CA on appeal from QBD Commercial Court (Mr Justice Colman) before MR, Waller LJ, Vice-President of the Court of Appeal, Civil Division; Sedley LJ. 21st March 2007

**Lord Justice Waller :** This is the judgment of the court.

1. Pursuant to an arbitration clause in a contract between Asset Management Shop Limited (AMS) [the predecessors in title of Sumakan Limited] and The Commonwealth Secretariat (CMS), arbitrators made an award dated 25th April 2005 in favour of CMS. AMS applied to the court for leave to appeal on a point of law under section 69 of the Arbitration Act 1996 [the 1996 Act]. By a judgment handed down on 20th February 2006 Colman J decided that by a further term incorporated into the contract the parties had in the words of s.69(1)"otherwise agreed" to exclude the jurisdiction of the court. The ruling involved him deciding first that the clause excluding the right of appeal had been incorporated as a matter of English domestic law into the contract, and second that he could not accept the submission that some special meaning had to be given to the words "otherwise agreed" to avoid an infringement of Article 6 of the Convention on Human Rights.

2. He indicated that he would have granted permission to appeal from the award, if he had had the jurisdiction to do so. He refused permission to appeal to the Court of Appeal from his decision.

3. On the application for permission to appeal Colman J's decision to this court, Rix LJ on paper refused permission to appeal so far as Colman J had decided as a matter of domestic law that the clause excluding a right of appeal to the courts was incorporated, but he granted permission on the Human Rights point and the effect of Article 6.

4. A preliminary point arises as to the Court of Appeal's jurisdiction. CMS apply to set aside Rix LJ's permission to appeal on the grounds that the refusal to grant leave by Colman J excludes any right of appeal to the Court of Appeal. It is argued that Colman J's ruling amounted to a refusal to grant permission to appeal from the award under section 69 and that by virtue of section 69(6) an appeal could only be brought with leave of the original court, i.e. Colman J himself.

5. The appellants resist that application and further seek to renew the request for permission to appeal Colman J's decision on incorporation as a matter of English domestic law. It is convenient to take first the question whether the Court of Appeal have any jurisdiction following Colman J's refusal to grant leave.

**Does the Court of Appeal have jurisdiction to consider the appeal from Colman J as to the existence of an exclusion agreement?**

6. To follow the arguments it is necessary to have regard in particular to Sections 67, 68, 69, 70 (2) and (3) and 73 of the 1996 Act. But also relevant for reasons that will become apparent, are sections 44 and 45. For convenience those provisions are appended hereto. Section 67 is dealing with substantive jurisdiction. Two points will be noted. First by subsection (1) it is provided that a party may lose the right to object under s.73 and that the right is subject to the restrictions in section 70(2) and (3). Second, the language of subsection (4) restricting appeals to the Court of Appeal is to require leave of the court for any appeal from a decision of the court "under this section." Section 68 is dealing with serious irregularities affecting the tribunal. The two points to be noted in relation to this section are the same as for section 67. First by subsection (1) a party may lose the right to object under section 73 and the right to apply is subject to the restrictions in section 70(2) and (3).Second by subsection (4) leave to appeal is required from a decision of the court "under this section".

7. Section 69 is dealing with appeals on points of law. The points to note on this section are these. First by subsection (1) a party may appeal "unless otherwise agreed" i.e. a decision which the judge must take before considering whether to grant leave to appeal is whether access to the court has been excluded by agreement. Second subsections (2) to (6) deal with the granting or refusing of permission to appeal from the arbitration award. In that context by subsection (2) the right of appeal is subject to the restrictions in section 70(2) and (3) similar to those in subsections (2) of sections 67 and 68, but the language of the restriction on the right to appeal the court's decision to the Court of Appeal is different from that in Sections 67 and 68, leave of the court being required by subsection (6) for any appeal from a decision of the court "under this section to grant or refuse leave to appeal".

8. Subsections (7) and (8) of section 69 deal with the appeals once leave to bring the same has been given, and the restriction on the bringing of an appeal to the Court of Appeal is in quite different language again. Subsection (8) provides for the decision of the court being treated as a judgment of the court for the purposes of an appeal, and then provides that no such appeal lies without leave of the court, and gives directions as to the only circumstances in which leave should be given.

9. Although not referred to in the course of argument section 45 is of relevance. It relates to the court's jurisdiction to rule on a preliminary point of law. It (like section 69) commences with the words "Unless otherwise agreed by the parties", and it contains a fetter on the right to appeal to the Court of Appeal not by reference to any decision "under this section", but to particular aspects of decisions under section 45 which on a literal interpretation do not include a decision on whether the parties have "otherwise agreed".

10. It is common ground that in all the subsections requiring leave from "the court" for the bringing of an appeal to the Court of Appeal, "the court" is the first instance court. That this was the position under Section 69 was so held by the Court of Appeal in ***Henry Boot Construction v Malmaison Hotel*** [2001] QB 388. In ***Athletic Union of Constantinople v National Basketball Association*** [2002] 1 WLR 2863 the Court of Appeal followed the *Henry Boot* decision and held that wherever the expression "the Court" occurred in sections 67, 68 as well as 69 it meant the court of first instance. Since then it has been recognised that wherever leave is required from the "court", and it is

required in many sections apart from those already mentioned, the "court" is the court of first instance; see for example ***Cetelem SA v Roust Holding* Limited** [2005] 1 WLR 3555.

11. ***Cetelem*** was concerned with section 44 and in particular section 44(7), as we shall see, and it is an authority to which we shall return. That is one reason for appending section 44. But we also draw attention to the fact that that section commences with the words "*Unless otherwise agreed by the parties..",* and a literal interpretation of section 44(7), excluding a right of appeal to the Court of Appeal without leave of the court *"from a decision of the court under this section",* would appear to us to apply to a decision as to whether the parties had otherwise agreed.

**Mr Speaight's submissions**

12. Mr Speaight QC for Sumukan concentrated on the language of section 69(6) and (8). He argued that a decision that the parties had entered into an exclusion agreement, which precludes the court having jurisdiction to consider whether to grant leave to appeal and thus prevents the actual hearing of an appeal on a point of law, is neither a "decision of the court under [section 69] to grant leave or refuse leave to appeal" within subsection (6), nor "the decision of the court" from which "no such appeal lies without leave of the court" within subsection (8).

13. There can be no real issue that a decision as to the existence of an exclusion agreement is not a decision covered by subsection (8), but for completeness Mr Speaight argued that the decision is not a decision under Section 69 at all because it is a decision as to whether Section 69 is to apply or not.

14. In support of his argument that the court should not construe Section 69 (6) or (8) as preventing an appeal as to the effectiveness or otherwise of an exclusion agreement, Mr Speaight referred us to certain authorities. He pointed to the language used by Lord Nicholls in ***Inco Europe v First Choice Disribution*** [2000] AC 586 at 590F where in the context of demonstrating that the draftsman of the 1996 Act must have made an error Lord Nicholls said "The draftsman must have intended that, save to the extent that an appeal was expressly circumscribed, parties to court decisions under the various sections be able to exercise whatever rights of appeal were available to them from sources outside the Act itself."

15. That sentence appears in a judgment dealing with what was clearly an error in the drafting of a particular section, and we are not much influenced by it. One must bear in mind that there are many sections in which the right to appeal to the Court of Appeal is circumscribed by the necessity to obtain leave from "the court" at first instance. This was important to those drafting the 1996 Act. It was the intention of those drafting the 1996 Act to limit appeals to the Court of Appeal to avoid the delay and expense that such appeals can cause. Indeed the wording of the original Bill was altered to make the position absolutely clear [see paragraph 27 of the Supplement to the DAC Report]. Furthermore the philosophy is reflected in section 1(a) of the 1996 Act which provides that *"the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay and expense."*[our underlining]. Consistent with this objective one might expect the decision as to whether parties to an arbitration agreement had excluded the right of appeal to the court to be something to be finally decided by the court at first instance unless that court gave leave for the point to go further.

16. Mr Speaight also referred us to *Cetelem*. In that case the Court of Appeal were (as we have said) concerned with section 44 of the 1996 Act. Under that section, unless otherwise agreed the court has for the purposes of arbitration proceedings the same powers for the making of certain orders as it has in relation to legal proceedings. By subsection (3), if the case is one of urgency the court may make such orders as it thinks necessary for the purpose of preserving evidence or assets. By subsection (7), leave of the court, i.e. once again the court of first instance, is required for any appeal "*from a decision of the court under this section"*. Beatson J made an order under section 44(3) and he refused permission to appeal. The defendant in that case applied for permission to appeal to the Court of Appeal and that application was initially refused on paper in reliance on subsection (7). When the application was renewed it was held in a judgment of Clarke LJ with which the other members of the court agreed, that a decision reached without jurisdiction was not a decision under section 43(7). The court further concluded that the judge had exceeded the jurisdiction conferred by section 44(3) and thus granted permission to appeal.

17. The judgment in paragraph 4 recognised that wording similar to section 44(7) was contained in many provisions of the 1996 Act including sections 67(4) and 68(4); [it inferentially clearly detected the difference in the wording of the subsections in section 45 and 69 those sections not being included in the list of sections]. It follows that if a court purported to make a decision under any of the sections containing wording similar to section 44(7) which it had no jurisdiction to make, that would not be a decision under the sections and a refusal by the first instance court to grant permission to appeal would not preclude the Court of Appeal granting permission and having jurisdiction to consider the lower court's decision.

18. Mr Speaight submits that under section 69 the question whether the parties have or have not "agreed otherwise" goes to the court's jurisdiction. He submits that if the parties have agreed to exclude the court's jurisdiction but a judge makes an error of law in holding that they have not, and then grants permission to appeal from an arbitration award, the granting of permission to appeal would be being made without jurisdiction. He submits that ***Cetelem*** would show that section 69(6) would not bite on the decision to grant permission to appeal from the award on a point of law. He submits that further supports the view that if the judge were to refuse permission to appeal from his or her decision as to the existence of an exclusion agreement, that would not preclude the Court of Appeal from entertaining an appeal from that decision. He submits that the question whether the court had

jurisdiction would be justiciable by the Court of Appeal. He further submits that this demonstrates that section 69(6) has no application to the decision as to whether the parties have "otherwise agreed". Thus he submits Colman J's decision that the court had no jurisdiction must be as justiciable by the Court of Appeal as the decision would have been if he had found to the contrary.

19. Mr Speaight suggests that that he gains further support from the Ontario Court of Appeal in ***Denison Mines Limited v Ontario Hydro*** [2002] 56 O.R (3d) 181. That court had to consider, amongst other points, whether it had jurisdiction to consider a ruling that the parties had agreed to exclude the court's jurisdiction, after the court of first instance had ruled that there was such an agreement. The lower court had refused permission to appeal under rather similar provisions to those contained in the 1996 Act. The relevant provisions under the Arbitration Act 1991 were as follows:-

*"Arbitration Act, 1991, ss 45(1) and 49*

*45(1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,*

*(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and*

*(b) determination of the question of law at issue will significantly affect the rights of the parties.*

*49. An appeal from the court's decision in an appeal of an award, an application to set aside an award or an application for a declaration of invalidity may be made to the Court of Appeal, with leave of that court."*

20. By reason of section 1 of the same Act "the court" was the court at first instance and not the Court of Appeal.

21. Morden J giving the judgment of the court said this:-

*"8. As I have said, the non-appealability of orders refusing leave is the general rule. As Hillmond sets forth on pp 624-25 O.R., the courts have engrafted onto this general rule an exception which is applicable where the judge mistakenly declines jurisdiction. Hillmond referred to and quoted the following passage from the reasons of Cartwright J for the Supreme Court of Canada in Canadian Utilities Ltd v Deputy Minister of National Revenue, supra, at p 63 SCR:*

*"It appears to me to have been consistently held in our courts and in the courts of England that where a statute grants a right of appeal conditionally upon leave to appeal being granted by a specified tribunal there is no appeal from the decision of that tribunal to refuse leave, provided that the tribunal has not mistakenly declined jurisdiction but has reached a decision on the merits of the application. (Emphasis added)*

*9. Denison relies upon this exception in the present case. It submits that Macdonald J erred in concluding that the arbitration agreement dealt with the appeals on questions of law (s.45(1) of the Arbitration Act 1991), that is, that the parties had "contracted out" of a right of appeal and, accordingly, erred in declining jurisdiction.*

*10. I appreciate that in many cases the meaning of "jurisdiction" can be fraught with difficulty. In the present case, however, I think that the principle stated by Cartwright J can be applied with some degree of confidence. He distinguished between declining jurisdiction and reaching a decision on the merits of the application. In the present case, the parties did not argue the merits of the application before Macdonald J. By agreement they argued whether or not Macdonald J had jurisdiction to grant leave to appeal. If she had decided that she had jurisdiction, they would have continued the hearing of the application on the merits. I think that the exception applies."*

**Mr Nicholls QC's submissions**

22. Mr Nicholls QC submits that a decision as to whether parties have otherwise agreed under section 69 is clearly a decision under section 69. He accepts that there is a difference in wording between the subsections (4) in section 67 and 68, and subsections (6) and (8) in section 69, but the reason for the different wording in section 69 is simply to draw a distinction between the two aspects with which section 69 is concerned. A decision that the parties have agreed otherwise, leads, in ordinary language, to a refusal of permission to appeal which as such, he submits, is obviously covered by section 69(6).

23. He submits that the distinction sought to be drawn between a decision being taken as to whether there is jurisdiction under the section (said not to be covered by 69(6)), as opposed to a decision whether to refuse or grant permission under the section once jurisdiction is established, is a false distinction. He points out that the court is required under section 69(2) to consider whether section 70(2) or (3) restricts the right of appeal. Section 70(3), for example, requires an application under section 69 to be brought within 28 days of an award or if there is an arbitral process of appeal or review within 28 days of the appellant being notified of the result. Thus a ruling that a party was outside the 28 days would be a ruling that the court had no jurisdiction to entertain an application under section 69. By the same process of reasoning as used in relation to the decision on the exclusion agreement, such a decision could (he submits) be said to be not a decision to refuse permission under the section, but a decision as to whether section 69 applied at all. But he submits that process of reasoning has been rejected by the Court of Appeal in ***ASM Shipping Ltd v TTMI*** [2006] EWCA Civ 1341.

24. In the context of section 68, *ASM* established that a decision that a right has been waived under section 73 is a decision under section 68 and thus unappealable if the judge has refused permission. In *ASM* it was argued that a decision as to waiver was not a decision on the asserted irregularity [see paragraph 7 of the judgment], but Longmore LJ, giving the judgment of the court, having referred to ***Cetelem***, said this:

> *"9. That case is very different from the present case. Here there is no doubt that Morison J had jurisdiction either to accede to the application or to refuse it. Whichever way the decision went, it was still a decision under section 68 of the Act and a refusal of permission to appeal was likewise a decision under the section. It cannot, therefore be challenged by way of appeal even if the decision is wrong or, even, obviously wrong. The fact that waiver (or indeed estoppel) can be said to operate as a defence to a prima facie entitlement is, in our view, nothing to the point. A decision to refuse relief (for whatever reason) is still a decision under section 68 just as much as a decision to grant relief would have been, if the decision had gone the other way."*

25. Mr Nicholls submits (in our view rightly) that there cannot be a distinction between decisions relating to section 73 under section 68 or sections 70(2) or (3) under section 68, and decisions relating to section 70(2) and (3) under section 69. He thus submits that although under section 68 decisions on section 73 or 70(2) and (3) are taken "under the section" and thus within the language of section 68(4), those decisions when taken under section 69 must be taken to be part of the decision to grant or refuse leave to appeal the arbitration award.

26. He further distinguishes *Cetelem* submitting that that is an authority on jurisdiction. It simply decides he submits that a decision, which a judge had no jurisdiction to make, is not a decision. But Colman J he submits did have jurisdiction to decide whether there was an agreement otherwise agreeing to exclude the court and did have jurisdiction to refuse to grant permission to appeal. There is no question of this being a case where Colman J made a decision to refuse to grant permission without jurisdiction to do so.

**Conclusion on jurisdiction of the Court of Appeal**

27. We have not found the point an easy one. We thought at one time that *Cetelem* was support for the view that if Colman J had decided that there was jurisdiction by concluding that the exclusion clause was not part of the contract, the Court of Appeal would have had jurisdiction to consider an appeal by CMS even if permission had been refused by Colman J. On that basis not to give the same jurisdiction to the Court of Appeal when the contrary decision was made would seem unsatisfactory. But ***Cetelem*** does not so hold. It is only by an extension of *Cetelem* that Mr Speaight gains any assistance from it. His argument proceeds in stages along the lines that because a decision that an exclusion agreement exists may be wrong, and because if it were, the ultimate decision to grant permission would be made without jurisdiction, that decision would not be a decision to grant permission, it being made without jurisdiction. This, he submits, leads to the conclusion that the decision as to whether the exclusion agreement applies must also be appealable.

28. But if the court has jurisdiction as part of the section 69 process to decide in the context of whether to grant permission to appeal, whether there is an exclusion agreement, it seems to me that the absence of jurisdiction argument fails. It is only if the decision as to whether there is an exclusion agreement is a preliminary decision to which section 69(6) does not apply, that an argument as to lack of jurisdiction for the decision as to whether to grant or refuse permission could succeed. In other words the argument relying on ***Celetem*** can get nowhere it being founded on an assumption which the argument is seeking to establish.

29. Furthermore, having regard to *ASM,* if it were to be held that an appeal in relation to the existence or otherwise of an exclusion agreement is a matter over which the Court of Appeal retains jurisdiction, despite refusal of permission by the lower court, there will be a need to distinguish that type of "preliminary decision", from the "preliminary decision" that for example the application had been made outside the 28 day period laid down by section 70(3) as required under section 69(2).

30. Ultimately the following factors have persuaded us that the Court of Appeal does have jurisdiction. First, although there might be a temptation (in the interest of speed and saving expense) to construe any part of the language of the 1996 Act in a way that renders all decisions under the various sections where permission of the court is required as final, if the first instance court so rules, there is a distinction between those cases where the court is assisting or overseeing the arbitration process and the cases where the question is whether the jurisdiction of the court has been excluded. This is recognised in the passage I have quoted from the judgment of the Court of Appeal in Ontario.

31. It may thus be that one should not be surprised if as a matter of language a distinction is drawn between jurisdiction issues as preliminary decisions as to whether the section is to be applicable at all and other decisions. It seems to us that Section 45(5) could be said to have been deliberately and even more clearly drawn so as to limit the restriction on appeal to decisions as to whether the conditions in subsection(2) are met and so as not to cover a ruling as to whether the parties have "otherwise agreed". It would be strange if the position were different when one came to Section 69 and on the language again it seems the same point (albeit less clearly) can be made. There is a distinction between a decision as to whether the parties have agreed to exclude the court and (if they have not) the decision as to whether to grant or refuse permission to appeal. Until the court has decided whether there is an exclusion agreement it does not, in fact, engage on the considerations relevant to the question whether permission to appeal should be refused or granted. Although the language of the order made by Colman J would not be determinative, the language of the order in this case accurately reflects the decision of the court declaring the existence of an exclusion agreement.

32. There are two points with which we should deal. First the distinction between a decision as to whether the restrictions in section 70(2) and (3) to which by virtue of section 69(2) the right to appeal under section 69 "is also subject", and a decision as to whether the parties have "otherwise agreed" under section 69(1), is a fine one. But the decisions which have to be taken as to whether 28 days has expired from the date of the award (section

70(3)) and in that context whether an extension of time should be granted under section 79, or whether the applicant has exhausted other avenues (section 70(2)) are procedural points not going to jurisdiction in the fundamental sense. For that reason, the wording of section 69(2) brings the questions that arise on section 70(2) and (3) within the compass of the process of deciding whether permission to appeal should be given, in the same way as subsections (2) of section 67 and 68 bring decisions on section 73 and section 72(2) and (3) within the compass of the decision making process under those sections.

33. The second point we must refer to relates to section 44(7). In this instance the "unless otherwise agreed" are the commencing words of section 44(1), and the language of section 44(7) is apt to cover a decision "under this section" as to whether the parties had or had not otherwise agreed. Furthermore if the parties had otherwise agreed that would go very much to a fundamental question of jurisdiction. It could be that an argument that the question of whether the parties had otherwise agreed should consistently with the views we have formed as to the proper construction of section 69, be held to be a preliminary point as to whether that section applied at all, rather than a decision under the section, but the point does not arise in this case.

34. The question whether there is an exclusion agreement is, in our view, a preliminary question under section 69 (1), and Mr Speaight's arguments are to be preferred. It follows that the permission granted by Rix LJ should not be set aside since the Court of Appeal has jurisdiction despite the refusal of permission to appeal by Colman J.

**Incorporation as a matter of English domestic law**

35. Clause 9 of the contract was in the following terms:-
*"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."*

36. The statute there referred to contained the following clause:-
*"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."*

37. Colman J held that as a matter of English domestic law by the reference to the statute in the arbitration clause the parties had agreed to exclude any appeal to the courts. Such an agreement could not of course exclude the right to come to the courts under Section 67 and 68, but did, he held, exclude the right to appeal on a point of law under section 69 of the 1996 Act. Rix LJ refused permission to appeal on this aspect. Although if one excludes from consideration the impact of Article 6, our conclusion would be to agree with Rix LJ, because the impact of Article 6 must be reviewed in the context of the position in domestic law and, indeed, because it is ultimately a matter of domestic law what the effect of article 6 should be, we shall deal with the point in some detail.

38. There are no authorities dealing with the incorporation of an exclusion agreement by reference under the 1996 Act. However by section 3(1) of the Arbitration Act 1979 the High Court was precluded from granting permission to appeal on a point of law from 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 …"*. In ***Arab African v Olieprodukten*** [1983] Vol 2 419 Leggatt J dealt with the position under that section. A contract for the sale of gas was made by an exchange of telex messages containing a term *"…Inco Terms 1980 – English law-arbitration, if any London according I.C.C. rules"*. By Article 24 of the I.C.C. rules any right of appeal was waived. The arbitrator made an award and there was an attempt to appeal the same on a point of law. Seeking to argue that there was no valid exclusion agreement Arab African argued so far as material to points in the instant appeal (1) there was no agreement in writing; (2) section 3 required a provision which itself excluded the right of appeal and not one which merely incorporated by reference.

39. Reliance in the course of argument before Leggatt J was placed on two decisions of the European Court of Justice in relation to Article 17 of the Brussels Convention dealing with agreements as to "*exclusive jurisdiction*", the first of which held that Article 17 imposed on a court the duty of satisfying itself that the clause conferring jurisdiction was in fact the subject of consensus between the parties, and the other holding that where a contract concluded orally was confirmed in writing accompanied by notification of general terms, the terms had to be accepted in writing. It was urged that adopting the approach under these decisions of the European Court, under section 3(1) *"the agreement in writing relied upon must in terms exclude the right of appeal."*

40. Leggatt J held that the exclusion agreement had been incorporated into the contract in written form. He held as follows:-

*"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."

41. Although permission to appeal to the court of appeal was given by Leggatt J, that case did not go to the court of appeal. Section 3(1) of the 1979 Act was considered again by Staughton J in a case where the terms of the contract provided for "*Arbitration in London under the Rules of the I.C.C.",* Article 24 being again relied on as one of those rules. He followed Leggatt J's reasoning in *Marine Contractors Inc v Shell Petroleum Development Co. of Nigeria Ltd* [1984] 2 Lloyds Rep 77. He made clear that he not only followed it because he would naturally be inclined to do so but also because *"I would myself have reached the same conclusions ..".*He also said *"The question of whether there has been an exclusion clause 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 our view plainly an exclusion agreement in article 24 of the rules of the I.C.C."*

42. This aspect of Staughton J's decision was not challenged when the matter went to the court of appeal. A more narrow point was taken as to whether the exclusion agreement applied to an interim award. The court of appeal held that it did, and in the course of rejecting the arguments of the appellants Ackner LJ said something of general relevance to exclusion agreements. He said "The reasons for foregoing the rights of appeal may be all or one of the following. Firstly, that the dispute is to be decided by the tribunal of the parties choice. Secondly, that a decision which is final will be achieved as soon as possible, and this is made possible by excluding appeals and thirdly, that the dispute is dealt with in privacy."

43. Amongst the other authorities to which Colman J referred was *Circle Freight v Medeast* [1988] 2 Lls Reps 427. That case was concerned with the question whether standard terms had been incorporated into a contract when the basis of incorporation being relied on was a reference to the terms over a course of dealings on invoices i.e. on documents sent after the execution of a number of oral contracts. Bingham LJ said this:-

*"Between March and August 1983 the plaintiffs delivered to the defendants at least 11, perhaps 13 or 14, invoices. These related to business done between the parties pursuant to oral contracts. There was no other contract document between these parties other than the invoice. Each invoice bore the legend –*

*All business is transacted by the company under the current trading conditions of the Institute of Freight Forwarders, a copy of which is available on request.*

*That lettering was clear and legible. It was placed immediately below the price payable on the invoice where the eye would naturally light on it. Mr Zacaria personally looked at the invoices as they arrived. He did not see the reference to the IFF conditions before the loss, but he knew that freight forwarders normally deal on standard terms and he must have seen some writing on the invoice. The defendants' own invoices bore a somewhat similar – although in their case meaningless – legend in a somewhat similar position.*

*Applying to this case the question posed by Lord Justice Ackner (as he then was) in Keeton Sons Ltd v Carl Prior Ltd Mar 13 1985 (unreported), "Has reasonable notice of the terms been given?", the only possible answer in my judgment is that it has. The Judge decided otherwise on the ground that terms should have been recited in extensor and not simply incorporated by reference, but, whatever the rule in other jurisdictions, the clear rule of English law is that clear words of reference suffice to incorporate the terms referred to: see, for example, Smith v South Wales Switchgear Co Ltd [1978] 1 WLR 165. I therefore conclude that the IFF standard trading conditions were effectively incorporated into the contract, and I would accordingly allow the appeal on this first issue"*

44. As Bingham LJ's reference to *Smith v South Wales Switchgear* demonstrates, there is a distinction between cases in which by a term of a written contract the parties agree to incorporate a clause even a limitation clause, and a case where a party is arguing that by a course of conduct terms have been incorporated. But as Mr Speaight emphasises in his skeleton argument, there is no doubt that even in a case where under the ordinary rules of offer and acceptance it might be said a clause was a term of the contract, the court may impose an obligation to draw attention to any unusually onerous term if the court is to allow reliance upon it. This important principle of construction is most clearly expressed in *Interfoto Library Ltd v Stiletto Ltd* [1989] 1 QB 433. In that case the plaintiffs ran a transparency lending library. They delivered some transparencies under cover of a delivery note containing on the front certain conditions including a condition that if the transparencies were not returned within 14 days a holding charge would be made of £5 a day. Dillon LJ held the clause was not incorporated saying:-

*"Condition 2 of the plaintiffs' conditions is in my judgment a very onerous clause. The defendants could not conceivably have known, if their attention was not drawn to the clause, that the plaintiffs were proposing to charge a "holding fee" for the retention of the transparencies at such a very high and exorbitant rate.*

*At the time of the ticket cases in the last century it was notorious that people hardly ever troubled to read printed conditions on a ticket or delivery note or similar document. That remains the case now. In the intervening years the printed conditions have tended to become more and more complicated and more and more one-sided in favour of the party who is imposing them, but the other parties, if they notice that there are printed conditions at all, generally still tend to assume that such conditions are only concerned with ancillary matters of form and are not of importance. In the ticket cases the courts held that the common law required that reasonable steps be taken to draw the other parties' attention to the printed conditions or they would not be part of the contract. It is, in my judgment, a logical development of the common law into modern conditions that it should be held, as it was in Thornton v Shoe Lane*

*Parking Ltd [1971] 2 QB 163, that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.*

*In the present case, nothing whatever was done by the plaintiffs to draw the defendants' attention particularly to condition 2; it was merely one of four columns' width of conditions printed across the foot of the delivery note. Consequently condition 2 never, in my judgment, became part of the contract between the parties."*

45. Bingham LJ held that the clause could not be relied on saying:-

*"The tendency of the English authorities has, I think, been to look at the nature of the transaction in question and the character of the parties to it; to consider what notice the party alleged to be bound was given of the particular condition said to bind him and to resolve whether in all the circumstances it is fair to hold him bound by the condition in question. This may yield a result not very different from the civil law principle of good faith, at any rate so far as the formation of the contract is concerned.*

. . . .

*To the extent that the conditions so displayed were common form or usual terms regularly encountered in this business, I do not think the defendants could successfully contend that they were not incorporated into the contract.*

*The crucial question in the case is whether the plaintiffs can be said fairly and reasonably to have brought condition 2 to the notice of the defendants. The judge made no finding on the point, but I think that it is open to this court to draw an inference from the primary findings which he did make. In my opinion the plaintiffs did not do so. They delivered 47 transparencies, which was a number the defendants had not specifically asked for. Condition 2 contained a daily rate per transparency after the initial period of 14 days many times greater than was usual or (so far as the evidence shows) heard of. For these 47 transparencies there was to be a charge of each day of delay of £235 plus value added tax. The result would be that a venial period of delay, as here, would lead to an inordinate liability. The defendants are not to be relieved of that liability because they did not read the condition, although doubtless they did not; but in my judgment they are to be relieved because the plaintiffs did not do what was necessary to draw this unreasonable and extortionate clause fairly to their attention. I would accordingly allow the defendants' appeal and substitute for the judge's award the sum which he assessed upon the alternative basis of quantum meruit."*

46. Mr Speaight criticises Colman J in the instant case for (as he would submit) proceeding directly from a finding that incorporation by reference was a theoretical possibility to a finding that it had happened without considering all the circumstances. Mr Speaight's starting point is that a term purporting to exclude the court from considering an appeal is an onerous or unusual term or involves the abrogation of a right given by statute and is thus one to which the *Interfoto* principle applies. He submits thus that whether the term was incorporated would depend on the particular circumstances of the case including the steps taken to draw the clause to the attention of his clients. The circumstances to which he points in this case are that there was inequality of bargaining power; AMS had no previous experience of contracting with CMS; the statutes contained other provisions which were unusual and one sided e.g. under Article IV.5 the President of the Arbitral Tribunal and its other members were to be appointed by the Commonwealth Secretary-General, who is head of CMS; and by Article X111, the statute could be amended by the Secretary-General from time to time; the reference to statutes whilst perfectly legible, were not so placed as to spring out at first glance from the pages of the contractual documents.

47. There cannot be any doubt that under normal rules of domestic contract law, (i.e. without application of what we shall call for convenience the *Interfoto* principle) the exclusion agreement would be incorporated into the contract. This is not a case of incorporation by conduct. In this case an admitted contractual term expressly incorporated the statute and the terms of the statute. Unless for some reason the *Interfoto* principle applied, the exclusion agreement would be a term of the contract. The question is whether the *Interfoto* principle applies. To answer that question it is necessary to consider whether and if so the extent to which the clause is onerous or unusual or takes away statutory rights. We shall consider that question at this stage without regard to the impact of Article 6.

48. The only clause to be considered is the term which excludes a right of appeal to the court from an arbitration award, and not (as Mr Speaight's skeleton would suggest) other terms of the statute. One thus starts from the position that there is an arbitration agreement, and what is being sought to be imposed **on both** parties is a limit on the right to appeal. The term does not and could not exclude the rights under section 67 or 68 to bring to the courts irregularities in the arbitral process, which it should be stressed would cover any argument that the tribunal appointed was not impartial [thus covering arguments that might arise on the unusual nature of Article 1V.5 relied on by Mr Speaight]. Furthermore the right to appeal on point of law pursuant to statute is not absolute. The 1996 Act recognises that parties should have the right to refer their disputes to arbitration and it favours the view that on the whole the resolution of those disputes should be left to the tribunal of their choice. By commencing with the words "*unless otherwise agreed*" section 69 of the 1996 Act recognises that it is by no means unusual for parties to agree to exclude the court. The remainder of section 69 (apart perhaps from s.69(2)(a)) leaves it in the discretion of the court as to whether the point of law is appropriate for the court to consider, the section by implication confirming that in the absence of agreement by the parties that there should be an appeal, many cases should be finally decided by the arbitrators.

49. As Leggatt J explained in ***Arab African***, section 3 of the 1979 Act reversed the public policy expounded more than half a century before in *Czarnikow v Roth Scmidt & Co* [1922] 2 K.B. 478 making it no longer contrary to public policy to oust the jurisdiction of the court. That has been emphasised again in the 1996 Act, and indeed if

anything the policy of that Act is to encourage the notion that persons should be entitled to arbitrate and keep the resolution of their disputes out of the courts.

50. Accordingly, in our view, as a matter of domestic law without regard at this stage to Article 6, the reasoning of Leggatt J and Staughton J demonstrates that the court would not see an exclusion agreement as some form of unusual or onerous clause to which the *Interfoto* principle should be applied in considering whether it has been incorporated.

51. It is also relevant to say that under the 1996 Act, there is still a requirement for writing if an arbitration clause is to be valid and a requirement for writing to establish whether parties have "*otherwise agreed*" to exclude the right of appeal on a point of law. We mention this aspect not because any point has been taken on whether there was writing in this case, but to emphasise that under Section 5 incorporation of a written term by reference in another written term would clearly be "*an agreement in writing*".

52. In our view Colman J's conclusion as a matter of domestic law was inevitable for the following reasons. Where parties have agreed arbitration there is nothing unusual in also agreeing to limit the right of appeal under section 69. To agree no right of appeal is common form for the reasons quoted from the judgment of Ackner LJ above. The court should thus approach the question of incorporation as Staughton J put it "without any predisposition". On their ordinary construction the words in section 69(1) "otherwise agreed" require a contractual agreement in writing following section 5 as to what agreed in writing requires. In the instant case it is clear beyond argument that by a written term of the contract the parties incorporated by reference an exclusion agreement. The *Interfoto* principle has no application in this case and Rix LJ was correct to refuse permission to appeal on that aspect of Colman J's decision.

**Does Article 6 of the ECHR and section 3 of the Human Rights Act 1998 affect the above conclusion?**

53. Under Article 6 of the ECHR it is provided that:
*"In the determination of his civil rights and obligations …. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"*

54. Mr Speaight's argument for the appellants is on the following lines. Article 6 rights can be waived, but the more important the right being waived, the more anxiously the court must examine whether there is a true waiver. Any waiver must be voluntary in the sense that there must be a genuine free exercise of choice and it must be with full knowledge. Whereas in principle a voluntary waiver in favour of arbitration is acceptable, that waiver does not waive all rights, and a waiver of the right to appeal an arbitration award under section 69 is a serious relinquishment of Article 6 rights. It accordingly must itself be voluntary and with full knowledge of the facts. Article 6 would be infringed if "unless otherwise agreed" enabled a party to rely on an agreement not to appeal of which the other party as a fact had no notice. Section 3 of the Human Rights Act requires "primary legislation to be read and given effect to in a way which is compatible with the convention rights". The words "Unless otherwise agreed" should therefore be read in a way which requires the waiver of a right to appeal to be drawn expressly to the attention of the other contracting party i.e. the waiver must at the very least be an express term of the contract, and not incorporated simply by reference.

55. In any event he argues that the circumstances of this case were close to compulsory arbitration and there was an imbalance of bargaining power as between the parties. There are doubts he submits as to the independence and impartiality of the tribunal. His clients he submits were unaware of the exclusion agreement contained in the statute; even the phrasing of Article 9 IX(2) if it had been drawn to the attention of the appellants is not such as to point up that the appellants were contracting out of their right to bring an appeal on a point of law and the appellants should not thus be taken to have waived their Article 6 rights.

56. Mr Nicholls accepts that the crucial question was whether the appellants had waived an Article 6 right, and he further accepts that the more important the Article 6 right the greater the scrutiny of the court would be in examining whether it had been waived. He further accepted that any waiver must be voluntary and that a condition of waiver was "the absence of constraint". The court would not hold for example that a party had waived such a right if his consent was vitiated by duress. But he submitted that where it was a term of the contract voluntarily entered into as a matter of domestic law that there should be arbitration, and where as a matter of domestic law it was held that the terms of the contract included by incorporation a term that the right of appeal on a point of law would be excluded, the court should hold that there had been a waiver.

57. Many of the authorities in this area have been cited in our decision in ***Stretford v The Football Association Ltd.*** Principles relevant to this appeal, as demonstrated by those authorities, seem to us to be the following. First the court has recognised that in *"civil matters, notably in the shape of arbitration clauses in contracts…the waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention."* [see *Deweer*] Second thus there is no reason in principle why at least certain Article 6 rights may not be waived, since that is the effect of an arbitration clause. Third, a condition of waiver must be the absence of constraint and (what may come to the same thing) a waiver must be voluntary and not compulsory. Fourth, in considering to what extent Article 6 has been waived and its impact, account must be taken not only of the arbitration agreement between the parties and the nature of the arbitration proceedings, but also of the legislative framework providing for such proceedings in order to determine whether domestic courts retained some measure of control of the arbitration proceedings.[see *Nordstrom-Janzon*] Fifth it is not a requirement that national courts must ensure that all aspects of Article 6 are complied with – for example

arbitration is intended to be private- and it is for the contracting state in principle to decide itself on which grounds an arbitral award should be quashed. [see again ***Nordstrom-Janzon***]. Sixth, there may be Article 6 rights which are difficult to waive, e.g. the right to an impartial judge.

58. None of the authorities was concerned with a clause excluding the right of appeal to the court as such, but once arbitration is recognised as in the interests of parties seeking to resolve their dispute, it is no major step to recognise the advantages to the parties [not, I stress, just one party] agreeing that there be no appeal from that award. The arbitrators are the persons that the parties have by contract agreed to resolve their disputes. The reason for arbitration would normally include a wish for speed and privacy. The parties are simply agreeing a process that fulfils those objectives.

59. There is in any event under the 1996 Act not a total exclusion of the court. Safeguards are provided by the mandatory provisions section 67 and 68. If the partiality of the arbitrators is open to question, or there is some serious irregularity then an application under section 68 can be made. All that is being waived is the right to a public hearing in court (and that by the unchallenged arbitration clause), and a right to test the decision of the arbitrator in a court other than under sections 67 and 68.

60. There is no allegation that the contract was entered into under duress and there is no doubt that if the clause was validly incorporated into the contract, its effect would be to waive certain Article 6 rights. The questions on that basis are these. Does the impact of Article 6 alter the conclusion as to whether the clause excluding the right of appeal was onerous or unusual so as to bring into play the ***Interfoto*** principle? Put another way, would the conclusion reached as a matter of domestic law, that the clause was incorporated and binding, lead to the conclusion that the appellants' Article 6 rights were being infringed because they should not be held to have waived the same? Is it necessary to read down the words in s.69(1) in some way to avoid an infringement of Article 6?

61. In our view the impact of Article 6 does not render the clause, excluding a right of appeal onerous or unusual. The Article 6 rights waived are of a limited nature. It is common in a commercial context, when arbitration is agreed, to agree to limit the right of appeal. It is not onerous in that the parties have the tribunal of their choice to decide disputes between them and, if there is any absence of impartiality, or some other irregularity, the right to go to the court is still maintained. In any event the clause was not so onerous as to require CMS to do more than it did to draw the appellants' attention to the clause. What we have in mind is that the contract was in writing; that the arbitration clause referred expressly to the statute; and, if the appellants had wished to read what was contained in the statute, they could have done so and would not have been surprised to find the exclusion agreement therein. To hold that the exclusion agreement was incorporated and that the appellants were bound by it would not involve an infringement of the appellants' Article 6 rights.

62. The question whether the word "agreed" should be read down is a slightly broader question. It is not fact-specific. In our judgment, however, for the English court to continue to construe the word "*agreed*" consistently with the view of Leggatt J and Staughton J will not involve an infringement of Article 6. We say that because, in our view, construction as a matter of domestic law, taking account of the impact of Article 6, provides sufficient protection. We see no necessity thus to read the words of that section down.

63. For the reasons we have endeavoured to give we would dismiss the appeal.

Anthony Speaight QC and Kate Livesey (instructed by Sumukan Ltd) for the Appellant
Colin Nicholls QC and Tom Poole (instructed by Speechly Bircham LLP, Solicitors) for the Respondent