legislation involve expensive changes in construction or equipment of new ships. As an example the new rail ferry "Arahura" was measured for tonnage as an "existing ship" under the old tonnage rules because at the critical date for coming into force of new measurement rules 50 tonnes of steel had been assembled. The gross tonnage of the ship under the new measurement rules would have been considerably more than it was under the old.

When does a "voyage" actually commence? Is it the act of casting off mooring lines, or starting up the engines, signing on the crew, or what? Every ship's officer and every surveyor knows exactly what is meant by a quadrennial "thorough examination" of cargo gear and an annual "thorough inspection" of cargo gear — but try and define it in regulations!

I share the frustration of shipowners, shipmasters and seafarers generally at the length of time it takes to introduce new legislation or amend or abolish existing legislation. There are of course numerous factors which contribute to this slowness. International agreement invariably take many years to hammer out into a convention — getting about 125 countries of different political philosophies, social standards and industrial situations to reach a consensus is quite clearly a time-consuming task, as is the task of agreeing on a form of words which can be translated into several languages without losing meaning in the translation.

Introducing the convention into domestic law takes another period of time, again often lengthy. States may agree on an international basis as to what is desirable but each government must then go through its own legislative process to implement that agreement. This involves drafting of legislation (often with delays due to staff shortages or pressure of other work), consultation (often lengthy and sometimes contentious) with affected organisations, and finally getting parliamentary time for debate and approval.

This latter can itself be time consuming. In the first place the Minister of Transport must get a legislative priority for the appropriate session of Parliament and she or he can only expect to get a reasonable share of parliamentary time. The Minister has therefore to weigh up the relative priorities, often on political considerations rather than practical ones, between shipping legislation on the one hand and road transport, civil aviation, or railways on the other.

Marine Division staff are people who have a predominantly technical training and a practical background experience of shipping. Their task is to try to formulate requirements which are aimed at regulating practical shipping problems of various kinds. In the Ministry's Legal Section and in the Parliamentary Counsel Office there are people whose job it is to translate the practical person's requirements into legislation. These people are undoubtedly able lawyers but they are not always able seamen and hence we do get occasions where the complexities of the maritime scenario escape both the practical and the legal eye.

This is where I think maritime lawyers enter the picture. In their role as legal advisers to the shipping fraternity or as prosecutors or defenders of alleged offenders against maritime law their objective is often to find loopholes in the legislation and thus defeat the joint efforts of the Ministry of Transport and

Parliamentary Counsel.

This, no doubt, is as it should be, but I make two points. Firstly, in the preparation of legislation I think there is too little collaboration between the Ministry of Transport and Parliamentary Counsel on the one hand and practising lawyers on the other. An association such as the Maritime Law Association can assist in overcoming this deficiency but there may be other ways also and I would like to see more use made of working parties comprising legal and practical people to draft particular pieces of legislation. In this respect I would commend the working party which has struggled for some time to revise the Marine Pollution Act and another which has tackled the drafting of the Ship Registration Bill.

However I am not too sure how receptive industry would be to too many requests for assistance on working parties — they take time and effort which busy people can ill-afford. Secondly I wonder whether the mass of legislation that we labour under, is in fact counter-productive and worth the time and effort put into its preparation and enforcement.

I have referred to the difficulties associated with both and I therefore pose the question, whether for the future we should aim to have fewer laws but ones which are more easily enforced and which attract more effective penalties, in preference to a large volume of legislation which is often difficult to interpret, not easy to implement and of dubious punitive value.

Incorporation of charterparty terms into bill of lading contracts - a case rationalisation

W. J. Park*

This article attempts to rationalise recent English decisions which have grappled with the interpretation of incorporation clauses. In so doing, the author succeeds in dispelling some of the considerable confusion and uncertainty to which they have contributed in this important area of maritime and commercial law. Having carefully analysed the judicial reasoning underpinning them, the author concludes that the cases are reconcilable and identifies the law which should be applied in future cases.

I. INTRODUCTION

Recent cases concerning the law of contracts of carriage contained in bills of lading and incorporation of charter party terms into those bills of lading have revealed that there is considerable confusion and uncertainty in this area of the law. This is despite the claim by Davis in 1966 "that there now seems little room for further litigation"[1] in the area.

Before proceeding, it is perhaps best to outline the usual contracts involved in carriage of goods by sea and how this particular interaction between charterparties and bills of lading comes about.

A person may wish to use the whole or a substantial part of a ship. In such a case the most economical means of carriage is to enter into a charterparty in respect of the whole ship. The contract in such a case is the charterparty. In basic terms, a charterparty is a contract "by which an entire ship or some principal part of her is let to a merchant, called the charterer, for the conveyance of goods on a determined voyage to one or more places, or until the expiration of a specific period".[2] The charterparty may in such a case be a contract of carriage where

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1 D. A. Davis "Incorporation of Charterparty Terms into Bills of Lading" [1966] J.B.L. 326, 334.

2 *Halsbury's Laws of England* (4 ed., Butterworths, London, 1983) vol. 43. p.239.

the charterer has the right to have his goods conveyed on a particular ship and have the services of the ship and its master and crew. A charterparty may, however, result in a demise of the ship itself in which case the master and crew of the ship will become the servants of the charterer and the charterer gains total control of the ship; the contract being more identifiable as a contract of hire rather than a contract of carriage. In both cases, a charterparty will contain many clauses which are not strictly applicable to a contract of carriage but concern more the hiring of the ship.

A charterer may use the whole cargo area of the ship or, alternatively, he may use part of that area and operate the remainder as a general ship taking cargoes for other merchants. In both of these cases a bill of lading will be issued in respect of the cargo. In basic terms a bill of lading "is a document signed by the master or other agent of the shipowner which states that certain specified goods have been shipped in a particular ship and which purports to set out the terms on which the goods have been delivered to and received by the ship".[3] The contract of carriage between the shipowner and the charterer is contained in the charterparty; the bill of lading in the charterer's hands being a mere receipt rather than evidence of the contract.[4] Where the charterer uses the ship or part of the ship as a general ship the contract of carriage between the charterer and the merchant is "constituted in" or "evidenced by" the bill of lading.[5]

The bill of lading, being a recognised document of title, enables the owners of the cargo to deal with it while it is in transit. If a charterer negotiates the bill of lading to a third party or consignee[6] the bill of lading itself will evidence or constitute the contract of carriage between the shipowners and the consignee.

In all of these cases, since the shipowner is involved in at least two separate contracts of carriage (one with the charterer and one with the consignee or general merchant), he will be concerned to equate the various contracts and the obligations and conditions in those contracts. The practice in such cases is to do two things:

1. Firstly to put into the charterparty clauses stating that the charterer is not to present bills of lading to the prejudice of the charter and outlining what clauses of the charterparty are to be incorporated into any bills of lading presented or issued.
2. Secondly to include incorporation clauses in bills of lading incorporating some of the contractual provisions of the charterparty. Such a clause may provide: "All terms and conditions as per charterparty."

In establishing the contractual relationship between the shipowner and consignee, the Court's concern is to interpret the bill of lading contract and thus to interpret the bill of lading incorporation clause. Several problems arise in inter-

3 Ibid. 328.

4 R. Colinaux (ed.) *Carver's Carriage by Sea* (13 ed., Stevens and Sons, London, 1982) 615-620.

5 In terms of general principle, a bill of lading only evidences a contract of carriage and external evidence is also admissible to show the contract's terms. Where the bill is negotiated, however, the Mercantile Law Act 1908 s.13 has the effect of making the terms in the bill of lading actually constitute the contract.

6 In general terms a consignee is a person to whom the bill of lading is delivered or negotiated. He may be named in the bill of lading as the party to receive the goods or the bill of lading may be negotiated to him as an importer or buyer of the goods.

preting such clauses and outlining the obligations of the parties, the principal problems being:

1. What contractual provisions are incorporated into the bill of lading by phrases such as "terms", "conditions", "clauses" and "provisions"?
2. Is it correct to say that the words "conditions" or "terms" are terms of art and have a specific meaning incorporating only limited contractual provisions from the charterparty?
3. Is it desirable to have contractual provisions incorporated into the bill of lading when in practice it is usual that neither the merchant nor the consignee of the goods has seen the charterparty contract?
4. Recent cases and articles have suggested "that an arbitration clause can be incorporated from a charterparty into a bill of lading, provided this is done clearly and explicitly in either document."[7] What is the role of charterparty clauses which outline the clauses to be incorporated into the bill of lading, in interpreting the obligations in the contract between the shipowner and the consignee?

Recent cases concerning the interpretation of general word incorporation clauses (that is, those which do not refer to the incorporation of a specific clause) have accepted that a two-stage test is applicable in determining what obligations such a clause incorporates into the contract[8] The test is:

1. What is the prima facie effect of incorporation clauses and what clauses from the charterparty are incorporated into the bill of lading?
2. Should the clauses prima facie incorporated be rejected because they are insensible or inapplicable to the bill of lading contract because of their subject matter, their wording or their inconsistency?

This paper concerns the first stage of this test and its aim is to rationalise recent cases concerning the interpretation of incorporation clauses and their handling of the interpretation problems which arise.

It is the view of the writer that recent cases fail to clearly set out the law in this area and have resulted in considerable confusion and uncertainty.

II. JUDICIAL HISTORY — AN OVERWHELMINGLY SETTLED RULE OF CONSTRUCTION

The traditional rule of construction, which underlies the view of Davis expressed above, can be summarised in two basic propositions:

Proposition 1 is that clauses containing general words of incorporation will incorporate only those clauses which are germane to shipment, carriage and delivery of the goods. *Proposition 2,* which is complementary to the first proposition, is that reference to a charterparty in a bill of lading incorporation clause does not give the holder constructive notice of the contents of the charterparty and, further, that a clause in the charterparty stating what is to be incorporated is irrelevant to the contract contained in the bill of lading.

The leading case regarding the first proposition is the House of Lords decision in *T. W. Thomas & Company Limited* v. *Portsea Steamship Company Limited (the Portsmouth).*[9] The Portsea Steamship Company Limited had chartered to one

7 Infra n.15.
8 *Miramar Maritime Corp.* v. *Holborn Oil Trading Ltd. (The Miramar)* [1984] 1 Lloyd's Rep. 142, 143.
9 [1912] A.C. 1.

W. M. MacKay the ship *Portsmouth* for carriage of a cargo of timber. The cargo was supplied and a bill of lading relating thereto was presented to the shipper who negotiated it to T. W. Thomas & Company Limited, being for the purposes of this action the owner of the cargo and consignee of the bill of lading.

On discharge, the ship was delayed and the owners commenced this action for the eight days' demurrage. The consignee applied for a stay of proceedings upon the ground that the arbitration clause was incorporated into the bill of lading. The incorporation clause in the bill provided:

> He or they paying freight for the said goods, with other conditions as per charterparty with average accustomed.

and:

> Deck load at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charterparty including negligence clause.

The Court of Appeal[10] discussed the stay order of the Divisional Court and held that the arbitration clause was not incorporated. The matter went to the House of Lords which arrived at the same conclusion while taking a seemingly different approach from that of the Court of Appeal.[11] The judgments of Lord Loreburn L.C. and Lord Atkinson are the most frequently quoted and, it is submitted, most accurately state the ratio of the House's decision. Lord Loreburn L.C., referring to the second clause above, stated:[12]

> I do not think that this paragraph brings into the bill of lading the arbitration clause any more than the other. The arbitration clause is not one that governs shipment or carriage or delivery or the terms upon which delivery is to be made or taken.

Lord Atkinson stated:[13]

> I think it would be a sound rule of construction to adopt that when it is sought to introduce into a document like a bill of lading — a negotiable instrument — a clause such as this arbitration clause, not germane to the receipt, carriage or delivery of the cargo or the payment of freight — the proper subject matters with which the bill of lading is conversant — this should be done by distinct and specific words and not by the general words . . . [in the second clause above quoted].

The Law Lords were referred to a number of cases to support their decision[14] but the most relevant part of their judgment for our purposes is the reasons which

10 [1911] P.54.

11 The Court of Appeal followed the approach of the Court of Appeal in *Hamilton & Co.* v. *Mackie & Sons* (1889) 5 Times L.R. 677. There Lord Esher M.R. held that the effect of a general word incorporation clause was that the conditions of the charterparty must be read verbatim into the bills of lading as though they were printed in extenso. Those conditions which were insensible would then be disregarded. Some authorities, particularly Davis, op. cit., *The Phonizien* [1966] 1 Lloyd's Rep. 150, and United States cases expressed the view that this test is substantially different from the test applied by the House of Lords in the *Thomas* case. In effect, this opinion is that a clause read in extenso is excluded if its wording or grammar is insensible to that used in the bill of lading.

12 *T. W. Thomas and Company Limited* v. *Portsea Steamship Company Ltd.* [1912] A.C. 1, 6.

13 Idem.

14 E.g. *Russell* v. *Niemann* (1864) 17 C.B.(N.S.) 163; *Serraino* v. *Campbell* [1891] 1 Q.B. 283.

they adopted for their decision. The first reason was that a bill of lading is a negotiable instrument which passes in commercial usage from hand to hand and title to goods passes with it. A consignee of a bill of lading often has no knowledge of a charterparty under which a shipper ships the goods and frequently has no opportunity even to see that charter. This being the case, a Court will not force upon a consignee clauses which would be peculiar to the nature of a bill of lading, and will limit the effect of general words of incorporation to those clauses which appertain to or are concerned with the subject matter of a bill of lading. The second reason concerned the nature of the arbitration clause and the Courts' traditional jealousy of their jurisdiction. The Court considered that the effect of the clause in this case would be to oust the jurisdiction of the Court and compel arbitration of all questions in dispute. Since such a drastic step was a matter of contractual agreement, and this was not commonly a clause applicable to bills of lading, such a clause should be expressly included.

III. RECENT CASES

A. *A New Rationale*

We now come to examine the proposition in *Astro Valiente Compania Naviera S.A.* v. *Pakistan Ministry of Food and Agriculture (No. 2) (The Emmanuel Colocotronis No. 2)*[15] that an incorporation clause requires the parties to peruse the charterparty which may provide in a clause, other than that sought to be incorporated, what clauses are to be incorporated into the bill of lading contract.

The foundation for this proposition is arguably found in the Court of Appeal's judgment in *T. B. and S. Batchelor & Co. Ltd.* v. *Owners of S.S. Merak (The Merak)*.[16] The plaintiffs, Batchelors, entered into a charterparty with one William Dickinson & Co., Ltd. The charter provided that Dickinsons were to provide a ship from Finland to Newport for a cargo of timber. This charter contained, inter alia, the following terms:

> [clause 32 — arbitration] . . . Any dispute arising out of this charter or any bill of lading issued hereunder shall be referred to arbitration.

and:

> [clause 10 — incorporation] . . . The bills of lading shall be prepared in the form indorsed upon this charter and shall be signed by the Master; quality, condition and measure unknown, freight and all terms, conditions, clauses (including cl. 32) and exceptions as per this charter.

Dickinsons fulfilled their obligation by entering into a sub-charter with the defendant-shipowners. The subcharter was in substantially the same form as the charter, including an additional typewritten clause stating that any bills of lading issued should be in accordance with the charterparty. Bills of lading were issued by the Master to the shippers Rauma-Repola Oy and contained the following incorporation clause:

> All the terms, conditions, clauses and exceptions including *cl. 30* contained in the said charterparty apply to this bill of lading and are deemed to be incorporated herein.

15 [1982] 1 W.L.R. 1096 (Q.B.D.).
16 [1965] P.223.

On discharge the plaintiffs discovered that there was short delivery and damage and they initiated proceedings on the basis of the bills of lading which had been endorsed to them. The defendant sought a stay of proceedings in reply on the ground that the parties had agreed to arbitration. Since the bill of lading did not expressly contain an arbitration clause, the issue thus became whether the charterparty arbitration clause was effectively incorporated.

In discussing this issue, Sellers L.J. found that the incorporation clause in this case was clear and wide and required reference to the charterparty; this being the case the charterparty outlined clearly what was to be incorporated in the bill of lading. Sellers L.J. thus found that a consignee would be required to read the charterparty and the charterparty, being clear in meaning, was sufficient to incorporate terms into the bill of lading contract.[17] Davies L.J. also held to the view that here the incorporation clause referred to the charter which outlined what was to be incorporated.[18]

It is these statements which were relied upon by Staughton J. in *The Emmanuel Colocotronics (No. 2)* as authority for the proposition outlined above.[19]

But is this the general effect of *The Merak?* Although Russell L.J. held the arbitration clause to be incorporated, his approach, it is submitted, is directly in line with settled authority. In explaining the *Thomas* decision, Russell L.J. concluded that only clauses relating to the shipment, carriage and delivery of the goods would be incorporated into bills of lading and that a statement in the charterparty outlining what was to be incorporated into the bill of lading contract is irrelevant in interpreting the contract constituted by the bill of lading itself.[20]

The factor which in Russell L.J.'s view distinguished this case from the effect of *Thomas,* was the reference in the arbitration clause itself to "disputes arising under bills of lading". If this is the distinguishing feature, it must be because it makes the arbitration clause a term which is directly germane to "shipment . . . " or "which does . . . in terms relate to a bill of lading".[21] Thus, according to Russell L.J., clause 10 in the charterparty is irrelevant in deciding what clauses are incorporated in the bill of lading contract; the only specific statement in the charterparty which is relevant is the reference in the arbitration clause itself.

Davies L.J.'s judgment on close analysis arguably has the same effect. The statement by Davies L.J. relating to the charterparty clause is obiter, as he decided the case primarily on more traditional grounds. In relation to *Thomas,* Davies L.J. held that the case did not establish that charterparty clauses "which expressly apply to disputes arising out of the shipment, carriage or delivery of the goods" can not be incorporated into the bill of lading.[22]

17 Ibid. 250.
18 Ibid. 254.
19 Infra n.34 and accompanying text.
20 *The Merak* [1965] P.223, 260.
21 Ibid. 259.
22 Ibid. 254.

This finding is consistent with previous case authority. The *Thomas* case is not authority for the proposition that an arbitration clause can never be incorporated as germane to the shipment, carriage and delivery of the goods. It is apparent from Davies L.J.'s statement that the reason he regarded the clause as incorporated was because it was applicable to the bill of lading subject matter. Coupled with this, Davies L.J.'s references to "knowledge of the charterparty" and charterparty clauses, outlining what provisions are incorporated into the bill of lading, are references to the special facts of this case. Here the consignees were a party to the charterparty. They had signed the contract containing clauses 10 and 32 outlining what was to be incorporated.[23]

It is submitted, therefore, that *The Merak* is not authority for the wide proposition laid down in *The Emmanuel Colocotronis (No. 2).*[24] Sellers L.J. seems to provide such authority, but he is in the minority. Davies L.J.'s statements concerning reference to the charterparty are in another context and his decision rests mainly on the wording in the particular arbitration clause.

The second major case is *The Annefield.*[25] The defendants, owners of the vessel, time chartered it to Oretea Spa who, in turn, voyage chartered it to one of the four plaintiff cargo owners. The charter was in centrocon form for the shipment of maize from Argentina to Europe. The Master issued thirteen bills of lading in respect of the maize, some of which were endorsed to the third plaintiffs. The bill of lading contained the following incorporation clause:

> . . . all the terms, conditions and exceptions of which charterparty, including the negligence clause, are incorporated herewith.

The maize arrived substantially damaged and a claim was made for damages. The defendants sought a stay on the ground that the parties had agreed to arbitration via the arbitration clause in the charterparty which was arguably incorporated into the bill of lading. The charterparty arbitration clause provided:

> All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single arbitrator, be referred to the final arbitration of two Arbitrators.

The case came before Brandon J. at the first instance in the High Court. Although he did support the judgment of Sellers L.J.[26] in *The Merak,* Brandon J.'s judgment was based substantially on authority. Brandon J. summarised the applicable law in four propositions, two of which are specifically relevant here:[27]

> (1) [I]n order to decide whether a clause under a bill of lading incorporates an arbitration clause in a charterparty, it is necessary to look at both the precise words in the bill of lading alleged to do the incorporation and also the precise terms of the arbitration clause . . .

23 Ibid. 259. It was also argued by Russell L.J. that Davies L.J.'s reliance on this actual knowledge was in fact wrong.

24 Authority for this statement can be found in *The Varenna* [1984] 2 W.L.R. 156, 176.

25 [1971] P.168.

26 Brandon J.'s reference to Sellers L.J.'s judgment in *The Merak* concerned his approval of the approach of considering the effect of an incorporation clause once both documents had been considered. This approval was, however, not applied by Brandon J.

27 *The Annefield* [1971] P.168, 173.

> (2) [W]here the arbitration clause by its terms applies both to disputes under the charterparty and to disputes under the bill of lading, general words of incorporation will bring the clause into the bill of lading so as to make it applicable to disputes under that document.

From these statements it can be seen that Brandon J. is adhering to the authority of the *Thomas* case and the judgments of Davies L.J. and Russell L.J. in *The Merak*. In applying these propositions of law to the facts of the *Annefield,* Brandon J. noted the indeterminate reference in the arbitration clause to "this contract". Brandon J., however, followed Sir Boyd Merriman P. in *The Njegos*[27a] and the long-accepted practice that "this contract" meant "this charterparty contract" and hence general words would not incorporate the arbitration clause.[28]

The judgments of the Court of Appeal in *The Annefield,* however, seem to favour more that of Sellers L.J. in *The Merak,* and have been taken as providing more definite authority for his approach than that of Brandon J. in the court below.[29] Lord Denning M.R. stated:[30]

> But, if the clause is one which is not thus directly germane, it should not be incorporated into the bill of lading contract unless it is done explicitly in clear words either in the bill of lading or in the charterparty.

What Lord Denning M.R. meant by clear words "in the charterparty" is not made clear but he gave the example of the arbitration clause in *The Merak*. His judgment cannot, it is submitted, be taken as authority for the proposition that a clause such as clause 10 in *The Merak,* will suffice to incorporate an arbitration clause into a bill of lading.

Similarly, Cairns[31] and Phillimore[32] L.JJ. made statements to the effect that an arbitration clause could be incorporated into a bill of lading by an explicit reference in the charterparty. The statements from Cairns and Phillimore L.JJ. are, however, purported explanations of *The Merak* which was held inapplicable in this case. In neither judgment is it stated that the explicit reference in the charter (which, in their opinion, was the clause which effected incorporation) was clause 10. The case, it is submitted, cannot be regarded as authority that "some other provisions in the charter" will effect incorporation.

We arrive at Staughton J.'s judgment in *Astro Valiente Compania Naviera S.A.* v. *Pakistan Ministry of Food and Agriculture (No. 2) (The Emmanuel Colocotronis No. 2).*[33] This must be regarded as the high water mark in this line of cases. The Pakistan Ministry of Food and Agriculture were consignees of bills of lading issued on behalf of Astro Valiente, owners of the *Emmanuel Colocotronis*. The charterparty provided:

27a [1936] P.90.
28 Ibid. 177.
29 E. A. Marshall "Incorporation of Arbitration Clauses into Charterparty Bills of Lading" [1982] J.B.L. 478.
30 *The Annefield* [1971] P.168, 184.
31 Ibid. 186.
32 Idem.
33 [1982] 1 W.L.R. 1096.

> It is also mutually agreed that this contract shall be completed and superseded by the signing of Bills of Lading in the form customary for such voyages for grain cargoes, which Bills of Lading shall contain the following clauses: . . . clause 9: All disputes from time to time arising out of this contract shall, . . . be referred to the final arbitration of two Arbitrators . . .

The shipment concerned a cargo of maize from Antwerp to Karachi. Thirteen bills of lading were issued which were negotiated by the shippers to the Pakistan Ministry of Food and Agriculture. The shipment was delayed by the monsoon season and this resulted in claims from the owner for demurrage and from the consignees for damage to cargo. As with the previous cases, there arose a question of who was going to hear the case, the owner alleging that the arbitration clause was incorporated via the bill of lading clause:

> All other conditions, exceptions, demurrage, general average and for disbursements as per above-named charterparty.

On appeal from the arbitrators who had decided that the arbitration clause was incorporated, Staughton J.[34] relied on the judgment of Sellers L.J. and the more limited statements of Davies L.J. in *The Merak,* and *The Annefield* as authority for the proposition that a statement in a charterparty, stating what is to be incorporated into a bill of lading, is sufficient to achieve such incorporation, provided the bill of lading contains a phrase such as "All other conditions . . . as per above-named charterparty"[35] directing the consignee's attention to the charterparty first, and making binding upon the consignees those incorporated clauses.[36]

It has been argued that the authorities relied on by Staughton J. do not provide authority for this proposition. The case can, however, be reconciled with other authorities. In his judgment Staughton J. referred to the term "this contract" in the arbitration clause and decided it meant "this bill of lading contract".[37] It is likely Staughton J.'s conclusion in this respect is correct. The arbitration clause in the charterparty was, it seems, not a working part of the charter, but simply followed, and was part of, the clause outlining what was to be incorporated in the bill of lading. If such were the case, then the clause would be germane to the bill of lading contract and incorporated (as was the clause in *The Merak*) on that basis.

The Emmanuel Colocotronis (No. 2) along with the judgment of Sellers L.J. in *The Merak* are authority for the proposition that reference to a charterparty permits and requires the consignee to refer to that charterparty, and that a provision in the charterparty stating what is to be incorporated will effect such incorporation and make binding on the consignee the incorporated clauses. It also seems that *The Merak* and *The Annefield* decisions have been accepted as authority[38]

34 Ibid. 1104-1105.
35 Ibid. 1107.
36 Idem. Also see E. M. Marshall, op. cit., 484.
37 Contrast in this respect the decision of Lord Denning M.R. in *The Annefield* [1971] P.168, 183.
38 See, for example, Sir A. A. Mocatta, M. J. Mustill and S. C. Boyd (eds.) *Scrutton on Charterparties and Bills of Lading* (18 ed., Sweet and Maxwell, London, 1974) 66.

for that proposition. If this is the case, a clause in a charterparty to the effect that all conditions, terms and exceptions including the demurrage, negligence and arbitration clauses shall be incorporated in any bills of lading issued, would incorporate into a bill of lading providing "all conditions as per charterparty", all the clauses listed, even though a consignee commonly has no knowledge of or has never seen the charterparty. As stated, the material authority relied on by Staughton J. does not support such a proposition. If it is accepted as good law then perhaps it is best to limit such a proposition to arbitration clauses, although such a distinction seems illogical and the statements from cases relate to incorporated clauses in general.

B. *Current Case Law: Detraction And Confusion*

The group of cases culminating in *The Emmanuel Colocotronis (No. 2)* is not the final word on the effect of general word incorporation clauses — two very recent cases also deal with the problem, namely *The Varenna*[39] and *The Miramar*.[40] *The Varenna* detracts from the proposition stated by Staughton J. in *The Emmanuel Colocotronis (No. 2)* and it also detracts from *The Merak* (concerning the latter, it detracts too far and leaves the law largely confused). Skips A.S. Nordheim chartered a ship to Colocotronis Greece S.A.. The Syrian Petroleum Co. Ltd. were the shippers of a cargo of crude oil for which they received bills of lading which they negotiated to Petrofina. Actions were brought by Skips A.S. Nordheim against Syrian Petroleum and Petrofina for demurrage liability defaulted on by the charterers. The immediate concern of the Court was an application for a stay of proceedings pending arbitration with Petrofina arguing that the bill of lading contract incorporated the charterparty arbitration clause. The charterparty provided:

> . . . any dispute arising under this charter shall be settled in London by arbitration

and further:

> [cl.44] All bills of lading issued pursuant to this charter shall incorporate by reference all terms and conditions of this charter including the terms of the Arbitration Clause and shall contain the following Paramount Clause.

The bill of lading incorporation clause provided that "all conditions and exceptions of which charterparty including the negligence clause, are deemed to be incorporated in bill of lading." As can be seen, the case placed before the Court Staughton J.'s proposition and raised the question as to whether clause 44 would produce incorporation of the arbitration clause.

The judgment of the Queen's Bench Division (Commercial Court) was delivered by Hobhouse J. whose judgment is important in three areas:

(1) The basis for his judgment;
(2) His treatment of *The Emmanuel Colocotronis (No. 2);*
(3) His treatment of the words "conditions" and "terms".

39 [1984] 2 W.L.R. 156 (H.C.) and (C.A.).
40 [1984] 3 W.L R. 1 (H L.).

Hobhouse J. held that the arbitration clause was not incorporated by the incorporation clause. The basis for Hobhouse J.'s decision was primarily the view that once a phrase has been interpreted by a Court, especially as regards a commercial document in standard form, another Court should be slow to change that meaning since it would be acted upon by the commercial community. The word "conditions", according to Hobhouse J., had been long defined and its settled meaning should not be disturbed. Thus clauses incorporated by the word "conditions" were "conditions" which were related to the shipment, carriage and delivery of the goods.

Perhaps the most important part of Hobhouse J.'s judgment was his discussion of *The Emmanuel Colocotronis (No. 2)* and the authority for that case. Just what effect Hobhouse J. gave to the principles in *The Emmanuel Colocotronis (No. 2)* is, however, not entirely clear. Hobhouse J.'s judgment can be viewed as a disapproval of the proposition Staughton J. enunciated. Hobhouse J. adopted as his basic premise the proposition that "[t]he contractual intention must be found in the first instance in the bill of lading . . . [t]he charterparty does not as such have a contractual force except as between the parties to it . . . "[41] Hobhouse J.'s disapproval of Staughton J.'s proposition is also evident in his treatment of the authorities relied on by Staughton J. These authorities he distinguished as relying not on Staughton J.'s proposition but on the wider words of incorporation found in the bill of lading incorporation clauses. Although the cases are distinguishable, it is not, it is submitted, upon the basis suggested by Hobhouse J. Staughton J. cited them as approval for the proposition that specific words in the charterparty will suffice, provided that the bill of lading has once directed the reader to look at the charterparty. Hobhouse J. made no comment on the passages relied on by Staughton J.

After distinguishing the authorities and seemingly disapproving of Staughton J.'s ratio decidendi, Hobhouse J. went on to reinstate those very principles. Firstly he noted that the incorporation of charter terms may be effectively produced where a situation arises such that:[42]

> [w]hen one reads the bill of lading and the charterparty together one may find that the word 'conditions' has been given some special meaning. Thus the bill of lading might say 'conditions as per charterparty' and the charter might say 'the conditions to be included in the bill of lading are the following' and then set out the various clauses including an arbitration clause.

Secondly, in response to counsel's argument that an arbitration clause in *The Merak* form was necessary to effect incorporation and that clause 44 was insufficient to resurrect the form adopted, Hobhouse J. cited with approval the judgment of Gorrell-Barnes J. in *The Northumbria*[42a] (to the detriment of that of Russell L.J. in *The Merak*).[43] Hobhouse J. then went on to consider Staughton J.'s test in the alternative and concluded that it did not apply here as the divergence between

41 *The Varenna* [1984] 2 W.L.R. 156, 164.
42 Ibid. 165.
42a [1906] P.292.
43 Ibid. 166.

the incorporation clause in the charterparty and bill of lading demonstrated an intention to incorporate "less in the bill of lading than the charterparty had provided".[44]

The third important part of Hobhouse J.'s judgment arises from counsel's argument that here "conditions" should be given its usual meaning and not the more limited interpretation which provides for the incorporation of clauses relating to the shipment, carriage and delivery of the goods.[45] These arguments were rejected by Hobhouse J. who held that the word "conditions" had been interpreted by the courts on a number of occasions and always the wider words of construction had been rejected.[46] Hobhouse J.'s answer to these arguments is, it is submitted, correct in light of the case authorities and the fact that for the sake of commerce the word must receive a consistent meaning.

Hobhouse J.'s approach does, however, leave open another "theory", inherent in some cases, that while the word "conditions" is a term of art which has a narrow meaning, the same cannot be said of the words "terms" or "clauses" such that they are sufficient to incorporate all terms of a charterparty. Hobhouse J. quoted Bailhache J.'s finding in *Fort Shipping Co. Ltd.* v. *Pederson*[47] that the word "terms" has a very much wider meaning than the word "conditions" and that it should receive its ordinary meaning and incorporate all terms of a charterparty into a bill of lading.[48]

Further authority that Hobhouse J. regarded an arbitration clause incorporated by wider words of incorporation can be found in his description of an arbitration clause as a "term" or "clause" and "not a condition"[49] and in his method of distinguishing the cases relied on in *The Emmanuel Colocotronis (No. 2)*[50] This theory is not consistent with case authority discussed here. Firstly it is contrary to the *Thomas* case which specifically relates to the word "terms" and in theory and reasoning to all general words of incorporation. Secondly, once the defining of "conditions" had passed the ejusdem generis stage (around the time of *Diederichsen*), it is difficult to see how a different interpretation could be given to the words "terms" and "clauses".

Hobhouse J.'s judgment in *The Varenna* seems to leave the law in considerable confusion. Hobhouse J. disapproved of *The Emmanuel Colocotronis (No. 2)* yet revived the theory of that case later in his judgment. His Lordship also supported

44 Idem.
45 This argument was first advanced by Rigby L.J. in *Diederichsen* v. *Farquharson* [1898] 1 Q.B. 150, who considered that as the word "conditions" was not followed by the phrase "paying freight", it should receive its wider meaning and not be interpreted ejusdem generis with the phrase "paying freight". In this respect also see R. Colinaux (ed.) *Carver's Carriage by Sea*, op. cit., 531, where the argument is advanced that where the phrase "all conditions including negligence clause" is used, it evinces an intention to use the word "conditions" in a wider sense.
46 *The Varenna* [1984] 2 W.L.R. 156, 163.
47 (1924) 19 Ll.L.Rep. 26, 27.
48 *The Varenna* [1984] 2 W.L.R. 156, 163.
49 Ibid. 164.
50 Ibid. 165.

the theories of *Thomas* in part but recoiled from applying that case's reasoning to what are arguably wider words of incorporation such as "terms" "clauses" and "provisions".

The consignees appealed to the Court of Appeal which took greater pains than had Hobhouse J. to return to the approach of *Thomas*.[51] It is submitted, however, that the Court went further than to merely follow the authority and ratio of *Thomas*. The judgment of Sir John Donaldson M.R. largely followed *Thomas* and the basic principles enunciated there. He held that *Thomas* had not been overturned or criticised and so the word "conditions" retained its narrower meaning. The Master of the Rolls also followed *Manchester Trust* v. *Furness*[52] (thus detracting from the proposition in *The Emmanuel Colocotronis (No. 2))* stating that clause 44 was not sufficient to achieve incorporation as what was sought was interpretation of the incorporation clause, not notice of the existence of another contract.[53]

Oliver L.J. delivers perhaps the most interesting judgment of the three. Oliver L.J.'s judgment is summed up by the following propositions:

(1) That case law suggests a two-pronged approach as outlined in *The Emmanuel Colocotronic (No. 2)*[54]
(2) Reference to a charterparty does not incorporate the whole of that charterparty simply because a party has notice (constructive or actual) of its existence;[55]
(3) The words "all conditions and exceptions" mean such conditions and exceptions as are appropriate to the carriage and delivery of goods and do not, as a matter of ordinary construction, extend to collateral terms such as an arbitration clause *even if that clause is expressed . . . in terms which are capable without modification of referring to the bill of lading contract* (emphasis supplied);[56]
(4) The authorities clearly show that the use of general incorporating words — whether "terms" or "conditions" — in a bill of lading are and have for years been normally construed in the restrictive way for which the plaintiff contends, but no one has argued that there may not be a context or surrounding circumstances from which some wider connotation may be culled.[57]

It is submitted that Oliver L.J.'s judgment goes too far in its statement of the law both in terms of what is necessary to decide the case and how the law stands. Concerning the third proposition above, to state that general words never incorporate "collateral" terms which are capable without modification of referring to the bill of lading, is going too far and contradicts authorities as analysed in *The Merak* by Scarman J. Oliver L.J.'s finding that a charterparty clause stating what is to be incorporated into a bill of lading is not sufficient to incorporate an arbitration clause, is, it is submitted, correct. Such a clause is not a statement of intention between the parties to the bill of lading contract and it is thus irrelevant.

51 The judgments are noted in E. A. Marshall "Arbitration Clauses not Incorporated into Bills of Lading" [1984] J.B.L. 42.
52 [1895] 2 Q.B. 539 (C.A.).
53 *The Varenna* [1984] 2 W.L.R. 156, 170.
54 Ibid. 173. See the judgments of Mustill J. ([1983] 2 Lloyd's Rep. 319) and Sir John Donaldson M.R. ([1984] 1 Lloyd's Rep. 142, 143) in *The Miramar*.
55 Idem.
56 Ibid. 174.
57 Idem.

Oliver L.J.'s disapproval of *The Emmanuel Colocotronis (No. 2), The Annefield* and *The Merak* cases to the extent that they support Staughton J. is accepted. But where the arbitration clause relates to bill of lading disputes, it is by previous authority applicable to the subject matter of the bill of lading and so must be validly incorporated — not because it is a statement of intention outside the bill of lading contract, but rather once the parties' intention is to incorporate clauses germane to the shipment, carriage and delivery; the arbitration clause, in that form, is such a clause.

Oliver L.J.'s judgment does in part adopt this reasoning and support previous authority. Oliver L.J. rationalised *The Merak* as relying on two propositions. Firstly that the very wide incorporation clause was effective to achieve incorporation of the arbitration clause. In adopting this reasoning, he left open the proposition that the words "clauses" and "terms" be given their ordinary meaning and not be interpreted as terms of art as the word "conditions" has been. Oliver L.J.'s second rationalisation of *The Merak* was that where an arbitration clause makes it clear that it applies to bill of lading disputes, it is to be treated in the same way as clauses which are related to the shipment, carriage or delivery of the goods.[58]

If Oliver L.J.'s second explanation of *The Merak* is accepted, the law would be in substantially the same terms as held in more traditional authorities. However, Oliver L.J.'s disapproval of *The Annefield* and the *Emmanuel Colocotronis (No. 2)* is stated in the strongest terms, and it is likely this will result in only those terms which are traditionally accepted as being germane to the shipment, carriage and delivery of the goods being incorporated, and never collateral terms such as arbitration even if suitable. Thus the Court of Appeal's decision in the *Varenna* detracts from the proposition laid down in the *Emmanuel Colocotronis (No. 2)* and probably also from the more limited proposition underlying *The Merak* and the *Annefield* cases discussed above.

The most recent case, *The Miramar,* however, says little of *The Merak* or *The Varenna* decisions by way of resolving the resulting confusion. The case is substantially concerned with another issue.[59] The case concerned the following clauses:

> [clause 20, terms of bills of lading] the carriage of cargo under this charterparty and under all bills of lading issued for the cargo shall be subject to the statutory provisions and other terms set forth or specified in subparagraphs (i) through (vii) of this clause and such terms shall be incorporated verbatim or be deemed incorporated by reference in any such bill of lading . . .

The incorporation clause in the bill of lading read as follows:

> This shipment is carried under and pursuant to the terms of the charter dated . . . between . . . and . . . charterer and all the terms whatsoever of the said charter except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in this shipment.

In the Court of Appeal little was said regarding the incorporation clause. Sir John Donaldson M.R. did, however, hold that the words of incorporation were as wide as possible and, therefore, the whole charterparty was tentatively incor-

58 Ibid. 176.

59 I.e. the consistency issue or the second limb of the test outlined in recent cases. See n.54.

porated into the bill of lading.[60] This, it must be noted, adds support to the proposition that while the word "conditions" is a term of art, words such as "clause" and "terms" are to be given their usual meaning.

In the House of Lords, Lord Diplock also said little in this area. His Lordship did, however, refer to clause 20 noting that "There is nothing here to impose on a consignee or bill of lading holder any personal liability for demurrage . . . "[61] It could, perhaps, be argued that Lord Diplock's reference to clause 20 constitutes an implied approval of Staughton J.'s approach. This, however, is doubtful. Lord Diplock emphasised the different natures of the bill of lading and charterparty contracts and also decided the case on another issue. It is submitted that recent judgments, especially those of Oliver L.J. in *The Varenna* and Sir John Donaldson M.R. in *The Miramar,* leave the law in this area in a state of confusion.

IV. ANALYSIS

A. Reconciliation and Case Reasoning

The above cases reveal that the law in this area is far from settled. These cases proffer three different rationales[62] regarding the effect of a general word incorporation clause:

(1) There is the theory that all general words of incorporation will incorporate only those clauses which are related to the shipment, carriage and delivery of the goods, i.e. the subject matter to which the bill of lading is pertinent.[63] Of the authorities supporting the proposition, all except the judgment of Oliver L J. are consistent with the view that "collateral terms"[64] are clauses which are related to the shipment, carriage and delivery of the goods.

(2) The approach which states that the word "conditions" relates to germane clauses and all other general words are to receive their ordinary meaning.[65]

60 [1984] 1 Lloyd's Rep., 142, 143 (C.A.). This is inconsistent with the judgment of Lord Denning M.R. in *Pacific Molasses Co. and United Molasses Trading Co. Ltd.* v. *Entre Rio Companies S.A. (The San Nicholas)* [1976] 1 Lloyd's Rep. 8.

61 *The Miramar* [1984] 3 W.L.R. 1, 8 (H.L.).

62 To these three rationales can be added a fourth which is given by American case law. This approach is that the clause "conditions as per charterparty" is a specific and clear reference to the charter, which gives a consignee actual or constructive notice of what is incorporated, and is thus sufficient to incorporate the charter terms. Authority for this approach is as follows: *Son Shipping* v. *de Fosse & Tanghe* 199 F. (2d) 687 (1952); *Lowry & Co.* v. *S.S. Nadir* 223 F. sup. 891 (1963); *Lowry & Co.* v. *S.S. Le Moyne D'Iberville* 253 F. sup. 396 (1966); *Coastal States Trading Inc.* v. *Zenith Navigation S.A.* 446 F. sup. 330 (1977).

63 Cases and judges supporting this proposition are: *Diederichsen; Thomas; The Annefield* (per Brandon J. in the Commercial Court); *The Merak* (per Scarman J., Davies and Russell L.JJ.); *The Varenna* (per Hobhouse J. and unanimously in the Court of Appeal); *Manchester Trust*; and *The Njegos* [1936] P.90.

64 Collateral terms are those which, although not relating to shipment, carriage and delivery of the goods, are expressed to relate to the bill of lading such as the arbitration clause in *The Merak.*

65 Cases which support this proposition are: *Diederichsen* (per Rigby L.J.); *The Varenna* (per Hobhouse J. and Oliver L.J. in relation to the word "clauses"); *Crossfield and Co. Ltd.* v. *Kyle Shipping* [1916] 2 K.B. 885; *Fort Shipping* v. *Pederson* (1924) 19 Ll. L. Rep. 26.

(3) That a reference to a charterparty in the incorporation clause permits and directs attention to that charterparty which may contain a statement of intention as to what clauses are incorporated into the bill of lading contract *or* the first approach above may apply.[66]

Of these approaches it is difficult to see which will be employed in any given case and hence to what extent a consignee may be bound by stipulations contained in the charterparty. In terms of strict authority, recent cases apply only to arbitration clauses, and incorporation of other charter terms, such as demurrage and freight liens, must be determined according to the older cases. It is submitted that the approach which should be taken to general word incorporation clauses such as "all terms and conditions as per charterparty" is the first approach above. Therefore, only those clauses which are pertinent to the subject matter of a bill of lading are so incorporated, and the correct question to ask is whether the clause sought to be incorporated is such a clause. This is the view which dominates cases and texts, although in some instances it is expressed in terms of incorporation *in extenso* coupled with an overlying consideration in all cases that clauses which are not pertinent to the bill of lading be excluded.[67] This is the approach of Davis[68] and Carver[69] who note in particular two applications of this principle — firstly, the incorporation of the Hague Rules into a charterparty[70] and secondly, of a charter into a bill of lading.[71]

It is submitted, therefore, that the proposition in *The Emmanuel Colocotronis (No. 2)* (the third approach above) is insupportable and should not be effective in achieving incorporation of charterparty terms into bill of lading contracts. The insupportable nature of this proposition is also noted by Watkins L.J. in *The Varenna*. There he stated:[72]

> . . . I have striven in considering the large accumulation of authority to which we were referred to ascertain whether the view taken of them by Staughton J. . . . which continues to have an attraction for me, can be supported. Alas! with no enthusiasm I am obliged to say that I have reached the conclusion for the reasons explained by Sir John Donaldson M.R. and Oliver L.J., that the weight of authority is opposed to that view.

The proposition, it must be noted, is also against basic contractual principle. The contract between the parties is contained in the bill of lading and not in any other document; it is here that the contractual intention of the parties must be found. If an incorporation clause, then, states "all conditions and terms of the charterparty dated . . . are herewith incorporated", it is the effect of this clause

66 Authority for this proposition is: *The Merak* (per Sellers L.J.); *The Northumbria; The Varenna* (per Hobhouse J. in his approval of *The Northumbria*); *The Emmanuel Colocotronis (No. 2)*; and, some argue, *The Annefield* (in the Court of Appeal).

67 This alternative application of the *Thomas* test is basically that outlined in *Hamilton and Co.* v. *Mackie and Sons* (1889) 5 T.L.R. 667. There is little doubt that the *Hamilton* case and the *Thomas* case lay down in effect the same test. Authority for this proposition can be found in Scarman J.'s judgment in *The Merak*.

68 Davis, op. cit. 329.

69 Carver, op. cit. 877.

70 Ibid. 477.

71 Ibid. 728.

72 [1984] 2 W.L.R. 156, 177.

which must be inquired into and a clause in a charterparty stating what clauses are to be incorporated is irrelevant. This is substantially the view of Sir John Donaldson M.R. in *The Varenna*:[73]

> The starting point for the resolution of this dispute must be the contract contained in or evidenced by the bill of lading, for this is the only contract to which the shipowners and the consignees are both parties. What the shipowners agreed with the charterers, whether in the charterparty or otherwise, is wholly irrelevant . . . an incorporation cannot be achieved by agreement between the shipowners and the charterers.

Thus, statements in the charterparty, such as clause 10 in *The Merak* or clause 44 in *The Varenna,* cannot be effective to incorporate into the bill of lading, and thus make binding upon the consignee, such clauses as they list.

It remains to deal with Staughton J.'s argument that his approach does in some cases reflect the parties' contractual intention. Consider the example suggested by Hobhouse J. in *The Varenna* where the charter provides "the conditions to be incorporated in the bill of lading are as follows . . . " and the bill provides, "conditions as per charterparty". It is indeed arguable that here the parties to the bill of lading intended to follow the charter clause. Indeed, these were substantially the words in *The Emmanuel Colocotronis (No. 2)*. Hobhouse J., however, stated that this reasoning could not apply as the charter provided for incorporation of "clauses" and the bill, incorporation of "conditions".[74] Assuming this argument can be made, it is doubtful that it can be as effectively made in relation to the clauses:

> All conditions, terms and clauses contained in the charterparty are herewith incorporated.

and the charterparty itself:

> All conditions, terms and exceptions including the arbitration clause shall be incorporated in any bills of lading issued.

Although the distinction between the two examples is a matter of semantics, contractual intention cannot be said to be reflected in the second example. There are also grave policy and commercial reasons which run contrary to Hobhouse J.'s example. Firstly, a consignee is not a negotiating party to a bill of lading. The bill is endorsed to him and thus it is difficult to interpret the contract contained in the bill of lading by referring to his intention. Secondly, a consignee may also never see the charterparty which is the basis of the shipment. Staughton J.'s approach would in such a case make binding upon consignees, conditions listed by parties to the charter of which the consignees had no knowledge. In such a case, it is difficult to refer to statements in the charterparty as relevant to the consignee's and shipowner's intention. What must be interpreted is the incorporation clause contained in the bill of lading.

What, then, is the basis for limiting such clauses to those which are related to the shipment, carriage or delivery of goods, when the words of incorporation apparently refer to all conditions or clauses of that charter? Why, therefore, are the words of incorporation not given their ordinary meanings as argued for by

73 Ibid. 170. To the same effect is the judgment of Oliver L.J. at 173.
74 Supra. n.42.

some cases underlying the second approach above? The reason is again basically a policy reason. A bill of lading is only relevant to the shipment, carriage and delivery of the goods concerned whereas a charterparty may contain various other clauses specifically relating to the ship hire. Courts have thus been slow to put upon the consignee these other or "peculiar clauses in a charterparty which he has no opportunity of seeing", or which will not concern him.[75] This was the original policy reason in the *Thomas* case and other authorities[76] and it would still appear to be a relevant consideration in cases in this area. In the result, general word incorporation clauses have been held not to make a consignee personally liable for all clauses found in a charter, merely those relevant to his contract.

Although the cases offer a number of rationales for the effect of general word incorporation clauses, it is submitted that the cases are reconcilable. This reconciliation is evident in Scarman J.'s judgment in *The Merak* and Brandon J.'s judgment in *The Annefield.* Scarman J. held the arbitration clause incorporated.[77]

> . . . if . . . [an arbitration clause] be so drafted as to apply approximately and sensibly to the bill of lading contract and its subject matter, that is the receipt, carriage and delivery of cargo and the payment of freight, then . . . general words of incorporation will introduce such a clause into the bill of lading.

This passage illustrates that Scarman J. decided according to the settled authority of the *Thomas* case. *The Phonizien*[78] can perhaps be considered in contrast. This case concerned the incorporation clause:

> All the terms, conditions, liberties and exceptions of the charterparty are herewith incorporated .

The arbitration clause read:

> Any dispute arising under this charterparty shall be referred to Arbitration in London; one Arbitrator to be nominated by the owners and the other by the Charterer.

McNair J. held the clause not to be incorporated as it would be insensible in the bill of lading contract in so far as it did not relate to the bill of lading contract or the subject of the bill of lading (i.e., the shipment carriage and delivery of the goods). In *The Merak,* however, it was held to be incorporated. Authority for the view that *The Merak* was decided in accordance with *Thomas* can be provided by the *Thomas* case itself. Lord Loreburn L.C. there said of the arbitration clause:[79]

> . . . it only governs the way of settling disputes between the parties to the charterparty and disputes arising out of the conditions of the charterparty.

This is a comment on the specific arbitration clause in *Thomas* and it cannot be regarded as authority that an arbitration clause can never be germane to shipment, carriage and delivery. In *The Varenna,* Oliver L.J. also was of the opinion that clauses drafted as in *The Merak* should be "treated in the same way as clauses which are germane to the shipment, carriage and delivery of goods".[80]

75 Supra. n.68.
76 See, for example, Russell L.J. in *The Merak.*
77 *The Merak* [1965]P.223, 232.
78 [1966] 1 Lloyd's Rep. 150.
79 [1912] A.C. 1, 6.
80 [1984] 2 W.L.R. 156, 176.