Neutral Citation Number: [2010] EWHC 29 (Comm)

Case No: 2009 FOLIO 1001

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/01/2010

Before :

MR JUSTICE CHRISTOPHER CLARKE

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Between :

HABAŞ SINAI VE TIBBI GAZLAR ISTHISAL ENDŰSTRI A.Ş.	**Claimant**
- and –	
SOMETAL S.A.L.	**Respondent**

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Paul Key and Siddharth Dhar (instructed by **Radcliffes Le Brasseur**) for the **Claimant**
John Russell (instructed by **Clyde & Co**) for the **Respondent**

Hearing dates: 18th December 2009

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Judgment

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MR JUSTICE CHRISTOPHER CLARKE :

1. This is an application by Habaş Sinai ve Tibbi Gazlar Isthisal Endustri A.S. ("Habaş") under section 67 of the Arbitration Act 1996. Habaş, a Turkish company, seeks to set aside an Interim Final Award on Jurisdiction and Costs made by an LCIA Arbitral Tribunal ("the Tribunal") by which the Tribunal decided that it had jurisdiction to entertain the claim made by Sometal S.A.L ("Sometal"), a Lebanese company. On such an application the Court is not involved only in reviewing the decision of the Tribunal: *Azov Shipping v Baltic Shipping Co (No 1)* [1999] 1 Lloyd's Rep 68.

The underlying contract

2. By a contract in writing dated 9th June 2008 ("the June Contract"), typed on a sheet of paper with the letter heading of a company whose abbreviated name is "Metkīm" (hereafter "Metkim")[1], Sometal S.A.L. ("Sometal"), for which Metkim acted as agent, agreed to sell 10,000 m.t. of steel scrap ex Romania & Bulgaria CIF FO Memrut Bay, Turkey. The contract contained a number of terms under the headings Material, Quantity, Price, Shipment, Discharge Rate, Payment, Final weight and NOR Tenderence (sic) and then ended with the words:

> *"ALL THE REST WILL BE SAME AS OUR PREVOUS CONTRACTS"*

The issues

3. There had been 14 previous contracts between the same parties. The issues that presently divide them are whether general words such as these are capable of incorporating an arbitration clause and whether, if they are, the effect of these words as between these parties was to incorporate a London arbitration clause in the following terms:

> *"All disputes, or controversies, or differences, which may arise between buyer and seller under this contract, shall be settled in London, according to London Arbitration Rules, by the United Kingdom Law".*

I call this "the London arbitration clause". The parties have agreed that, if this clause forms part of their contract, then the dispute between them, which is as to the validity of Sometal's claim for more than US $ 5 million on account of Habaş' alleged repudiation of the contract by failing to take delivery of the scrap, is to be resolved by an LCIA arbitration.

4. Habaş contends, firstly, that for a clause such as the London arbitration clause to be incorporated into a contract there must either be an express reference to the clause or wording that shows a clear intention to incorporate it, and that in the present case neither requirement is satisfied. Secondly, even if general words are capable of incorporating such a clause, the words used in the present case are inapt for the purpose. Sometal submits that there are no such requirements and that the Tribunal was right to find that the parties had intended to incorporate the London arbitration clause.

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[1] Metkim Metal Makina Kimya Sanayi Ve Dis Ticaret Limited Sirketi

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The previous contracts

5. The first 3 of the previous 14 contracts were on paper with Habaş' letter heading. The next 11 were either on a form drawn up by Sometal or on paper with Metkim's letter heading.

6. The sequence of contracts was as follows.

(i) **23 January 2004**: a contract prepared by Habaş which provided:

> *"Should any dispute arise during the conclusion or execution of this contract, the parties will endeavour to settle any disputes in amicable fashion. Should the parties be unable to reach an amicable solution, the disputes should be submitted to the Court of Arbitration with UNCITRAL Arbitration Rules*".

(ii) **24 May 2004**: a contract prepared by Habaş which contained the same clause.

(iii) **5 September 2005**: a contract prepared by Habaş which contained a clause in which the first sentence was as in the two previous contracts but in which the second sentence read:

> "*Should the parties be unable to reach an amicable solution, the disputes shall be submitted to the Court of Arbitration in Istanbul according to the Turkish laws".*

(iv) **23 March 2006**: a two-page contract prepared by Sometal which contained the London Arbitration Clause as the second of two clause 10s.

(v) **14 March 2007**: a one-page contract on Metkim's letter heading which provided, after the operative clauses dealing with Material. Quantity, Price, Shipment, Payment etc:

> "*The rest will be agreed mutually*"

(vi) **3 May 2007**: a contract like that of 23 March 2006 prepared by Sometal which contained the London Arbitration Clause.

(vii) **9 August 2007**: a one-page contract on Metkim's letter heading which provided:

> "*The rest will be as per previous contracts*"

(viii) **11 September 2007**: a one-page contract on Metkim notepaper, which also provided:

> "*The rest will be as per previous contracts*".

(ix) **25 October 2007**: A one-page contract on Metkim notepaper, which again provided:

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"*The rest will be agreed mutually*"

(x) **3 April 2008**: A contract prepared by Sometal like that of 23 March 2006 which contained the London Arbitration Clause.

(xi) **9 April 2008**: A contract prepared by Sometal like that of 23 March 2006 which contained the London Arbitration Clause.

(xii) **14 April 2008**: A one-page contract, on Metkim notepaper, which provided:

"*The rest will be agreed mutually*"

(xiii) **6 May 2008**: there were two contracts with this date, which provided as follows:

i. The first contract in time was on Metkim notepaper, was signed by Habaş on that date, and provided:

"*All the rest will be same as our previous contracts*"

ii. The second contract, prepared by Sometal, which was signed by at least one of the parties on 12 May 2008 and thus superseded the earlier contract, contained the London Arbitration Clause.

(xiv) **27 May 2008**: a (one-page) contract, on Metkim notepaper, which provided:

"*All the rest will be same as our previous contracts*"

(xv) **9 June 2008, the June Contract**: a (one-page) contract, on Metkim notepaper which provided:

"*All the rest will be same as our previous contracts*"

7. In respect of each of the contracts which provided that "*The rest will be agreed mutually*", or "*The rest will be as per previous contracts,*" or "*All the rest will be same as our previous contracts*", other than the first contract of 6 May 2008, there is no evidence of any later agreement that disputes should be determined by arbitration. The Metkim prepared contracts, like the Sometal prepared contracts set out the terms relating to Material, Quantity, Price and Shipment but, unlike the Sometal contracts, did not set out terms relating to quality, demurrage, force majeure or law and arbitration.

The ruling of the Tribunal

8. The Tribunal (Sir Simon Tuckey, Chairman, Mr Mark Hamsher and Mr Stephen Jagusch) heard Habaş' challenge to its jurisdiction as a preliminary issue. In paragraphs 13 and 14 of its Award it recorded the distinction made by the Courts

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between (a) cases where what was sought to be incorporated were the terms of a separate contract between two other persons or between one of the parties and a third party, on the one hand, where, as it held, specific reference to the arbitration clause or demonstration of a clear intention to incorporate the arbitration clause was required, and (ii) other cases of incorporation where general words would suffice and where no specific evidence of clear intention to incorporate the arbitration clause was required. It then held that the present case fell into the latter and not the former category

9. On the issue as to whether the words used did in fact incorporate the London arbitration clause, the Tribunal referred to the fact that the June contract, like the other Metkim prepared contracts, did not refer to important commercial terms such as quality and demurrage and asked itself whether the reference to terms "*as our previous contracts*" should be limited to terms such as those, as Habaş contended. It answered that question in the negative, deciding that the intention of the parties was to incorporate any terms from previous contracts which added to the terms set out in the short form Metkim prepared contracts. It then defined the question that it had to answer as being: is it clear where one has to look to discover what those terms were?

10. The Tribunal then decided that the parties could not possibly have intended to refer back to the Habaş prepared contracts (contracts 1-3) because Metkim had not been involved in making those contracts, each of which was subject to Turkish law and the last of which had been made in September 2005. It then held that the parties could not have intended to refer to the previous Metkim prepared contracts because those contracts either contained no relevant additional terms at all (in the case of contracts 5, 9, and 12 where the terms were to be agreed) or themselves referred to previous contracts (in the case of contracts 7, 8, 13 and 14). That left only the Sometal prepared contacts, which contained additional terms including the London arbitration clause.

11. As a result, the Tribunal concluded, the parties, by incorporating "*all the rest*" of the terms in "*our previous contracts*" in the June Contract clearly intended to refer to the additional terms to be found in the Sometal prepared contracts. The Tribunal thought that, if there was any doubt about the matter, it was resolved by what happened in relation to contract 13. In that case a Metkim prepared contract providing "*all the rest will be same as our previous contracts*" was replaced by one including the London arbitration clause in circumstances where there was nothing to suggest that the second contract was intended to be a variation of the first. The inference that the Tribunal drew was that the parties intended and understood that, when Metkim referred to terms in previous contracts, it was referring to the additional terms in the fuller Sometal prepared contracts. There was no reason why the same words used in the June Contract should not have been intended and understood by the parties to have the same meaning.

Are general words of incorporation sufficient?

12. The authorities recognise a distinction in approach between cases in which the parties incorporate the terms of a contract between two other parties or between one of them and a third party and those in which they incorporate standard terms.

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13. Parties are free to incorporate (or seek to incorporate) whatever terms they choose by whatever method they choose. In those circumstances it is unwise to seek to formulate definitive categories. But, with that caveat, most attempts at incorporation of an arbitration (or jurisdiction) clause are likely to fall within one of the following broad categories (in which the terms referred to include an arbitration clause):

(1) *A and B make a contract in which they incorporate standard terms.*

These may be the standard terms of one party set out on the back of an offer letter or an order, or contained in another document to which reference is made; or terms embodied in the rules of an organisation of which A or B or both are members; or they may be terms standard in a particular trade or industry.

(2) *A and B make a contract incorporating terms previously agreed between A and B in another contract or contracts to which they were both parties*

(3) *A and B make a contract incorporating terms agreed between A (or B) and C.*

Common examples are a bill of lading incorporating the terms of a charter to which A is a party; reinsurance contracts incorporating the terms of an underlying insurance; excess insurance contracts incorporating the terms of the primary layer of insurance; and building or engineering sub contracts incorporating the terms of a main contract or sub-sub contracts incorporating the terms of a sub contract

(4) *A and B make a contract incorporating terms agreed between C and D.*

Bills of lading, reinsurance and insurance contracts and building contracts may fall into this category.

14. Mr Paul Key on behalf of Habaş submits that no authority is to be found dealing with cases in category (ii) but that the same approach should be adopted in respect of such cases as in those in categories (iii) and (iv), namely that, in order for an arbitration clause to be validly incorporated there must either be a specific reference to the clause in the incorporating contract or that contract must manifest a clear intention to incorporate the arbitration clause in question.

The Bill of Lading cases

15. In *Thomas v Portsea* [1912] AC 1 the House of Lords held that an arbitration clause in a charterparty between shipowner and charterer was not incorporated in a bill of lading contract between the shipowner and the holder of the bill in the absence of an express reference in the bill of lading not merely to the terms of the charterparty but specifically to the arbitration clause. The bill of lading had provided for the payment of freight "*with other conditions as per charterparty with average accustomed*" together with a manuscript clause reading:

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

Lord Loreburn LC said that the arbitration clause was not one which governed shipment or carriage or delivery and only governed "*the way of settling disputes between the parties to the charterparty and disputes arising out of the conditions of the charterparty, not disputes arising out of the bill of lading*" and that if the holders were to be put under "*an obligation to arbitrate because that obligation is stated in the charterparty, it must be done explicitly"*.

16. Lord Atkinson said that when it was sought to introduce into a document

> "*like a bill of lading – a negotiable instrument – a clause such as this arbitration clause, not germane to the receipt, carriage, or delivery of the cargo or the payment of freight - the proper subject-matters with which the bill of lading is conversant - this should be done by distinct and specific words*".

Lord Gorrell thought it unlikely that a consignee would assent to a clause which might commit him to arbitration at a port of shipment with which he had no connection and on the fact that if the arbitration clause was actually written into the bill of lading, it would be seen to be inconsistent with it. He said that "*very clear language should be introduced into any contract*" which was to have the effect of precluding parties from bringing a dispute before a court of law. Lord Robson doubted whether, when written out into the bill of lading the arbitration clause was applicable to a dispute between persons other than the parties to the charter and referred to the status of the bill of lading as a negotiable instrument as a reason for requiring that "*if it is sought to deprive either party of his ordinary legal remedies, the contract cannot be too explicit and precise*".

17. That approach, namely that general words of incorporation in a bill of lading are not to be construed as incorporating the terms of a charterparty arbitration clause applicable to disputes under the charterparty was followed in *The Annefield* [1971] P 168[2]; *The Varenna* [1983] 2 Lloyd's Rep 592; and *The Federal Bulker* [1989] 1 Lloyd's Rep 103.

18. In *The Federal Bulker* [1981] 1 Lloyd's Rep 103 the issue was whether a clause in a charterparty requiring bills of lading to provide for arbitration of "*all disputes arising out of this contract*" was incorporated in bills which provided "*all terms …… as per charterparty …. to be considered as fully incorporated as if fully written*". The Court of Appeal held that the arbitration clause was not incorporated. Bingham LJ, as he then was, said:

> *"64 Generally speaking, the English law of contract has taken a benevolent view of the use of general words to incorporate by reference*

[2] The judgments of Brandon, J, and of the Court of Appeal indicate, however, that general words of incorporation in a bill of lading may be effective to incorporate an arbitration clause where the arbitration clause in the charterparty applies both to disputes under the charterparty and the bill of lading: see *The Merak* [1965] P 223. But these propositions do not appear to be reconcilable with *The Varenna* and *The Federal Bulker*: see *Siboti K/S v BP France SA* [2003] EWHC 1278.

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standard terms to be found elsewhere. But in the present field a different, and stricter, rule has developed, especially where the incorporation of arbitration clauses is concerned. The reason no doubt is that a bill of lading is a negotiable commercial instrument and may come into the hands of a foreign party with no knowledge and no ready means of knowledge of the terms of the charterparty. The cases show that a strict test of incorporation having, for better or worse, been laid down, the Courts have in general defended this rule with some tenacity in the interests of commercial certainty. If commercial parties do not like the English rule, they can meet the difficulty by spelling out the arbitration provision in the bill of lading and not relying on general words to achieve incorporation.

65 The importance of certainty in this field was emphasised by Lord Denning, M.R. in The Annefield ... by Sir John Donaldson, M.R. in The Varenna ... and by Lord Justice Oliver in the same case ... This is indeed a field in which it is perhaps preferable that the law should be clear, certain and well understood than that it should be perfect. Like others, I doubt whether the line drawn by the authorities is drawn where a modern commercial lawyer would be inclined to draw it. But it would, I think, be a source of mischief if we were to do anything other than try to give effect to settled authority as best we can."

Other cases

19. In *Pine Top Insurance Co Ltd v Unione Italian Anglo Saxon Reinsurance Co* Ltd [1987] 1 Lloyd's Rep 476 Gatehouse J was concerned with whether an incorporation clause in a retrocession contact in general terms validly incorporated an arbitration clause in an underlying reinsurance contract. He decided, obiter, that it was appropriate to apply the "*settled principles of the bill of lading cases*" and hold that, in the absence of express incorporation in the slip, the arbitration clause in the reinsurance contract was not incorporated.

Aughton Ltd v M.F. Kent Services Ltd

20. In *Aughton Ltd v M.F. Kent Services Ltd* [1991] 57 BLR 6 the Court of Appeal had to consider whether general words had the effect of incorporating an arbitration clause from a sub-contract into a sub-sub contract. Both parties were aware of the clause which was sought to be incorporated at the time that they made the sub-sub-contract. The clause in question required modification if it was to be applicable to disputes under the sub-sub contract. The Court sat as a court of two.

21. Lord Justice Ralph Gibson thought that there was no special rule of construction that general words would not incorporate an arbitration clause; but that the question was whether the parties so clearly expressed by the words used an intention to incorporate the relevant clause that the Court had to modify its terms so as to be applicable to disputed under the sub-sub-contract.

22. Sir John Megaw thought that an arbitration clause could not, even outside the bill of lading context, be incorporated by general words. He observed that it was implicit in

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the speeches in *Thomas v Portsea* that clauses in the charterparty other than the arbitration clause could be validly incorporated by the use of general words, such as clauses governing the shipment or carriage or delivery or the terms upon which delivery was to be made or taken. It followed that the reason for excluding an arbitration clause was not confined to the special features of the charterparty/bill of lading relationship nor to the fact that the bill of lading was a document of title.

23. Sir John then identified three reasons for excluding an arbitration clause from the category of clauses which could be incorporated by general words. The first was that it would need clear words to oust the jurisdiction of the courts. The second was that section 7 (1) (e) of the Arbitration Act 1979 required an arbitration agreement to be in writing and showed the need for a conscious and deliberate relinquishment of a right to go to court. The third reason was that a so-called arbitration clause is a "*self contained contract collateral or ancillary to "the substantive contract"* – per Lord Diplock in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 - and thus must be expressly referred to in the document relied on as incorporating it. All those three factors, he held, applied to the engineering sub-sub-contract in suit and were fatal to the purported incorporation of the arbitration clause.

24. In *Excess Insurance Co Ltd v Mander* [1995] LRLR 358 Colman, J, whilst accepting that the imputed mutual intention to be ascribed to the parties had to be arrived at by general principles of construction applicable to any other contractual term, recognised that the court's approach in relation to bill of lading contracts could be regarded as a settled rule of construction which might be adhered to in the interests of consistency and certainty of commercial law. After a review of the authorities he concluded that at the time when Excess, the retrocedant had entered into a retrocession contract with C.J. Mander, the retrocessionaire, there was no binding arbitration agreement between Excess and the company that Excess reinsured, although the XOL treaty slip contract had been entered into by Excess (without referring to arbitration). General words of incorporation in the retrocession slip were held not to express any intention to incorporate such arbitration clause as might ultimately be agreed by the leading underwriter under the XOL treaty. The use of general words would not have incorporated even a pre-existing arbitration clause from the XOL treaty, much less an arbitration clause which had not yet been agreed when the retrocession was entered into.

25. In *Trygg Hansa Insurance Co Ltd v Equitas* [1998] 2 Lloyd's Rep. 439 the applicant reinsurer sought a stay of the action by its excess of loss reinsured, on the basis that the excess of loss insurance contracts had incorporated in them an arbitration agreement in the primary policy, and the reinsurance contract had incorporated the arbitration agreement in the excess of loss policy. The excess of loss contracts stated that: *"Except as otherwise provided herein this policy is to follow the same terms, exclusions, conditions, definitions and settlements as the Policy of the Primary Insurers…"* The reinsurance contract stated "*Form: As original."* It was agreed that the latter words referred to the wording of the relevant excess of loss insurance.

26. The principal issue was whether the general words of incorporation in the excess of loss and reinsurance contracts were effective to incorporate the arbitration agreement

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in the insurance contract between the underlying insured and its primary insurer. HHJ Raymond Jack QC, as he then was, sitting as a judge of this court, referred to the fact that *Excess Insurance* supported a strict test of incorporation. Accordingly, he rejected (at p. 447) the argument that the general words of incorporation indicated an intention by the parties to incorporate the arbitration agreement from the primary insurance contract:

> "*The words used in the excess of loss insurances are "to follow the same terms, exclusions, conditions, definitions and settlements as the Policy of the Primary Insurers" - cl. 8 of the General Conditions. In accordance with the law as I have concluded I should apply it, these words are not to be taken as indicating an intention to incorporate the arbitration clause from the general conditions to the primary insurance. That is conclusive of the applications for a stay*."

27. In *AIG Europe UK Ltd v Anonymous Greek Insurance Company of General Insurances, The Ethniki* [2000] 1 Lloyd's Rep. IR 343 (Court of Appeal) one of the issues was whether the parties to a reinsurance contract had by the words "*CONDITIONS: Wording as original*" agreed to incorporate by reference a clause in the underlying insurance policy providing for the jurisdiction of the Greek courts. Evans LJ said, at para 33, that at first instance Colman J had held that:

> "*general words of incorporation such as these do not suffice to bring an arbitration clause from the other contract referred to into the contract in which they appear; and he held that the same principle would be applied when the clause in question is a clause conferring jurisdiction not on arbitrators but on another court*."

He also referred to the fact that Colman J after stating his view that it was to be inferred that the function of the incorporating clause was confined to ensuring that the substantive or subject-matter terms of the reinsurance matched the substantive or subject-matter terms of the primary cover except where expressly provided to the contrary had acknowledged that it remained necessary to construe the particular contract in each case and had said that he did not suggest.:

> *"that to be an inflexible rule. There may be cases where in all the circumstances prevailing between the parties when they made their contract it would be unrealistic to restrict the scope of incorporation so as to exclude the jurisdiction clause"*.

28. At paragraph 37 Evans LJ went on to state:

> *"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 from Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd [1981] AC 909. The*

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question is whether the same approach should be adopted towards incorporation of a jurisdiction clause."

29. In *Cigna Life Insurance Company of Europe SA-NV and others v Intercaser SA de Seguros Y Reaseguros* [2001] 1 Lloyds Rep. IR 821 Morison, J set out in paragraph 10 three general principles of law, of which the third was:

> *"Whether general words of incorporation in one contract of terms and conditions in another contract are apt to incorporate an arbitration clause has been a question much debated in the courts. For the reasons he gives, I adopt entirely the principles and conclusions arrived at by Judge Raymond Jack QC (as he then was) in Trygg Hansa Insurance Co Ltd v Equitas Ltd and others [1998] 2 Lloyd's Law Rep 439."*

30. Similarly, in *American International Specialty Lines Insurance Co v. Abbott Laboratories* [2004] Lloyd's Rep. IR 815, Cresswell J followed both *Excess Insurance* and *Trygg Hansa* in holding that general words of incorporation were insufficient to carry an arbitration clause from a first layer policy into an excess layer policy.

31. In *Dornich Ltd v Mauritius Union Assurance Co Ltd* [2006] 2 Lloyd's Rep 475 one of the conditions of a slip policy of excess reinsurance was that it was to follow "all terms and conditions of the primary policy together with riders and amendments applicable thereto covering the identical subject matter and risk". The primary policy in question was the primary policy of reinsurance with a Mauritian jurisdiction clause. The Court of Appeal upheld the decision of Aikens, J, as he then was, that the Mauritius jurisdiction clause was mot incorporated in the excess reinsurance.

32. The judgment of the court was given by Tuckey, LJ. At para 27 he said:

> *"27 There are many cases in which the courts have to decide whether terms from one contract have been incorporated in another. A number of these cases concern the incorporation of terms from a direct insurance into a reinsurance. But no hard and fast rules emerge from these cases as one would expect. The question in each case is one of construction: 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? It may be, as Mr Kealey submits, that the courts will answer this question in favour of incorporation more readily in some categories of cases than in others, but that is no more than saying that the contractual context and the words used are all important. As choice of law and jurisdiction clauses are important, clear words of incorporation are required. In the insurance context where the contracts concerned are back-to-back and cover the same subject matter and interest incorporation is more likely to have been intended than where the contracts are not so closely connected."*

33. The Court upheld the first instance judgment on the basis that although the reinsurance contracts were closely connected they were not a complete match and that the general words related to the "subject-matter" and "risk" and not the primary reinsurance's jurisdiction clause.

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34. It is apparent from these and other authorities that various different reasons have been given for the Court's restrictive approach to the incorporation of arbitration clauses in two-contract situations. These are, or include, the following:

(a) Arbitration clauses are not "germane" or "directly" relevant to, nor part of the subject matter of, the main contract, and general words must generally be taken to cover only those contractual provisions that are germane to the subject matter of the bill of lading contract (e.g. provisions as to carriage and discharge) and are capable of being operated in conjunction with that subject matter because the court cannot confidently infer that the parties intended to incorporate any more than that: *Thomas v Portsea* (Lord Loreburn, L.C. and Lord Atkinson; *The Annefield, Excess Insurance.* See also *Moore-Bick J in AIG Europe SA v QBE International Insurance [2001] 2 Lloyd's Rep 268, 273.*

(b) Arbitration clauses are ancillary provisions by way of dispute resolution essentially personal to the parties which agree them so that general words of incorporation are insufficient; see Sir John Megaw in *Aughton*; and *Excess Insurance* p 364 LHC; an arbitration clause is, thus, not incorporated by language which refers to all terms: *The Federal Bulker;* or all conditions: *The Varenna;* see also *The Delos* [1999] 2 Lloyd's Rep 685.

(c) Arbitration clauses oust the jurisdiction of the courts and clear words are need for that purpose: Lord Gorrell and Lord Robson in *Thomas v Portsea*. Section 7 of the Arbitration Act 1979 requires an arbitration agreement to be in writing and shows the need for a conscious and deliberate relinquishment of a right to go to court: Sir John Megaw in *Aughton*;

(d) Bills of lading may come into the hands of those who will, or may, neither know, nor have the means of knowing, the arbitration clause in the charterparty which they will not have seen and to which they would be unlikely to assent. They will not therefore appreciate that by becoming a party to the bill they became parties to a contact precluding access to the courts: see Lords Atkinson, Robson and, Gorrell in *Thomas v Portsea*; Bingham LJ in *Federal Bulk*; Colman, J in *Excess Insurance* at p 364; although the fact that a contract is not contained in a negotiable instrument does not mean that general words of incorporation are in general capable of incorporating arbitration clauses: *Excess Insurance* p 365 LHC,

(e) The terms of a charterparty arbitration clause may not be applicable to disputes between the bill of lading holder and the shipowner - Lords Loreburn, Gorrell and Robson in *Thomas v Portsea* - and on that account are not to be regarded as incorporated by a general reference[3];

[3] In his illuminating judgment in *Roche Products v Freeman Process Systems* [1996] 80 BLR 110 HHJ Hicks QC expressed the view that, with the possible exception of Lord Gorrell's reference to the ouster of the court's jurisdiction the speeches in *Thomas v Portsea* were directed exclusively to the issue whether an arbitration

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(f) The need for certainty in the law: Bingham LJ in *The Federal Bulker*.

35. Habaş submits that the line of authorities to which I have referred shows that the Court adopts a restrictive approach when it is suggested that an arbitration clause in one contract has been incorporated by general words of incorporation contained in another. Whilst the present case may be regarded as falling within the second of the categories set out in paragraph 13 above the Court's approach should be no different to that which it has developed in relation to cases in the third and fourth categories, particularly given that the first three of the reasons identified in the previous paragraph are applicable.

The Athena (No 2)

36. Habaş' submissions are inconsistent with the decision of Langley, J in *The Athena (No 2)* [2007] 1 Lloyd's Rep 280 upon which the Tribunal relied. In that case, Langley J described the cases in which the strict test of incorporation of an arbitration agreement was applied as being "*two-contract*" cases, whereas in "*single contract*" cases, general words of incorporation sufficed. At paragraph 65 of his judgment, having cited the passage from the judgment of Bingham LJ cited in paragraph 18 above, he said:

> *"In my judgment, this dictum expresses both the principle and (with some reluctance) the justification for an exception to it. In principle, English law accepts incorporation of standard terms by the use of general words and, I would add, particularly so when the terms are readily available and the question arises in the context of dealings between established players in a well-known market. The principle… does not distinguish between a term which is an arbitration clause and one which addresses other issues. In contrast, and for the very reason that it concerns other parties, a ''stricter rule'' is applied in charterparty/bills of lading cases. The reason given is that the other party may have no knowledge nor ready means of knowledge of the relevant terms. Further, as the authorities illustrate, the terms of an arbitration clause may require adjustment if they are to be made to apply to the parties to a different contract. The language of Bingham LJ would not encourage any extensions of the stricter rule, a sentiment with which I would respectfully agree. "*

37. Habaş submits that this approach does not reflect the law and should not be followed by this Court. It fails to give proper weight to the fact that, in *Aughton,* Sir John Megaw was of the view that there was no single contract/two-contract distinction, and that the same rule ought to apply in both cases. As he said in that case:

> *"…the reason for excluding an arbitration clause is certainly not confined to the special features of a charter party/bill of lading relationship, nor to the fact that the bill of lading is a document of title."*

He then set out the three reasons for the rule and, when dealing with the third said this:

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clause from one contract should be incorporated without express reference into another between different parties into which it does not readily fir and that the ratio decidendi is confined to that situation.

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"*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… This status of "self-contained contract" exists irrespective of the type of substantive contract to which it is collateral. In Bremer Vulkan it was a shipbuilding contract. It appears to me that this consideration (which I believe has not infrequently been over-looked) is another important reason why arbitration clauses are to be treated as being in a category of their own, as was the arbitration clause in the charterparty, which the House of Lords declined to permit to be incorporated into the bill of lading contract in Thomas v Portsea. If this 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 a mere reference to the terms and conditions of the contract to which the arbitration clause constitutes a collateral contract."*

38. In Habaş' submission Langley J's judgment did not directly address the view expressed by Sir John Megaw in *Aughton* that the rationale for the strict test of incorporation did not depend upon a single contract/two-contract distinction. Nor did he grapple with the important point that an arbitration agreement is itself a contract collateral to the contract within which it is contained whatever the nature of the substantive contract. What he did was to refer to reasons (d) and (e) set put in paragraph 34 above, but not to reasons (a) – (c) which are the more significant ones. In *Excess Insurance* Colman, J identified reason (a) as the predominant explanation.

39. The facts of *The Athena (No 2*) were that Sea Trade Maritime Corporation ("Sea Trade") applied in December 1992 to enter The Athena with the Hellenic Mutual War Risks Association (Bermuda) Ltd for the purpose of obtaining war risks insurance. It accepted an offer of insurance made by the Association's agents "*in accordance with the rules and bye-laws of the Association*" as a result of which the vessel was entered into the Association on 10 December 1992. On the same day Sea Trade completed an application for membership of the Association which stated that it applied to become a member "*in accordance with the Bye-Laws and the Rules for such Association with which I/we agree to conform*".

40. The insurance was renewed from year to year from 1 January of each year. In May 1997 Sea Trade presented a war risks claim. After the Association had made a discretionary payment under its rules Sea Trade commenced proceedings in New York claiming further monies, which were stayed in favour of the London arbitration for which the Rules provided. One of the issues in the arbitration was whether the relevant Rule had been validly incorporated into the insurance contract, which was to be found in the exchanges in December 1992 and in the application for membership. Langley J held that it had.

41. In the course of giving judgment he observed:

> *"66 I can see little or no reason for a rule which incorporates some but not all of the terms of a reference document, provided at least that, as a matter of construction the incorporated terms can readily apply to the relevant contract without violence to the principles on which contracts are to be construed. I think the authorities justify an approach to the issue as one of*

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construction albeit certain recognised principles of construction have been established by authority in two-contract cases. Terms that are incorporated, as the law stands, are just as (if not more) likely to be unknown to the parties as an arbitration clause. This case is a case in point. On their evidence, Sea Trade ad Trans-Ocean were wholly unaware of any of the terms of the insurance although it is not in dispute that the contract of insurance was made in late 1992. Yet they accept that al the other terms in the Rules were incorporated in that contract, or perhaps all other terms "germane to the insurance" (hardly a recipe for certainty) but not the arbitration clause. I can see little logic in that. Mr Brenton submits that logic requires the stricter rule to be applies in all cases. But it is that rule, if any, which I think to be illogical. In the case of a single contract, the ordinary rules of construction work perfectly well. Those rules, of course, include rules which justify a different approach to "unusual" or "onerous" terms sought to be incorporated and are subject statutory modification in consumer contracts, but such considerations are of no relevance to this case".

42. Langley J then dismissed as "*hopeless*" the submissions made by Mr Timothy Brenton QC (i) that *Thomas v Portsea*, *The Federal Bulker*, *Heyman v Darwins* and *Bremer Vulkan* established that, absent special circumstances, the true rule is that arbitration clauses are not to be incorporated in any contract unless specifically referred to in the primary contractual documentation; (ii) that the rationale of the decision in *Thomas v Portsea* applies to a single contract case as much as to a two-contract case; and (iii) that the principle to be derived from the other decisions that an arbitration clause was a self contained contract collateral to the contract in which it was to be found dictates that arbitration clauses are special and subject to special principles. The reason that he dismissed this submission as hopeless was that "*it would involve the exception swallowing up the rule"*.

43. Langley J then observed that there were four decisions which could not be reconciled with Mr Brenton's submission: *Modern Buildings Wales Ltd v Limmer & Trinidad Co Ltd* [1975] 2 Lloyd's Rep 318, where the Court of Appeal decided that general words of incorporation were sufficient to incorporate an arbitration clause into a contract between head contractor and the sub-contractor; *Tracomin SA v Sudan Oil Seed Co* [1983] 1 Lloyd's Rep 560 in which Staughton, J decided that an arbitration clause was incorporated by reference in a contract of sale in the same manner as any other clause and *The St Raphael* [1985] 1 Lloyd's Rep 403 in which the Court of Appeal decided that the fact that the party denying incorporation was unaware that the document referred to contained an arbitration clause was irrelevant; and *Wyndham Rather Ltd v Eagle Star & British Dominions Insurance Company Ltd* (1925) 21 Ll L Rep 214 in which the Court of Appeal held that an insurance slip, which was stated to be subject to the proposal form which, in turn, stated that it was subject to "*the usual conditions*" of the insurers' policy, which contained an arbitration clause, was held to be subject to that clause.

44. Langley, J said that he could see no reason why the fact that arbitration clauses oust the jurisdiction of the court should give rise to anything more than a point of construction and that the independent nature of an arbitration clause had much greater relevance when the clause was to be found in a two-contract case, because in a single contract case the anterior question is whether any of the referenced terms are

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incorporated with the illogicality, if they are, of picking and choosing between them. As to Sir John Megaw's reliance upon the provisions of the Arbitration Act 1979 he observed that *The St Raphael* was authority that in a single contract case an arbitration clause is binding on a party unaware of it.

45. Lastly he referred to a decision of HHJ Lloyd QC in *Ben Barrett v Henry Boot* [1995] CILL 1026 in which he had applied Sir John Megaw's words in a single contract case[4]. He pointed out that that decision had not been followed in two subsequent cases: *Roche Product v Freeman Process Systems Ltd* [1996] 80 BLR 102; and *SOS for Foreign and Commonwealth Affairs v Percy Thomas Partnership* [1998] 65 Con LR 11.

Conclusion on the first issue

46. Where parties are in dispute as to what they have agreed the task of the Court is to determine from the communications that passed between them in the context in which those communications were made what reasonable persons in their position would regard them as having intended to agree. Where those parties agree the essential terms of a contract and also that their contract shall include the terms of a previous contract or contracts between them the Court may have to determine which provisions of which contract(s) they meant to incorporate. If the Court is able to decide what those provisions were, it should not, in my judgment, be astute to impose any special rules which limit the ability of the parties validly to agree what, on ordinary principles of construction, they would be taken to have agreed.

47. If terms which are said to have been agreed are particularly onerous or restrictive of rights that would otherwise arise, it may be necessary, if they are to be enforceable, for the party seeking to rely upon them to show that notice of their existence appropriate to their content was given to the party potentially affected by them. Where the term in question ("the offending term") was included in a previous contract, but without such notice being given, it may be that general words incorporating terms of the previous contract (including the offending term) in a later contract are insufficient to incorporate the offending term. But an arbitration clause such as the present is not usually some form of onerous term to which special attention must be drawn: see: *Streford v Football Association* [2007] EWCA Civ 238. The fact that such an arbitration clause ousts the jurisdiction of the court does not, in a single contract case, mean that it requires some extraordinary method of incorporation.

48. I accept that, if the terms of an earlier contract or contracts between the parties are said to have been incorporated it is necessary for it to be clear which terms those were. But, like Langley J, I do not regard this to be the position only if the terms said to be incorporated include an arbitration or jurisdiction clause. Whenever some terms other than those set out in the incorporating document are said to be incorporated it is necessary to be clear what those terms are. Since arbitration clauses are not terms which regulate the parties' substantive rights and obligations under the contract but are terms dealing with the resolution of disputes relating to those rights and obligations it is also necessary to be clear that the parties did intend to incorporate

[4] See also *Lexair v Edgar W Taylor* [1993] 65 BLR 87 a single contract case where HHJ Fox-Andrews QC preferred the approach of Sir John Megaw; and *Co-Operative Wholesale Society Ltd v Saunders & Taylor Ltd* [1994] 39 Con LR 77 a two-contract case where HHJ Gilliband said that, if he had to choose, he would prefer the view of Sir John Megaw.

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such a clause. But, if a contract between A and B incorporates all the terms of a previous contract between them other than the terms newly agreed in the later contract, there should be no lack of clarity in respect of what is to be incorporated.

49. There is a particular need to be clear that the parties intended to incorporate the arbitration clause when the incorporation relied on is the incorporation of the terms of a contract made between different parties, even if one of them is a party to the contract in suit. In such a case it may not be evident that the parties intended not only to incorporate the substantive provisions of the other contract but also provisions as to the resolution of disputes between different parties, particularly if a degree of verbal manipulation is needed for the incorporated arbitration clause to work. These considerations do not, however, apply to a single contract case.

50. I am not sure that I would have described the submission of Mr Brenton in *The Athena* as "*hopeless*". If Sir John Megaw (with whom Evans LJ agreed in *The Ethniki,* which does not appear to have been cited in *The Athena No 2*) was correct to say that the ancillary nature of the arbitration clause was a reason why general words could not incorporate it, and that is to be regarded as an inflexible rule not confined to two contract cases, the submission was well founded.

51. Like Langley J, however, I do not accept that, in a single contract case, the independent nature of the arbitration clause should determine whether it is to be incorporated. A commercial lawyer would probably understand that an arbitration clause is a separate contract collateral to another substantive contract and that the expression "*arbitration clause*" is, on that account, something of a misnomer for "*the arbitration contract which is ancillary to the primary contract*". But a businessman would have no difficulty in regarding the arbitration clause (as he would call it) as part of a contract and as capable of incorporation, by appropriate wording, as any other term of such a contract; and it is, as it seems to me to a businessman's understanding that the court should be disposed to .give effect. A businessman who had agreed with his counterparty a contract with 10 specific terms under various headings and then agreed with the same counterparty terms 1-5 under the same headings as before and, as to the rest, that all the terms of the previous contract should apply, would, I think, be surprised to find that "*all*" should be interpreted so as to mean "*all but the arbitration clause*".

52. I do not accept that the present case is to be regarded as a "two-contract" case. Whilst, literally speaking, there is more than one contract to be considered, being the June contract and whatever other contracts between the same parties are to have some of their terms incorporated, the relevant distinction is between incorporation of the terms of a contract made between (a) the same and (b) different parties. In short there is a material distinction between categories 1 and 2 on the one hand and categories 3 and 4 on the other. In relation to the latter two categories a more restrictive approach to incorporation is required. That should not, however, mean that a similarly restrictive approach should apply to cases in categories 1 and 2. I agree with Langley J that, if that were so, the exception would swallow up the rule. It is important that it should not do so given that the precise rationale of the rule is debatable; its retention is partly attributable to the desirability of not changing an approach established "*for better or worse*"; and that the rule is not easily congruent with ordinary principles of construction. Further there is good reason not to apply a more restrictive approach in relation to cases in category 2, where the parties have already contracted on the terms

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said to be incorporated, than to those in category 1, where the party resisting incorporation is either more or at least as likely to be unfamiliar with the standard term relied on as is the party resisting incorporation in category 2..

53. I do not regard myself as bound by the decisions of the Court of Appeal in *Aughton v Kent* and The *Ethniki* to reach a different conclusion. Both were two-contract cases. Further the judgments of Sir John Megaw and Lord Justice Ralph Gibson are, in part in conflict so as to preclude either of them being binding authority even in a two contract case. The agreement of Evans LJ 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*" was obiter.

54. I also have some difficulty in reconciling Sir John Megaw's analysis, which is to the effect that bill of lading/charterparty cases are not *sui generis,* with the passage at para 38 of Lord Justice Evans' judgment in which he says:

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

Community law

55. In *Africa Express Line Ltd v Socofi SA* [2009] EWHC 3223 Africa Express Lines ("AEL") contended that its agreement with Socofi, constituted by an exchange of letters, incorporated the terms of an agreement between AEL and a third party called DAM, which included an English jurisdiction clause. I accepted the submission that the authorities distinguished between (i) cases where parties agree to incorporate standard trading terms (either of their own or standard in the trade) which contain a jurisdiction clause, into their contract; and (ii) cases where the parties incorporate the provisions of an existing, separate contract with a third party..

56. The case fell to be determined by reference to Community law which lays down that a valid prorogation of jurisdiction clause within the meaning of Article 23 of the Judgments Regulation requires "*real consent*" to, or "*actual acceptance* " of a jurisdiction clause which must be "*clearly and precisely demonstrated*".

57. In the course of my judgment I said this:

> *"28 Where the contract refers expressly to one party's standard terms it is not necessary for there to have been a specific reference to the jurisdiction clause for the purposes of establishing the real consent required by Article 23: 7E Communications Ltd v Vertex Antennentechnik GmbH [2007] 1 W.L.R. 2175, 2185, para [32] (CA) Credit Suisse Financial Products v Société Générale d'Entreprises [1997] CLC 168, 171 – 172 (CA) (per Saville L.J., delivering the only reasoned judgment of the Court in a case involving the 1992 ISDA Master Agreement). In those circumstances it is irrelevant that the party against whom the jurisdiction clause is sought to be enforced does not have a copy of the terms and conditions. Further the parties' agreement may be contained in more than one document e.g. by an exchange of correspondence: 7E Communications para 33.*

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> *29 So there will be a valid agreement in writing where a quotation is made on one party's own standard terms and is accepted, even though the acceptor did not have a copy of those terms. In 7E Communications a German company faxed a quotation to an English company offering to sell certain satellite equipment on its general terms and conditions. These contained an exclusive German jurisdiction clause. No copy of those terms was sent to the claimant, which faxed the defendant a purchase order for the goods in the quotation. It was held that there was an agreement in writing for the purpose of Article 23(1)."*

58. In the result I held that AEL was not able to rely on the jurisdiction clause in the AEL/DAM agreement. Habaş placed some reliance on this case. It is, however, both a two-contract case and one in respect of which Community law requires a particular degree of clarity if incorporation is to be effected. It is, moreover, to be noted that, even under Community law, standard terms including a jurisdiction clause can be validly incorporated by general conditions without specific reference to the clause even if the party resisting incorporation does not have a copy of the terms: see the passage cited above.

59. Further, as I pointed out, under Community law there was a sufficient fulfilment of the requirement of writing if the contract referred to a prior written offer which referred to general conditions including a jurisdiction clause if (but only if) the express reference could be checked by a party exercising reasonable care and the general conditions (including the jurisdiction clause) had been communicated to the other party with the prior offer. In the present case the incorporation (if, as a matter of construction any was effected at all), was of the terms of a prior contract of which Habaş had a copy and which it could readily check. In those circumstances Community law does not provide any incentive to invalidate incorporation of the terms of earlier contracts between the parties, if as a matter of ordinary construction, such incorporation would be effective.

60. Accordingly, as I hold, general words of incorporation are capable of incorporating terms which include an arbitration clause without specifically referring to it. I turn to consider whether, in this case, they did so.

The second issue - were the words of incorporation effective?

Habaş' submissions

61. Mr Key for Habaş submits that it is impossible to determine from the phrase "*all the rest will be the same as our previous contracts*" that the parties agreed that the London arbitration clause should apply to the June contract. A consensus to that effect cannot be established from the sequence of contracts, which has no common theme. The first three contracts, on Habaş paper, do not provide for London arbitration but either for an unspecified Court of arbitration with UNCITRAL rules or an equally unspecified Court of Arbitration (which might signify an actual Court) in Istanbul applying Turkish law. The contract of 23 March 2006 incorporated the London arbitration clause. But its successor in March 2007 provides for the "*rest to be agreed mutually*". This is not an agreement to any kind or arbitration and itself shows that the parties did not regard arbitral dispute resolution as an essential aspect of their bargains.

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62. The contract of 3 May 2007 re-introduced the London arbitration clause, but the Metkim contract of 9 August 2007 then introduced the new phrase "*the rest will be as per previous contracts*". It is not possible to tell what this means. There were six previous contracts with 4 different provisions (UNCITRAL Rules arbitration, Istanbul Court of arbitration, London Arbitration and "*to be agreed mutually*"). The same phrase then appeared in the contract of 11 September 2007; but the meaning is no clearer. Even if "*as per previous contracts*" is by this stage to be taken to refer only to Metkim drafted contracts the problem is not solved, since one of the two previous Metkim contracts provided for matters to be agreed mutually and the other for the rest to be "*as per previous contracts*". The contract of 25 October 2007 then provides for "*the rest to be agreed mutually*", as does the contract of 14 April 2008, after an intervening contract of 9 April 2008 which contains the London arbitration clause.

63. The London arbitration clause then re-appears in the second of the 6 May 2008 contracts. Habaş submits that the combination of two contracts in May 2008 is either neutral or assists it. If the first contract was sufficient to incorporate the Sometal terms there was no need for the Sometal form to be signed. It is to be inferred that Sometal prepared the second form because the Metkim form was not sufficient to incorporate the Sometal form terms.

64. Then there are the two contracts of which the June contract is the second where "*all the rest are to be the same as our previous contracts*". But the sequence has not resolved what the "*same as our previous contracts*" means and, in particular, which of the four variants is to apply.

65. Habaş submits that the Tribunal reached its decision by a process of exclusion which was illicit. There was no reason to exclude the first three contracts. Metkim may not have been involved in the making of those contracts; but Sometal obviously was. It has not even been established that Metkim was ignorant of the terms of those earlier contracts so as to exclude the possibility of it intending any reference to them. Nor were there any grounds for excluding the contracts where the additional terms were "*to be agreed*" or to be the "*same as our previous contracts*". Each of those contracts was part of the history of "*previous contracts*". If the effect of incorporating the terms of previous contracts is to leave it unclear what, if anything, is incorporated by way of additional terms, (because some of the terms incorporated were "*to be agreed*" or "*same as our previous contracts*"), that is not a ground for excluding the incorporation. It simply produces the result that there is no clear incorporation of any arbitration clause.

66. The provision "*all the rest will be the same as our previous contracts*" is, in context, ambiguous. It could mean to incorporate all the terms that were common to previous contracts or all the terms found in any one of the previous contracts save where there was a conflict between such terms. Neither of these would provide for the incorporation of the London arbitration clause. At an earlier stage Habaş had submitted that what were incorporated were all the commercial terms from previous contracts.

67. Contract 13 does not provide the answer. If the Metkim prepared contract ("*all the rest will be same as our previous contracts"*) itself incorporated the London

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arbitration clause, there was no need for the later Sometal prepared one. The latter must have been intended to effect a change from the former. It is also to be noted that there are differences between the two. The Metkim contract provides for a Notice of Readiness to be tendered "*during office hours (0900 – 1600)*". The Sometal contract provides for a NOR to be tendered within official working hours "*(Monday-Friday/08.00-17.00)*". The latter also contains additional conditions 6-10 (which are, however, the same as in previous Sometal prepared contracts).

Discussion

68. The function of the Court is to determine what incorporation the parties intended to effect. It is possible that the words they used have no effect at all. But they must have intended that the words should have some effect; and the Court should not be astute to find that they wholly failed to do so.

69. Mr Key understandably draws attention to all 15 of the relevant contracts in order to show the confusing picture produced by looking at all of them. It is not, however, to be assumed that the parties intended to refer to *all* their previous contracts (an expression that they did not employ) as opposed to some more limited class.

70. The Tribunal felt able to exclude the first three contracts on the ground that Metkim did not prepare them. There is, however, no evidence (and there was no evidence before the Tribunal) as to the scope of Metkim's involvement (if any) in the conclusion of the Habaş prepared contracts or as to its knowledge of the terms of those contracts (or, indeed, of the Sometal prepared contracts). I do not regard it as appropriate to exclude them from consideration on that ground. Further, on the Tribunal's own reasoning, the reference to "*our*" in "*our previous contracts*" in a document written "*for and on behalf of Sometal*" must be to Sometal, since it is only in the Sometal drafted contracts that the London arbitration clause appears.

71. It seems to me clear, however, that the parties did not in June 2008 intend to incorporate the provisions of the Habaş drafted contracts of January and May 2004 and September 2005, whatever the involvement of Metkim in those contracts. By June 2008 the last of those contracts was 2 ¾ years distant. Moreover, and more importantly, in March 2006 there had been a distinct change from contracts being drafted by Habaş, the buyer, to contracts drafted by Sometal, the seller, or Metkim, its agent. It was to those more recent contracts (or some of them) that reference must have been being made.

72. It is apparent that, in respect of the Metkim drafted contracts, the parties either sought to incorporate, or agreed to agree, terms additional to the expressly agreed core commercial terms. When in the June contract they provided for all the rest of the terms to be the same as previous contracts they cannot have intended to refer to the three contracts in which they had agreed to agree the rest. Such a reference would be ineffective to incorporate any additional terms and would thus defeat the object of the exercise.

73. If regard is had, as in my judgment it must, to the sequence of contracts from and including contract 4 onwards it is clear that the words of incorporation in the June

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contract (contract 15) are apt to incorporate the London arbitration clause. Contract 4 contains that clause. Contract 5 provides for the rest to be agreed mutually and is ineffective to incorporate anything. But contract 6 includes the London arbitration clause. When, then, Contract 7 provides that "*the rest will be as per previous contracts*" it must be referring to the terms of contracts 4 and 6. The same applies to contract 8. Contract 9 suffers from the same deficiency as contract 5 but contracts 10 and 11 contain the London arbitration clause. Contract 12 suffers from the same deficiency as contracts 5 and 9. The Tribunal concluded that "*as per previous contracts*" could not apply to contracts which themselves only referred to previous contracts. Whilst that is a possible reading it seems to me that the reference in the June contract extends both to the Sometal contracts and the Metkim contracts providing for incorporation of the terms of previous contracts since those latter contracts also, in my judgment, incorporated the relevant terms of the Sometal contracts.

74. Contract 13 came in two forms. It is not clear why on this occasion there were two forms. But there is no evidence that the Sometal contract was intended by the parties to be a variation of the Metkim contract or to introduce something different; nor is there any evidence of negotiation taking place between the parties in the short interval between the completion of the two contract forms. Sometal's evidence is that there was none. I infer that the parties regarded the Sometal contract as setting out the full content of the Metkim contract including that which the Metkim contract incorporated by reference. Like the Tribunal I regard that as clear evidence, in context, of what the parties meant the words of incorporation to mean.

75. Some reliance was placed on the fact that the June contract contains a provision:

> *"NOR TENDERENCE IT CAN BE TENDERED DURING OFFICE HOURS (08.00) AND 08/14 CLAUSE TO BE APPLIED"*

The reference to the "08/14" clause is to the NOR provision in the Sometal form by which Laytime was to commence at "1400 hours on the same working day if NOR is tendered before 12.00 hours, or at 0800 next working day if NOR is tendered after 1200 hours on the previous day". Habaş submits that this shows that, when the parties wanted to incorporate a Sometal term they did so expressly and that they should not be treated as having incorporated some other term impliedly. I do not, however, accept that the fact that the NOR tenderence clause referred to the 08/14 clause means that the "All the rest" clause does not incorporate other terms from the Sometal form. There was, moreover, a sensible reason for an express reference to the 08/14 clause since in the case of contract 6 the clause relating to laytime had had the words quoted above crossed out. The express reference served to show that the unamended clause was intended.

76. The arbitration clause does not require any linguistic manipulation to fit the bill. When the parties referred to "*all the rest*" being the same there is no good reason to treat them as meaning all of the rest except the arbitration clause.

I do not regard as convincing the proposition that the parties intended one or other of the three alternatives referred to in para 66 above or that the words of incorporation must be regarded as having no effect at all.

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77. Some, but limited, reliance was placed on Sometal's conduct after the June contract in initiating proceedings in Turkey on the footing that such conduct was relevant to the question whether or not the parties ever made a collateral contract which provided for arbitration. I derived no assistance from this for two reasons. Firstly the question is one of construction in respect of which the subsequent conduct of the parties is inadmissible as an aid. Secondly the conduct in question consisted of instructing a Turkish lawyer who then, in accordance with usual Turkish practice, served Habaş with a written and notarized notice to perform under Turkish law, which requires an innocent party to set a final and specific time limit for performance before an obligor will be deemed to be in default, failing which, as the notice said, execution proceeding and actions would be brought. Whilst these are the actions which are appropriate under Turkish law before any attempt to execute or to bring an action at law, as opposed to initiating an arbitration, in the event Sometal did not commence any such proceedings or action in Turkey. Instead it engaged Clyde & Co and initiated arbitration proceedings. In those circumstances the service of the notice casts no real light on the agreement of the parties.

78. Accordingly, as I hold, for similar but not identical reasons to those upon which the Tribunal relied, it is clear that the June contract incorporated the London arbitration clause. Subject to any argument as to the form of the order I shall dismiss the application.

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