THE VICTORIAN BAR

Continuing Legal Education Program

INCORPORATION BY REFERENCE

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General Principles [1]

A term may be incorporated into a contract:

(a) by signature on a contractual document;

(b) by reasonable notice;

(c) under the principles established in the "ticket cases";

(d) by a sufficient course of dealing; or

(e) by reference.

A term may be incorporated by reference to another contract or document if there is an express or implied agreement to that effect, provided the term is not inconsistent with the contract into which it is alleged to have been incorporated.

It is quite common for parties to record the bare essentials of their contract in a document and for that document to refer to, and incorporate, a set of terms, such as the standard form of a trade association, or the standard terms of one of the parties. However, the incorporation must be the subject of express or implied agreement, and a communication purporting to accept an offer will not incorporate terms as set out in a contract note where these differ from the terms of the offer. The approach may also be used to incorporate the terms of another contract related to the transaction.

Most of the commercial cases are English authorities, usually involving sale of goods and charterparty contracts. However, the general approach is that the terms must be "germane" to the contract. An arbitration clause is not necessarily incorporated by this process.

The meaning of the words in the incorporated document is one of construction and the words in the express contract will not necessarily bear the same

meaning as in the incorporated document. If the effect is to incorporate provisions inconsistent with the express contract, written terms will prevail. The issue, however, is ultimately one of construction of the incorporating document.

A common source of difficulty in arriving at the true intention of the parties will be where a document referred to by reference for a particular purpose also contains an arbitration clause which one of the parties seeks to invoke. It is this aspect of incorporation by reference that I propose to concentrate upon.

As in other areas of commerce, the exchange of documents which lead up to the conclusion of a sub-contract frequently contain references, often in vague terms lacking precision, showing that some other identifiable document or set of contract terms are to apply to the subcontract. In construction subcontracts these usually take two principal forms:

(a) references to a part or all of the Head Contract itself (or to the Head Contractor's obligations under it which, by implication if not expressly, the subcontractor undertakes to perform); and

(b) references, often garbled and inaccurate, to some known and publicly available set of documents or a standard form which it is intended should constitute the formal subcontract conditions.

This can give rise to considerable difficulties, since the incorporation is often loosely expressed in the most general words and without any precise or careful consideration of the consequences. Each case must be separately considered to determine the precise purpose and extent to which it is desired to incorporate the term or terms of the Head Contract. It follows from the absence of privity between the owner and the sub-contractor that, without incorporation, the terms of the Head Contract, even though well known to both parties, cannot bind the sub-contractor. This will be very much a question of interpretation on a case-

by-case basis of often informal documentation in an endeavour to ascertain the parties' objective intentions to be derived from the language used.

Frequently parties refer to a document which cannot be used to fit the parties' own contractual relationship or description without some necessary modifications. In the case of an arbitration clause in a Head Contract, for example, it may or may not be worded so as to be applicable to sub-contracting parties without modification of at least some parts of the clause.

In the field of marine contracts of affreightment, a substantial case law has built up as a result of the practice whereby Bills of Lading incorporate by reference the terms of the principal Charterparty. Relatively rigid rules of interpretation have been developed by the English Commercial Courts in Bill of Lading cases, to the effect that where the terms of the Charterparty's arbitration clause are not applicable without some modification of its provisions to suit the Bill of Lading relationship or transaction, a general incorporating reference to the Charterparty without some more specific reference to the arbitration clause itself will not suffice.

In many circumstances "loose incorporation" or references in a subcontract to a superior contractor's Head-Contract obligations may often only be intended to mean that the physical work under the inferior contract is to comply with all the superior contractor's obligations in that regard to his own employer. That is to say, only the specifications or descriptions of the work, or of its mode and manner of execution, in the superior contract are intended for incorporation into the inferior contract. Once, however, the intention is shown to go beyond that point and adoption of another contract's terms or conditions generally, the onus may shift to the party seeking to avoid incorporation of the arbitration clause, even if some necessary modification of the other contract may be required.

The English Cases

Modern Buildings Wales Ltd v. Limmer & Trinidad Co Ltd **[1975] 2 Lloyds R 318**

The main contractors (plaintiffs) placed a written order with the nominated subcontractors (defendants)

> *"To supply adequate labour, plant and machinery to carry out, complete, the ventilated and non-ventilated ceilings at the contract site within the period stipulated in the programme of work and* ***in full accordance with appropriate form for nominated subcontractors (RIBA 1965 Edition)****..."*

The Royal Institute of British Architects (RIBA) had no standard form of contract between a contractor and a nominated subcontractor and, although it had a form of main contract in a 1963 edition, it had no such form in a 1965 edition. The National Federation of Building Trades Employers and the Federation of Associations of Specialists and Subcontractors had issued in 1963 a form of contract ("the green form") to be used by contractors and nominated subcontractors nominated under the 1963 Edition of the RIBA form of main contract.

The plaintiffs began an action for damages for breach of contract and applied for summary judgment under RSC Order 14. The defendants applied under Section 4(1) of the Arbitration Act 1950 to stay the action on the ground that the written order incorporated the green form which contained an arbitration clause. Affidavit evidence was given on their behalf that the words:

> *"in full accordance with the appropriate form for nominated subcontractors (RIBA 1965 Ed)"*

would be understood in the trade as referring to the green form. The plaintiffs contended:

(a) that their Order did not refer to the green form;

(b) it was doubtful whether the arbitration agreement had been incorporated; and

(c) that the existence of such a doubt afforded good ground for allowing the action to proceed.

The Master refused the defendants' application to stay the action and on appeal Kerr J affirmed that decision.

On the defendants' appeal to the Court of Appeal the question that had to be decided was whether there was an arbitration agreement between the parties, in which case the action should be stayed pending arbitration.

Allowing the appeal and granting the stay the Court held:

(1) When a party applied to stay proceedings on the ground that there was an effective arbitration agreement the Court was obliged to construe the terms of the Contract and to decide whether there was such an agreement before the party was required to take any step in the action.

(2) The words '*the appropriate form for nominated subcontractors*' read in the light of the defendants' uncontradicted affidavit evidence were to be construed as referring to the green form; that since the words were in parentheses, "*RIBA 1965 edition*' they were not intended to restrict the preceding words but were an added description. They were to be ignored as a false and inappropriate description of the preceding intelligible words and that, since the words '*in full accordance*' were wide enough to import all clauses in the green form relating to the supply of labour, plant and machinery, which included the arbitration clause, the defendants were entitled to an order staying the proceedings and referring the dispute to arbitration.

Buckley LJ said at p.323:

> *"I think it is a dispute relating to the supply of labour, plant and machinery and the carrying out of the works, and the words 'in full accordance with the appropriate form for nominated subcontractors', appear to me to be 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 the works, including the arbitration clause, which is itself a clause relating to those matters…In my judgment, the green form of contract must be treated as forming part of the written contract, subject to any modifications that may be necessary to make the clauses in the green form accord in all respects with the express terms agreed between the parties.*
>
> *For these reasons, I reach the conclusion that this is a case in which there is a written arbitration agreement between the parties which is applicable to any dispute or difference in regard to any matter or thing of whatever nature arising out of the Subcontract or in connection with it."*

The case is accordingly authority for the proposition that a general incorporation of a document containing an arbitration clause as distinct from a specific incorporation of the arbitration clause as such, was effective.

A divergent view was expressed by the Court of Appeal, differently constituted in ***Aughton Ltd* v. *MF Kent Services Ltd* [1991] *57* BLR 1**. In that case the plaintiffs "Aughton" were sub-subcontractors to the defendants "Kent" under six contracts for instrumentation and electrical works. Kent were subcontractors to Press Construction Ltd who were main contractors to the Ministry of Defence. Press had based its subcontract conditions on GC/Works/1, Edition 2 as used in the main contract.

Aughton commenced proceedings to recover sums allegedly due under each sub-subcontract. Kent applied for a stay in respect of claims under

Subcontracts 2 and 4 on the basis that the arbitration clause contained in Kent's Subcontract with Press had been incorporated into Sub-Subcontract 2, and that Sub-Subcontract 4 was an agreed extension or variation of the work under Sub-Subcontract 2.

Sub-subcontract 2 was made when Aughton accepted (by starting work) the offer contained in a letter from Kent dated 3 June 1988. This letter stated, *inter alia:*

> *"(7) You* [i.e. Aughton] *will enter into a sub-subcontract with us* [i.e. Kent] *based on GC Works 1 as discussed at our meeting on 21.2 .88 for the execution of works.*
>
> *(11) Our previous correspondence and the documentation encompassed in our enquiry forms part of our agreement."*

The *"previous correspondence and documentation"* included oral discussions and reference to *"Press Construction Ltd conditions of subcontract and MFKent Services Ltd conditions of sub-subcontract"* (the Press/Kent conditions), Condition 61 of which was:

> *"61.1 All disputes, differences or questions between the parties to the subcontract with respect to any matter or thing arising out of or relating to the subcontract other than a matter to which the decision or the report of the contractor or of any other person is by the subcontract expressed to be final and conclusive shall after notice by either party to the subcontract to the other of them be referred to a single arbitrator agreed for that purpose."*

Judge Stannard at first instance had to face the problem of dealing with the difficulties involved in incorporating a subcontract arbitration clause into a sub-subcontract where the arbitration clause required manipulation to make it workable in a contract for which it was not designed. He held that Aughton

had by its conduct admitted that the sub-subcontract was governed by the Press/Kent conditions; that little adaptation was required to Condition 61 to apply it to Aughton's subcontract; but that general incorporation was insufficient since in order that an arbitration clause might be incorporated, it must be explicitly incorporated or apply expressly to disputes under the sub-subcontract. He therefore refused a stay. Kent appealed.

The Court of Appeal dismissed the appeal. Both judges agreed that the reference to the Press/Kent Conditions, ie. GC/works/1 as modified by Press, was insufficient to impose on Aughton an obligation to arbitrate its disputes on the two subcontracts.

Per Ralph Gibson LJ (General incorporation)

(i) At p.23: The arbitration clause, by its words, was applicable only to disputes under the subcontract. No special rule of construction prevents incorporation of an arbitration clause by general words; dicta of Brandon J in **The Annefield** [1971] P168 at page 173 applied.

(ii) At p.24: It would be perverse for the Court to treat two commercial parties as having incorporated all the Press/Kent conditions (suitably modified) except an arbitration clause, the existence of which in such contracts most businessmen are aware. The parties had sufficiently expressed their intention to incorporate all the Press/Kent conditions, and that included the arbitration clause.

(iii) At p.24: The decision in **Modern Buildings Wales** was of no assistance in this case as the words of incorporation in that case referred directly to the "green form" of nominated Subcontract whose terms were applicable to the subcontract in question without modification.

(iv) At p.26: However, the requirement for a written agreement for arbitration, or a written direction to a place where the arbitration clause could be found, was not satisfied in this case. The letter of 3 June 1988, which referred to the GC Works/1 Conditions was not sufficient.

Per Sir John Megaw (Specific incorporation)

(i) At p.30: Distinct and specific words were required to incorporate an arbitration clause because of their nature (as opposed to these provisions from another contract), and there were no such words so that the clause was not incorporated. **TW Thomas & Co Ltd v. Portsea Steamship Co Ltd** [1912] AC 1 applied.

(ii) At p.31-2: An arbitration agreement is of a special nature because:

(a) an arbitration agreement may preclude a party from his right to have a dispute brought before a Court;

(b) that as a result of (a) the Arbitration Act requires a specific written agreement so as to ensure that a person is not to be deprived of this right unless he has consciously and deliberately so agreed; and

(c) an arbitration agreement is itself a self contained contract collateral or ancillary to and of a different nature from any other types of contracts and clauses.

***Lexair Ltd* v. *Edgar W. Taylor Ltd* [1993] *65* BLR 87**.

In about July 1989 the Plaintiff ("Lexair") who was a mechanical and electrical contractor was approached directly by W & H Partnership ("WHP") the Principal, to provide prices for certain mechanical and electrical work to be

carried out in connection with the construction of a new hotel on the Buckingham Ring Road. Lexair submitted a priced proposal to WHP on 24 July 1989. On 26 September 1989 WHP entered into a standard form JTC construction contract with the Defendant ("Taylor") as building contractor for the construction of the hotel. The construction contract provided a procedure for the nomination of a subcontractor which was not followed. By Architects Instruction dated 2 October 1989 Taylor was instructed to employ Lexair as a nominated subcontractor to perform the mechanical and electrical work.

On 5 October 1989, a meeting was held between WHP, the architect, the quantity surveyor, Lexair and Taylor. At the conclusion of the meeting, Lexair required that it be formally recognised as a nominated subcontractor, and Taylor wrote out an order. It provided:

> *"Mechanical and electrical services.., subject to... agreement on programme and entering into a JCT form of a subcontract incorporating main contract conditions… Subject to our standard conditions of contract."*

Lexair started work on 13 October 1989. Disputes arose and proceedings were issued by Lexair. Taylor applied for a stay pursuant to Section 4 Arbitration Act 1950. His Hon Judge Forbes QC directed there should be a trial of the issue whether or not the contract between Lexair and Taylor incorporated an arbitration agreement.

Held by Judge Fox Andrews QC*:*

(1) At p.99: A concluded subcontract came into existence when Lexair commenced work on 13 October 1989 and that the Subcontract incorporated the terms in form *NSC/4a.*

(2) At p.102: There was no evidence that the parties intended the arbitration clause in form NSC/4a to apply.

Judge Fox Andrews QC said at p.102:

> *"But the facts in the present case have to be considered. I have held that in commencing work on 13 October the plaintiffs were entering into a subcontract on the terms of NSC/4a. But on the narrative that I have indicated they reach that stage in circumstances from which it is far from clear that they would have had the arbitration clause in mind.*
>
> *I find on the facts of this case that it is not possible to find that both parties intended the arbitration clause in NSC/4a to apply.*
>
> *In any event I prefer to follow the judgment of Sir John Megaw. I hold therefore that the Subcontract between the parties was governed by NSC/4a save as regards the arbitration clause."*

This case therefore adopted the strict and narrow approach of Sir John Megaw from **Aughton's** case.

Co-operative Wholesale Society Ltd* v. *Saunders & Taylor Ltd* (1994) 39 Con LR *77

The defendant was a subcontractor to Alfred McAlpine Construction Ltd ("McAlpine") on a contract for a new paper mill being built in North Wales. The defendant sub-subcontracted some electrical and mechanical work to the plaintiff. The work was carried out in 1991. Interim payments were made but no agreement was reached on the final account.

By a letter dated 8 April 1992, the plaintiff called on the defendant to concur in the appointment of the arbitrator. On 8 May 1992 the plaintiff applied to the President of the Institution of Civil Engineers for the appointment of an arbitrator and on or about 22 June 1992 Mr JR Dowell was appointed.

On 11 February 1994 the plaintiff issued a specially endorsed Writ claiming payment of £36,986.27 from the defendant. The judge dismissed the plaintiffs'

application for summary judgment under RSC Order 14 on the grounds that the negotiations between the parties did not reveal any sufficiently clear agreement either as to liability or to quantum.

The defendant applied for a stay of proceedings under Section 4 of the Arbitration Act 1950. The sub-subcontract between the plaintiff and defendant contained a provision:

> *"Work to be carried out on site to the site programme of work and to the same terms and conditions as placed on our company by the main contractor and clients."*

The subcontract between the defendant and McAlpine was on the Federation of Civil Engineering Contractors' Standard Form of Subcontract (184 revision) (the blue form), clause 18(1) of which contained an arbitration provision. The defendant argued that clause 18(1) had been incorporated into the sub-subcontract by reference.

Judge Gilliland said at p.84-5:

> *"Faced with this difference in approach between the two members of the Court of Appeal in* ***Aughton*** *the proper course for me to adopt in my judgment is to follow and apply the principle laid down by the trial Judge in* ***Aughton****. That is a decision of a Court of co-ordinate jurisdiction and the reasoning of the trial judge on this point was in substance upheld on appeal by one of the two members of the Court of Appeal and accordingly while* ***Aughton*** *may not technically be binding upon this Court nevertheless in my judgment I should follow that decision on this point unless I am convinced that it was wrong. I am not so convinced and indeed if I had to choose between the approach of Sir John Megaw and that of Ralph Gibson LJ I should with respect prefer the reasoning and conclusion of Sir John Megaw.*

> *It is in my judgment desirable that the law on the question when an arbitration clause in one contract may be incorporated by general words into another contract should be clear and the principle expressed by the late Judge Stannard in* ***Aughton*** *appears to me to provide a clear and workable principle consistent with the authorities and is one which can be readily understood and applied by businessmen and contractors in the resolution of a question which is of not infrequent occurrence in practice….*
>
> *In the result I hold for the reasons I have stated that no arbitration clause was incorporated into the sub-subcontract between the Plaintiff and the Defendant…. The Defendant's summons to stay the action will be dismissed…."*

This case also adopted the narrow and strict approach of Sir John Megaw from **Aughton's** case.

Ben Barrett & Son (Brickwork) Ltd **v.** ***Henry Boot Management Ltd*** [1995] CILL 1026

The Plaintiffs were brickwork subcontractors to Boot who were, Management Contractors for the University of Manchester. Barrett started work pursuant to a Letter of Intent dated 6 December 1993 which incorporated Boot's invitation to tender dated 27 September 1993 and Barrett's tender dated 20 October 1993 stipulating that the form of the works contract was to be Works Contract/2 as issued by the JCT. The Letter of Intent was countersigned and was found to constitute a contract.

Boot purported to determine the contract for alleged lack of progress, and refused to pay certified sums, alleging a substantial cross claim.

The issue for decision was whether the arbitration clause in Works Contract/2 had been incorporated by reference into the contract.

Judge Loyd QC held that it had not. Following the judgment of Sir John Megaw in **Aughton** he held that notwithstanding the offer in Barrett's tender which had been incorporated into the Contract to "*conclude a works contract on the Works Contract (Works Contract/1 and Works Contract/2)*", that reference was insufficient to incorporate the arbitration agreement contained in Section 3, Article 3 and Section 9 of the conditions of Works Contract/1.

Judge Loyd QC concluded that if the arbitration clause was to be incorporated it had to be expressly referred to in the document which was relied on as the incorporating writing ie: the letter of intent. It could not be incorporated by reference only to the terms and conditions of contract. He said at p.1028:

> *"I have to say that I unhesitatingly prefer the approach of Sir John Megaw. In this case the words relied upon as incorporating the arbitration clause into the agreement are of course those contained in the letter of intent. The letter of intent makes no reference to the arbitration agreement. It makes reference to the documents which incorporate the contract conditions of which the arbitration agreement forms part. I take the view that the approach of Sir John Megaw is properly to be adopted. Whilst Mr Coulson's argument has its attractions and is supported at first blush by the decision in* **Modern Buildings Wales** *it has to be borne in mind that* **Modern Buildings Wales** *was decided some five years before the decision of the House of Lords in* **Bremer Vulkan**. *It is the speech of Lord Diplock in that case which formed a substantial part of the reasoning for Sir John Megaw in* **Aughton**. *Thus following the passage in the judgment of Sir John Megaw:*
>
> > *'If the self-contained contract is to be incorporated, it must be expressly referred to in the document which is relied on as the incorporating writing. It is not incorporated by mere reference*

> *to the terms of the conditions of the contract to which the arbitration clause constitutes a collateral contract.*
>
> *I hold that an arbitration agreement was not incorporated into the contract which I have found to exist in this case.'"*

This case therefore adopted the strict and narrow approach of Sir John Magaw from **Aughton's** case.

Giffen (Electrical Contractors) Ltd v. Drake & Scull Engineering Ltd and Femwork Ventilation Ltd .v. Drank & Scull **(1994) 37 Con LR 84**

Two appeals were heard together by the Court of Appeal. In each case the plaintiff was a sub-subcontractor who sued the defendant subcontractor for damages under the respective sub-subcontracts. In each case the defendant applied unsuccessfully for a stay of the action under Section 4 Arbitration Act 1950 and appealed.

The first appeal concerned the redevelopment of property at Cloak Lane, College Hill in the City of London. The Principal was Reinhold (College Hill) Pty Ltd. The plaintiff (Giffen) was sub-subcontractor to the defendant (Drake and Scull) who were subcontractors to the main contractor, AMEC Projects Pty Ltd. The main contract contained an elaborate arbitration clause. The subcontract was in the Blue form and also contained a substantial arbitration clause. The sub-subcontract was in Drake & Scull's in house form of standard conditions of subcontract.

The second appeal concerned the redevelopment of Dun and Bradstreet's headquarters office building in High Wycombe, Buckinghamshire. The Principal under the main contract was Dun and Bradstreet European Business Information Centre BV. The main contractor was Tarmac. The form of main contract was JCT80 Private Form. It contained a complex arbitration clause.

The subcontract was placed by Tarmac with Drake & Scull. The form of contract used was Domestic Subcontract Form, DOM 1. This contained an arbitration clause.

The sub-subcontract was placed by Drake & Scull with Femwork.

It was common ground that Drake & Scull's standard conditions of subcontract applied.

Clause 7 of the subcontract provided for Giffen/Femwood the sub-subcontractor to pay loss and expense to the defendant in respect of late completion. It continued:

> *"In the event of disagreement, the terms of the main contract will apply in relation to the reference of arbitration."*

The Court of Appeal held it was necessary to look very closely at the particular language of the provisions to be construed and the particular circumstances of the contract in question. The Court found on the true construction of the sub-subcontract that the main contract arbitration clause was not incorporated. The fundamental question was whether the language of clause 7 pointed plainly to the intention of the parties to incorporate the main contract arbitration clause.The Court concluded that it did not. The Court determined that the operation of clause 7 only arose where there was a disagreement as to whether the subcontractor had failed to complete on time or there were disagreements as to the measure of compensation payable. The Court concluded it was a very limited clause which could be involved only in defined circumstances. It was entirely incompatible with a general incorporation clause.

Sir Thomas Bingham MR in dismissing both appeals said at p.92 and 94:

> *"(92) In my judgment, therefore, asking oneself the fundamental question whether the language of these clauses points plainly to*

> *the intention of the parties to incorporate the arbitration clause in the main contract respectfully, my answer is negative….*
>
> *(94)….I do not, for my part, think it is necessary for us to examine the extent of the difference in principle between Ralph Gibson LJ and Sir John Megaw which may, on close examination, turn out to be a good deal narrower than might, at first sight, appear… I consider that the authorities, although interesting, do not throw real light on the problem which we have to resolve, which is whether the language of the Drake & Scull subcontract is such as to point to a clear indication to incorporate the arbitration provision of the main contract. As I have already indicated, I consider that the language does not have that effect."*

The Court of Appeal declined to resolve the difference in approach displayed in **Aughton's** case.

***Roche Products Ltd & Celltech Therapeutics Ltd .v. Freeman Press System and Haden Mclellan Holdings Pty Ltd, Black Country Development Corp .v. Kier Construction Ltd* (1999) 80 BLR 102**

Two cases were dealt with together by Judge Hicks QC as they dealt with the same issue and a composite judgment was produced.

The facts in the **Roche Products** case were that by a contract in writing ("the Building Contract") made between the first plaintiff, Roach (through the agency of the second plaintiff, Celltech) and the first defendant ("Freeman"), Freeman agreed to design and construct a purification process plant as Slough for £1.5m. The second defendant (Haden) is the first defendant (Freeman) holding company. It was joined because it had entered into a Deed of Guarantee (the Guarantee) with the plaintiff in respect of the first defendant's performance of its obligations pursuant to the Building Contract.

Disputes arose between the plaintiffs and the defendants under the Building Contract and the Guarantee.

The plaintiffs issued proceedings. The defendants applied for a stay.

The first defendant applied pursuant to Section 4 of the Arbitration Act 1950 for a stay on the ground that the disputes giving rise to the plaintiffs' claim were within the scope of an arbitration clause forming part of the Building Contract.

The second defendant's application was made pursuant to the inherent jurisdiction of the Court and on the ground that there would be a wasteful duplication and the possibility of inconsistent decisions if arbitration and litigation on overlapping issues were to proceed concurrently.

The parties' representatives signed a document headed "(A) AGREEMENT" which stated (inter alia) as follows:

> *"The following documents only and their annexes, if any, shall together constitute the Contract between the Purchaser as the Contractor…*
>
> *(A) Agreement*
>
> *(B) the General Conditions of Contract*
>
> *(C) the Special Conditions (if any)….*
>
> *For the purposes of identification the said General Conditions shall be incorporated by reference as set out in Section (B) hereto. The said Special Conditions… are bound together with this form of Agreement and have been signed on behalf of the Purchaser the Contactor."*

An unsigned document headed "(B) GENERAL CONDITIONS" stated:

> *"Save as amended by the Special Conditions, The Institute of Chemical Engineers' Model Form of Contract for Process Plant, Lump Sum*

> *Contracts, 1981 revision General Conditions shall apply hereto, and shall be deemed to be incorporated in full in this Contract, and all terms used in this Contract shall have the meanings assigned to them in the said General Conditions."*

The form of General Conditions referred to includes in clause 47 an arbitration clause.

The (C) Special Conditions contained amendments by way of deletion, insertion and revision of clauses in the Institute of Chemical Engineers' Model Form ("the Model Form"). Special Condition 7.3.3 provided in relation to the service of a Notice of Determination that either party may give to the other a written request to "concur in the appointment of an Arbitrator under Clause 47'.

The facts of the **Kier** case were that the plaintiff was the employer and the defendant a contractor under a contract for reclamation works at the Leabrook Road site at a price of £3.4m entered into on 1 March 1993.

Disputes arose and the defendant requested the plaintiff to concur in the appointment of an Arbitrator. Assent to the plaintiff concurrent the defendant applied to the President of the Institution of Civil Engineers to appoint an Arbitrator. The President did so on 19 January 1996. On 19 February 1996 the plaintiff issued a proceeding seeking a declaration that the parties had not concluded an agreement to arbitrate the disputes.

The contract provided:

> "*(2) The following documents shall be deemed to form part of an be read and construed as part of this Agreement:*
>
> *a the tender*
>
> *b the drawings*

c the Conditions of Contract."

The tender documents included as "Section C" a document headed "Conditions of Contract" which states:

> *"The Conditions of Contract shall be the Conditions of Contract (5th Ed) prepared by the Institution of Civil Engineers (ICE) ….dated June 1973 (Revised January 1979, Reprinted January 1986)."*

The ICE Conditions included clause 66 which was an arbitration agreement.

In each of these cases it was argued that, in the absence of express reference to "arbitration" in the parties "form of agreement", the fact that external documents incorporated standard form contracts containing arbitration agreements was insufficient to create an arbitration agreement.

Judge Hicks held in the **Roach** case granting the stay:

(1) At p.125 and 127: Clause 47 of the Model Form was part of the Building Contract by virtue of document (A) or the parties intended to incorporate it.

(2) At p.125 "*In my view it is clear beyond peradventure that the parties intended the arbitration clause to be part of the contract between them. In am far from convinced, indeed that any question of "incorporation:, in the sense discussed in the authorities arises."*

(3) Subject to Haden's undertaking to be bound by the findings of the Arbitrator and to pay sums found by the Arbitrator to be due from Freeman, the stay sought by Haden should be granted because the primary contract in respect of which the parties' rights and obligations were in issue was the Building Contract and the choice of Arbitration in that contract outweighed the absence of an Arbitration Agreement in the Contract of Guarantee and the ability of all parties to join in litigation.

Judge Hicks held in the **Black County** case ,granting a stay:

(1) At p.125-6: The expression "Conditions of Contract" in clause 2(c) referred to the ICE Conditions.

(2) At p.126: The ICE Conditions were expressed to form part of the contract as amended by Section C and were part of the contract or the parties intended to incorporate the arbitration provisions in the ICE Conditions.

In each case the Judge approached the question as one of construction. In both cases signed agreements incorporated documents which referred to standard forms containing arbitration clauses and in both cases the parties own amendments (contained in documents incorporated into the contract by reference) made reference to those clauses. In those circumstances it was not surprising that the judge had no hesitation in finding a clear intention that the parties intended the arbitration clause to apply.

The authors of the Building Law Reports (V.80 p.107-8) note as follows:

> *"Cases in which the contract refers to another contract which contains an arbitration clause designed for disputes between different parties usually arise where a contract incorporates the terms of another contract. It is often unclear whether a contract which refers to the terms of another contract intends to adopt the terms, which militates against the incorporation of an inapt arbitration clause in the absence of express reference (see by way of illustration* ***Brightside Kilpatrick Engineering Services .v. Mitchell Construction (1973) Ltd*** *(1975)1 BLR 62). The approach to such cases adopted by the Court of Appeal in* ***Giffen*** *(and Ralph Gibson LJ in* ***Aughton****) is as follows:*
>
> *(1) examine the terms of the contract said to incorporate the arbitration agreement;*

(2) (examine the arbitration agreement said to be incorporated to see how apt and workable it would be if incorporated.

That two –stage approach is appropriate in cases where an arbitration agreement is sought to be incorporated from another contract. Adoption of that approach in ***Giffen*** *suggests that Ralph Gibson LJ's approach in* ***Aughton*** *should be preferred to that of Sir John Megaw."*

Secretary of the State for Foreign and Commonwealth Affairs .v. Percy Thomas Partnership

Secretary of State for Foreign and Commonwealth Affairs .v. Kier International Ltd **65 Con LR 11:**

In the two cases the defendants, Percy Thomas Partnership (PTP) and Kier International Ltd (Kier), were the architects and main contractors respectively for the erection of the British Embassy in Amman, Jordan. The embassy was built in 1986 and 1987. There were troublesome leaks in the roofs. The Foreign and Commonwealth Office (FCO) issued Notice to concur in the appointment of an Arbitrator on PTP on 15 April 1992 and on Kier on 2 September 1993. On 16 April 1996 FCO applied to the Court to appoint an Arbitrator. No affidavits were sworn in support of the application until 18 months later.

The defendants argued that:

(a) there was no arbitration agreement;

(b) at the date of the Notice to concur there was no dispute or difference between the parties;

(c) the plaintiff had not followed the contractual procedure for appointing an Arbitrator;

(d) in the case of Kier there was a 'Final Certificate'; and

(e) in any case the Court should not exercise its discretion to appoint an Arbitrator following repeated periods of inordinate and inexcusable delay.

Judge Bowsher QC held that an arbitration clause can be incorporated into a contract by reference and it is a question of construction in each case whether that had been done. The decision of the Court of Appeal in **Aughton** was not authority for the proposition that arbitration clauses could not be incorporated by reference. Both PTP and Kier had entered into contracts in which an arbitration clause was effectively incorporated.

Judge Bowsher QC held:

> *"(63) Since the two judges of the Court of Appeal were in disagreement, no decision was formed in the **Aughton** case which is binding on me.*
>
> *(76) I am bound by the decisions of the Court of Appeal in **Modern Buildings Wales** and **The Annefield** and I follow those decisions and follow them gladly because to do so is consistent with commercial practice and common sense.*
>
> *(79) Kier and PTP each entered into a contract with FCO on terms of written conditions which included an arbitration clause and that clause was incorporated into the contract along with all the other written conditions."*

This decision represents a swing to the principle of general incorporation of a document containing an arbitration clause advanced in **Modern Buildings Wales** and by Ralph Gibson LJ in **Aughton**.

The Australian Cases

***O'Neill & Clayton Pty Ltd .v. Ellis & Clark Pty Ltd* (1978) 20 SASR 132**

In that case a subcontract between a builder and a sub-contractor for the execution of certain works provided in clause 8 that if any dispute should arise between the builder and the sub-contractor relating to the sub-contract or the works "*such dispute shall be submitted to arbitration*".

The sub-contract also provided in clause 9 that "*subject to the provisions of this agreement, the Conditions of the Building Contract made between the building owner and the builder should be incorporated in the sub-contract* ***insofar as such conditions are applicable hereto***".

The Building Contract (Edition 5b) contained a provision in clause 32 that in the event of any dispute or difference between the building owner and the builder, the dispute should be referred to arbitration, the arbitrator's award being final and neither party being entitled to commence any action in respect of the dispute (ie: a **Scott .v. Avery** clause).

A dispute arose concerning the sub-contract works and the sub-contractor commenced an action against the builder in the Local Court. The builder applied for a stay of proceedings to enable the dispute to be referred to arbitration. The application was refused by the Local Court.

On appeal it was held by the Full Court dismissing the appeal that where a Subcontract itself contained an arbitration clause and also incorporated by reference such of the conditions of the Head Contract as were applicable, it did not thereby incorporate the Head Contract arbitration clause into the Subcontract. The two arbitration clauses were inconsistent and the provision for incorporation was expressed to be subject to the provisions of the Subcontract and the incorporation was only "*insofar such conditions are applicable hereto*".

Clause 8 of the Subcontract did not make arbitration a condition precedent to the commencement of an action.

Legoe J held at p.141:

> *"The provision for arbitration in the subcontract was not a* ***Scott .v. Avery*** *type agreement and therefore the discretion was unfettered by any restrictive agreement between the parties as to the commencement or maintenance of any action."*

Behmer & Wright Pty Ltd .v. Tom Tsiros Constructions Pty Ltd **(VSCA, unreported 30 October 1997):**

By an agreement dated 15th November 1994 ("the Head Contract") Wesley College engaged the appellant builder to construct the new Wesley Preparatory School at 625 St Kilda Road, Prahran.

By a sub-contract work order ("the Work Order') signed on behalf of the appellant on 16th December 1994 and on behalf of the respondent concreter on 2nd March 1995 the respondent agreed to carry out "the Detail Excavation Concrete, Formwork, Precast & Post Tensioning" at the project.

A dispute arose between the parties as to the carrying out of the sub-contract works, which the respondent claimed should be resolved by arbitration in accordance with section 13 of the Head Contract….

The Work Order provided, on the front page, that the respondent agreed to carry out the sub-contract works "in accordance with the Terms and Conditions contained herein". Clause 4 provided:

> *"4. The terms and conditions will be clauses (1-6) Sub-Contract Details, Behmer & Wright Pty. Ltd. Standard Terms & Conditions clauses (1-24) and the provisions of the Head Contract."*

The expression "*clauses (1-6) Sub-Contract details*" refers to the six clauses appearing under the heading "*Details of the Sub-Contract Works*" in the Work Order.

The expression "*Behmer & Wright Pty. Ltd. Standard Terms & Conditions clauses (1-24)*" refers to a document of 24 clauses physically annexed to the Work Order and concluding with the words, "*The Sub-Contractor hereby agrees to carry out the aforementioned works in accordance with the Terms and Conditions contained herein*". It too was signed on behalf of the parties. The provisions of the Head Contract were not annexed, but there is no dispute as to the identity of that contract. There are accordingly three documents referred to in clause 4."

The Court of Appeal held that Section 13 (the arbitration clause) of the Head Contract was not incorporated into the Subcontract.

Ormiston JA at 3 was cautious of adopting any a priori rules as to the interpretation of the Subcontract in question:

> *"There was indeed a careful examination of the relevant authorities in the unreported judgment of Malcolm CJ (in whose reasons Pidgeon and Murray JJ substantially concurred) in* ***Carob Industries (in liq) v Simto Pty Ltd*** *(SCW of A (FC), 22 May 1997, as yet unreported). I would not wish to disagree with the conclusion there reached that the particular arbitration clause in the head contract had been incorporated into the sub-contract but I would be cautious about adopting any rules as to construction of these kinds of contracts except where they have been professionally drawn or have adapted forms drawn by lawyers or experts in the trade. Otherwise I consider that the task of interpretation must be resolved by considering in a realistic and practical way the terms of the agreements reached between the parties together with such other extrinsic material as is appropriate. The contract we are presently*

considering is a commercial contract entered into by people in the building trade and one ought not therefore to assume anything about their intentions, whether that be favourable to the use of arbitration clauses or not, save that one might fairly take judicial notice of the fact that arbitration is a very common form of dispute resolution in the building and construction industry in this State."

"…Nevertheless careful consideration of the terms used and the consequences of the adaptation of the head contract appearing in the parteis' own agreed terms have led me to the conclusion that the parties in this case did not intend to incorporate that "arbitration clause" or any part of it…." (p.4)

Callaway JA at p.7-8 held that:

(i) it was accepted by the Full Court in the **Carob** case that even a provision to the effect that a head contract forms and should be read and construed as part of a subcontract is not enough on its own to incorporate an arbitration clause that refers in terms only to the Head Contract. The view was expressed that something more is required, such as a provision to the effect that the Head Contract is to apply as if references to the Principal were to the Contractor and references to the Contractor were to the Subcontractor or language which imparts such transmutation;

(ii) it was only where the intention to incorporate was established by reference to the other contract generally or as a whole "*only then may an incorporation clause readily be taken to extend to a provision for arbitration, even if the provision requires some modification to make it work*".

(iii) inspection of the appellant's Terms and Conditions shows that they deal with most of the topics in the Head Contract that might

> have relevance between the parties, so that, if clause 4 incorporated all the provisions of the Head Contract, most of them would have to be ignored in order to achieve consistency with the appellant's Terms and Conditions.

Carob Industries Pty Ltd .v. Simto Pty Ltd **(1997) 18 WAR 1**

The appellant (a sub contractor) entered into a subcontract with the respondent (the Main Contractor) which provided that certain documents formed part of the Subcontract, including the General Conditions of Contract issued by the Principal (the General Conditions) in relation to the Main Contract between the Principal and the Main Contractor. The Subcontract further provided that:

> *"All contractual conditions between Principal and the Main Contractor will be deemed to apply between the Main Contractor and the Subcontractor."*

The Subcontract further provided for the subcontract works to be carried out in accordance with the General Conditions and the General Conditions were physically incorporated in the collection of documents which constituted the Subcontract.

Clause 50.4 of the General Conditions provided for the reference of "*disputes arising in relation to the Contract to arbitration*".

The appellant sought to rely on this clause to refer to arbitration a dispute arising under the Subcontract.

At first instance, it was held that clause 50.4 of the General Conditions was not incorporated into the Subcontract.

An appeal was successful. The Full Court held, per Malcolm CJ at p.17:

- in order to incorporate by reference into a contract an arbitration clause in another contract, it is not necessary to refer to the

arbitration clause specifically (**Modern Building Wales** followed. **Aughton** not followed);

- there can be no doubt that the weight of authority in England favours the approach adopted by Sir John Megaw in **Aughton** that a specific reference to the arbitration clause in another contract is required in order to incorporate it by reference… The approach adopted in England has resulted in the adoption of too strict a test. However, it seems to me that a provision that the Project General Conditions form and should be read and construed as part of the Subcontract does not of itself go far enough to incorporate the arbitration clause;

- General words of incorporation by reference (such as a provision that the conditions of the main contract form part of the Subcontract) will not, alone, be sufficient to incorporate an arbitration clause like clause 50.4. That clause referred disputes in relation to "the Contract", meaning the main contract, to arbitration. That clause does not refer disputes relating to the Subcontract to arbitration;

- here, however, the effect of the clause that "*all contractual conditions between Principal and the Main Contractor will be deemed to apply between the Main Contractor and the Subcontractor*" was to require the reference in clause 50.4 to "*the Contract*" to be read as a reference to the Subcontract;

- in this case the Project General Conditions were physically incorporated in the package of documents which constituted the Subcontract;

- the Subcontract agreement incorporated the arbitration provisions of the Project General Conditions on the basis that they applied as between the Respondent as the Main Contractor and the Appellant

as Subcontractor as "*the parties*" and that "*the Contract*" was the Subcontract. It follows the Subcontract contained a valid arbitration clause.

Lief Investments Pty Ltd .v. Conagra International Fertiliser Company Matter No. CA 40753/97 **(1998) NSWSC 481 (16 July 1998)**

An issue at trial was whether an agreement was made by faxes exchanged by the parties on 21 February 1997 which contained a term that incorporated by reference the terms of Sinochem's standard contract which included an arbitration clause (the appellant was an Australian company 70% owned by Sinochem) or whether it was made by a written agreement signed by the parties on 24 February 1997 which did not contain the term incorporating Sinochems standard contract. The trial judge found the exchange of faxes were negotiations and that an agreement was formed on 24 February 1997. The appeal was dismissed.

The Court of Appeal judgment was that of Shellar JA who held at p.17 that the approach taken by Malcolm CJ in **Carob's** case conforms with the approach and the propositions put forward by Brandon J in **The Annefield** (1971) P.168 at 173 (set out on page 15 of the judgment):

> *"…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 of 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 to make it applicable to disputes under the contract contained in, or evidenced by, that document.*
>
> *Fourthly, where the arbitration clause by its term 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 to make it applicable to disputes under that document…."*

His Honour regarded it as having great force and it was adopted. He held "*that being so, if the parties had agreed to the incorporation of the terms and conditions of Sinochem's standard contract and these could have been identified with certainty, there was no textual or policy consideration which would prevent the incorporation of the arbitration clause into the contract of sale. However… I do not think the arbitration clause was incorporated*".

Trefalk Centre for Cats & Dogs Pty Lt d .v. Sommer **(2001) 7 Qd R 443**

The applicant proprietor sought an injunction to restrain an arbitration being conducted by the first respondent pursuant to a Notice of Dispute served by the second respondent, builder. The agreement was contained in a letter from the builder to the proprietors architect and in a letter from the proprietor to the builder. The first letter provided:

> *"The form of contract proposed is MBA Construction Management Contract – CM1."*

The second letter stated:

> *"I accept the terms and conditions specified. I look forward to signing the Construction Management Contract…"*

The MBA Construction Management Contract contained clause 20 which was an arbitration clause. The Court held that the second letter was in clear and unequivocal terms and that the MBA Construction Management Contract was incorporated. The Applicant argued that even if this was so, the arbitration clause was not incorporated. He relied on the decisions in **Aughton, Thomas, The Annefield** and **Roche Products**.

Wilson J held at p.446 that:

> *"It is primarily a question of the proper construction of the words of incorporation and the arbitration clause itself. This is not a case of incorporation by reference of the terms of a contract between one of the contracting parties and a third party. Rather it is a case of incorporation by reference of a standard form contract developed by the industry for persons in the respective positions of these parties. By its terms the arbitration clause is applicable to disputes between the owner and the construction manager. In those circumstances general words of incorporation may suffice to incorporate the arbitration clause. It would be wrong to approach the questions from the standpoint that there is a rule of construction predisposing in favour of or against the incorporation of an arbitration clause, save that judicial notice can be taken of the fact that arbitration is a very common form of dispute resolution in the building and construction industry.*
>
> *I respectfully adopt the observations of Malcolm CJ in* ***Carob*** *that the approach adopted in the English authorities – that a specific reference to the arbitration clause in another contract is required to incorporate it by reference – has resulted in the adoption of too strict a test (****Carob*** *p.17). The English approach seems to have been influenced, at least in part, by rules of construction which had developed in relation to charterparties and bills of lading. The Court should hesitate before*

applying rules of construction developed in the specialised context of transferable documents of title to other types of contracts….

The English authorities seem to have been influenced also by the fact that a submission to arbitration is a collateral self contained contract within a more comprehensive agreement between the parties. However, as Malcolm CJ observed in ***Carob*** *at p.15, that is no justification for denying it incorporation by reference where parties engaged in the industry for which the standard from contract has been developed expressly agree to contract on the terms of the standard form which includes an arbitration clause.*

The question is whether in the present case the general words of incorporation are adequate to incorporate the arbitration clause. Having regard to the fact that the parties were incorporating the terms of a standard form specifically devised for persons in positions such as theirs and having regard to the arbitration clause's express application to disputes between the owner and the construction manager, I consider that the general words of incorporation were sufficient."

CONCLUSION

Where the parties do not sign a formal subcontract they often seek to incorporate terms of other contracts. This is satisfactory, provided the essential terms of the subcontract are agreed and the works relied on as having the effect of incorporation are clear.

There are no special rules as to the incorporation of arbitration clauses by reference in construction contracts.

The question in each case is whether, on a proper construction of the contractual material, the parties intended to incorporate the arbitration clause,

although clear evidence of this intention is probably required particularly where the arbitration clause is not specific to the subcontract in question.

Incorporation of Main Contract Terms

Parties sometimes seek to incorporate the main contract or some of it. This is inherently likely to cause problems having regard to the differences of subject matter and is not to be recommended.

If such incorporation is attempted, each case must be construed according to its own words.

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[1] See generally **Carter on Contracts** by JW Carter (looseleaf) p.24,195 – 199, 24,221 – 224, 24,245 – 248, 24,271 – 272;
Keating on Construction Contracts (8th Ed) by S. Furst p.403-5;
Hudson's Building & Engineering Contracts (11th Ed) by I. N. Duncan Wallace p.440-4, 1357-1361, 1583-1587;
Russell on Arbitration (12th Ed) by A. Walton and M. Victoria p.45-50;
The Construction of Contracts by G. McMeel p.279-305;
Commercial Arbitration Law and Practice by M. Jacobs (looseleaf) p.1421 – 1428; and
Building and Construction Contracts in Australia by J Dorter and J Sharkey (looseleaf) p.573-576.