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## General words sufficient to incorporate arbitration clause into sale contract

*Habas Sinai Ve Tibbi Gazlar isthisal Endustri AS v Sometal SAL [2010] EWHC 29 (Comm)*

### Background

The seller, S, sought to bring a claim against the buyer, H, in London arbitration for alleged repudiatory breach of a sale contract for steel scrap. H countered that there was no arbitration agreement incorporated into their contract with S dated June 2008. The issue was whether the London arbitration clause that appeared in some of the previous contracts between the same parties was incorporated into the June 2008 contract, given that it was not expressly referred to in that contract.

The contractual history of the parties was as follows. There had been 15 contracts in all between H and S. The first three had been drafted by H and provided for UNCITRAL Arbitration Rules / Turkish arbitration. The subsequent contracts were either prepared by S and were full form contracts setting out all the applicable terms, including a London arbitration provision, or were prepared by S's agent, M, and were short form contracts which did not contain the full terms or any arbitration provision, but stated that "*the rest will be agreed mutually*" or "*all the rest will be same as our previous contracts*". M prepared the 15th contract, the June 2008 contract in respect of which the dispute arose, on behalf of S and that short form contract contained the words "*all the rest will be same as our previous contracts*".

The Arbitral Tribunal decided, as a preliminary issue, that it had jurisdiction over the substantive claim and issued an Interim Award to this effect. H applied to the court under section 67 of the Arbitration Act 1996 to set aside the Tribunal's Award as to its own jurisdiction over the contractual claim. H argued *inter alia* that there either had to be an express reference to the London arbitration clause or wording that showed a clear intention if incorporation were to be effective. The application was dismissed.

### Commercial court decision

The judge reviewed the relevant case law relating to the incorporation of an arbitration clause where only general words of incorporation were used in the contract and no specific reference had been made to the arbitration provision. He said that the courts had traditionally taken a more restrictive approach to the incorporation of terms in "two-contract cases" (i.e. incorporating terms from one contract into another) than in "single contract" cases (e.g. incorporation of one of the party's standard terms into the main contract). One of the reasons given for the more restrictive approach in respect of the incorporation of arbitration clauses was that they were ancillary provisions personal to the parties which agreed them so that general words of incorporation were insufficient to incorporate them into a different contract. Another reason was that arbitration clauses ousted the jurisdiction of the courts, and clear words were required for that purpose in order to demonstrate a conscious and deliberate relinquishment of a right to go to court by the parties.

The judge said, however, that in a case such as the present one, the relevant distinction was less a "two-contract" / "one-contract" issue, and more a distinction between incorporating the terms of a contract made between (i) the same parties and (ii) different parties. Where the parties had previously agreed to and contracted on the terms said to be incorporated, there was

no good reason to apply the more restrictive approach set out above. This reasoning applied equally, in the judge's opinion, to an arbitration provision as to any other term of the contract.

Therefore, the judge held that general words of incorporation would be enough to incorporate an arbitration clause into a contract without specific reference to it, if the court concluded that that was what the parties had intended. In the present case, he held that the parties must have intended to incorporate the London arbitration clause which was contained in the full-form contracts prepared by S and which was also incorporated into the short form contracts prepared by M (by virtue of the words "*the rest will be agreed mutually*" or "*all the rest will be same as our previous contracts*" in those contracts). Mr Justice Christopher Clarke commented that these words did not require linguistic manipulation to make them "fit" the June 2008 contract.

The judge discounted any intention by the parties to incorporate the terms of the contracts prepared by H because the last of them was almost 3 years distant. Furthermore, in his view, there had been a distinct change from contracts prepared by the buyer to contracts being drafted by the seller or its agent, and the judge found that it was to those more recent contracts that reference must have been intended to be made.

In conclusion, Mr Justice Christopher Clarke held that the June 2008 contract did incorporate the London arbitration clause and consequently that the Tribunal had jurisdiction over the dispute.

### **Comment**

The judge in this case took a commercial view in circumstances where he evidently considered that a restrictive approach to the incorporation of an arbitration clause into a separate contract was inappropriate. In particular, he gave weight to what he believed would be the perspective of a businessman, namely that he would be surprised to find that his agreement to incorporate into a new agreement "all" of the terms of his previous contract with the same counterparty meant "all but the arbitration clause". This might be a comprehensible distinction to a commercial lawyer, but not to a businessman.

However, Mr Justice Christopher Clarke's pragmatic approach in this instance will not impact on the common situation regarding incorporation of charter party arbitration clauses into bills of lading, where the parties to the two contracts of carriage are usually different. The courts have been traditionally reluctant to impose a jurisdiction clause on a party which could not reasonably be expected to have been aware of it and / or agreed to it.

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