JUDGMENT : Justice Colman : QBD. Commercial Division. 27th February 2006.

Introduction

1. This application for permission to appeal against an arbitration award by the Commonwealth Secretariat Arbitration Tribunal ("CSAT") raises an issue of importance as to the meaning and application of section 69 of the Arbitration Act 1996.

2. The Commonwealth Secretariat ("ComSec") is an international organisation. It is entitled as such to diplomatic immunity to the effect that it cannot be impleaded in the courts of this country by reason of the terms of the International Organisations Act 2005. One of its functions is to enter into contracts for the provision of aid by way of services to the governments of states that are Commonwealth members. For this purpose, it enters into contracts with outside providers of goods and services. Such contracts sometimes, if not invariably, include an arbitration clause. That clause refers disputes which cannot be settled by negotiation to the CSAT for settlement by arbitration in accordance with its statute, that is the Statute of the Arbitral Tribunal of the Commonwealth Secretariat. It provides that the seat of the Arbitral Tribunal is to be the principal office of ComSec which is in London.

3. On 6 July 2001 the Claimants' predecessors in title, Asset Management Shop Ltd ("AMS"), entered into a contract with ComSec under which AMS was to create a prototype website for the Government of Namibia by which to display the market in the products of certain industries in Namibia. The Government was to be given the opportunity of considering whether the prototype justified the creation of a fully functional website covering a full range of industries in addition to those (two) represented in the prototype.

4. The contract by clause 9 included the following term: *"The Secretariat and the consultant shall endeavour to settle by negotiation and agreement any dispute which arises in connection with this contract. Failing such agreement the dispute shall be referred to the Commonwealth Secretariat Arbitral Tribunal for settlement by arbitration in accordance with its statute which forms part of this contract and is available on request."*

5. The Statute there referred to included at Article IX 2 the following provision: *"The judgment of the Tribunal shall be final and binding on the parties and shall not be subject to appeal. This provision shall constitute an "exclusion agreement" within the meaning of the laws of any country requiring arbitration or as those provisions may be amended or replaced."*

6. Following completion by AMS of the prototype website a dispute arose as to the effect of one of the provisions of ComSec's Standard Terms and Conditions for Short-Term Consultancies which were incorporated by reference into the Contract. That was clause 3 which provided that title to and rights in any material produced under the contract which did not vest in the Commonwealth government to which it had been applied passed to ComSec. Thus, whereas Comsec claimed title to the website, AMS relied on various provisions in the Terms of Reference and its earlier proposal in respect of the works, both of which were expressly incorporated into the contract, to the effect that title to the prototype was to remain in AMS.

7. The dispute was referred to arbitration by CSAT and a three-person panel consisting of Prof Duncan Chappell, President, Dame Joan Sawyer and Miss Anesta Weekes QC. By an award dated 25 April 2005 the Tribunal held that the website was owned by ComSec and not by AMS.

8. AMS has applied under Section 69 of the Arbitration Act 1996 for permission to appeal against that award on the grounds of error of law. ComSec submits that this court has no jurisdiction to give permission to appeal because the incorporation by clause 9 of the ComSec Statute of the Arbitral Tribunal, Article IX.2, had the effect of an exclusion agreement disentitling either party from the right to appeal under section 69 of the 1996 Act.

9. Section 69(1) provides: *"Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section."*

10. It is submitted by Mr Colin Nicols QC, on behalf of ComSec, that in this case there was a sufficient exclusion agreement by reason of the incorporation by reference of the ComSec Statute, Article IX.2, and that it was not necessary to spell out in the body of the agreement to arbitrate contained in clause 9 that the right of appeal was excluded.

11. On behalf of the Claimant Mr Rhodri Thompson QC submits that the exclusion of the right of appeal is such a draconian measure when, as here, imposed by the standard arbitration system relied on by a public authority, such as ComSec, that before there can be reasonable notice by ComSec to an opposite contracting party such as AMS there must be an express reference to that exclusion on the face of the agreement to arbitrate. Alternatively, if that would not be necessary at Common Law, it must be necessary in order to comply with the requirements of Article 6 of the European Convention on Human Rights.

Discussion

12. Counsel were unable to refer me to, and I have been unable to find, any direct authority on whether it is sufficient for the purposes of the opening words of Section 69 that a contract arbitration clause incorporates an agreement to exclude a right of appeal by reference rather than by expressly stating the exclusion agreement on its face. However, there is clear authority that under the much more elaborate provisions of section 3(1) of the Arbitration Act 1979, by which the right to appeal on questions of law was first introduced into English arbitration law, a mere reference in an arbitration clause to a body of arbitration rules (in that case those of the International Chamber of Commerce) was sufficient to incorporate an exclusion agreement. That is the decision of Leggatt J. in **Arab African Energy Corporation v. Oliproduckten Nederland** [1983] 2 Lloyd's 419. It is to be observed that in the course of his judgment Leggatt J. referred at page 423 to that approach to construction being conditioned by the change in English public policy towards the desirability of finality in arbitration as against the demands of supervisory control by the courts. He said this: *"Section 3 (1) of the 1979 Act does not require the overt demonstration of an intention to exclude the right of appeal. True it is, that formerly the Court was careful to maintain its supervisory jurisdiction over arbitrators and their awards. But that aspect of public policy has now given way to the need for finality. In this respect the striving for legal accuracy may be said to have been overtaken by commercial expediency. Since public policy has now changed its stance, I see no reason to continue to adopt an approach to the construction of exclusion agreements which might well have been appropriate before it had done so. In my judgment, the phrase "an agreement in writing . . . which excludes the right of appeal" is apt to apply to an exclusion agreement incorporated by reference. I reach this conclusion unpersuaded to the contrary by the decisions of the European Court which I consider might be misleading in this essentially domestic context. Whatever considerations of good sense may support those decisions and however much one, might be impressed by them if approaching the matter a priori, the pursuit of homogeneity should not deter me from the broader approach hitherto adopted by the common law. It is more important that commercial men should know that the English Courts are consistent than that the Courts should turn towards Luxembourg when Parliament has not directed them to do so."*

13. Section 3(1) provided as follows:

"(1) Subject to the following provisions of this section and section 4 below -- (a) the High Court shall not, under section 1 (3) (b) above, grant leave to appeal with respect to a question of law arising out of an award . . . if the parties to the reference in question have entered into an agreement in writing (in this section referred to as an "exclusion agreement") which excludes the right of appeal under section 1 above in relation to that award . . .

(2) An exclusion agreement may be expressed so as so relate to a particular award, to awards under a particular reference or to any other description of awards, whether arising out of the same reference or not; and an agreement may be an exclusion agreement for the purposes of this section whether it is entered into before or after the passing of this Act and whether or not it forms part of an arbitration agreement.

(4) Except as provided by sub-section (1) above, sections 1 and 2 above shall have effect notwithstanding anything in any agreement purporting -- (a) to prohibit or restrict access to the High Court; or (b) to restrict the jurisdiction of that court; or (c) to prohibit or restrict the making of a reasoned award."

14. In **Marine Contractors v. Shell Petroleum Development of Nigeria** [1984] 2 Lloyd's Rep 77 the Court of Appeal upheld a decision of Staughton J. who had followed the approach of Leggatt J. with regard to the incorporation of Art 24 of the ICC Rules. At page 79R Staughton J. observed: *"The question of whether there has been an exclusion agreement in a business contract should be decided on ordinary principles of construction of contracts without any predispositions one way or the other. By that test there is, in my judgment, plainly an exclusion agreement in article 24 of the rules of the ICC."*

15. The Court of Appeal agreed with Staughton J and upheld his judgment. It is to be observed that in the course of his judgment at pp82-83 Ackner LJ. identified the reasons the parties might have had for giving up the

right of appeal as (i) the determination of the appeal by a tribunal of the parties' choice, (ii) that finality would be achieved as soon as possible, (iii) that the dispute is dealt with in private.

16. The 1996 Arbitration Act was intended to leave intact as a feature of English arbitration the aspect of privacy and confidentiality (see DAC Report Chap 2 paras 9-17). It was further intended to reflect and preserve the twin objectives of finality and party autonomy (see DAC Report Chap 2 paras 18 and 19). The right to appeal questions of law, so severely restricted by the provisions of section 69(3), continues the balancing of the countervailing aspects of public policy which underlay the 1979 Arbitration Act, namely supervision by the courts of the content of awards with the purpose of maintaining and developing a predictable and coherent body of English Commercial Law on the one hand and maximising finality and party autonomy on the other hand. The right to contract out of even the restricted supervisory regime represented by appeals under section 69 thus presented an optional facility for the reinforcing of finality and party autonomy in preference to the court's power to intervene in the arbitrators' decision-taking on matters of law. It provides a consensual facility directed to reinforcing two of the key principles underlying the 1979 and 1996 Acts.

17. The arbitration clause in this case expressly provided that the Statute was to form part of the contract and stated that it was available on request. AMS did not make any such request. Had it done so, it would have been unsurprised by Article IX.2 or specifically by its exclusion of the right of appeal. That is because before it entered into the contract with ComSec there were conversations between Ms Jananayagam of AMS and Mr Rao of ComSec in the course of which Mr Rao told her that ComSec had diplomatic immunity and that CSAT was the sole tribunal for disputes relating to ComSec. On being given that information, AMS ought to have appreciated that it was ComSec's belief that it could not be impleaded in the English courts in respect of this arbitration.

18. However, as the judgment of David Steel J. in **Selina Mohsin v. The Commonwealth Secretariat** (Unrep) 1 March 2002, demonstrated Comsec did not enjoy immunity and could be impleaded in the English courts with regard to arbitration awards under section 69. Whatever, the correct position in law, however, at the time when the contract was entered into both parties were under the misapprehension that, quite apart from the applicability of any exclusion agreement, there could be no appeal to the courts from any award.

19. As a matter of general principle contractual terms which have the effect of excluding liability can be incorporated by reference to general conditions provided that the notice given is reasonable in all the circumstances: see **Circle Freight International Ltd v. Medeast Gulf Exports Ltd** [1988] 2 Lloyd's Rep 427, per Taylor LJ. at p433 and Bingham LJ. at p435.

20. The exclusion of the supervisory jurisdiction of the courts under section 69(1) of the 1996 Act is a provision which, unlike an exclusion of liability clause, does not go to the substantive rights of the parties but only to the ancillary dispute resolution machinery under the statute. Given that the consensual exclusion of the right of appeal represents a means of enhancing party autonomy and the achievement of finality, both of them policy foundations of the 1996 Act, it is hard to see why the test of what is reasonable notice of an exclusion agreement should present a particularly high threshold and, in particular, one which would be higher than that required under the 1978 Act.

21. In these circumstances, I conclude that, leaving aside ECHR considerations, the provisions of section 69(1) do permit the incorporation of exclusion agreements by reference without spelling them out in the body of the arbitration clause.

22. Does ECHR and in particular the power of the English courts under section 3 of the Human Rights Act 1998 affect this conclusion?

23. It is argued on behalf of AMS that if effect were given to the exclusion agreement in Article IX.2 by application of the Common Law principles of construction of section 69(1) and the analysis which I have described, given that, as is common ground, ComSec is a public authority for the purposes of the ECHR, there would be a breach of Article 6 by ComSec's reliance on that exclusion agreement and by this court's enforcement of it. Accordingly, this court should so construe section 69(1) so as to require an exclusion agreement to be explicitly set out and agreed to. In support of this proposition Mr Thompson QC submits (i) that exclusion of the right of appeal by means of Article IX.2 not being explicitly disclosed on the face of the arbitration agreement deprives AMS of its right to a fair and public hearing by an independent and impartial

tribunal established by law, (ii) that a derogation, from a party's Article 6 rights ought to be made explicit and (iii) that applying the approach to construction of Acts of Parliament under section 3 of the Human Rights Act identified by the House of Lords in **Ghaidan v. Godin-Mendoza** [2004] 2 AC 557, section 69(1) should be construed as requiring by the words "unless otherwise agreed by the parties" an express reference to an agreement to exclude the right of appeal in an arbitration agreement entered into by a public authority. In Ghaidan v Godin-Mendoza it was held that even if the unambiguous construction of a legislative provision gave a particular meaning, if and to the extent that such meaning would involve permitting a breach of the requirements of the ECHR, the courts could adopt a convention – compliant meaning for that provision provided that such meaning was not inconsistent with a fundamental feature of the legislation.

24. The foundation for this argument is that the effect of an enforceable exclusion agreement would be to deprive the parties of *"a fair and public hearing … by an independent and impartial tribunal established by law."*

25. There can be no doubt that parties to a commercial contract, including a public authority, can enter into an agreement to refer all disputes to arbitration thereby entitling them as of right not to have such disputes resolved *"at a public hearing by a tribunal established by law"*, without there being any failure to comply with Article 6. Public authorities commonly enter into arbitration agreements. Awards made in such arbitrations are final in many jurisdictions, including Sweden and the United States, in the sense that there is no right of appeal to the courts on the merits. If Parliament had decided in 1996 that, in accordance with widely-held views, the public interest demanded that party autonomy and the finality of awards should be given priority over the supervision of the courts over the merits, and had entirely abolished the right of appeal on the merits, no argument could have been advanced that arbitration agreements entered into thereafter by public authorities infringed Article 6. That would be because neither party would be permitted to resile from its agreement that all disputes should be resolved otherwise than by public hearing by a tribunal established by law. The right to utilisation of the courts would yield to the public policy of adherence to freely contracted agreements for the means of dispute resolution.

26. It follows, in my judgment, that parties who, by entering into an arbitration agreement, contract into the restricted supervisory regime of Section 69 of the 1996 Act, are not by agreeing to such restrictions acting inconsistently with the human rights of the opposite party, regardless of whether one of them is a public authority. Although they are to have a very restricted right of appeal, that is not impermissible under the Convention. Equally, if they mutually agree to go down the route of entirely excluding a right of appeal, they are also acting entirely consistently with Article 6 in the sense that they have preferred the facility offered by section 69(1) of finality and privacy to the prospect of subsequent supervisory court proceedings and, having so agreed, they cannot be permitted to rely on Article 6 and complain that there was anything unlawful in one party, whether or not a public authority, inviting agreement to the exclusion of a restricted right of appeal.

27. Against this background I am not able to accept the submission that, unless there is a requirement in respect of the method of formation of an agreement to exclude the right of appeal prohibiting incorporation by reference, there will be an infringement by ComSec of Article 6. The mechanism of communication of terms which gives rise to a binding arbitration agreement in the first place and one which largely excludes the jurisdiction of the courts save on appeal is that which is ordinarily required to prove a binding contract in English law. There is no logical reason why any special mechanism of communication should be introduced for the purpose of going one stage further by utilising the facility offered by section 69(1) and wholly excluding such right of appeal. That additional stage requires no more protection than the initial stage of agreeing to arbitrate, for both involve a statutorily permissible consensual disengagement from what would otherwise be an entitlement under Article 6. Neither can justifiably require special rules for contracting. Accordingly, in my judgment, the court's powers under section 3 to give a special convention-compliant meaning to section 69(1) is not engaged.

28. I therefore conclude that in this case there is an effective and enforceable exclusion agreement and that I have no jurisdiction to entertain an application for leave to appeal under section 69.

Mr R Thompson QC and Mr K Qureshi (instructed by Turbevilles) for the Applicant
Mr C Nicholls QC and Mr T Poole (instructed by Speechly Bircham) for the Respondent