

Kluwer Arbitration Blog

Arbitration and the Shipping Industry: A Discussion on Bills of Lading

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Shipping disputes might range from minor issues to complex jurisdictional claims with several parties involved in the contracts. Due to the popularity and observed benefits of arbitration, such as the privacy of the arbitral process and perceived certainty in the binding nature of arbitral awards, arbitral agreements have grown in use with the increase in international trade. Despite the size or complexity of the matters involved, parties prefer to opt for alternative, cost effective, and efficacious forms of dispute resolution. It is, therefore, common for contracts – which govern marine adventures and those for the sale of goods – to contain an arbitration agreement, and a set of arbitral rules which will govern the dispute resolution between the parties. The overwhelming majority of such contracts worldwide provide for arbitration in London in accordance with the terms of the London Maritime Arbitrators Association (LMAA). [The 2018 Statistics released by LMAA](#) show a number of 508 awards issued in 2018 and a number of 21 mediation proceedings conducted in the same year.

Some cases involving maritime issues and arbitration became notorious also in the context of broader issues, such as the power of the courts of the Member States of the European Union to issue anti-suit injunctions under the [Brussels Regulation](#). In *Allianz Spa and another v West Tankers inc* (THE “FRONT COMOR”) Case C-185/07 [2009], the CJEU indicated that it is for the court (first) seized to exclusively rule on the arbitration agreement objection and on its own jurisdiction and that resorting to anti-suit injunction to prevent the court from doing so “necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation no. 44/2001 [Brussels Regulation]” and “runs counter to the trust which the Member states accord to one another’s legal systems and judicial institutions”.

In *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd (The “Sea Master”)*, QBD (Comm Ct) (Poplewell J) [2018] EWHC 1902 (Comm), the judgment establishes an example of reconciling the [competence-competence principle](#) with the rights and obligations of the parties. The judgment contains an interesting discussion on the auxiliary stance of arbitration clauses inserted in commercial contracts, with an interesting illustration on the effects on challenges to arbitral jurisdiction under the [Carriage of Goods by Sea Act 1992](#) (“COGSA 1992”). Further, the discussion is contextualised with reference to the rights and obligations of Bill of Lading (BoL) holders. Bills of lading are important documents within shipping transactions. A BoL is a document issued by the carrier to the shipper of goods. It is a negotiable instrument, which serves several purposes, amongst those are the receipt for the goods shipped; it evidences the contract of carriage, and also serves as a document of title, *viz.* for ownership purposes. One important aspect

which is attached to the BoL, is that it serves as a security for trade finance providers.

In the light of the judgment of Popplewell J, parties must now be aware that when holding a BoL as security that such a holder of a *BoL may become subject to an arbitral tribunal's jurisdiction which has been formed under an arbitration agreement, contained in or evidenced by the BoL*,¹⁾ irrespective of the fact that they are not seeking to exercise rights under the BoL. Based on the Courts' decision, one must note that an arbitration agreement is separate and independent from the contract, under the doctrine of separability, as confirmed by Popplewell's J:

"[O]ne could not assume that a statute such as COGSA which addresses the substantive rights and obligations of the parties under a matrix contract intends to treat the rights and obligations under the ancillary arbitration agreement in precisely the same way."

The *Sea Marine* case further provided how rights and obligations operate in practice when a BoL incorporates an arbitration agreement. Section 2(1) of the COGSA 1992 provides that *"the lawful holder of a bill of lading... shall (by virtue of becoming the holder of the bill...) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract."* Essentially, it provides that contractual rights entailed in the BoL are automatically vested with the holder. Therefore, the rights obtained by and obligations imposed upon the holder of a BoL are governed under the statute. Contrary to section 2, section 3 of the COGSA 1992 sets out that obligations and liabilities entailed in a BoL only apply to the holder; amongst those are *"taking or demanding delivery of the goods under the contract of carriage, making a claim under the contract of carriage against the carrier in respect of any of those goods, or is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods, that person shall become subject to the same liabilities under that contract as if he had been a party to that contract"*. Bearing this in mind, it has been discussed that the holder of a BoL who is a party to the carriage of goods due to section 2 of the COGSA 1992, is bound by an arbitration clause, irrespective of the fact that the liability incurred has not been triggered by the factual events required by section 3 of the COGSA 1992. Therefore, the importance of this case in arbitration is that the Commercial Court ruled that *"the holder of a BoL which includes or incorporates an arbitration agreement is subject to the jurisdiction of a tribunal formed under the arbitration agreement"*²⁾, regardless if the holder is not seeking to exercise any rights under the BoL. This formulates the legal stance, irrespective of whether parties are seeking to exercise their rights under the BoL or are no longer holders to the BoL.

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References

- ?1 Watson Farley & Williams, [Do arbitration agreements in bills of lading bind their holders?](#), August 2018.
- ?2 [Do arbitration agreements in bills of lading bind their holders?](#) Watson Farley & Williams, August 2018, *see here*.

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