# ASTEL-PEINIGER JOINT VENTURE v ARGOS ENGINEERING & HEAVY INDUSTRIES CO LTD - [1994] 3 HKC 328

HIGH COURT
KAPLAN J

CONSTRUCTION LIST NO 14 OF 1994

18 August 1994

**Arbitration -- Arbitration agreement -- Incorporation of arbitration clause by reference -- Construction of art 7(2) of the Uncitral Model Law -- Whether reference to document containing arbitration clause limited to documents signed by parties to arbitration -- Whether contract made between one party and third party binding -- Uncitral Model Law art 7(2)**

By a sub-sub-contract dated 17 March 1993, Argos Engineering and Heavy Industries Pte Ltd(the defendant) sub-sub-contracted painting work for the suspension spans to the Tsing Ma bridge to Astel-Peiniger Joint Venture(the plaintiff). The defendant had previously, and in the presence of the plaintiff, entered into an assembly sub-contract for the spans with Cleveland Structural Engineering Ltd. The plaintiff had been provided with a copy of the terms and conditions of the assembly sub-contract, including the arbitration clause, well in advance of the signing of the sub-sub-contract. Clause 2 of the sub-sub-contract provided that all the terms and conditions of the assembly sub-contract would be 'directly applicable on a back-to-back basis but proportionally to scope of works as described in cl 1 hereof and to the proportion and value of this sub-sub-contract'. This provision in turn implemented a memorandum of understanding to this effect between the parties dated 19 January 1993. Clause 31 of the assembly sub-contract provided for arbitration in London under the Uncitral Arbitration Rules. The sub-sub-contract did not contain an arbitration clause. A dispute arose between the parties as to which of them was responsible for the supply and construction of mobile paint sheds. The plaintiff considered it was the responsibility of the defendant and issued a writ on 20 May 1994 claiming nearly HK$10.5m. The defendant sought a stay of these proceedings under art 8 of the Uncitral Model Law, claiming that the parties had agreed to arbitration of any disputes through the incorporation by reference of the arbitration clause in the assembly sub-contract and that the arbitration agreement was an international arbitration agreement to which the Model Law applied.

**Held, allowing the application:**

(1) On a proper construction of the final sentence of art 7(2) of the Uncitral Model Law, the meaning of 'a document containing an arbitration clause' was not limited to a document signed by the parties to the arbitration but could include a contract made between one party and a third party, a contract between two strangers to the arbitration or an unsigned standard form of contract. To restrict the meaning of these words to a contract between the two parties to the arbitration would be unworkable in commercial practice.

(2) In the light of the interpretation given to art 7(2) of the Model Law, the decision of the House of Lords in *Thomas v Portsea Steamship Co Ltd* default [1912] AC 1 had no application to Hong Kong. The test for determining whether there



had been incorporation by reference was one of construction, viz to ascertain the intentions of the parties when they entered into the contract by reference to the words they had used.

(3) It was quite clear from the actual words used in the sub-sub-contract that the parties intended to incorporate the arbitration clause in the assembly sub-contract. The plaintiff had had ample opportunity to consider the terms of the assembly sub-contract prior to making the sub-sub-contract but had taken no steps to object to the incorporation of the arbitration clause.

The necessity to reject or modify some of the provisions of the arbitration clause to make it suitable for the purposes of the sub-sub-contract did not, of itself, displace the parties' intention.

**Cases referred to**

*Annefield, The* (1971) P 168

*Aughton (formerly Aughton Group) v MF Kent Services* [1991] 57 BLR 1

*Federal Bulker, The; Federal Bulk Carriers v C Itoh & Co* [1989] 1 Lloyd's Rep 103

*Giffen (Electrical Contractors) v Drake & Scull Engineering* [1993] 33 Con LR 84

*Varenna, The; Skips A/S Nordheim v Syrian Petroleum Co* [1984] QB 599

*Thomas v Portsea Steamship Co* [1912] AC 1

**Legislation referred to**

(HK) Arbitration Ordinance (Cap 341) s 2(3), Sixth Schedule

(HK) Arbitration Ordinance 1982 (Ordinance No 10 of 1982)

(HK) Arbitration Ordinance 1989 (Ordinance No 64 of 1989)

(UK) Arbitration Act 1979 [UK]

**Other legislation referred to**

Broches Aron Commentary on the Uncitral Model Law on International Commercial Arbitration p 41 -

Holtzmann and Neuhaus Guide to the Uncitral Model Law on International Commercial Arbitration pp 263-264 -

Kaplan, Spruce and Moser China and Hong Kong Cases and Materials (Butterworths, 1994) p 747 -

Keating Building Contracts383

Uncitral Model Law on International Commercial Arbitration arts 1, 7(2), 8

**Application**

This was an application by the defendant for a stay of proceedings pursuant to art 8 of the Uncitral Model Law on International Commercial Arbitration (Arbitration Ordinance (Cap 341) Fifth Schedule). The facts appear sufficiently in the following judgment.

*John Scott (Bateson Starr)* for the plaintiff.

*Michael Thomas QC and Godfrey Lam (Kwok & Chu)* for the defendant.

KAPLAN

I have before me an application taken out by the defendant for a stay of these proceedings pursuant to art 8 of the Model Law. This



application raises two interesting questions. The first relates to the proper construction of the last sentence of art 7(2) of the Model Law. The second relates to the principles relevant to the incorporation of an arbitration clause by reference.

As is well-known, one of the key features in the Airport Core Programme (ACP) for the new airport at Chep Lap Kok is the Tsing Ma bridge which will carry both vehicular and rail traffic. It is an exciting and bold engineering project. It will be one of the longest suspension bridges in the world, having a total span of 2.16km.

There are, of course, many features to the construction of the bridge and not surprisingly, there is a long contractual chain, which I need to set out briefly.

The Hong Kong government entered into a contract for the construction of the bridge with an Anglo-Japanese joint venture on ACP terms which involved three stages of dispute resolution, namely, mediation, adjudication and, after substantial completion, arbitration.

The Anglo-Japanese joint venture sub-contracted the steel decking works to the Cleveland Mitsui Consortium.

Cleveland Mitsui Consortium entered into two assembly contracts for the suspension spans with Cleveland Structural Engineering Ltd (CSEL) and with MES Joint Venture.

CSEL entered into an assembly sub-contract with the defendant (Argos) who sub-sub-contracted the painting work to the plaintiff. The plaintiff in turn sub-contracted the labour element to Chun Wah.

A dispute has now arisen between the plaintiff and defendant as to which of them is responsible under the assembly sub-sub-contract for the supply and construction of mobile paint sheds. The plaintiff considers that it is the responsibility of the defendant and has issued a writ on 20 May 1994 claiming just under HK$10.5m.

The defendant contends that the parties have agreed to arbitrate any disputes and seeks a stay under art 8 of the Model Law to achieve that end. The arbitration clause relied on provides for arbitration in England, under English law and under the Uncitral Rules. Because the place of arbitration is outside Hong Kong, this arbitration agreement is covered by the Model Law by reason of art 1.

It is common ground that there is no express arbitration agreement in the assembly sub-sub-contact (the contact), but it is argued by the defendant that there is an arbitration clause in the assembly sub-contact between the defendant and CSEL which, by the terms of the contact, has been incorporated into the contact between these parties.

In order to appreciate how the argument runs, it is necessary to set out the recital and first two clauses of the contact between the plaintiff and defendant.



*Sub-sub-contract*

This agreement is made 17 March 1993

Between

Argos Engineering and Heavy Industries Co Ltd of 3rd Floor, Eton Tower, 8 Hysan Avenue, Causeway Bay, Hong Kong (hereinafter called 'the assembly sub-contractor')

And

Joint Venture of Advance Specialist Treatment Engineering Ltd of Unit 32-35, 4/F, Sino Industrial Plaza, 9 Kai Cheung Road, Kowloon Bay, Hong Kong and Oberflaechenschutz Peiniger International GmbH of AM Funkturm 2, 4300 Essen 1, Federal Republic of Germany (hereinafter called 'the authorized treatment sub-contractor') with address: c/o Chun Wah Engineering & Heavy Industries (Don Guan) Co Ltd, Zhexi Industrial Zone, Shatin Town, Dong Guan, Guan Dong, People's Republic of China.

Whereas the assembly sub-contractor was awarded the assembly and painting works for Lantau Fixed Crossing as per assembly sub-contract with Cleveland Structural Engineering (China) Ltd, United Kingdom and Mitsui Zosen Steel Construction Co Ltd, Japan dated 17 March 1993 as per *attachment 1*hereof and which forms an integral part hereof (hereinafter called 'the assembly sub-contract').

It is hereby agreed as follows:

1 The assembly sub-contractor hereby sub-contracts all the current and future painting and protective treatment works and facilities as per the assembly sub-contract and more specifically set out under App 2 to Pt B of the Fourth Schedule of the assembly sub-contract to the authorized treatment sub-contract for a price as per *HK$156,036,205.*

2 All terms and conditions of the assembly sub-contract shall, subject to the following clauses hereof, *be directly applicable on a back-to-back basis but proportionally to scope of works as described in cl 1 hereof and to the proportion and value of this sub-sub-contract.* [Emphasis added.]

It is common ground that immediately before the signing of the contract, the defendant entered into and signed on the same occasion and in the presence of the plaintiff, the assembly sub-contract with CSEL and Mitsui. Further, the plaintiff had been provided with a copy of the terms and conditions of the assembly sub-contract, which included the arbitration clause, well before the signing of the contract on 17 March 1993.

Further, the plaintiff entered into a memorandum of understanding on 19 January 1993 with the defendant in which it was stated:

> The sub-contract terms shall be principally on back-to-back basis upon the terms of conditions as stipulated in the contract between the main contractor and the contractor but proportional to the portion and value of sub-contract.



The arbitration clause in the sub-contact is cl 31 which provides as follows:

> *Dispute resolution procedure*
>
> (1) Any dispute or difference of any kind whatsoever arising between the assembly contractor and the assembly sub-contractor in connection with or arising out of the assembly sub-contract or the assembly sub-contract works and whether during the execution of the assembly sub-contract works or after its completion and whether before or after the termination, abandonment or breach of the assembly sub-contract shall be settled in accordance with the provisions of this cl 31.
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> (2) For the purpose of this cl 31, a dispute shall be deemed to arise when one party serves on the other party a notice in writing (hereinafter called a 'notice of dispute') stating the nature of the dispute. Subject to cl 31(3) and (5), all such disputes shall be referred to and finally settled by arbitration in accordance with the Uncitral arbitration rules in force at the date of the reference. The arbitrator shall be a person agreed upon by the parties, or failing agreement, within 21 days from the date of the notice of dispute, the arbitrator shall be appointed by the president for the time being of the Institution of Civil Engineers of the United Kingdom. The place of arbitration shall be London.
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> (3) Unless the assembly sub-contract or the assembly sub-contractor's employment thereunder has already been terminated, the assembly sub-contractor shall in every case continue to proceed with the assembly sub-contract works with all due diligence regardless of the nature of the dispute and shall give effect forthwith to every instruction of the assembly sub-contractor except and to the extent that the same shall have been revised by:
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> (a) settlement agreement; or
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> (b) arbitral award.
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> (4) The assembly sub-contractor shall provide the assembly sub-contractor with all such assistance and support as the assembly contractor may require in relation to any dispute between the assembly contractor and CSEL or MES which concerns or relates to the assembly sub-contract works or any requirement under either the assembly contract for the assembly contractor to provide assistance or support to CSEL or MES in any dispute between the contractor and the main contractor which relates to the assembly sub-contract works.
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> (5) No steps shall be taken in any reference of a dispute to arbitration until:
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> (a) after the completion or alleged completion of the assembly sub-contract works unless with the written consent of the assembly contractor and the assembly sub-contractor; or
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> (b) the termination of the assembly contract or of the assembly contractor's employment under the assembly sub-contract.



**Proper construction of art 7(2)**

Mr Bailey, for the plaintiff, has deposed to the fact that the assembly sub-contract works will not be completed until 31 December 1995 and that the sub-sub-contract works will not be completed until 31 October 1995. He states that if cl 31 does bind the plaintiff, then the defendant will be able to deny the plaintiff considerable sums of money, to which it maintains it is entitled, until late 1995.

Mr Scott, who appeared for the plaintiff, submitted that the incorporation by reference relied upon by Mr Thomas QC, who appeared for the defendant, did not work because of the terms of art 7(2) of the Model Law, which provides as follows:

> The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. *The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.* [Emphasis added.]

Mr Scott pointed out that under art 7(2) there were four ways in which the necessary form could be complied with:

> (1) a document signed by the parties. This, he submitted, meant the parties to the proposed arbitration and not other parties; or
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> (2) an exchange of letters, etc which provide a record of the agreement. This, he submitted, meant an agreement of the parties and not of other parties; or
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> (3) an exchange of statements, etc (which is not relevant here); or
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> (4) reference in a contract to a 'document containing an arbitration clause'. He submitted that this phrase must be a reference to an arbitration clause which otherwise satisfies 1, 2 or 3 above, in other words, it must be between the *same* parties.

I have no doubt that Mr Scott's interpretation, however ingenious, is insupportable and I reject it. It would bring about some surprising results.

Take two parties agreeing a charterparty who had agreed that they should be bound by the terms of a standard form of charterparty that did contain an arbitration clause. On Mr Scott's interpretation, art 7(2) would not avail them because the reference to a standard form of charterparty would not be a reference to another document signed by the same parties. Similarly, if parties agreed that they would be bound by the Model Arbitration Clauses of the Hong Kong International Arbitration Centre,



Mr Scott would say -- on his construction of art 7(2) -- that as these Model clauses were not a contract between these parties, again, this attempted incorporation would fail.

I think one only has to state the results that would flow from Mr Scott's restrictive interpretation of art 7(2) to see how unworkable it would be in commercial practice. One then has to ask whether the drafters of the Model Law could possibly have intended such a restrictive interpretation. Fortunately, s 2(3) of the Arbitration Ordinance provides:

> In interpreting and applying provisions of the Uncitral Model Law, regard should be had to its international origin and to the need for uniformity in its interpretation, and regard may be had to the documents specified in the Sixth Schedule.

The first of the Sixth Schedule documents is a report to the Secretary General dated 25 March 1985 and entitled *An Analytical Commentary on the Draft Text of the Model Law on International Commercial Arbitration*, and the second of the Sixth Schedule documents is the report of the United Nations Commission on International Trade Law on the work of its 18th session (3-21 June 1985). A commentary on art 7(2) in the analytical commentary can be found at p 747 in *Hong Kong & China Arbitration* published by Butterworths in May 1994. Paragraph 8 states:

> The second addition, contained in the last sentence, is intended to clarify a matter, which, in the context of the 1958 New York Convention, has led to problems and divergent court decisions. It deals with the not infrequent case where parties, instead of including an arbitration clause in their contract, refer to a document (eg general conditions or another contract) which contains an arbitration clause. The reference constitutes an arbitration agreement if it is such as to make that clause part of the contract and, of course, if the contract itself meets the requirement of written form as defined in the first sentence of para (2). As the text clearly states, the reference need only be to the document; thus, no explicit reference to the arbitration clause contained therein is required.

I find nothing in that passage that suggests that the reference to the contract containing the arbitration clause is to be between the same parties.

Holtzmann and Neuhaus in their *Guide to the Uncitral Model Law on International Commercial Arbitration*comment on this point at pp 263-264 where they state:

> 4 *Reference in a written contract to a document containing an arbitration clause, if the reference makes the clause part of the contract.* This sentence was added to make clear that when an arbitration clause is not contained in a written contract but rather in a document referred to therein -- such as general conditions of contract or another contract -- the arbitration agreement may be deemed to be 'in writing'. The contract containing the reference must be in writing. This probably means that it must meet the requirements contained in the second sentence of the paragraph. That is,
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> *[1994] 3 HKC 328 at 335*
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> the contract probably must be either signed or contained in an exchange of letters, telexes, etc. Otherwise, as already noted, the parties could, merely by placing the arbitration clause in a separate document, avoid the requirement of a written assent from each party.
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> The meaning of the requirement that 'the reference [be] such as to make [the arbitration] clause a part of the contract' may raise questions. The working group made clear that it did not mean the contract had to make explicit reference to the arbitration clause itself. The requirement was adopted as a middle ground between two positions: one view was that the text of the arbitration agreement had to 'be before both parties' in order to bind them; another view was that only a 'reference' in the contract to general conditions or other documents containing the arbitration clause was enough. The language adopted appears to mean that the general conditions, prior contract or other document must have been intended to be incorporated into the contract, and not merely referred to in, for example, a 'whereas' clause or as background to the agreement.

Aron Broches in his *Commentary on the Uncitral Model Law on International Commercial Arbitration* states at p 41:

> 11 Thirdly, they clarified the effect of a reference in a contract to another document which contains an arbitration agreement provided the contract is itself in writing and the reference is such as to make that clause part of the contract. In adopting this language at its final session, the working group agreed that it should not be understood as requiring an explicit reference to the arbitration clause in the other document.

It seems to me that there is much significance in the use of the word 'document' in the last sentence of art 7(2). Had it meant a contract entered into between the self same parties, then surely it would have so stated. There is nothing in the passages quoted above which support Mr Scott's interpretation and, if he were right, it is inconceivable that this very restrictive interpretation would not have been commented upon by these eminent authorities and would not have been the subject of much debate during the Uncitral working sessions.

For these reasons, therefore, I am satisfied that it is possible under art 7(2) to incorporate an arbitration clause into a written agreement between A and B, by reference to an arbitration clause contained in an agreement between B and C, or for that matter, between X and Y or by reference to an unsigned standard form of contract.

I now turn to consider -- on the facts of this case and on the law as I find it to be -- whether there has, in fact, been a successful incorporation by reference.

**Incorporation by reference**

It is immediately obvious when one looks at the relevant authorities under English law that art 7(2), as interpreted by me above, side-steps many of

*[1994] 3 HKC 328 at 336*

them. The leading case on this subject is the House of Lord's decision in *Thomas v Portsea Steamship Co Ltd* default [1912] AC 1. In that case, a bill of lading provided, inter alia, 'all other terms and conditions and exceptions of charter to be as per charterparty, including negligence clause'. The charterparty provided for arbitration. The House held that the arbitration clause was not incorporated in this bill of lading.

Lord Atkinson was obviously concerned about the negotiability of the bill of lading in the context of incorporation by reference because he said at p 6:

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

Lord Gorell was concerned about the jurisdiction of the court being ousted by granting the stay sought and he said at p 9:

> But there is a wide consideration which I think it is important to bear in mind in dealing with this class of case. The effect of deciding to stay this action would be that the bill of lading holder or shipownerin this case it would be the shipowner, but it might just as well occur where a bill of lading holder is concerned who does not wish for an arbitration) that either party is ousted from the jurisdiction of the courts and compelled to decide all questions by means of arbitration. Now I think, broadly speaking, that very clear language should be introduced into any contract which is to have that effect, and I am by no means prepared to say that this contract, when studied with care, was ever intended to exclude, or does carry out any intention of excluding, the jurisdiction of the courts in cases between the shipowner and the bill of lading holder. It seems to me that the clause of arbitration ought properly to be confined, as drawn, to disputes arising between the shipowner and the charterer.

It seems to me that the House was troubled about ousting the jurisdiction of the court and, indeed, one can find similar expressions by other judges. I was also referred to *The Annefield*[1971] P 168 where, in the context of shipping cases, Brandon J (as he then was), after referring to several cases including*Thomas v Portsea* default , set out the principles with clarity at p 173:

> Those cases seem to me to establish the following propositions. First, in order to decide whether a clause under a bill of lading incorporates an arbitration clause in a charterparty, it is necessary to look at both the precise words in the bill of lading alleged to do the incorporating, and also the precise terms of the arbitration clause in the charterparty alleged to be incorporated. Secondly, it is not necessary, in order to effect incorporation, that the incorporating clause should refer expressly to the arbitration clause. General words may suffice, depending on the terms of the latter clause.Thirdly, when the arbitration clause is, by its terms, applicable only to disputes under the charterparty, general
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> *[1994] 3 HKC 328 at 337*
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> words will not incorporate it into the bill of lading so as to make it applicable to disputes under the contract contained in, or evidenced by, that document. Fourthly, where the arbitration clause, by its terms, applies both to disputes under the charterparty and to disputes under the bill of lading, general words of incorporation will bring the clause into the bill of lading so as to make it applicable to disputes under that document.

In *The Federal Bulker; Federal Bulk Carriers v C Itoh & Co* default [1989] 1 Lloyd's Rep 103, 105, Bingham LJ (as he then was) succinctly explained why the more restricted approach had been taken in relation to charterparty/bill of lading cases:

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

The importance of certainty in this field was emphasized by Lord Denning MR in *The Annefield ...* default by Sir John Donaldson MR in *The Varenna* default ... and by Oliver LJ 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.

In *Aughton v Kent* default (1991) 57 BLR 1 at pp 18-19, Ralph Gibson LJ said this:

> The propositions stated by Brandon J were not, in my judgment, as stated by him or as stated in the cases from which they were derived, intended to be a statement of rules applicable to the incorporation of an arbitration clause, from one

> document or contract into another contract by words of reference, in the case of all or any sorts of contract and in all sorts of circumstances. Thus, in the judgment of the House of Lords in *Thomas v Portsea,* default their Lordships were applying, as I understand their speeches, ordinary principles of construction to the particular contract contained in the bill of lading there under consideration with due regard to the nature of that contract and of the circumstances in which it was made.

However, at p 20 of the same case, Ralph Gibson LJ, while accepting that the propositions of Brandon J stated above were 'authoritative guides to construction in any case where the court is considering whether an arbitration clause has been incorporated by reference' went on to state:

*[1994] 3 HKC 328 at 338*

> If the particular case is concerned with contracts and circumstances different from those normally found in charterparty/bills of lading cases, the relevant differences will or may affect the answer which the court will be constrained to give, and in particular to the question whether, in the circumstances, the 'precise words alleged to do the incorporating' can properly be given the effectcontended for as disclosing the intention of the parties. Thus, in this case, in my judgment, the issue turns upon the proper construction of the words of incorporation which, put shortly, were that sub-sub-contract No 2 would be 'a sub-sub-contract based on Press/Kent'.

In addition, I was referred to a recent decision of the Court of Appeal in *Giffen (Electrical Contractors) Ltd v Drake & Scull Engineering* default*Ltd* default (1993) 33 Con LR 84 , where in the context of a construction contract, it was argued that on the true construction of the sub-sub-contract, the main contract arbitration clause was incorporated.The court held that it was not incorporated and stated that the 'fundamental question was whether the language of the clauses relied on pointed plainly to the intention of the parties to incorporate the main contract arbitration clause ...'.

Further, at p 90 of *Giffen v Drake & Scull* default (supra), Sir Thomas Bingham MR emphasized that the task of the court was one of construction. He said:

> Any process of construction is to be begun by looking at the words that the parties have actually used in order to ascertain what their intention was. It is, of course, well known that the context in which particular words are used may be of great importance with the result that language, taken out of context and construed on its own, may appear to have one meaning, but assumes a different meaning when it is read in the context of a complete contractual document. It is also, of course, familiar to anyone concerned with construing documents that the nature of the transaction may be of relevance.

Thus, one finds in the authorities that significance is sometimes attached to the fact that a document is a negotiable instrument, which conditions the mind of the court in trying to discern what meaning the parties intended a provision to have, whereas here the question is whether the parties to one contract intended to incorporate in their contract a term from another contract. It is relevant, particularly in the absence of clear and express language, to see how apt and workable the term in question would be if it were so transplanted.

From all this it follows that we have to look very closely at the particular language of the provisions that we have to construe and the particular circumstances of the contract in question. Unless clear rules have been laid down -- and they sometimes have been -- for example, as to the meaning to be given to the expression 'condition' in the context of charterparty and a bill of lading, one has, I think to be cautious in reasoning from one case to another, since cases appear to turn very much on their own particular terms and their own particular facts.

In that case, the arbitration clause was very limited and could only be invoked in very defined circumstances. Sir Thomas Bingham MR held that it was 'entirely incompatible with a general incorporation of the main contract arbitration clause'.

*[1994] 3 HKC 328 at 339*

In my judgment, the real problem facing the House of Lords in *Thomas v Portsea* default was the question of negotiability of the bill of lading. Bills of lading are not signed by both parties to them and the owner of the goods and subsequent owners would have no knowledge of the terms of the charterparty between the shipper and the owner of the ship. It is easy to see why the House was reluctant to incorporate by reference on the facts of that case.

Nevertheless, as can be seen from some of the authorities cited above, there has been a sea change of opinion and attitude as exemplified by the 1979 Act in England, the 1982 and 1989 amendments in Hong Kong and the adoption of Model Law in Hong Kong and in other jurisdictions. It seems to me that *Thomas v Portsea* default must be viewed in the context of dealing with a negotiable instrument, namely, a bill of lading. Different considerations can be said to apply in those circumstances. It is also a case which must be considered in the light of the actual words relied upon to support the argument in favour of incorporation. The expressions of reservations about ousting the jurisdiction of the court in that case fall on infertile ground in Hong Kong at the end of the twentieth century, a fortiori, when the legislature has enacted the Model Law which relegates the role of the court to basically one of support for the arbitral process and gives full effect to the principle of full party autonomy.

In the light of my construction of art 7(2) of the Model Law discussed above, I am therefore quite satisfied that in so far as *Thomas v Portsea* default is authority for the proposition that the arbitration clause must be specifically referred to before it can be satisfactorily incorporated, it has no application in Hong Kong. The task before the court in determining whether or not there has been incorporation by reference is one of construction, namely, to ascertain the parties' intentions when they entered into the contract by reference to the words that they used.

Accordingly, I must now turn to the task of construing the relevant clauses in the contract before me.

**Construction of the relevant clauses**

In support of his argument that the arbitration clause in the sub-contract had been incorporated into the contract, Mr Thomas relied upon a number of factors:

> (1) The contract was negotiated against the background of the envisaged assembly sub-contract and was finally concluded by reference to the contractual structure already in place. It must, therefore, have been intended that all those involved in the project should be subject to the same elaborate scheme defined in the assembly sub-contract.
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> (2) As from the date of the memorandum of understanding dated 19 January 1993, the plaintiff knew that the contract would be on a
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> *[1994] 3 HKC 328 at 340*
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> back-to-back basis, upon the terms and conditions of the assembly sub-contract between the defendant and Cleveland-Mitsui.
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> (3) The plaintiff was given a copy of the terms and conditions of the assembly sub-contract well before 17 March 1993.
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> (4) The memorandum of understanding recites that the plaintiff shall have the opportunity to read and note the provisions of the assembly sub-contract. Mr Thomas pointed out that Mr Bailey's firm view and clear intention not to be bound by the arbitration clause had never been ventilated or communicated to the defendants. If the plaintiff had a clear intention not to have arbitration, it would not have signed a contract which, at least on its face, would incorporate back-to-back all the terms of the assembly sub-contract including the arbitration clause.
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> (5) Both the contract and assembly sub-contract were specifically negotiated agreements at arm's length as opposed to standard form contracts. The terms were not inserted lightly nor without careful consideration and there is no reason why the court should not give full effect to them.
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> (6) The contract stipulated that all the terms of the assembly sub-contract should be directly applicable on a back-to-back basis. Mr Thomas submitted these were clear words to show that all such terms should apply as between the plaintiff and defendant mutatis mutandis. In addition, he pointed out that the recital stated that the assembly sub-contract 'forms an integral part' of the sub-sub-contract.
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> (7) In any event, it is common practice in construction works to provide for the settling of disputes by arbitration, see *Keating on Building Contracts* (5th Ed) p 383, and *Aughton v Kent Services* default (supra) at p 26. Mr Thomas submitted that this fact militated in favour of incorporation of the arbitration clause andmade it appear odd that the plaintiff should have failed to make it clear thatthere was to be no arbitration if indeed that was its intention at the time.
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> (8) The plaintiff itself relied upon and pleaded incorporation by reference of the terms and conditions of the assembly sub-contract as could be seen from para 10 of the statement of claim.

It is, of course, plain that the arbitration clause in cl 31 contemplates a dispute between the defendant and the Cleveland-Mitsui Joint Venture. Mr Thomas put his case on the basis that the parties must be taken to have intended that applicable necessary modifications were to be made to the terms of the assembly sub-contract when applied as between the plaintiff and defendant, such as substituting 'sub-sub-contractor' for 'assembly sub-contractor'. To make this good, Mr Thomas placed before me a document showing the necessary modifications to the parties and contracts named in cl 31. He submitted that, given appropriate changes, cl 31(1) could be read as follows:



> Any dispute or difference of any kind whatsoever arising between the *assembly sub-contractor* default and the *authorized treatment sub-contractor* default in connection with or arising out of the *sub-sub-contract* default or the *sub-sub-contract works* default and whether during the execution of the *sub-sub-contract works* default or after its completion and whether before or after the termination, abandonment or breach of the *sub-sub-contract* default shall be settled in accordance with the provisions of this cl 31.

Mr Thomas agreed that the language could be clearer. Nevertheless, he submitted that the language was clear enough to give rise to incorporation by reference. He submitted that the references to 'proportionally' and 'proportion' indicated that it may be necessary, in achieving a back-to-back incorporation, to carry out some scaling down. Some clauses in the assembly sub-contract might be quite inapplicable to the contract and, in those circumstances, Mr Thomas submitted that they should be omitted. A good example of this was the clause which provided for a legal opinion from Denton Hall. Mr Thomas further submitted that in making the above-mentioned references, the parties had made it clear that some alterations would have to be made and that these could be done quite easily.

Mr Scott, on the other hand, submitted that if the arbitration clause was incorporated in the way suggested, it would give rise to such serious problems of implementation that it would be 'incapable of being performed', a phrase which he had taken from the end of art 8 of the Model Law. On being pressed on this point, Mr Scott, I think, realized that it really was not his best point and did not press it any further.

However, Mr Scott further submitted that there had been no reported case where general words incorporating an arbitration clause which required modification had been upheld. The arbitration clause in this case would require substantial modification and this could not be sanctioned by mere general words. He then gave a number of examples which, he submitted, indicated how difficult it was going to be to work this clause in practice. These, he submitted, were a clear indication that the parties could not possibly have intended the arbitration clause to bite.

One of the examples given by Mr Scott was that of timing, namely, when was the arbitration to commence? Was the arbitration to begin after the plaintiff's works had been completed, or only after the defendant's assembly sub-contract works had ended? Mr Scott submitted that no amount of tinkering with the clause could assist here. I reject this argument, because if I make appropriate modifications to cl 31(5), one clearly arrives at a result that arbitration cannot commence until the completion or alleged completion of the sub-sub-contract works.

Mr Scott also referred to the following potential problems: obedience to instructions, the provisions relating to claims support, the appointment of an arbitrator and the service of notices.



In response, Mr Thomas retorted that Mr Scott was putting the problem the wrong way round.Mr Scott's approach was to see what might happen if the arbitration clause was incorporated and, if this threw up any problems, to submit that those problems were a clear indication that the parties could not have intended to incorporate the said clause.

I agree that Mr Scott was approaching the problem from the wrong end. I have to concentrate solely on the parties' intention, which must be gleaned from the words they have used. If I am satisfied that this arbitration clause has been incorporated, it is irrelevant to me that the parties may have thereby created some problems for themselves. It frequently happens that parties enter into arbitration clauses which are poorly drafted and which give rise to problems. I am not saying that this is what has necessarily happened in the present case but if Mr Scott is right in identifying certain problems then, if I am satisfied that the parties clearly intended to

incorporate the sub-contract arbitration clause, they are problems which will have to be dealt with by the parties themselves as and when they arise.

In construction cases, one has to approach the question of incorporation by reference from the standpoint of the intention of the parties with no preconceived notions. One is entitled to take into account all the surrounding facts -- the factual matrix -- but, at the end of the day, one ends up trying to give contractual and commercial effect to the actual words used by the parties.

I am quite satisfied that by the actual words used by the parties in their agreement, they did intend to incorporate cl 31 of the assembly sub-contract. I have not forgotten that applying the clause mutatis mutandis does involve some rejection and modification, but that, by itself, does not displace the parties' intention. In using the word 'proportional', they must have recognized that some modifications would have to be made. If, as Mr Scott fears, there may be problems in putting this agreement into practice, this does not seem to me to be a reason for not incorporating the clause but is a reason for castigating the parties' bargain as ill-advised. Time alone will tell. Suffice it to say, for present purposes, I am not satisfied that the problems to which Mr Scott has averted are insurmountable.

In relation to this latter argument, namely, that the parties could not have intended such a result, because some of the clauses in the assembly sub-contract are not apposite to the contract, I believe that the following dicta of Sir John Donaldson MR in *The Varenna; Skips A/S Nordheim v Syrian Petroleum* 1984 1 QB 599, 616 is of some relevance:

> Operative words of incorporation may be precise or general, narrow or wide. Where they are general, and in particular where they are general and wide, they may have the effect of incorporating more than can make any sense in the context of an agreement governing the rights and liabilities of the shipowner and of the bill of lading holder. In such circumstances, what one might describe as 'surplus', 'insensible' or 'inconsistent' provisions fall to be 'disincorporated',
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> *[1994] 3 HKC 328 at 343*
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> 'rejected' or ignored as 'surplusage'. But the starting point must always be the provisions of the bill of lading contract producing the initial incorporation. And what must be sought is *incorporation,* not*notice* of the existence or terms of another which is not incorporated.

**Conclusion**

In the light of the facts of this case and of the words used by the parties in their contractual documentation, I am quite satisfied that the parties to this contract had agreed to incorporate all the terms of the assembly sub-contract into the contract with appropriate modifications to be made wherever necessary. This, as I have already held, includes the rejection of clauses which have no relevance to the contract in question. I would find it to be a strange result if the parties had agreed to incorporate by the words they used only some of the terms of the assembly sub-contract but not others including the arbitration clause -- particularly where other parties in the contractual chain had agreed on arbitration.

Further, the plaintiff was given every opportunity to consider the terms of the assembly sub-contract and at no stage did it indicate its objection to the arbitration clause. Indeed, it is common ground that even if Mr Bailey had had any reservations about arbitration, he did not communicate them to the defendant. Such uncommunicated intention is therefore quite irrelevant and has to give way to the words which the parties actually used when making their contract.

The issue of whether or not there will be difficulties in operating the terms of cl 31, as suitably modified, is not really a matter for me. Once I have decided that the arbitration clause, suitably modified, is capable of operation, then the mere fact that there might be some problems in its operation is irrelevant because they will have to be dealt with as and when they arise by the person charged with the responsibility for resolving such problems, be it the arbitrator or a judge in England.

For these reasons, therefore, I am quite satisfied that the arbitration clause in the assembly sub-contract has been incorporated into the contract between the parties before me and, in those circumstances, I have no discretion other than to grant a stay of these proceedings pursuant to the terms of art 8 of the Model Law.

As to costs, I propose to make a costs order nisi in favour of the defendant, who has been successful in the application for a stay of proceedings.

I would like to express my thanks to counsel for the interesting and helpful submissions which they provided to me, and for the economy with which they were all deployed.