading being a "negotiable"[5] instrument, it is common practice in international commercial trade that the holder of the bill of lading could be an endorsee and also insurers or reinsurers of cargo interests could be involved in the disputes by way of subrogation.[6] This may cause "two or more parallel proceedings before Courts and arbitral

1 **Richard Aikens/Richard Lord/Michael Bools**, Bills of Lading (1st edn, Taylor & Francis, 2006) para 2.3; **Julian Cooke and others**, Voyage Charters (4th edn, Informa Law 2014) 494; See also: **Guenter Treitel/FMB Reynolds**, Carver on Bills of Lading (3rd edn, Sweet & Maxwell 2011), paras 2-001, 3-001, 6-001; **MG Bridge**, The International Sale of Goods (3rd edn, OUP 2013), paras 3.21, 8.94; **John F Wilson**, Carriage of Goods by Sea (7th edn, Pearson 2010) 117-141.

2 **Melis Ozdel**, Bills of Lading Incorporating Charterparties (Hart Publishing 2015) 1; **Melis Ozdel**, "Incorporation of Charterparty Clauses into Bills of Lading" in Malcolm A. Clarke (ed) Maritime Law Evolving (Hart Publishing 2013) 181, 182.

3 **Julian Cooke and others**, Voyage Charters (n 1) para 18.48.

4 **Ozdel**, Bills of Lading Incorporating Charterparties, 15.

5 "Negotiable bill of lading means only transferable under English law": See **Felix Sparka**, Jurisdiction and Arbitration Clauses in Maritime Transport Documents (Springer 2009) 45; See also **Treitel/Reynolds**, (n 1) para 6-041; See also **Bridge** (n 1) para 8.40. "Negotiable" and "transferable" will be used interchangeably in this paper with regard to the functions of bills of lading.

6 **Yvonne Baatz**, "Should Third Parties Be Bound By Arbitration Clauses in Bill of Lading?" (2015) pt 1, Lloyd`s Maritime and Commercial Law Quarterly 85, 86.

tribunals, one of which could constitute res judicata or conflict with the other".[7] Notwithstanding the complexity of the disputes and multiplicity of the parties, there are also certain short time limits for the commencement of the legal proceedings for example, court litigation or arbitration in maritime disputes.[8] Thus addressing the questions whether there is a valid arbitration agreement and who are bound by that agreement are of great importance in disputes related to carriage of goods by sea, so as to avoid squandering money and time.

A valid arbitration agreement, which does exist under the applicable law[9] to it, is the cornerstone of arbitration.[10] "Arbitration is a creature of consent".[11] Parties shall give their consent to refer the disputes to arbitration.[12] Section 7 of the English Arbitration Act 1996 ("EAA") provides for the principle of separability. This principle was examined by the House of Lords in 2007 in the Fiona Trust case.[13] Under the principle of severability arbitration agreement and the underlying contract are separate which means that the issues which invalidate the underlying contract not necessarily invalidate the arbitration agreement.[14] Similarly, the law applicable to arbitration agreement may well be different then the law applicable to main contract.[15] Therefore, as a preliminary issue how to determine the applicable law to the validity and existence of the

7 Ibid 100, 104.

8 **Yvonne Baatz**, "The Conflict of Laws" in Yvonne Baatz (ed), Maritime Law (3rd edn, Informa 2014) 3.

9 **Clare Ambrose/Karen Maxwell/Angharad Parry**, London Maritime Arbitration (3rd ed, Informa 2009) 68.

10 **Margaret L. Moses**, The Principles and Practice of International Commercial Arbitration (2nd edn, CUP 2012) 18; See also **Gary Born**, International Arbitration: Law and Practice (Kluwer Law International 2012) 3; **Nigel Blackaby and others**, Redfern and Hunter on International Arbitration (5th edn, OUP 2009) para 1.38.

11 **Moses** (n 10) 19.

12 **Born** (n 10) para 3.01; **Blackaby and others** (n 10) para 2.01.

13 *Fiona Trust & Holding Corp v Privalov* also known as Premium Nafta Products Ltd & Fili Shipping Company Ltd & Ors [2007] UKHL 40.

14 **AV Dicey/JHC Morris/Lawrence Collins**, The Conflict of Laws, vol 1 (Sweet & Maxwell 2012) para 16-008; **Born** (n 10) para 2.04; **Moses** (n 10) 19; **Blackaby and others** (n 10) para 2.89.

15 **Dicey/Morris/Collins** (n 14) para 16-012.

incorporated arbitration clause under English law will be analysed in the first part.

Arbitration clauses in charter parties may be enforced against the due holder of a bill of lading who might not be a party to the charter party. The holder of the bills of lading might not be aware of the arbitration agreement in the charter party which deprives the Court's jurisdiction. The wording of incorporation clauses and arbitration clauses may vary in practice. Under English law, the wording of incorporation clauses and arbitration clauses are examined to determine the scope of the arbitration agreement. In the second part of this paper, by referencing the relevant case law the question as to whether third parties bound by the arbitration agreement incorporated into bill of lading will be addressed.

As a principle, incorporation by reference is sufficient to incorporate standard terms and conditions to a contract. An incorporation clause might incorporate the terms and conditions of the charter party into the bill of lading if they are "germane to the shipment, carriage, delivery of the goods".[16] However, ancillary clauses, for instance arbitration clauses, might not be incorporated directly and are treated differently under English law. The third part this paper will scrutinise whether arbitration clauses should be treated differently and what could be the reason for the different treatment.

In conclusion, the objective of this paper, findings will be summarised and suggestions related to the three questions posed by incorporation of charter party arbitration clauses into bills of lading will be presented.

[16] *Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd.* ("The Portsmouth") [1912] AC 1; See Lord Denning in *Owners of the Annefield v Owners of Cargo Lately Laden on Board the Annefield* ("The Annefield") [1971] 1 Lloyd's Rep. 1, 4 (CA); **Ozdel**, Bills of Lading Incorporating Charterparties (n 2) 1.

I. What is The Law Applicable to the Validity and Existence of the Arbitration Agreement?

1. Variable Sources of Conflict of Laws Applicable to Arbitration and the Rotterdam Rules

1.1. Rome I Regulation[17] and Brussels I Regulation[18]

Under the Article 3 of the Rome I Regulation, parties to an agreement are free to choose the applicable law to their agreement.[19] However, under Article 1 (2) (e) of Rome I Regulation, the applicable law to validity of the arbitration agreements issue is out of the scope of the Rome I Regulation[20] and the Contracts (Applicable Law) Act 1990.[21] Bills of lading are also excluded from the scope of the Rome I Regulation subject to the negotiable character of the obligations arise out of bills of lading.[22] "Where a bill of lading is negotiable[23] as it is an order or a bearer bill, Rome I Regulation will not apply as the obligations under it arise out of their negotiable character".[24]

Under Article 1 (2) (d), Article 73 (2) and Recital 12 of Brussels I Regulation it would also not be applied to arbitration.

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[17] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation").

[18] 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 (recast).

[19] The limits of party autonomy on choosing the applicable law were stated in *Vita Food Products Inc. v. Unus Shipping Co.* [1939] AC 277.

[20] **Dicey/Morris/Collins** (n 14) para 16-016.

[21] **Ambrose/Maxwell/Parry** (n 9) 68.

[22] See Article 1 (2) (d) and Recital 9 of the Rome I Regulation.

[23] See above (n 5).

[24] **Yvonne Baatz**, "Thirty Years of Europeanization of Conflict of Laws and Still all at Sea?" in Malcolm A. Clarke (ed) Maritime Law Evolving (Hart Publishing 2013) 258.

1.2. The Rotterdam Rules

There is not any uniform conflict of law rules which guide how to determine the applicable law to arbitration clauses incorporated into bills of lading. The latest convention with regard to unification of rules governing bills of lading is the Rotterdam Rules. According to Article 89 of the Rotterdam Rules, it would replace The Hague Rules, the Hague-Visby Rules and the Hamburg Rules.

Chapter 15 of the Rotterdam Rules sets forth the provisions of arbitration which deal with the place of the arbitration. The place of arbitration might have an effect on the applicable law to the agreement to arbitrate.[25] However, the Rotterdam Rules have not entered into force yet.[26]

1.3. The English Arbitration Act and the New York Convention

Governing law to the validity of the arbitration agreement shall be analysed separately for domestic and foreign arbitrations, the former which are seated in England and Wales or Northern Ireland[27], the latter are seated outside of the England and Wales or Northern Ireland.[28]

For foreign arbitration agreements, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC"), which has been ratified by 156 countries[29] including the UK, set forth the applicable law to arbitration agreements. The UK has given effect to the provisions of the NYC in the Part III of the English Arbitra-

[25] See Section 46 of the EAA.

[26] See <http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods / rotterdam_status.html> accessed 26 July 2015.

[27] See Section 2 (1) of the EAA.

[28] Under the Section 2 (2) some of the sections of the EAA would be applied also the arbitrations where the seat of arbitration is outside of England and Wales or Northern Ireland.

[29] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html accessed 24 July 2015.

tion Act 1996.[30] The EAA and common law rules should be applied to the validity of the arbitration agreement in domestic arbitrations.

The applicable law to arbitration agreement has been distinguished in each element of the arbitration agreement which is form, consent, capacity, and legality in the NYC. Article II (1) of the NYC provides for a written requirement for the validity of the arbitration agreement. Whereas applicable law to substantive validity of the arbitration agreement sets forth in Article V (1) (a) of the NYC which is the law chosen by the parties, failing which, the law of the seat.

In domestic arbitrations, English law would be applied to form requirements of an arbitration agreement.[31] If the proper law of the arbitration agreement is English law, formal requirement would be reviewed under the EAA. Under the Section 5 of the EAA, arbitration agreements should be in writing.[32] Concluding an arbitration agreement by incorporation is stipulated in the Section 6 of the EAA. Section 46 of the EAA provides for the law applicable to substance of the dispute in arbitration.

1.4. Common Law Conflict of Law Rules on Arbitration Agreements

The question of the applicable law to the substantive validity arbitration agreement was addressed recently in *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors* ("Sulamerica") case[33] by the application of a three stages test (i) express choice, (ii) implied choice, (iii) closest and most real connection, respectively.

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[30] **Baatz**, "Thirty Years of Europeanisation of Conflict of Laws and Still all at Sea?" (n 24) 247.

[31] **Dicey/Morris/Collins** (n 14) para 16-024.

[32] Under Section 81 (1) (b) of the EAA oral arbitration agreements might have effect under common law. See also **Ambrose/Maxwell/Parry** (n 9) 47.

[33] [2012] EWCA Civ 638 (CA); See also *C v D* [2007] EWCA Civ 1282 (CA), Court of Appeal held that English Law shall be applied to the validity of the arbitration agreement where the parties choose the seat of arbitration in London.

The Court of Appeal, in Sulamerica, noted that an express choice of the law of the contract is likely to lead to the conclusion that the parties intended to apply that same law to the arbitration agreement, "unless there are other factors present which point to a different conclusion".[34] In this case, if the law of the contract had been applied to the validity of the arbitration agreement, there would not be a valid arbitration agreement.[35] Thus the Court held that the law of the seat has the closest and most real connection with the arbitration agreement.[36]

2. Applicable Law to the Incorporation

The issue would be addressed under the English common law conflict of law rules. Two different approaches to the issue have already been derived from case law by the scholars[37]. These are the putative proper law of bills of lading or law governing the charter party.[38]

2.1. Putative Proper Law of Bills of Lading

Characterization of incorporation clauses should be made as a preliminary issue before the application of the conflict of law rules. "Incorporation is a matter of construction of contract".[39] In this respect, it could be argued that the proper law of the bill of lading contract would be applied to the incorporation issue due to the fact that incorporated terms and conditions forms part of bills of lading.[40] The questions with regard to the "formation of an arbitration agreement would be governed by the

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[34] Ibid [26] (Lord Moore-Bick).

[35] Ibid [30], [31] (Lord Moore-Bick).

[36] Ibid (n 54) [32] (Lord Moore-Bick).

[37] **Ozdel**, Bills of Lading Incorporating Charterparties (n 2) 7-16.

[38] Ibid.

[39] **Ambrose/Maxwell/Parry** (n 9) 51.

[40] The Heidberg (n 49); **Robert Force/Martin Davies**, "Forum Selection Clauses in International Maritime Contracts", Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force in Martin Davies (ed) (Kluwer Law International, 2005) 36: **Ozdel**, Bills of Lading Incorporating Charterparties (n 2) 12.

law under which the contract was validly concluded"[41] the so-called "putative proper law"[42] under English law.

The authority with regard to the putative proper law is the *Compania Naviera Micro S.A. v. Shipley International Inc.* ("*The Parouth*") case.[43] In *The Parouth*, Lord Ackner stated that the arbitration clause should not be disregarded and applicable law to the formation of charter party should be putative proper law.[44] Putative proper law defined as "the formation of a contract [which] is governed by the law which would be the proper law on the contract if the contract is validly concluded".[45] The Court concluded that the question of as to whether there was a binding agreement would be governed by English law on the grounds that there was an English arbitration clause.[46]

When there is a binding contract between the parties, the question as to whether the contract contains an arbitration clause arose in another Court of Appeal case: *Marc Rich & Co. A.G. v. Societa Italiana Impianti P.A.* ("The Atlantic Emperor")[47] which followed *The Parouth*. The Court of Appeal held that applicable law was English law which was the putative proper law of the arbitration clause.[48]

The Parouth and *The Atlantic Emperor* were distinguished in *Partenreederei "M/S Heidberg" v. Grosvenor Grain and Feed Co Ltd. ("The Heidberg")*[49] by Judge Diamond where the law applicable to the validity of incorporation of an arbitration clause was one of the three issues before the Commercial Court.[50] In this case, there were two different charters. The first charter was in Synacomex form and it provided for arbitration

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41 **Ambrose/Maxwell/Parry** (n 9) 70; **Dicey/Morris/Collins** (n 14) para 16-022.

42 **Dicey/Morris/Collins** (n 14) para 16-022.

43 [1982] 2 Lloyd`s Law Report 351 (CA).

44 Ibid 353.

45 Ibid 353.

46 Ibid 354.

47 [1989] 1 Lloyd`s Rep 548 (CA).

48 Ibid 554.

49 [1994] 2 Lloyd's Rep. 287.

50 Ibid 306.

in Paris. The second charter was in Synacomex 90 form and provided for arbitration in London under English Law. However, erroneously, the recap telex referred to Synacomex form which provided for arbitration in Paris instead of Synacomex 90.

In *The Heidberg*, Judge Diamond held that lex fori (English Law) would be applicable as to the question of whether or not the arbitration clause (Centrocon clause) was validly incorporated.[51] The existence of two different charters in this case led the Judge to apply the lex fori[52], [53].

In light of the above, the proper law of the charter party arbitration clause would also be assumed as to the putative proper law of the bill of lading.[54] In other words "the putative proper law of the bill of lading- the law that would govern the bill of lading if the charter party were incorporated."[55]

However, it might be criticized due to the fact that the holders of the bills of lading might not be aware of the charter party terms. This paper's objective is to examine the issue especially in cases where a third party- who is not a party to the charter party- is involved in the dispute. Thus, using this method to identify the putative proper law of the bill of lading may not reflect the real intention of the parties in all cases. Therefore, the law which has the most real connection with the bill of lading should be identified by the competent courts or arbitral tribunals and it should govern the bill of lading.[56]

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[51] Ibid 308.

[52] Ibid 306.

[53] Ibid 306, 308: Judge Diamond also suggested that the proper law of the bill of lading which has closest and most real connection with the bill of lading would be the French Law.

[54] The Njegos [1936] 90, **Ozdel**, Bills of Lading Incorporating Charterparties (n 2) 14-15.

[55] **Ozdel**, Bills of Lading Incorporating Charterparties (n 2) 11.

[56] See (n 53).

2.2. Law Governing the Charter Party

The law governing the charter party would also be applied directly to the incorporation issue based on the assumption that the proper law of the charter party would be incorporated into bill of lading.[57] In *The Njegos*[58] a claim was brought by endorsees of a bill of lading. There was an English arbitration clause in the charter party[59]. The bill of lading contained an incorporation clause[60] without any clear reference to arbitration. The Court held that the law governing the bill of lading should be determined by the actual or assumed intention of the parties.[61] The Court also held that the intention of the parties on proper law of the bill of lading would be assumed to be the English law which governs the charter party.

In *The San Nicholas*[62], there was a bill of lading referring to an unidentified charter party due to the fact that there were three charter parties- one of them was the head charter party and the two other were sub-charter parties. Following *The Njegos* the Court of Appeal held that, the proper law of the head charter party was incorporated into the bill of lading. Therefore, the bill of lading was governed by English law.[63]

This approach established in *The Njegos* and followed by *The San Nicholas* and other cases[64] could be justifiable where the holder of bill of lading is aware of the charter party terms. This is because the law that could be applicable to the bill of lading and its terms, for instance the law

[57] **Ozdel**, Bills of Lading Incorporating Charterparties (n 2) 14-15.

[58] The Njegos [1936] 90. For similar decision see the High Court of Singapore, The Dolphina (2012) 1 Lloyd's Law Reports 304. See also: **Liang Zhao/Felix W H Chan**, Incorporating the Charterparty's Applicable Law Clause Into Bills of Lading, (2012) Lloyd Maritime and Commercial Law Quarterly, 481.

[59] Ibid 92: "The charter party, by cl. 39, provided for the arbitrament of all disputes arising out of the [charter party] contract by two arbitrators carrying on business in London".

[60] Ibid 101: "All the terms, conditions and exceptions of which charter party, including the negligence clause, are incorporated herewith."

[61] Ibid 102.

[62] The San Nicholas (1976) 1 Lloyd`s Rep 8 (CA)

[63] Ibid 12.

[64] See **Ozdel**, Bills of Lading Incorporating Charterparties (n 2) 14 fn 62.

which sets the rules related to the rights and obligations of the bill of lading holder, should be identifiable from the wording of the bill of lading to which the due holder of the bill of lading is a party.

In that respect, it could be claimed that the charter party and bill of lading are interrelated contracts and the parties to them, as being reasonable businessmen[65], accepted that English law should be applicable both for the bill of lading and charter party as governing law of the arbitration agreement in the case where there is an arbitration in London clause included in the charter party. However, it seems more reasonable to apply to the putative proper law of the bill of lading for incorporation of an arbitration clause due to the fact that an arbitration clause constitutes a part of the bill of lading contract, and it should be examined under the bill of lading.[66]

II. Are third parties bound by an arbitration agreement incorporated from charter party into bill of lading?

1. Applicable Law to the Scope of the Arbitration

Under the section 5 (1) (a) of the Carriage of Goods by Sea Act 1992 ("COGSA"), "contract of carriage shall mean the contract evidenced by or contained in the bill of lading". "Parties to a contract of carriage are

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[65] See (n 58).

[66] Skips A/S Nordheim v Syrian Petroleum Co. and Petrofina SA ("The Varenna") [1983] 2 Lloyd's Rep 592, 615 (CA) (Lord Donaldson): "The starting point for the resolution of this dispute must be the contract contained in or evidence by the bill of lading, for this is the only contract to which the shipowners and the consignees are both parties (…). Such an incorporation cannot be achieved by agreement between the shipowners and the charterers. It can only be achieved by the agreement of the parties to the bill of lading contract and thus the operative words of incorporation must be found in the bill of lading itself."; **Paul Todd**, "Incorporation of Arbitration Clauses into Bills of Lading" (1997) Journal of Business Law 331, 347; **Ozdel**, Bills of Lading Incorporating Charterparties (n 2) 14.

persons named in it as shipper and carrier".[67] Under the doctrine of the privity, a contract does confer upon rights and obligations only to the parties to the contract.[68] However the rights and obligations conferred upon the holders of a bill of lading might be transferred to third parties due to the transferable character of the bill of lading.[69] Third party issues mainly arise in relation to the arbitration agreements that are intended to be incorporated into the bills of lading.

Binding effect of arbitration clauses on third parties, incorporated into bills of lading, is determined by national laws; there is not any internationally accepted rule in this respect.[70] The question as to whether a third party is bound by an arbitration agreement could be examined under either the question of the validity of the arbitration agreement or under the scope of the arbitration agreement (rationae personae).[71] By and large, the scope of an arbitration agreement could be discussed if there is any valid arbitration agreement. Therefore, it is generally accepted among academicians that a third party is bound by an arbitration clause is a matter of interpretation of the arbitration agreement.[72]

The applicable law to the scope of the arbitration agreement is identical with the law applicable to the validity and existence of the arbitration agreement.[73] In this part it would be assumed that the proper law of the validity, existence, and scope of the arbitration agreement would be English law, and the binding effect of charter party arbitration clauses on third parties will be examined under English law.

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[67] **Treitel/Reynolds** (n 1) para 4-001. For the detailed analysis of the parties to a bill of lading in C.I.F. and FOB contracts see: **Treitel/Reynolds** (n 1) paras 4-003 ff.

[68] **Edwin Peel/GH Treitel**, Law of Contract (13rd edn, Sweet & Maxwell 2011) para14-001.

[69] **Treitel/Reynolds** (n 1) para 7-001.

[70] **Baatz**, Should Third Parties Bound By Arbitration Clauses in Bills of Lading (n 6), 86.

[71] **Gary Born**, International Commercial Arbitration, (2nd edn, Kluwer Law International 2014) 1416.

[72] Ibid.

[73] **Dicey/Morris/Collins** (n 14) para 16-001.

2. Who Are the Third Parties?

If the incorporation is validly constituted under the applicable law to the arbitration, the arbitration clause should be a part of bill of lading. If the incorporation is sufficient, and the consignee of the endorsee of the bill of lading would like to sue the carrier under bill of lading pursuant to the Article 5 (2) (b) of the COGSA, it should be bound by the arbitration clause.[74]

Similarly, cargo insurers who subrogate cargo interests' rights and obligations under the bill of lading would be also bound by an arbitration agreement if the incorporation is sufficient to bind third parties.[75]

Consequently, in cases where the question of incorporation of arbitration agreement arises, specific words are needed for the incorporation of arbitration clauses as it would be binding on third parties.[76] Thus, particular importance should be given on the wording of incorporation clauses in bills of lading.[77]

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[74] **Baatz**, Should Third Parties Bound By Arbitration Clauses in Bills of Lading (n 6), 95.

[75] *Kallang Shipping SA Panama v Axa Assurances Senegal and Another ("The Kallang")* [2009] 1 Lloyd's Rep. 124, 142 (Com Ct); *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA ("The Front Comor")* [2007] 1 Lloyd's Rep. 391: Although incorporation clause was not an issue in this case, it shows that the insurers should be bound by charter party arbitration clauses. The Front Comor the issue was as to whether English Court grant an anti-suit injunction against a party who commence Court proceedings despite the arbitration agreement within the European Union ("EU"). The dispute referred to the European Court of Justice ("ECJ). ECJ held that English Courts should not grant an anti-suit injunction within the EU on the grounds that it would be contrary to Regulation (EC) No 44/2001. [*Case C-185/07 West Tankers Inc v Allianz SpA (formerly Riunione Adriatica di Sicurta SpA)* [2009] 1 A.C. 1138]; cf Case C-536/13 Gazprom" OAO, Re [2015] I.L.Pr. 31, 556; See Judge Males in *Caressa Navigation Ltd v Office National De l`electrite and others* [**2014**] **1 Lloyd's Rep 337, 344 (Com Ct)** "the consignee would be bound by whatever the original parties to the bill of lading had agreed by their incorporation of the charterparty arbitration clause". See also: **Baatz**, Should Third Parties Bound By Arbitration Clauses in Bills of Lading (n 6), 95ff.

[76] **Baatz**, Should Third Parties Bound By Arbitration Clauses in Bills of Lading (n 6), 86; **Ling Li**, Binding Effect of Arbitration Clauses on Holders of Bills of Lading as Nonoriginal Parties and a Potential Uniform Approach Through Comparative Analysis (37: 107, Tulane Maritime Law Journal 2012) 114.

[77] For the detailed examination of the form of the charter parties referred to in bills of

3. Wording of Incorporation and Arbitration Clauses

Incorporation clauses in bills of lading and it is scope has been debated more than a century[78] in English law. According to section 6 of the EAA, incorporation of an arbitration clause is sufficient if the reference makes the arbitration clause part of the agreement.[79] Nevertheless this provision does not specify how a reference clause should be drawn for the incorporation of an arbitration agreement.[80] The wording of an incorporation clause in the bill of lading might expressly refer to the arbitration clause,[81] or might be in general terms.[82]

In the orthodox view, it is accepted by scholars and stated in common law principles that the wording of the clauses included in both bills of lading and charter parties are to be scrutinized to address the incorporation of the arbitration issue.[83] The modern approach is that the wording of the bill of lading clause should primarily be interpreted to address the question of whether or not the arbitration clause is incorporated into a bill of lading and binds the third parties.[84]

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lading see: **Baatz**, Should Third Parties Bound By Arbitration Clauses in Bills of Lading (n 6), 88-91; **Ozdel**, Bills of Lading Incorporating Charterparties (n 2) 59 ff.

78 **Todd** (n 66) 331.

79 See above on page 7.

80 **Masood Ahmed**, Arbitration Clauses: Fairness, Justice and Commercial Certainty (2010), Volume 26 Issue 3, LCIA, Arbitration International 409, 413; **Ambrose/Maxwell/Parry** (n 9) 51.

81 For instance, in the Article 1 of the conditions of carriage of Baltic and International Maritime Council ("Bimco") Congenbill 2007 incorporation clause stipulated 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" (Julian Cooke and others (n 1) Appendix A5.8, 1280). For other bill of lading incorporation clauses see: **Nicholas Gaskell/Regina Asariotis/Yvonne Baatz**, Bills of Lading: Law and Contracts (LLP, 2000) paras 20.243-20.251.

82 See **Alan Mitchelhill**, Bills of Lading Law and Practice (2nd edn, Springer 1990) 153 for incorporation clause in the Bimco Congenbill 1976: "All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, are herewith incorporated".

83 **Todd** (n 66) 1.

84 Ibid; The Varenna (n 66).

The modern approach seems to be more reasonable since the third parties to a bill of lading might only be aware of terms of conditions of the bill of lading. It could also be claimed that there might be some cases where the charter party terms would be inconsistent with the incorporation clause of the bill of lading.[85] Therefore, the issue would mainly be analysed considering the wording of bill of lading incorporation clauses, as well as the wording of the charter party arbitration clauses under the relevant case law.[86]

The authority on the general words of incorporation in the bills of lading was *The Portsmouth*[87] which followed *Hamilton & Co. v. Mackie & Sons* case.[88] In *The Portsmouth* the question whether the arbitration clause in the charter party was incorporated into the bill of lading was discussed. The House of Lords held that general words of incorporation are not sufficient to incorporate a charter party arbitration clause into bill of lading.[89] Nevertheless, general words of reference may incorporate the charter party terms into "a negotiable instrument like a bill of lading that are germane to the receipt, carriage or delivery of the cargo or the payment of the freight".[90]

Furthermore, the ambit of the arbitration clause (the ratione materiae) was also examined by the Court. The arbitration clause in the char-

[85] The Portsmouth [1912] AC 1 (HL); See also **Treitel/Reynolds**, (n 1) para 3-026.

[86] **Treitel/Reynolds** (n 1) para 3-036: "some degree of verbal manipulation might be involved in applying an arbitration clause, which had it is origin in charterparty to the different context of a bill of lading contract"; See The Annefield (n 16) 4 (Lord Phillimore); cf Maritime Corp v Holborn Oil Trading ("The Miramar") [1984] AC 676, 688 (HL).

[87] See (n 16).

[88] [1888-1889] 5 Times Law Reports 677: In this case the incorporation clause was in general terms and the charter party arbitration clause was as follows: "All disputes under this charter shall be referred to arbitration". Lord Esher stated that "(...) if it was found that any if the conditions of the charter party on being so read were inconsistent with the bill of lading they were insensible, and must be disregarded." Thus, Court of Appeal held that "all other terms and conditions as per charter party" clause is not sufficient to incorporate arbitration clause into bill of lading.

[89] The Portsmouth (n 16) 5,6 (Lord Loreburn).

[90] Ibid 6,8 (Lord Gorell and also Lord Atkinson); See also **Treitel/Reynolds** (n 1) para 3-033.

ter party was: "Any dispute or claim arising out of any of the conditions of this charter party shall be adjusted at port where it occurs, and same shall be settled by arbitration."[91] The Court held that, the construction of a charter party clause is not consistent with the bill of lading.[92]

The Portsmouth has been followed by subsequent cases.[93] However, "the limits of the strict test applied in Portsmouth was designated[94]" in *The Merak* case.[95] In *The Merak,* there were two charter parties. The former charter party which was in Nubaltwood form, dated 21th April 1961, provided for arbitration in the clause 32.[96] In addition, clause 10 of the charter party expressed that the bill of lading was subject to charter party terms including, inter alia, arbitration clause.[97] And the second (the sub-charter party) referred to the first charter dated 21th April 1961. The bill of lading also provided for an incorporation clause as follows: "All terms, conditions, clauses and exceptions including clause 30 contained in the said charter party apply to this bill of lading and are deemed to be incorporated herein".[98]

At the Court of First Instance, Judge Scarman held that general words of the incorporation clause was not sufficient to incorporate an arbitration clause into the bill of lading, the reference to the clause 30 was

[91] The Portsmouth (n 16) 2.

[92] Ibid 6; **Michale Wagener**, Legal Certainty and the Incorporation of Charterparty Arbitration Clauses in Bills of Lading (2009) Vol 40, no 1 (Journal of Maritime Law & Commerce) 115,118.

[93] *The Annefield* (n 16); *The Federal Bulk Carriers Inc. v. C Itoh & Co Ltd* ("The Federal Bulker") [1989] 1 Lloyd's Rep. 103; *Siboti K/S v BP France SA ("The Siboti")* [2003] EWHC 1278 (Comm) where the Commercial Court held that, "a general words of incorporation of bill of lading was not sufficient to incorporate the exclusive jurisdiction clause"; *The Varenna* (n 66).

[94] Charterparty arbitration clause not incorporated into bill of lading (1989) Journal of Business Law, 1989, May, 249 <http://login.westlaw.co.uk.gate2.library.lse.ac.uk/maf/wluk/app/document?src=doc&linktype=ref&context=5&crumbaction=replace&docguid=IC3DEDA70E72111DA9D198AF4F85CA028> accessed 10 August 2015.

[95] [1964] 2 Lloyd's Rep. 527 (CA).

[96] Ibid 530: "Any dispute arising out of this charter or bill of lading issued hereunder shall be referred to arbitration".

[97] Ibid 529.

[98] Ibid 529.

"falsa demonstration".[99] On appeal, The Court of Appeal distinguished the case from *The Portsmouth*[100] and upheld the decision unanimously.

However the reasoning of the Court of Appeal was different from the Court of First Instance. Firstly, Lord Sellers stated that "if `including clause 30` is struck out, the remaining clause is quite adequate and effective to make the clause 32, the arbitration clause in the charter party, deemed to be incorporated into the bill of lading".[101] Lord Russell opposed to the Judge Scarman`s reasoning by stating that, "I see no justification, as a matter of construction, for reading this as if instead of clause 30 the reference was to clause 32 (…) clause 32 expressly refers to disputes arising out of any bill of lading issued hereunder."[102] Therefore, general words of reference to incorporate the arbitration clause into bill of lading were held to be sufficient if the parties' intention is clearly identified.[103]

The Merak case, followed by *The Annefield*[104], could be criticised on the grounds that instead of focusing on only the terms of the bill of lading, the Court also interpreted the arbitration clause in the charter party.[105] Moreover, the Court held that it could not rectify the wording of the bill of lading. This way of interpretation does not seem to be ap-

[99] Ibid 529.

[100] See (n 16).

[101] *The Merak* (n 95) 531.

[102] Ibid 536.

[103] **Treitel/Reynolds** (n 1) para 3-034.

[104] See Lord Denning in *The Annefield* (n 16) 3: "If it is desired to bring in an arbitration clause, it must be done explicitly in bill of lading or charter party".

[105] *The Varenna* (n 66); *The Federal Bulker* (n 93).

propriate under the modern approach to the construction of contracts under English law. [106],[107]

On the other hand, the incorporation clause might expressly refer to the arbitration clause in the charter party. In this case it would not be wrong to say that the arbitration clause be incorporated into the bill of lading.[108]

Reference to the "law and arbitration" clause was made in a recent case *The Channel Ranger*[109] which was distinguished from The Merak case. However, in this case the issue was not related to the incorporation of an arbitration clause even though "arbitration" was expressly stated in the incorporation clause.

In The *Channel Ranger,* the ship owner chartered a vessel named The Channel Ranger under a time charter party. And charterers chartered the vessel under a voyage charter which was in the form of a fixture recap and the charter party was not drawn up. The fixture recap referred to the Americanised Welsh Coal Charter form 1979. The charter party was governed by English law. There was an exclusive jurisdiction of High Court of Justice of England and Wales in the voyage charter. The bill of lading was in Congenbill 1994 form and provided for incorporation of "law and arbitration" clause of the charter party.[110] There was not any arbitration clause in the charter party; there was only an exclusive

[106] See *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] UKHL 38 [2009] 1 A.C. 1101 (HL) [25] (Lord Hoffman) "… there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant". See also Lord Hoffmann in *Investors Compensation Scheme LTD. v West Bromwich Building Society Same v Hopkin & Sons (a firm) and Others* [1998] 1 W.L.R. 896, 913: "if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had".

[107] See Lord Beatson in *Caresse Navigation Ltd v. Zurich Assurances Maroc and others ("The Channel Ranger")* [2015] 1 Lloyd's Rep. 256, 381 (CA).

[108] *The Siboti* (n 93); See also **Treitel/Reynolds** (n 1) para 3-035.

[109] *The Channel Ranger* (n 107).

[110] *The Channel Ranger* (n 107).

jurisdiction clause. In this case one of the questions held by the Court was whether the terms of "law and arbitration" on the bill of lading was sufficient to incorporate the exclusive Court jurisdiction in the voyage charter party or not.

At the Court of First Instance, Judge Males held that the jurisdiction clause incorporated into bill of lading from voyage charter party. And he granted an anti-suit injunction to prevent the cargo interests including cargo insurers pursuing the legal proceedings in Morrocco.[111],[112] The Court of Appeal upheld the decision and decided that jurisdiction clause which is an ancillary clause such as an arbitration clause is incorporated into bill of lading and cargo interests and their insurers are bound by exclusive jurisdiction clause.[113]

In Channel Ranger the Court of Appeal treated to the "law and arbitration" clause as a jurisdiction clause based on the modern approach on interpretation of contracts.[114] This approach leads that the courts could correct some errors made by the parties under certain circumstances. However it should always be kept in mind that the third parties who could likely see the bill of lading and might not be aware of the charter party terms. Furthermore, although arbitration and jurisdiction clauses could be classified as collateral clauses of charter parties related to incorpora-

[111] **See** *Caressa Navigation Ltd v Office National De l`electrite and others* **(n 75) para 47: Judge Males based on** his judgement **the reasoning of J Gloster in** *Y M Mars Tankers Ltd v Shield Petroleum (Nigeria) Ltd* [2012] EWHC 2652 (Comm) para 30: "the 'Law and Arbitration Clause' referred to in the Bill of Lading clearly should be, and would be, construed as a reference to the 'Law and Litigation Clause' in the Head Charterparty."

[112] In *The Channel Ranger* (n 107) the issue was incorporation of the jurisdiction clause from voyage charter into the bill of lading. *The Channel Ranger* was distinguished from The Rena K [1978] 1 Lloyd's Rep 545, The Nerano [1994] 2 Lloyd's Rep 50; *Owners of Cargo Lately Laden on Board the MV Delos v Delos Shipping Ltd ("The Delos")* [2001] 1 All E.R. (Comm) 763 2001 WL 15080 (Com Ct) which were dealing with express "Law and arbitration" clause in the standard form of bill of lading namely Congenbill. For further details on the congenbill cases see: **Miriam Goldby**, "Incorporation of Charterparty Arbitration Clauses into Bills of Lading: Recent Developments" (2007) The Denning Law Journal vol 19 171 http://ubplj.org/index.php/dlj/article/view/382 accessed 3 July 2015.

[113] **The Channel Ranger (n 107).**

[114] **Ibid.**

tion issues, they are entirely different dispute settlement mechanisms. Moreover, since the arbitration deprive court jurisdiction parties' consent is essential to refer to the disputes to arbitration. It also means if the parties gave their consent on the arbitration it does not seem possible to acknowledge that they consented for the exclusive jurisdiction clause in the charter party. Therefore, the outcome of the Channel Ranger seems to lead decisions which might go beyond the intention of the parties.

Although *The Channel Ranger* was related to the incorporation of an exclusive jurisdiction clause, jurisdiction and arbitration clauses are treated similarly.[115] Therefore, the decision of the Court of Appeal is of importance for the interpretation of arbitration clauses in terms of incorporation. As was stated above[116] third parties to the bill of lading would be bound by the arbitration clause if the arbitration clause incorporated into charter party. Thus, the interpretation of incorporation clauses should aim to identify the real intention of the parties which is also clear for a reasonable businessman. Courts should not go beyond the parties' intention by the application of wider interpretation of the words on the documents. In other words, the intention of the parties should also be clear on the face of the bill of lading[117] to conclude that there is an arbitration agreement. This is because the arbitration clauses are not germane to the bill of lading; the consent of the parties must be obvious for a valid incorporation of arbitration.

To conclude, the wording of the bill of lading reference clause should be decisive on the issue of the validity of the arbitration clause incorporated into bill of lading[118] due to the fact that parties to a bill of lading might not be aware of the charter party terms in particular arbitration clause. The wording of the charter party terms might be taken into consideration[119] if it is clear under the facts of the dispute that the

[115] **David Joseph**, Jurisdiction and Arbitration Agreements and their Enforcement (2nd ed, Sweet & Maxwell 2010) para 5.05.

[116] See above page 13.

[117] **Goldby** (n 112).

[118] *The Varenna* (n 66); cf **Wagener** (n 92) 121.

[119] *The Merak* (n 95), *The Annefield* (n 16).

third party holder of the bill of lading and its successors are aware of the charter party terms.[120] The wording of the incorporation clause should be clear, accurate and also include specific terms in relation to arbitration for a binding effect on the third parties.[121]

III. Why should the arbitration clauses be treated differently than the other clauses in the charter party incorporated into bill of lading?

1. Introductory

"An agreement is not binding contract if it lacks certainty either because it is too vague or because it is obviously incomplete".[122] Certainty is an important aspect of the bindingness of a contract which indicates that the terms and conditions of a contract shall be clear and completed from the parties point of view. Thus, if the parties prefer to refer written standard terms and clauses instead of according them into their agreement the incorporation clause and its scope should also be certain.

Under English law general words of incorporation in a contract to standard terms and conditions is sufficient.[123] For instance, if parties to a contract of sale refer to GAFTA[124] 119 standard form which include arbitration clause[125] parties would be bound by the arbitration clause.[126] In this case the intention of the parties is to incorporate all the standard terms and conditions into their contract without any requirement to express the arbitration particularly.[127] It is because as being prudent traders parties are supposed to be aware of all the standard terms and conditions

[120] **Ambrose/Maxwell/Parry** (n 9) 51.

[121] *The Portsmouth* (n 16); *The Federal Bulker* (n 93); *The Varenna* (n 66).

[122] **Peel/Treitel**, The Law of Contract (n 68) para 2-078.

[123] Ibid para 6-003; **Ahmed** (n 80) 410-412.

[124] The Grain and Feed Trade Association.

[125] See Article 26 of the GAFTA 119.

[126] **Joseph** (n 115) para 5.35.

[127] Ibid paras 5.04, 5.10.

including the arbitration clause.[128] However if the parties purport to incorporate the terms of another contract into their contract the incorporation clause should expressly include arbitration. The reason for that, under these circumstances it is not clear that the parties are aware of the arbitration clause in the other contract that they referred to.[129]

While making decisions on the incorporation issues, "single contract" cases and "two contract" cases were distinguished by the English Courts.[130] In the former the parties might incorporate the standard terms into their contract by reference whereas in the latter parties incorporate "the terms of a contract between two other parties or between one of them and a third party".[131] It would not be wrong to say that a restrictive approach has been approved to the incorporation of arbitration clauses in two contract cases such as incorporation of charter party arbitration clause into bill of lading while general words are found sufficient in one contract cases."[132]

There are different types of standard charter parties[133] and bills of lading[134] used in shipping practice. It is also common to refer to charter party terms into bill of lading.[135] However, as well as the construction of charter party arbitration clauses and bill of lading clauses, the number

[128] Ibid para 5.10

[129] Ibid para 5.13.

[130] **Ahmed** (n 80) 412.

[131] *Habaş Sınai ve Tıbbi Gazlar Istihsal Endustri AS v Sometal SAL.* [2010] EWHC 29 (Comm), [2012] 1 CLC 448, 455 ("Habas v Sometal") (Judge Clarke); See also *Sea Trade Maritime Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd* ("The Athena") [2007] 1 Lloyd's Rep. 280, 289 (Judge Langley). Applying *The Athena* in *Aughton Ltd (formerly Aughton Group Ltd) v MF Kent Services Ltd. Aughton Ltd (formerly Aughton Group Ltd) v MF Kent Services Ltd.* [1993] WL 963255, 57 B.L.R. 1 (CA) case, which is not related to shipping contracts the contracts in question in this case were construction contracts, The Court of Appeal held that general words of incorporation are not sufficient to incorporate an arbitration clause from a sub contract; See also **Reynolds/Treitel** (n 1) para 3-015.

[132] **Hugh Beale**, Chitty on Contracts (31st ed. Incorporating Second Supplement, Sweet & Maxwell 2014) para 32-026; **Ahmed** (n 80) 412; **Treitel/Reynolds** (n 1) para 3-021.

[133] **Michael Bundock**, Shipping Law Handbook (5th edn, Informa 2011) 708-912.

[134] Ibid 691-707.

[135] See (n 3).

of the parties involved and contracts concluded may vary in every case. Moreover despite the standard forms of contracts are used in marine transportation, the parties to a bill of lading might usually differ from the parties to a charter party.[136] This is because of the transfer of the bill of lading to the consignee or endorsee. Therefore, whereas incorporation by reference to standard terms and conditions is sufficient to incorporate arbitration clauses to a contract between the original parties, the incorporation clauses in bills of lading treated differently with regard to arbitration clauses.[137] The reason for the adoption of different treatment to collateral clauses such as arbitration was "negotiable character of bills of lading" in the earlier cases whereas in later cases "commercial certainty and clarity" reasoning was developed.[138]

It may be argued that arbitration clause and other clauses such as demurrage, law etc. should be treated in the same way.[139] However, it is well established rule under English law that arbitration (and jurisdiction) clauses which are not directly related "to the shipment, carriage and delivery of the goods"[140] could not be incorporated by general terms. In *Aughton Ltd (formerly Aughton Group Ltd) v MF Kent Services Ltd*.[141] Sir John Megaw analysed the reasons for different treatment to arbitration clauses. Sir John Megaw pointed out "three factors of arbitration agreements".[142] One of the factors that Sir John Megaw stated [143] was "arbitration clause included in a contract of any nature is different from

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[136] **Ahmed** (n 80) 414.

[137] *The Portsmouth* (n 16).

[138] **Todd** (n 66) 3-5; See also **Treitel/Reynolds** (n 1) para 3-014.

[139] See **Todd** (n 66) 3: "A clause which simply defines the proper law of the contract, for example, is arguably no more germane to the receipt, carriage or delivery of the cargo, or to the payment of the freight, than an arbitration clause".

[140] *The Portsmouth* (n 16).

[141] [1993] WL 963255, 57 B.L.R. 1 (CA).

[142] Ibid 16-17: Other two factors were: "First, an arbitration agreement may preclude the parties to it from bringing a dispute before a court of law (…) secondly, an arbitration agreement has to be a written agreement".

[143] Where he cited to Lord Diplock in Bremer Vulkan v. South India Shipping [1981] A.C. 909.

other types of clause because it constitutes a self-contained contract collateral or ancillary to the substantive contract."[144]

2. Negotiable Character of Bills of Lading

The reason why should the arbitration clauses be treated differently was stated as the negotiability of bills of lading in *The Portsmouth*.[145] As a negotiable instrument[146] bill of lading might well be transferred to third parties who neither see the charter party, nor a party to charter party.[147] The negotiable character of bill of lading particularly requires special treatment in terms of incorporation of arbitration clauses.[148] This is because the arbitration agreement which might deprive the court`s jurisdiction should be able to identifiable accurately by the consignee or endorsee of the bill of lading or its successors. Otherwise, it would not be wrong to say that the third parties are not bound by arbitration clauses. This reasoning was emphasized in *The Annefield* [149] by Lord Denning.[150]

3. Commercial Certainty and Clarity

In *The Varenna*[151] Lord Oliver pointed out the requirement for the clarity and certainty in terms of incorporation of arbitration clauses.[152]

[144] See (n 131).

[145] See *The Portsmouth* (n 16) 9 (Lord Gorell)

[146] See (n 5).

[147] See **Treitel/Reynolds** (n 1) para 3-014.

[148] **Todd** (n 66) 338-340.

[149] *The Annefield* (n 16).

[150] Ibid 4: "… if it is desired to put upon the holders of a bill of lading an obligation to arbitrate because that obligation is stated in the charter party, it must be done explicitly".

[151] *The Varenna* (n 66).

[152] Ibid 597: "What does seem to me important is that documents so commonly in use and containing familiar expressions which have a well-established meaning among commercial lawyers should be consistently construed and that a well-established meaning - particularly as regards something like an arbitration clause where clarity and certainty are important to both parties - should not be departed from in the absence of compulsive surrounding circumstances or a context which is strongly suggestive of some other meaning."

The necessity for the application of the strict test while deciding on the incorporation of arbitration clauses for the clarity and certainty was also approved in *The Federal Bulker*.[153]

In *The Siboti*[154] Judge Gross followed the same approach and he stated three reasons for requirement of the clarity in this field: "(a) the status of bills of lading as negotiable commercial instruments; (b) the jurisdictional consequences of such incorporation; and (c) the importance of certainty in this area".[155]

In a recent case, *The Channel Ranger,* the need for the commercial certainty was also emphasized for the incorporation of arbitration clauses into bill of lading.[156] In this case the Court put emphasis on the modern approach of the interpretation of contracts and Lord Beatson pointed out that "had The Merak been decided today (…) Lord Sellers dissenting judgement would have prevailed."[157]

It could well be justifiable that the commercial certainty and clarity is a requirement in disputes with regard to the charter parties and bills of lading. It is because the parties to a charter and a bill of lading might commonly be different. Therefore, it should be clear and unambiguous that the original parties of a bill of lading would like to intend to incorporate the arbitration agreement in the charter party. This is because bill of lading is a negotiable[158] document and the terms that are incorporated into one should be clear and certain as it could be discernible by the third parties.

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[153] See Lord Bingham in *The Federal Bulker* (n 93) 105: "This is indeed a field in which it is perhaps preferable that the law should be clear, certain and well understood than that it should be perfect. Like others, I doubt whether the line drawn by the authorities is drawn where a modern commercial lawyer would be inclined to draw it. But it would, I think, be a source of mischief if we were to do anything other than try to give effect to settled authority as best we can".

[154] *The Siboti* (n 93).

[155] Ibid 372.

[156] *The Channel Ranger* (n 107) 259, 260.

[157] Ibid 383.

[158] See (n 5).

Finally, when it comes to arbitration clauses it could be said that these clauses should require more certainty and clarity. If there is an incorporation clause in a bill of lading any of the holders of a bill of lading including the original parties will be cognizant that the terms and conditions of the charter party which are related to bill of lading contract would be applicable to him. However, collateral clauses such as arbitration could be incorporated once it is expressly stated in the incorporation clause. Therefore, the intention of the original parties to a bill of lading should be clear and certain in terms of arbitration agreement.

Conclusion

Incorporation clauses constitute the most perplexing aspect of the applicable law to arbitration agreement issues in maritime disputes.[159] Incorporation clauses in the bills of lading and their scope have been dealt with almost more than a century by English Courts.[160] Particularly, the incorporation of arbitration clauses constitutes the most puzzling part of the problem. The problems caused by incorporation clauses are limited with three interrelated problems which were discussed in this paper: the issues what is the applicable law to the validity and existence of arbitration agreement in terms of incorporation, the binding effect of arbitration clauses incorporated into bills of lading on third parties and the justification of distinctive treatment to the arbitration agreement.

The first issue is the applicable law to the arbitration agreement in case of incorporation. If the parties expressly or impliedly choose the law applicable to an arbitration agreement this law would be applicable to arbitration agreement. If there is no choice of law chosen by the parties, the law which has the closest most real connection with the arbitration agreement would be applied. That is, the law which has the closest and most real connection with the arbitration agreement is adopted as the law of the seat under English law.[161]

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[159] **Ambrose/Maxwell**, Parry (n 9) 70.

[160] As of *Hamilton & Co. v.Mackie & Sons case [1889]* (n 88).

[161] See (n 33).

However, it is common practise that parties usually refer to charter party terms and conditions to incorporate them into bill of lading contract. And parties usually choose the applicable law neither to the bill of lading nor to the arbitration agreement in the bill of lading. It is because the arbitration agreement and applicable law are commonly set forth in the charter party. Therefore, in that respect English Courts developed a presumptive solution which is the putative proper law of the bill of lading. In recent cases, the putative proper law of the bill of lading has been determined on the presumption that the arbitration clause is validly incorporated from charter party[162]. In earlier cases the English Courts applied directly the law governing the charter party to the incorporation issues[163].

On the other hand, Article V (1) (a) of the New York Convention to which the UK is party, provides for the applicable law to the arbitration agreement. Under this article, if the parties do not choose the applicable law to the arbitration agreement, the law of the seat will be applied to the validity of the arbitration agreement. It could be suggested that by taking into consideration the enforceability of the awards and the three stage test applied by the English Courts as the law which has the closest and most real connection with the bill of lading should govern the incorporation issue.

Secondly, the question of as to whether the arbitration clauses incorporated into bill of lading bind the third parties addressed. Arbitration clauses in charter parties may be enforced against the due holder of a bill of lading- namely the consignee or endorsee and its successors who might not be a party to the charter party. In most cases the parties to a charter party and bill of lading are different, and so the holder of the bill of lading may not be aware of the charter party terms in many cases. Therefore the wording of the bill of lading should primarily be reviewed related to the incorporation issues. If the arbitration clause is validly incorporated into bill of lading, it would bind the third parties. Under English law, if the incorporation clause is in general terms, only the terms

[162] See (n 37).

[163] Ibid.

and conditions of the charter party which are "germane to the shipment, carriage, delivery of the goods"[164] will be incorporated into bill of lading. However, under English law ancillary clauses, for instance arbitration clauses might not be incorporated without express words referring to an arbitration clause in the charter party.

In the third part of this paper the reason of the distinctive treatment to arbitration clauses was examined. In principle referring to standard terms and conditions by general terms is sufficient to incorporate standard terms and conditions including the arbitration clause into the contract. However English Courts made distinction between single and two contract cases. For the latter case, the parties to the first contract and the second contract are different than each other, i.e. charter party and bill of lading contracts. Moreover as a negotiable instrument, bill of lading might be transferred to third parties who will be a party to bill of lading therefore the intention of the parties with regard to the incorporation of the arbitration clause should be expressly stated. In the recent cases, the distinctive treatment to the arbitration clause was explained under the need for the commercial certainty and clarity in this field- particularly in cases where third parties were involved.

To conclude, arbitration is a private dispute resolution mechanism. The parties' intention to refer their disputes to arbitration should be clearly an explicitly identifiable in express terms in the bill of lading.[165] Therefore, bills of lading and charter parties should be drafted carefully particularly in case of arbitration agreements.

[164] See (n 16).

[165] See **Goldby** (n 112) 179: Specific words view would be in the same line with Article 83 of the Rotterdam Rules.

List of Abbreviations

AC	:	Appeal Cases
ALL ER (Comm)	:	All England Reports (Commercial Cases)
B.L.R.	:	Building Law Reports
CA	:	Court of Appeal
Cf	:	Confer
Com Ct	:	Commercial Court
COGSA	:	Carriage of Goods by Sea Act 1992
CUP	:	Cambridge University Press
EAA	:	English Arbitration Act
EC	:	European Council
ECJ	:	European Court of Justice
Edn	:	Edition
EU	:	European Union
EWCA Civ	:	Court of Appeal Civil Division
Ff	:	And the following pages
HL	:	House of Lords
Ibid	:	Ibidem
N	:	Number
NYC	:	The United Nations Convention on The Recognition and Enforcement of Foreign Arbitral Awards
OUP	:	Oxford University Press
Para	:	Paragraph
Paras	:	Paragraphs
Rep	:	Report
UKHL	:	United Kingdom House of Lords
V	:	Versus
Vol	:	Volume
WLR	:	Weekly Law Reports

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Mediation as an Option for International Commercial Disputes

Uluslararası Ticari Uyuşmazlıklar İçin Bir Seçenek Olarak Arabuluculuk

Assoc. Prof. Dr. jur. Zeynep Derya Tarman*

Abstract:

Over the last decade the approach taken by commercial parties towards dispute resolution has changed. While traditional forms of dispute resolution (i.e. litigation and arbitration) remain popular, commercial parties are increasingly looking to alternative forms of dispute resolution to find methods which better suit their commercial needs and deliver efficient and effective results. Mediation often provides the answer. Mediation allows the parties to keep control of a dispute and to aim at a commercial solution rather than legal remedies. It can turn a dispute from a business threat into a business opportunity. Therefore, mediation is a first option – arbitration and litigation are alternatives. In this paper, in addition to explaining the characteristics of mediation and how the process works, the advantages and disadvantages of mediation is explained, and suggestions how to promote mediation in commercial disputes are discussed.

* Assoc. Prof. Dr. jur; Koc University Law School, Istanbul/Turkey, Department of Private International Law. E-mail: ztarman@ku.edu.tr.

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Key Words: Mediation, Commercial Disputes, Alternative Forms of Dispute Resolution, Charachteristics of Mediaion, Enforcement of Settlement Agreements.

Özet

Ticari sözleşmelerin taraflarının uyuşmazlık çözümü konusundaki yaklaşımlarının özellikle son yıllarda değiştiği görülmektedir. Ticari uyuşmazlıkların çözümü konusunda mahkeme yargılaması ve milletlerarası tahkim tercih edilmekle beraber, taraflar ticari menfaatlerine daha iyi hizmet edecek etkili çözüm yolları arayışlarına girmişlerdir. Ticari uyuşmazlıkların çözümü konusunda arabuluculuk çok avantajlı bir uyuşmazlık çözüm yolu olarak karşımıza çıkmaktadır. Arabuluculuk, taraflara hukuki bir çözümden ziyade ticari bir çözüm olanağı getirmekte ve ticari bir riski ticari bir fırsata dönüştürebilme imkânı sağlamaktadır. Arabuluculukta kararı veren tarafların bizzat kendileri olmaktadır. Taraflar karşı karşıya değil bir araya gelmektedir, çünkü arabuluculukta amaç tarafların kazan-kazan çözümler üretmesi için bir ortam sağlamaktır. Bu nedenlerle, arabuluculuk ilk aşamada başvurulması gereken bir uyuşmazlık çözüm yolu olarak göz önünde bulundurulmalıdır. Bu çalışmada, arabuluculuğun özellikleri ve sürecin işleyişi hakkında bilgi verildikten sonra arabuluculuğun avantajları ve dezavantajlarına değinilecek, son bölümde ise ticari uyuşmazlıklarda arabuluculuğun nasıl daha etkin hale getirilebileceği konusundaki önerilere yer verilecektir.

Anahtar Kelimeler: Arabuluculuk, Ticari Uyuşmazlıklar, Alternatif Uyuşmazlık Çözüm Yolları, Arabuluculuğun Özellikleri, Sulh Sözleşmelerinin Icra Edilebilirliği.

I. Introduction

Over the last decade the approach taken by commercial parties towards dispute resolution has changed. While traditional forms of dispute resolution (i.e. litigation and arbitration) remain popular, commercial parties are increasingly looking to alternative forms of dispute resolu-

tion ("ADR") to find methods which better suit their commercial needs and deliver efficient and effective results. Mediation often provides the answer.

Mediation is an ADR mechanism in which a third party assists conflicting parties in order to reach an amicable settlement of their disputes arising out of or relating to a contractual or other legal relationship. Whether an agreement results or not, and whatever the content of that agreement, if any, the parties themselves determine rather than accepting something imposed by a third party[1]. The mediator does not have the authority to impose upon the parties a solution to the dispute.

In this paper, in addition to explaining the characteristics of mediation and how the process works, the advantages and disadvantages of mediation is explained, and suggestions how to promote mediation in commercial disputes are discussed.

A. Characteristics of Mediation

Mediation is a voluntary process whereby a neutral third party facilitates negotiations between the parties to a dispute to help them find a consensual outcome. The mediator is actively involved but generally has no power to adjudicate or say who is right and who is wrong[2]. Importantly, in mediation the parties retain ultimate control over the decision of whether to settle and on what terms[3].

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1 For definition of mediation please see Wells Jr, Southern Illinois University Law Journal (2003), p. 652.; John G Bruhn & Howard M Rebach, Handbook of Clinical Sociology, (Springer Science & Business Media. 2012). Moffitt&Schneider, Dispute Resolution: Examples & Explanations. 2011., p.83, see also Reismann, International Commercial Arbitration: Cases, Materials, and Notes On The Resolution of International Business Disputes, 1997., p.74.

2 Ivan Bernier & Nathalie Latulippe, Conciliation as a Dispute Resolution Method in the Cultural Sector, The International Convention on The Protection and Promotion of The Diversity of Cultural Expressions, p.4.

3 Thomas D. Cavenagh & Lucille M. Ponte, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 93.

Since the participation of the parties and the mediator is voluntary, the parties and/or the mediator have the freedom to leave the process at any time. The mediator may decide to stop the process for ethical or other reasons, and the parties may decide that they are not satisfied with the process. The agreement, which is reached between the parties, is voluntary; the parties own it and are responsible for implementing it. Unlike arbitrators and judges, mediators do not bear binding decision authority[4].

B. Advantages of Mediation

Mediation has a special advantage when the parties have ongoing relations that must continue after the dispute is managed, since the agreement is by consent and none of the parties should have reason to feel they are the losers[5]. Mediation provides an opportunity for conflicting parties to maintain their current relationship by resolving dispute by a win-win solution and accordingly establish strong long-term business relationship. Mediation is increasingly adopted during long term contracts, particularly in international infrastructure and construction contracts, where nominated mediators are brought in at short notice to help the parties move round problems which would otherwise delay or destabilize the project. As this indicates, mediation can be particularly useful where the parties wish to continue a business relationship which could be damaged by aggressive court or arbitral proceedings. Consequently, mediation may be appropriate when there is potential for preserving an ongoing relationship.

Apart from the advantage mentioned above, the flexibility can be count as another advantage of mediation. Parties of a dispute are entitled to determine process of the mediation in accordance with interest and needs of each party. This may involve the choice over location of the me-

[4] Cavenagh & Ponte, p. 93; Bruhn & Rebach, p.199; Meadow, International Encyclopedia of the Social and Behavioral Sciences, Elsevier Ltd (2015)., p.3; Runesson & Guy, Mediating Corporate Governance Conflicts and Disputes, 2007., p.25.

[5] Yona Shamir, Alternative Dispute Resolution Approaches and Their Application, No.7, p.30

diation, the time frame, the people who are to be involved, the selection of acceptable objective criteria, and many other choices related to the process[6].

Mediation is less costly when compared adjudicative ADR methods. Mediation can normally be completed in multiple conferences between conflicting parties. Furthermore, mediation is not a formal evidentiary process requiring extensive use of expert witnesses or demonstrative proof. As a result, the costs associated with the use of expert witnesses, trial counsel and case preparation are substantially reduced or even eliminated[7].

Another charming feature of mediation is the speed of the proceedings of which parties can resolve their dispute faster than adjudicative methods. There are various reasons of this circumstance; first, mediators are present to manage negotiation, not to represent a party or render a legal decision, they need not prepare extensively to conduct the conference[8]. Second, the vast majority of countries face a spectacular problem of overcrowded court dockets which cause considerable delay in trials.

One advantage of mediation in the international commercial context is that the parties have an opportunity to develop a creative outcome. Mediation process offers wide range of settlement options which is limited only by the imagination of the parties and the mediator. Although certain forms of injunctive relief are possible through litigation, most judges and juries think of the resolution of a civil case in dollar terms. Conversely, mediation allows parties to consider a far wider range of remedies. Long-term structured payment schedules and annuities allow parties to treat economic outcomes more creatively[9]. Since agreement is made by consent, parties are generally free to create value with their settlement for example, by developing new business relationships that were not originally contemplated[10].

[6] Shamir, p.30.

[7] Cavenagh & Ponte, p. 94.

[8] Cavenagh & Ponte, p. 94.

[9] Cavenagh & Ponte, p. 94.

[10] Brette Steele, Enforcing International Commercial Mediation Agreements as Arbitral

Mediation allows the parties to present their arguments in an informal manner, not bound by the procedures of the legal system. The parties may discuss their positions, and thus, generally feel that their concerns and positions are heard and dealt with fairly, regardless of the outcome. Once the parties believe that their positions have been accurately heard and discussed, tensions often diminish and a new receptivity develops, thus opening the parties' minds to a creative and consensual solution[11].

As mentioned above, parties are, at any time, free to opt out mediation proceedings without any valid or justified reason. Besides mediation process shall not preclude parties' main right to apply more formal dispute resolution mechanism such as arbitration or litigation. Parties are therefore free to strive for a settlement without jeopardizing their chances for or in a trial if mediation is unsuccessful[12].

One of the greatest advantages of mediation is that the parties discuss the issues confidentially[13]. Litigation is usually open to public while all written and/or oral correspondences through the course of mediation are private. The confidentiality of mediation may encourage parties to speak more openly and allow the true reasons for the disputes to emerge more quickly[14]. It is not only the mediation itself that is confidential: the sessions between the mediator and each party before, during and after the mediation will also usually be protected under confidentiality.

With all these advantages, mediation often results in settlement, thereby reducing the large volume of arbitration and litigation. Mediation may also change an adversarial relationship into a cooperative one, potentially improving the relationship between the parties. Even if mediation does not lead to a resolution, the parties are no worse off because they may still take advantage of arbitration or litigation. Moreover, they have had the opportunity to narrow the disputed issues and structure the

Awards under the New York Convention, 54 UCLA Law Review 1385 (2007), p. 1399.

[11] Shamir, p.30.

[12] Cavenagh & Ponte, p. 94; Runesson&Guy, p. 26.

[13] Radford Mary F., Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters, 1 Pepperdine Dispute Resolution Law Journal 2012, p.242.

[14] Radford, p.242.

framework for future negotiations. Consequently, parties who wish to maintain a harmonious business relationship and to preserve their contractual and commercial ties often prefer mediation.

C. Disadvantages of Mediation

Like other ADR methods, mediation also has its disadvantages. Most sensitive disadvantages of mediation are:

The formalized procedural and evidentiary rules of due process designed to protect parties and associated with the trial or arbitration of lawsuit are lacking in mediation[15].

Parties of a dispute cannot apply to appeal process in the event that the privately negotiated agreement is later determined by one of the parties to be flawed in some way. All mediation process and agreement is strictly confidential and accordingly it is never performed on the record or recorded by a clerk. Owing to that, unlike arbitration and litigation, mediation agreements are virtually impossible to appeal[16]. Consequently, parties of the mediation process are usually bound by the agreement reached mutually and in accordance with the interests and needs of conflicting parties. It is possible to argue that an agreement was tainted by fraud, duress or some other legal defence to a contract, but this is much different from formally appealing a court's judgement or setting aside an arbitrator's decision[17].

Lack of standardized rules and process sometimes makes mediation inconsistent, haphazard, unpredictable and unreliable.

If the mediation does not result in a settlement then the parties may encounter additional costs stemming from the need of following any other dispute resolution mechanism in order to procure a binding and valid decision as to the dispute at stake.

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[15] Cavenagh & Ponte, p. 95.

[16] Cavenagh & Ponte, p. 95.

[17] Cavenagh & Ponte, p. 95.

In case of settlement one may ask whether that settlement agreement can be enforced in another jurisdiction. Unlike arbitration, there is no similar network of treaties relating to the enforcement of foreign judgments. International commercial arbitration is therefore distinguishable from both international litigation and international mediation with respect to enforceability issues[18].

II. Overview of the Mediation Process

One of the main characteristics (and advantages) of mediation is flexibility: the identity of the mediator and the procedure and format are agreed by the parties in accordance with their commercial needs. As such, there is no universal procedure but typically, commercial mediations go through at least four main phases: Preparation, Opening session, Private meetings (often called "caucus sessions") and Conclusion.

Mediation usually commences upon a request of one party to solicit the participation of other parties to the dispute. Upon receiving the request of mediation, the prospective mediator shall declare that there is no conflict of interest exists between him or herself and parties of the dispute. Application of the conflict of interest restriction is quite sensitive issue and therefore there are lots of open doors for abuse. Mediator should not have an interest in the substance or outcome of the dispute and also any relationship with the parties of the dispute at stake. Through the course of negotiation process, mediator should serve as a facilitator not as a supporter of any party. Owing to that mediator shall remain impartial and keep his or her distance between the parties of the dispute. If no conflict of interest exists, the mediator will contact all relevant parties in order to explain the mediation process and secure participation of the parties.

The appointment of the mediator can be critical to the success of the mediation. If there is a mediation clause in the contract this will often

[18] Strong, Washington University Journal law & Policy (2014)., p.28, see also Peter Rutledge, Convergence and Divergence in International Dispute Resolution, J. Disp. Resol. (2012)., see also Runesson & Guy,. p.41.

provide the method for appointment. Most mediators of commercial disputes are lawyers but legal training is not a necessary qualification and other professionals, such as engineers or architects, often act as mediator. They can be appointed via mediation services providers (who often have panels of accredited mediators) or parties can elect to agree on a mediator[19]. At this point the Turkish legislator departed from the flexibility regarding the qualifications necessary for acting as a mediator. Turkish law requires mediators to be registered as such with the relevant central registry. Only Turkish citizens, who are graduates of law faculty with at least five years' experience, have full capacity and have no criminal convictions may be registered (Turkish Mediation Act Art. 20). The standard mediation training and written and oral examinations conducted by the Ministry of Justice are compulsory.

For disputes arising out of international business transactions the parties may want to choose a mediator with international experience and cultural sensitivity. By selecting an experienced international mediator who both respects and understands cultural differences, the parties may minimize their concerns and frustrations of not being understood or being misunderstood throughout the mediation process.

After receiving consent of relevant parties to proceed with mediation, the mediator will send an agreement to mediate which is a formal document and demonstrates the expectations of the parties and mediator[20]. The agreement is normally in a contractual form and contains, among other things, guarantees regarding the confidentiality of the process, the finality of any agreement reached, and the authority to settle[21]. The parties usually sign such agreement in the first mediation meeting. The mediator will confirm that all parties participating agree to do so with full authority to settle the case.

Normally the mediation process initiates with a brief, to the point and informal mediator's opening statement. Opening statement includes

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[19] Cavenagh & Ponte, p. 107.

[20] Bruhn & Rebach, p.207.

[21] Cavenagh & Ponte, p. 99.

details as to the mediation process and roles of both parties and the mediator. Following the mediator's opening statement, the party opening statements will be delivered to the mediator. Party opening statements involves a summary of the facts, issues and desired outcome.

Party opening statement affords an opportunity to the mediator to examine parties' position in order to proceed in a productive manner. Subsequently, the mediation process will continue with facilitated negotiation. Through facilitated negotiation period, the mediator will attempt to facilitate incremental compromise from both parties toward settlement. This is accomplished most significantly by helping the parties to expand the sources by identifying assets not previously described by the parties, by redefining or reconfiguring certain assets, or by looking for noneconomic assets that may be of some value to the parties[22].

The mediator is entitled to conduct private meetings with each party together with the mediation meetings. These private meetings is termed as *caucus* and allow parties to address issues which are not appropriate to discuss or disclose in open sessions, such as strengths and weaknesses of particular aspects of the case. Caucus meetings are strictly confidential and thus parties of a dispute at stake are feeling significantly freer to disclose confidential information as to their case and claims.

Parties are entitled to walk away from mediation whenever they deem such process as insufficient. Nonetheless, if parties find common way to settle the dispute at stake, the mediator will assist parties with regard to the closure. At this stage, the mediator has two roles to play in the closure scene. First, the mediator will assist parties to reach a point of final, formal acceptance of the settlement. Furthermore, the mediator is under obligation to remind the parties of the finality of any agreement reached via mediation process. Second, the mediator will also assist the parties while drafting the agreement because most successful mediation meetings result with an agreement that is final, permanent and immediate. This type of resolution is desirable because it is usually viewed as a "win-win" solution.

[22] Cavenagh & Ponte, p. 99.