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Status of Non-Signatory Parties in Maritime Arbitration: London and New York Compared

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Introduction

Consent
is the cornerstone of arbitration

- **However, in the maritime industry:**

✓ It is frequent for maritime contracts to be assigned; or

✓ To be entered into by third parties within relations of agency;

✓ Bills of lading can bind its holders to the charterparty arbitration clause;

✓ Maritime operators frequently function in corporate group structures in which affiliated companies operate in specific areas regarding transactions that are strongly interrelated.

Purpose of this presentation

1. Analyze and discuss on a comparative basis the approaches taken by the arbitral tribunals (and by the courts) regarding non-signatory parties within the context of the two major maritime arbitration hubs: London and New York City;

2. Look into the LMAA and the SMA;

3. Conclude with a reflection regarding which of the approaches better serves the maritime community in achieving a balance between legal certainty and commercial practicality.

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London

The LMAA
THE LONDON MARITIME ARBITRATORS ASSOCIATION

- ✓ World's dominant maritime arbitration hub;
- ✓ The majority of maritime arbitrations are conducted under the LMAA;
- ✓ Three thousand appointments and more than four hundred awards are estimated to be anually issued;
- ✓ LMAA arbitrators can also be lawyers;
- ✓ The vast majority of the awards are not public.

➢ **General Rule**: "*Doctrine of Privity of contract*"

- Arbitration proceedings shall be ruled by the **Arbitration Act 1996**;

  - Section 6(1) - defines arbitration agreement as "*an agreement to submit to arbitration present or future disputes*".

- **Exceptions:**

1. Agency;
2. Assignment;
3. Incorporation by reference;
4. The Contracts (Rights of Third Parties Act) 1999;
5. Group of Companies / alter ego / veil piercing.

1 - AGENCY

- It is frequent for maritime contracts to be entered into by an agent who, with actual or apparent authority, acts in representation of another party;

- Agency relationships can bind a "*third party*" - the principal - to an arbitration agreement regardless of the fact that the agreement is not directly executed by such party;

  In London Maritime Arbitration 16/07 [2007] 721 LMLN 3 - the Respondent was bound to arbitrate given that "*P*" was indeed acting as the Respondent's agent and had sent a fixture recap e-mail which incorporated the terms of a charter that included a London arbitration clause.

  In London Maritime Arbitration 13/16 [2016] 952 LMLN 4 the Tribunal held that it had no jurisdiction over a company described in a booking note contract as "*Merchant's representative at loading port*" since it was not a party to the contract.

2 - ASSIGNMENT

- A party to a maritime agreement can agree to assign its rights and obligations to a third party (the “assignee”) including the arbitration provision;
  - ✓ *Shayler v Woolf* [1946] Ch 320.

- Assignment is currently recognized by section 82(2) of the English Arbitration Act 1996 which states that references to a party to an arbitration agreement include any person claiming "*under or through a party to the agreement*“.

- The assignee, although a non-signatory to the original agreement will generally be bound by the arbitration provision.
  - ✓ *The Jay Bola* [1997] 2 Lloyd’s Rep 279 cited with approval in *Starlight Shipping* v *Tai Ping Insurance Co Ltd Hubei Branch* [2007] EWHC 1893 (Comm);
  - ✓ *West Tankers Inc* v *Ras Riunione Adriatica di Sicurta, The Front Comor* [2005] EWHC 454 (Comm) [2005] 2 Lloyd’s Rep 257.

3 - INCORPORATION BY REFERENCE

- Commonly associated with the question of whether a bill of lading successfully incorporates an arbitration provision included in a charterparty;

- Section 6(2) of the 1996 Arbitration Act - "*The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement;*

- Particular difficulties arise as to in which cases the reference is efficiently made:
  - ✓ The analysis should be made on a basis of construction of the meaning of the words as a whole in their context and of the parties' intentions;
  - ✓ As a principle, general words of incorporation in a bill of lading will not effectively incorporate an arbitration clause in a charterparty (*Caresse Navigation Ltd v Zurich Assurances MAROC and others (Channel Ranger)* [2014] EWCA Civ 1366 - This principle is "*an exception to the general approach of English law which in principle accepts incorporation of standard terms by the use of general words*");
  - ✓ The words should refer specifically to the arbitration provision.

4 - CONTRACTS (RIGHTS OF THIRD PARTIES ACT) 1999

- Allows a third party, on its own right, to enforce terms in a contract where there is an express provision allowing such enforcement or where, subject to a contrary intention, the term purports to confer a benefit (Section 1);

- Section 8(1) - If it is shown that the substantive term is within the range of Section 1 and that the third's party right to enforce is subject to an arbitration agreement, the third party - although a non-signatory of the agreement that contains the arbitral clause - shall be treated as such in order to enforce its right;

- This statute has had a significant impact regarding non-signatories within the maritime arbitration making it easier for non-signatories to enforce its rights:
  - ✓ **Independent contractors** (e.g. stevedores) can more effectively rely on exclusion or limitation clauses inserted into bills of lading or charterparties;
  - ✓ **Brokers** find it simpler to sue for commission under charterparties or ship sale contracts (*LMAA Arbitration 7/2006 [2006] LMLN 688*).

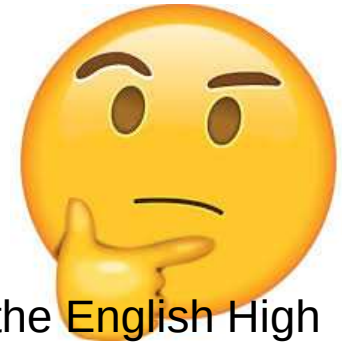
5 - GROUP OF COMPANIES / ALTER EGO / VEIL PIERCING

a) ***Group of Companies doctrine***: Corporate relations can be so close as to constitute a single economic unity, which together with an interpretation of the intent of the parties, can justify binding a non-signatory affiliate to an arbitral agreement;

↳ *Dow Chemical France v. Isover Saint Gobin (ICC Case n.º 4131)*

- Maritime arbitrators and courts in London have evidenced great reluctance towards this doctrine vigorously upholding the doctrine of independent legal personality (*Salomon v A Salmon & Co. [1897] A.C. 22)*.

- Examples:
  - ✓ *London Maritime Arbitration 3/14 (2014) 891 LMLN 4;*
  - ✓ *London Maritime Arbitration 2/14 (2014) 891 LMLN 3;*
  - ✓ *London Maritime Arbitration 2/14* 19/97 [1997] 472 LMLN 4;
  - ✓ *Peterson Farms Inc. v C&M Farming Ltd* [2004] EWHC 121 (Comm) the English High Court stated: **"*English law treats the issue as one subject to the chosen proper law of the Agreement and that excludes the doctrine which forms no part of English law*"**.



5 – GROUP OF COMPANIES / ALTER EGO / VEIL PIERCING

b) **Piercing the corporate veil**: the arbitral tribunal or court puts aside the limited liability of a company and may hold its shareholders / directors bound to arbitrate;

- Again, maritime arbitrators and courts in London have evidenced reluctance towards this doctrine, applying it only on a very exceptional basis;
  - ✓ *Antonio Gramsci Shipping Corporation v Stepanovs* ([2011] EWHC 333 (Comm));
  - ✓ *Alliance Bank JSC v Aquanta Corporation* ([2011] EWHC 3281 (Comm);
  - ✓ *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5;
  - ✓ *Prest v Petrodel Resources Ltd.* [2013] UKSC 34.

- Basic requirements:

i. There must exist some impropriety amounting to dishonest abuse of the company to pierce involving something akin to a "*sham*" transaction;
ii. The transaction has the purpose of avoiding a legal restriction or defeating rights of third parties.

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New York City

- ✓ Second most important maritime arbitration hub in the world;
- ✓ Home to the Society of Maritime Arbitrators, Inc., the leading maritime arbitration institution in the United States;
- ✓ SMA routinely publishes full reasoned awards. More than 4200 awards have been published;
- ✓ None of SMA members are practicing attorneys.

- **1925 Federal Arbitration Act (FAA)**

  ✓ Section 2: *a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction*" shall be "*valid, irrevocable and enforceable*, *save upon such grounds as exist at law or in equity for the revocation of any contract.*"

- **Exceptions:**

  1. Agency;
  2. Incorporation by reference;
  3. Assumption
  4. Estoppel
  5. Veil piercing / Alter Ego.

  (*Thomson-CSF, S.A. v American Arbitration Association,* 64 F.3d 773 (2d Cir. N.Y. Aug. 24, 1995).

1. **Agency;**

2. **Incorporation by reference;**

Do not comprise particular differences upon binding non-signatories when comparing to London.

3 - ASSUMPTION

- A non-signatory party can also be bound to arbitration if its conduct evidences that it is assuming a commitment to arbitrate.

- The requirement of "*consent*" is thus inferred from the party's behavior on which the other party relies;
  - ✓ *Gvozdenovic* v *United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991).

- The intention to be bound by an arbitral agreement, although subject to being inferred, should be clear and unambiguous;
  - ✓*Chios Charm Shipping Co. v Rionda*, 1994 U.S. Dist. LEXIS 4571 (S.D.N.Y. Apr. 11, 1994).

- The doctrine of assumption may overlap with other contractual or equitable principles such as estoppel.

4 - ESTOPPEL

- Estoppel is a theory grounded on a fundamental concept of "*fairness*". It has a wide scope, different criteria, and not always consistent application by the arbitrators or courts;

- Theories:

i. Non-signatories to arbitration agreements may be bound to arbitrate disputes where the non-signatory knowingly exploits the main agreement and accepts their benefits - *Deloitte Noraudit A/S v Deloitte Haskins & Sells*, U.S., 9 F.3d 1060, 1064 (2d Cir. 1993);

ii. Close [corporate and operational] relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract **. . .** and the claims are *'"intimately founded in and intertwined with the underlying contract obligations"* - *Thomson-CSF, S.A. v American Arbitration Association,* 64 F.3d 773 (2d Cir. N.Y. Aug. 24, 1995) (citing *Sunkist Softdrinks, Inc. v. Sunkist Growers, Inc*., 10 F.3d 753,757-758 (11 th Cir. 1993);

- Estoppel has been broadly applied in the US in order to compel a non-signatory to arbitrate to a point that it has been placed as an alternative to "*consent*";

5 – *Group of companies / Veil-piercing / Alter ego*

- SMA arbitrators have commonly allowed for non-signatory parties to take stand in arbitration proceedings where a close corporate and operational relationship between the parties and with the subject matter is found;

- Arbitrators typically take into account if the relationship between the parties and the issues/claims at stake, in particular their commercial intentions, duties, and obligations, are intimately founded in and intertwined with the charterparty;

- These principles were upheld in *Astra Oil Co. v Rover Navigation* 344 F.3d 276 (2d Cir. N.Y. Sept. 22, 2003) by the Court of Appeals for the Second Circuit under the theory of estoppel;

➢ However, in practice, this approach amounts to a form of lifting the principle of separation between separate but group related legal entities, being similar to the "*group of companies doctrine*".

5 - *Veil-piercing / Alter ego / group of companies*

1. *Amerada Hess Shipping v. Skip. Nordheim*, SMA 958 (1975);
2. *Allied Chemical v. Piermay Shipping Co.*, SMA 1168 (1977);
3. *Trade & Transport, Inc. v. International United Refining* Co., SMA 1325 (1979);
4. *Map Tankers, Inc. v. Mobil Tankers Ltd.*, SMA 1510 (1980);
5. *Compagnie Nationale* Algerienne de Navigation *v. Coscol Petroleum*, SMA 1576 (1981);
6. *Alpine Shipping/Marc Rich v. Clark Oil*, SMA 1885 (1983);
7. *Solidarity Carriers v. Amerada Hess*, SMA 2138 (1985);
8. *Transol Oil & Seeds, Inc. v. Euroam Tankers of Panama*, SMA 1746 (1982);
9. *Koch Shipping/Koch Supply v Mobil Shipping*, SMA 3615 (2000);
10. *Stena Bulk v. Citgo Asphalt Refining Co.*, SMA 3902 (2005);
11. *Stolt-Nielsen v. Halcot Navigation Ltd.*, SMA 3934 (2006);
12. *Sherwin Alumina, L.P. v. Western Bulk Carriers*, SMA 4230 (2014).

CONCLUSIONS

1. New York maritime jurisdiction has a more "*liberal*" approach upon allowing non-signatories to participate in arbitration proceedings, when compared to London;

2. Frequent use of the doctrine of Estoppel in New York, particularly by arbitrators, in stark contrast with London;

3. Justifications?
   a) The pro-arbitration policy of the FAA?
   b) The arbitrators?

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CONCLUSIONS

4. The application of principles of contract/agency and of theories such as "*group companies*" or "*estoppel*" in order to bind non-signatories to an arbitration agreement should remain as an exception.

5. A broad and inattentive application risks simultaneously jeopardizing three fundamental legal principles:
   a. Privity of contract;
   b. Corporate personality; and
   c. Consent in arbitration.

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Thank you!

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