Cases

Incorporation of Arbitration Clauses

by ANDREW TWEEDDALE

1. INTRODUCTION

The Arbitration Act 1996 (AA 1996) s.6(1) defines arbitration agreements and section 6(2) deals with incorporation of arbitration agreements by reference:

> (1) In this Part an "arbitration agreement" means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).
> (2) 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.

It would appear, at first sight, that referring to a written agreement containing an arbitration clause is sufficient for there to be an "arbitration agreement". However, the law is never that simple. Case law suggests that, in most circumstances, a general reference to a contract will not incorporate the arbitration provisions within that contract. If a party wishes to incorporate the arbitration provisions then it will need to refer expressly to those provisions.

2. THE DEPARTMENTAL ADVISORY COMMITTEE

In February 1996 the Departmental Advisory Committee (DAC) stated:

> In English law there is at present some conflicting authority on the question as to what is required for the effective incorporation of an arbitration clause by reference. Some of those responding to the July 1995 draft Clauses made critical comments of the views of Sir John Megaw in *Aughton Ltd v. MF Kent Services Ltd* (1991) 57 B.L.R. 1 (a construction contract case) and suggested that we should take the opportunity of making clear that the law was as stated in the charterparty cases and as summarised by Ralph Gibson L.J. in *Aughton*. (Similar disquiet has been expressed about decisions following *Aughton*, such as *Ben Barrett and Sons (Brickwork) Ltd v. Henry Boot Management Ltd* [1995] C.I.L.L. 1026). It seems to us, however, that although we are of the view that the approach of Ralph Gibson L.J. should prevail in all cases, this was really a matter for the courts to decide. The wording we have adopted certainly leaves room for the adoption of the charterparty rules in all cases, since it refers to reference to a document containing an arbitration clause as well as reference to the arbitration clause itself. Thus the wording is not confined to cases where there is specific reference to the arbitration clause, which Sir John Megaw (but not Ralph Gibson L.J.) considered was a requirement for effective incorporation by reference.

The indication from the DAC was that, although they considered that general words of incorporation should be enough to incorporate arbitration provisions, it was really a matter for the courts to decide. It is unfortunate that this issue was not resolved by the DAC. The inconsistencies in approach, which had arisen prior to AA 1996, have been repeated by the courts when dealing with cases on incorporation of arbitration clauses under that Act.

3. CASE LAW UNDER THE ARBITRATION ACTS 1950–1979

The reason arbitration provisions are treated differently from other clauses under the contract is that they form a discrete contract within the contract itself. The contract may be void but the arbitration clause will survive unless the arbitration provision is also tainted. The following sections analyse case law on specific incorporation of the arbitration clause as well as incorporation by general reference, in respect of both pre-1996 cases and post-1996 cases. A comparison of the approaches is then undertaken.

3.1 Specific or General Incorporation

In *TW Thomas & Co. v. Portsea Steamship Company*,[1] the House of Lords held that an arbitration clause within a charterparty was not incorporated into a bill of lading by general reference to the terms and conditions of that charterparty. Bailhache KC, for the respondent, submitted that:

> It would be dangerous to hold that a general reference in a bill of lading to the charter party incorporates the whole of the charter party, because a great deal of money passes on bills of lading, which are negotiable instruments, and the purchaser of the bill of lading never sees the charter party . . . . By general words of incorporation only those clauses are incorporated which relate to the carriage and delivery of the goods, including the duty of the bill of lading holder to take delivery and the terms upon which he is entitled to demand delivery: *Manchester Trust v. Furness* [1895] 2 Q.B. 539.

Lord Loreburn L.C. accepted those submissions and held that: "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 concurred with the Lord Chancellor's speech and stated:

> 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 cargo or the payment of freight,—the proper subject-matter with which the bill of lading is conversant,—this should be done by distinct and specific words, and not by such general words as those written in the margin of the bill of lading in this case.

Lord Gorell and Lord Robson also concurred with the speech of Lord Loreburn, but further stated that a clause which had the effect of ousting the jurisdiction of the courts and compelled a party to resolve its disputes by means of arbitration must be in very clear language. Lord Gorell concluded that a party should be made specifically aware of a clause which has the effect of excluding the jurisdiction of the courts. Lord Robson stated that a clause which deprived a person of his normal legal remedies could never be too precise or too explicit.

In *Aughton Ltd v. MF Kent Services Ltd*[2] Sir John Megaw referred to *Thomas v. Portsea* and stated that the reason for excluding an arbitration clause from the bill of lading was not confined to the special features of a charterparty/bill of lading relationship and concluded that specific words were necessary to incorporate an arbitration clause.[3]

> There are, in my opinion, three important inter-related factors peculiar to arbitration agreements. First, an arbitration agreement may preclude the parties to it from bringing a dispute before a court of law. . . . Secondly, it has been laid down by statute (Arbitration Act

[1] [1912] A.C. 1.
[2] (1991) 57 B.L.R. 1.
[3] pp. 31–32.

> 1950 s.32 as re-enacted in Arbitration Act 1979 s.7(1)) that an arbitration agreement has to be "a written agreement" . . . . Thirdly, the status of a so-called "arbitration clause" included in a contract of any nature is different from other types of clauses because it constitutes a "self-contained contract collateral or ancillary to" the substantive contract.

Sir John Megaw therefore concluded that the reference in a subcontract to a contract's terms and conditions would not incorporate the arbitration provisions of the contract into the subcontract[4]:

> The distinction that *Thomas v. Portsea* drew between the arbitration clause and other clauses of the charterparty applies equally to the arbitration clause of the engineering sub-contract in the present case. That, in my opinion, is decisive of the appeal.

Conversely, Ralph Gibson L.J. stated[5] that express words of incorporation were not always necessary to incorporate an arbitration clause from another contract, concluding that there would be circumstances where general words would be sufficient. He referred to the judgment of Brandon J. in *The Annefield*[6] who reviewed a number of previous authorities, including *Thomas v. Portsea*, and held that:

> Those cases seem to me to establish the following proposition. First, in 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 incorporating, and also the precise terms of the arbitration clause in the charterparty alleged to be incorporated. Secondly, it is not necessary, in order to effect incorporation, that the incorporating clause should refer expressly to the arbitration clause. General words may suffice, depending on the terms of the latter clause. Thirdly, when the arbitration clause is, by its terms, applicable only to disputes under the charterparty, general words will not incorporate it into the bill of lading so as to make it applicable to disputes under the contract contained in, or evidenced by, that document. Fourthly, where 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.

The first ground mentioned by Sir John Megaw had been referred to by Lord Gorell and Lord Robson in *Thomas v. Portsea* but was not relied upon by Lord Atkinson or Lord Loreburn. The second ground mentioned by Sir John Megaw has been rendered obsolete by the wording of AA 1996 s.5. In relation to the third ground, the rationale for treating the arbitration clause as a distinct contract can be traced back to cases regarding termination of the underlying contract. Arbitration clauses had to be treated as collateral to the underlying contract, otherwise they would cease to have effect on termination with the result that the purpose of the arbitration clause would be defeated.

In *Alfred McAlpine Construction Ltd v. RMG Electrical*,[7] a dispute arose regarding a subcontractor's work. McAlpine issued an order to RMG Electrical on February 11, 1991, stating that the subcontract was based on "the 1980 edition (revised 1984) of DOM/1 and Articles of Agreement". RMG acknowledged the order and McAlpine prepared the subcontract documentation, which they sent to RMG Electrical. The subcontract stated:

> The sub-contract conditions set out or contained or referred to under the Domestic Sub-Contract DOM/1 Articles of Agreement/1980 Ed . . . shall apply to this Sub-Contract . . . as if

[4] p. 32.
[5] 57 B.L.R. 1 at 16.
[6] [1971] P. 168 at 173.
[7] [1998] A.D.R.L.J. 33.

> fully set out hereunder and shall be fully incorporated herein, and the Sub-Contractor hereby acknowledges that he fully appreciates and understands the terms of the said Sub-Contract.

Judge Hedley was of the opinion that the words of the subcontract were express words of incorporation and that, even applying Sir John Megaw's reasoning, the arbitration clause had been validly incorporated. Judge Hedley held that the words used in the subcontract had the effect as if the whole of DOM/1 was reproduced on the face of the subcontract. He went on:

> Had the only contractual document been the order dated 11 February 1991, then, on the basis of Sir John Megaw's reasoning, clause 38 [the arbitration clause] would not have been incorporated, although it would have been incorporated on the basis of Ralph Gibson L.J.'s reasoning that general words of incorporation were sufficient.

The report gives no indication whether Judge Hedley favoured the approach of Sir John Megaw over that of Ralph Gibson L.J. However, in *Secretary of State for Foreign and Commonwealth Affairs v. Percy International & Kier International*,[8] Judge Bowsher suggested that Judge Hedley preferred the approach of Sir John Megaw.

Ben Barrett and Sons (Brickwork) Ltd v. Henry Boot Management Ltd[9] further supports Sir John Megaw's view that general words are not enough to incorporate an arbitration clause. Judge Lloyd felt bound by Sir John Megaw's view that if a self-contained contract is to be incorporated in another contract, it must be expressly referred to in that other contract, stating that this point of principle was based on the dicta of Lord Diplock in the House of Lords decision of *Bremer Vulcan v. South India Shipping*.[10]

Ralph Gibson L.J. in *Aughton* made reference to *Modern Building Wales v. Limmer and Trinidad Co*.,[11] where Buckley L.J. at p. 322 stated that what had to be considered was the language of the order and whether that order had the effect of incorporating an arbitration clause; the words "in full accordance with the appropriate form of nominated sub-contractors" was a phrase clearly understood by the parties as referring to the "green form". He stated that this phrase was:

> fully wide enough to introduce into the contract between the parties all the terms of the green form which relate to the supply of labour, and so forth, and the carrying out of works, including the arbitration clause, which is itself a clause relating to those matters.

In *Extrudakerb (Maltby Engineering) Ltd v. Whitemountain Quarries Ltd*,[12] a dispute arose whether an arbitration clause had been validly incorporated into the subcontract. Extrudakerb argued that an arbitration clause could only be incorporated in the subcontract if express reference was made to the clause itself. Carswell L.J. in the Queen's Bench Division of the Northern Ireland Court held that as both Extrudakerb and Whitemountain had agreed that the work should be undertaken under the terms of the FCEC form of subcontract, and were aware that it contained an arbitration clause, it would have been clear to an officious bystander that the terms for arbitration applied.

3.2 The Nature of the Arbitration Agreement

In *Bremer Vulcan v. South India Shipping*, Lord Diplock stated: "The arbitration clause constitutes a self-contained contract collateral to the shipbuilding agreement itself." It

[8] (1998) unreported.
[9] (1995) C.I.L.L. 1026.
[10] [1981] A.C. 909.
[11] [1975] 2 Lloyd's Rep. 318.
[12] [1996] N.I. 567.

is from this statement that a number of judges have concluded that an express reference to the arbitration clause is required. A general reference to a document containing the arbitration clause is not sufficient because it does not incorporate the arbitration clause, which is considered collateral to that document.

However, as Judge Bowsher in *Secretary of State for Foreign and Commonwealth Affairs v. Percy International & Kier International* pointed out, *Bremer Vulcan* was not concerned with incorporation. To apply Lord Diplock's comments to incorporation could lead to an absurd result where parties clearly intend to include an arbitration provision but have simply not referred to it directly.

3.3 The statement of first principles

In *Roche Products Ltd v. Freeman Process Systems Ltd*,[13] Judge Hicks, in a detailed and lengthy judgment, reviewed the authorities on incorporation. The claimants contended that, in order to incorporate an arbitration clause, the words used must refer explicitly to the arbitration clause itself; incorporation of a document in which it is contained, however clear, is not enough. Faced with apparently conflicting authorities Judge Hicks took as his starting point a statement of first principles and concluded that it would not be right to accept the proposition advanced by the claimants unless he was constrained by authority to do so. He reviewed the authorities and concluded that there was nothing there that required him to hold that an explicit reference to the arbitration clause was required:

> The most general and persuasive principle of the English law of contract is that effect should be given to the lawful intentions of the contracting parties. Where the contract is in writing that intention is to be derived from the written words, construed in a factual context and by reference to the subject matter. Compelling justification is needed for any rule which artificially restricts the search for the true intention of the parties by requiring them to use particular forms of words in order to achieve particular ends. Such rules place a premium on access to professional advice as to what are the magic words or labels needed. I see no justification for the rule contended for by the plaintiff.

On this basis he concluded that the general reference to a document containing the arbitration clause was sufficient to incorporate the arbitration clause, if there was evidence that it was the intent of the parties to incorporate that document.

4. CASE LAW REFERRING TO THE ARBITRATION ACT 1996

The question of incorporation was again analysed in *Secretary of State for Foreign and Commonwealth Affairs v. Percy International & Kier International*, a claim for defects in a roof. A number of preliminary issues came before Judge Bowsher, including whether there was a valid arbitration agreement. The defendant contended that: "An arbitration clause cannot validly be incorporated into an agreement by express reference in that agreement to a written set of conditions which contains the arbitration clause in question, but without express mention of the arbitration clause itself."

Judge Bowsher rejected this contention and held that, depending always on the words used, an arbitration clause can validly be incorporated into an agreement by express reference in that agreement to a set of conditions which contains the arbitration clause in question, but without express mention of the arbitration clause itself. Although the case involved the Arbitration Act 1950, Judge Bowsher proceeded to examine incorporation under AA 1996, saying that the older law would remain a guide to the interpretation of AA 1996 s.6(2). He started his analysis by reference to the leading textbooks, citing the first edition of *Mustill and Boyd*[14]:

[13] (1996) 80 B.L.R. 102.
[14] (1998) Unreported.

> . . . it is well established that the parties need not set out the terms of their arbitration agreement in the contract itself. It is sufficient for the clause to be incorporated by reference either to a standard form of clause or to a set of trade terms which themselves include provisions requiring disputes to be submitted to arbitration. Nor need the contract itself be contained in a single document; an agreement to arbitrate can be spelt out in an exchange of correspondence or telex messages but the documents must be clear enough to show that the parties did indeed intend to incorporate an agreement to arbitrate.

The second edition uses the same words, with the addition of the following[15]:

> In principle an arbitration clause may be incorporated by a reference to a standard form of contract or the particular terms of another contract in which the clause is set out, even without express reference to the clause. But it must be clear that the parties intended the arbitration clause to apply.

To this paragraph there is appended note 7:

> Where the arbitration clause is in terms which are prima facie inapt for the contract in question (eg where a clause covering disputes "under this charterparty" is said to be incorporated into a bill of lading), the court will not engage in the verbal manipulation necessary to make the clause fit the new context unless it is quite clear that this was what was intended: *TW Thomas & Co v. Portsea Co Ltd* [1912] A.C. 1; *The Annefield* [1971] P. 168; *The Rena K* [1979] QB 377; *Skips AS Nordheim v. Syrian Petroleum The Varenna* [1983] 2 Lloyd's Rep. 592; *Pine Ton Insurance v. Unione Italiana Analo Saxon Reinsurance* [1987] 1 Lloyd's Rep. 476.

Judge Bowsher then considered *Aughton*. He stated that, since the two judges of the Court of Appeal were in disagreement, no binding decision was formed in *Aughton*. He also distinguished *Aughton* because there the arbitration clause required manipulation to make it workable in a contract for which it was not designed. He considered *Lexair Ltd v. Edgar W Taylor Ltd*,[16] *Co-operative Wholesale Society Ltd v. Saunders & Taylor Ltd*,[17] *Alfred McAlpine Construction Ltd v. RMG Electrical Ltd*[18] and *Ben Barrett & Son (Brickwork) Ltd v. Henry Boot Management Ltd*.[19] He noted that in *Ben Barrett* Judge Lloyd had followed the dictum of Sir John Megaw that the arbitration clause in the case was "entirely apposite to the contract" and that Judge Lloyd did not accept counsel's reliance on *Modern Building v. Limmer*.[20] Judge Bowsher commented:

> While I have the highest respect for Judge Lloyd's judgments, in this instance I have to say that I disagree with his judgment. The report does not purport to be a full report, but I have obtained a full copy of his judgment, and the full text does not differ in material respects from the extracts reported in Construction Industry Law Reports. I will give the reasons for my disagreement with that decision later when discussing the decision in *Modern Building v. Limmer.*

He then considered *Roche v. Freeman*, saying he agreed with Judge Hicks and was bound by both authority (*Modern Building*) and long standing commercial practice to find in favour of the claimants on this point. He then considered Sir John Megaw's comments on *Bremer Vulcan* and distinguished that case because it did not deal with incorporation. He stated:

[15] 1989 p. 106.
[16] [1993] 65 B.L.R. 87.
[17] (1995) 39 Con. L.R. 77.
[18] [1998] A.D.R.L.J. 33.
[19] [1995] C.I.L.L. 1026.
[20] [1975] 1 W.L.R. 1281.

> As to commercial practice, I have already cited at length from the leading work by Mustill and Boyd which I take to reflect as well as lead current commercial practice. Moreover, in a multitude of cases parties opposing arbitration have not taken the point that an arbitration clause cannot be incorporated by general reference when it would have been open to them to take that point. Those cases are generally not reported, but they are common in my experience. One such case that is reported is *Sidney Kaye v. Bronesky* (1973) 4 B.L.R. 1. In that case, architects sued their client for damages for breach of contract. The architects had been engaged by letter which provided that "The RIBA Conditions of Engagement so far as consistent with the foregoing shall apply." Those were the same conditions as are under consideration in one of the cases before me and they contained an arbitration clause. The defendants obtained a stay of the action from the judge. The plaintiffs contended that the dispute was outside the terms of the arbitration agreement. The Court of Appeal upheld the decision of the judge below and continued the stay.

Judge Bowsher concluded that general words of incorporation were therefore sufficient.

In *Trygg Hansa Insurance Co. Ltd v. Equitas Ltd*,[21] Judge Jack arrived at the opposite conclusion. Neither *Modern Building* nor *Roche Products* were cited. Judge Jack relied on a number of judgments relating to contracts of retrocession to support the contention that general words of incorporation were not enough. In particular he referred to *Excess Insurance Co. Ltd v. Mander*.[22] He therefore held[23]:

> The approach of Megaw L.J. in *Aughton* has been adopted in preference to that of Ralph Gibson L.J. in two cases in the Official Referees Court involving construction contracts, namely *Ben Barrett & Son (Brickwork) Ltd v. Henry Boot Management Ltd* [1995] Constr. Ind. Law Letter 1026 and *Cooperative Wholesale Society v. Sanders & Taylor* (1995) 11 Constr. Law Jo. 118. In *Giffen v. Drake & Scull* (1995) 11 Constr. Law Jo. 122 the Court of Appeal found it unnecessary to decide between the two approaches: Bingham L.J. suggested that the difference might not be so large as it might seem.
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> It is stated by Professor Merkin in his *Arbitration Law* that: "In the light of these cases, the general policy of the law as regards the purported incorporation by general wording of arbitration clauses in other contracts must be regarded as finally settled." If it was my task simply to apply these authorities, there can be little doubt that I should follow the analysis and conclusion in *Excess v. Mander* and hold that here the arbitration clause was not incorporated.

The issue of incorporation again arose in *Anonymous Greek Co. of General Insurances, "The Ethniki" v. AIG Europe (UK) & Ors*,[24] which involved the incorporation of jurisdiction clauses. Although his words were purely *obiter*, Evans L.J., in referring to arbitration clauses, stated:

> I respectfully adopt and agree with Sir John Megaw's analysis of the authorities with regard to arbitration clauses and specifically with regard to the incorporation of charterparty arbitration clauses into bills of lading. There was a time when the objection to incorporation was expressed on semantic grounds (the arbitration clause was, or was not, a "term, condition or exception", etc) but this was overtaken by the closer analysis of the nature of an arbitration agreement which appeared in *Bremer Vulcan v. South India Shipping Co.* [1981] A.C. 909.

He then considered reinsurance contracts, which were the subject matter of the dispute:

[21] [1998] 2 Lloyd's Rep. 439.
[22] [1995] L.R.L.R. 358.
[23] [1998] 2 Lloyd's Rep. 439 at p. 446.
[24] [2000] 2 All E.R. 566.

> It is clear in my judgment that the circumstances in which charterparty provisions are stated to be incorporated in a bill of lading are special and possibly unique, and they cannot give rise to any rule of construction which should apply whenever one contract incorporates the terms of another.

Evans L.J. concluded that the question which needed to be answered was: "did the parties to the contract in which the general words of incorporation appear intend that their contract should include the particular term from the other contract referred to?"

In *Cigna Life Insurance Co. of Europe v. Intercaser SA de Seguros y Reaseguros*[25] Morison J. examined whether general words could incorporate an arbitration clause and stated:

> For the reasons he gives, I adopt entirely the principles and conclusions arrived at by Judge Raymond Jack . . . in *Trygg Hansa v. Equitas* [1998] 2 Lloyd's Rep. 439. . . . it seems to me that, absent words which expressly incorporated the arbitration clause, words of general incorporation of the words of the contract between [the parties] are not sufficient. The legal justification for this conclusion comes from the special position which these clauses have in English law. An agreement to arbitrate disputes is regarded as personal to the parties to the agreement and collateral to the main obligations.

5. CONCLUSION

The explanatory memorandum to the Arbitration Bill stated that section 6 was intended to correspond to Article 7 of the UNCITRAL Model Law.[26] In two cases dealing with incorporation under the UNCITRAL Model Law it was held that general words of incorporation would suffice.[27] Incorporation was permitted even though some modification of the arbitration clause was required in order to make the clause work. In *Trygg Hansa* Judge Jack accepted that if the Model Law had been adopted in England then it would have been right to put the English authorities to one side. However, the English courts have concluded that AA 1996 section 6(2) does not correspond to Article 7 and the courts continue to apply established case law principles in determining whether an arbitration clause has been effectively incorporated.

From the established authorities it seems that there is a distinction between a reference to a standard form agreement, of whose terms both parties are aware, and a reference to an agreement, of whose terms one party may not have knowledge. In the commentary to *Roche Products v. Freeman*[28] the editors of the Building Law Reports write:

> It is submitted that express reference in writing to a standard form of contract which contains an arbitration clause which is apposite to the parties to the contract will usually be sufficient, in the absence of any indication to the contrary, to establish an intention to incorporate the arbitration agreement without express reference to the arbitration clause.

This approach accords with *Mustill and Boyd* regarding commercial practice and *Hudson's Building and Engineering Contracts* (11th ed.) para. 18.033. Furthermore,

[25] (unreported) 18 May 2001.

[26] "The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

[27] *Astel-Peiniger Joint Venture v. Argos Engineering & Heavy Industries Co. Ltd* (Case Law on UNCITRAL texts (CLOUT) Case No. 78) and *Gay Constructions Pty Ltd and Spaceframe Buildings (North Asia) Ltd v. Caledonian Techmore (Building) Ltd and Hanison Construction Co. Ltd (as a third party)* (Case Law on UNCITRAL texts (CLOUT) Case No. 87).

[28] (1996) 80 B.L.R. 102 at 108.

the approach fits well with the statement of principles developed by Judge Hicks in *Roche Products*.

The DAC could have adopted the approach taken in the UNCITRAL Model Law to this issue. That would have led to a general principle for the incorporation of arbitration clauses which was clear and unambiguous. But it did not. There is, however, formidable logic in the argument that an express reference to an arbitration clause is required, especially where the clause is designed for disputes between different parties. As Morison J. said in *Cigna Life*, an agreement to arbitrate disputes is regarded as personal to the parties to the agreement.

There is no objection *per se* to having differing approaches to the incorporation of arbitration clauses. What is objectionable is that too often the different approaches become blurred. At present it is for the courts to sort out this issue case by case. This is less than satisfactory and will not assist in the promotion of arbitration as a sensible alternative to litigation.