

# Dubai court of Cassation judgment: Incorporation of Arbitral Clause by reference in bill of lading

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Most arbitral clauses are contained within the main body of a contract. However sometimes parties find it convenient to agree the specifics of an agreement in one document, and then refer to another document for the standard terms.

The terms in this other document are then incorporated by reference and become part of the contract. One of these standard terms may be an arbitration clause.

Such practices can create problems under UAE law because arbitration is considered a special form of dispute resolution which takes away the jurisdiction of the national courts. As such, parties must be shown to have consciously agreed to arbitration (usually evidenced by their signature on the contract), and this may not be the case if the clause is found embedded in a separate list of standard terms referred to in the main body of the contract.

In the case reported below, the Dubai Court of Cassation held that an arbitration clause in a charter party (which is a contract between a ship owner and merchant for the hire of a ship and delivery of cargo) that was referred to in a bill of lading (the document listing the goods to be transported) was sufficiently clear to enable the arbitration clause to be incorporated by reference.

## **Background**

The Appellant (an insurance company) initiated civil court proceedings against the Respondent (a ship owner) seeking judgment for US\$ 2,364,065 (AED 8,676,120.2). Pursuant to a Bill of Lading, the Respondent had agreed to transport and ship a consignment of sulfur fuel oil on board the Respondent's vessel from Yanbu Port, Saudi Arabia, to Khorfakkan Port, UAE, to be delivered to a third party. Upon the arrival of the vessel at Khorfakkan Port, the third party discovered that the consignment had become contaminated in transit.

The Insured (the consignment owners) had an insurance policy whereby the Appellant agreed to indemnify the third party or its subsidiaries) against any damage arising from the transport or shipment of any quantity of crude fuel oil, gas, diesel, or any other petroleum products specified in the bill of lading. On that basis, the Appellant proceeded to appoint loss adjustors to inspect the consignment and assess the quantum of damages sustained by the Appellant. The loss adjustors' survey concluded that the Respondent was liable for the contamination of the consignment and assessed the damages at US\$ 2,340,065.45. The Appellant paid this amount to the third party and then brought the claim against the Respondent for compensation.

The Respondent objected to the proceedings on the basis of an arbitration clause. The charter party stated that all disputes and differences arising out of the charter party shall be referred to arbitration. This clause was incorporated into the bill of lading because the bill stated that "arbitration clauses contained in the vessel's charter party are herewith incorporated and form part hereof".

## **Court of First Instance**

The Court of First Instance ordered the Respondent to pay to the Appellant the sum of AED 8,676,120.2 plus interest. The Court dismissed the objection against the proceedings and held there was no arbitration clause.

### **Court of Appeal**

The Respondent appealed in Civil Appeal No. 325-2011. The Court of Appeal overturned the decision of the Court of First Instance and held that there was an arbitration clause.

### **Court of Cassation**

The Appellant appealed to the Court of Cassation.

The Appellant (the Insurer) argued that the bill of lading did not contain any explicit or implicit agreement showing intent on the part of the parties to have any dispute arising between them in relation to the consignment resolved through arbitration. The bill of lading (an original English copy of which was submitted to the Court) was a printed form that contained, amongst other things, sections dealing with the details of the charter party that had been left blank. Since there was no charter party for the vessel among the documents and the bill of lading itself does not establish the intent of the parties to refer any disputes between them to arbitration, there was no arbitration clause.

The Court of Cassation disagreed. It held that arbitration clauses in charter party agreements are often incorporated by reference to the bill of lading. While mere reference in a bill of lading to the validity of all the conditions of a charter party is not sufficient to incorporate the arbitration provisions into the bill of lading, a charter party arbitration clause that is clearly referred to in the bill of lading will be incorporated into the bill of lading. It follows that the parties to the bill of lading intended to refer their dispute to arbitration according to the arbitration clause contained in the charter party.

### **Conclusion**

The important aspect of the Court of Cassation's judgment is that the arbitral clause was incorporated because it was explicitly referred to in the bill of lading as existing in the charter party. Had the bill of lading merely referred simply to the charter party terms, the arbitral clause would not have been upheld. This is consistent with the court's longstanding view that arbitration is a special form of dispute resolution and parties will only be held to have agreed to arbitration if there is some evidence that they are aware of having done so.

It is advisable then when incorporating standard terms by reference which contain an arbitration clause, either the arbitration clause should be explicitly mentioned in the main contract, or the standard terms should themselves be signed so there is some evidence that the parties were both aware of their terms and the arbitration clause within.