CHANGAROTH CHAMBERS LLC

Issue No. 4 of 2014
December

CONTRACT LAW (& ARBITRATION): INCORPORATION OF CONTRACTUAL TERMS BY SILENCE

R1 International Pte Ltd v Lonstroff Ag [2014] SGCA 56

In Summary

The Singapore Court of Appeal on 21 November 2014 decided that in assessing whether the terms of a "Contract Note" issued subsequent to the supply contract had been incorporated into the terms of the contract; there is an objective approach in determining the intentions of the parties through the parties' correspondence and conduct against the relevant background of the parties' industry; the character of the document containing the terms; and the course of dealings between parties.

Facts

The Respondent purchased "SVR" - a type of "Technically Specified Rubber" from the Appellant in five separate transactions. The Respondent commenced proceedings against the Appellant in Switzerland for allegedly supplying defective goods in breach of the Second Supply Contract.

The Appellant responded by seeking an anti-suit injunction (a court order to prevent a party from commencing or continuing legal proceedings in another country) in Singapore to prevent the Respondent from continuing with the Swiss proceedings, on the basis that the Respondent was in breach of an agreement to arbitrate any disputes in Singapore as incorporated by virtue of a Contract Note (which was sent subsequent to the basic terms of the contract that had been negotiated by the parties via email or telephone and subsequently set and sent out in an email confirmation by the Appellant to the Respondent). The Respondent was (as requested in the Note) to sign and return to the Appellant via email, but had not done so.

Issues and holding of the lower court

The Honourable Sundaresh Menon CJ dismissed the Appellant's application for an anti-suit injunction on the grounds that the International Rubber Association Contract (IRAC) terms had not been incorporated into the contract between the parties by trade custom (the evidence of trade custom adduced by the Appellant being insufficient) or course of dealing.

Issues on Appeal

The issue before the Court of Appeal was whether a set of terms containing an agreement to arbitrate in Singapore, found in a detailed contract note that was sent by the Appellant to the Respondent shortly after the deal had been agreed, was incorporated as part of the contract between the parties.

Holding

The Court of Appeal allowed the Appeal and granted an anti-suit injunction in favour of the Appellant. The Honourable Sundaresh Menon CJ held that both parties had contemplated that the basic terms of the email confirmations would be supplemented by a set of standard terms for three principal reasons:

Contemplation of Terms

Firstly, the Appellant's evidence that it was market practice in the rubber industry for the parties initially to only discuss the commercial terms of each trade -- the specific product, quantity, price and destination at the time the trade was confirmed with the rest of the terms of the transaction being dealt with and specified subsequently. The Respondent's witness failed to adduce evidence contrary to this market practice and/or deny the Appellant's assertions.

Secondly, having regard to the industry practice, it was unlikely that the parties would have expected to contract purely on the bare "bones" of the email confirmation given the size and scope of the subject matter since the email confirmation had left out a number of crucial matters that would only be dealt with by the Contract Notes.

Thirdly, the parties' conduct showed that both parties had contemplated that the basic terms would be supplemented by a set of standard terms. The Appellant had sent the Respondent a Contract Note containing the supplementary terms throughout the course of dealing, and the Respondent had attempted to impose its own terms in the third transaction through its purchase order, seeking to contend that the transaction would be governed by its terms and not the suppliers'. Menon CJ pointed out that the Respondent's proposal of its own standard terms to govern the subsequent transactions constituted an acknowledgement that the standard terms would supplement the essential terms found in the Email Confirmation.

Terms applicable

Regarding whether the Appellant's standard terms or the Respondent's terms were incorporated, Menon CJ stated that in these circumstances, the Respondent's silence to the Contract Note amounted to an assent to the Appellant's standard terms, and thus its incorporation into the contract. During the first and second transaction, the Respondent had accepted delivery and paid for the goods without protest even after it had sight of the Contract Note, and was therefore bound by it and hence also bound by the arbitration agreement in Singapore.

Signing of Contract Document

On the issue of whether the Contract Notes had to be signed and returned before being binding, Menon CJ stated there is an objective assessment of the facts and circumstances to determine if a party's request for a countersigned copy if a document be returned is an essential act to constitute a contract. In this case, the failure to adhere to the request does not render the terms of the Contract Notes not binding since the relevant language in the cover emails sent by the Plaintiff did not go so far as to suggest that the Contract Notes would not be binding if their request was not adhered to.

Accordingly, the court allowed the Appeal and the anti-suit injunction was granted. The Respondent was bound to arbitrate in Singapore.

Concluding Views

This case highlights the importance of ensuring that all agreed terms are put down in an agreement. This would resolve the issue of a 'battle of forms' as well as ensure that there are no important terms left unresolved.

The Court's decision is both pragmatic and commercially sensible, taking into account parties' intentions and conduct, including, trade customs such that the bare bones contract could be supplemented by terms of the contract note.

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CONSTRUCTION LAW: DISPUTE RESOLUTION – PREMATURE APPLICATIONS AND REPEAT CLAIMS

***LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd* [2014] SGHC 254**

In Summary

The Singapore High Court on 28 November 2014 dealt with timelines for service of payment claims and payment responses, particularly when there was conflict or inconsistency between clauses in the contract of the parties and the *Singapore Institute of Architects Conditions of Sub-Contract* ("***SIA Conditions***"); the issue of premature Adjudication Applications; and whether a "repeat claim" was permitted.

Facts

The Subcontract between the Plaintiff and Defendant stipulated that the Payment Claim had to be served no later than the 22nd day of each month, and the Payment Response within 21 days thereafter, or the date set out for the service of a Payment Claim, whichever was later, while the *SIA Conditions* provided its standard dates.

On 22 June 2013, the Plaintiff served "Payment Claim No. 24" for the amount of S$ 631,683.71, and subsequently issued repeated claims on 22 of July, August, September and November 2013 respectively and on 2 December 2013 though no new works had been carried out by the Plaintiff since June 2013.

When the Defendant submitted its Payment Response of S$ 0.00, the Plaintiff lodged an Adjudication Application (method of alternative dispute resolution for parties to a construction contract to expeditiously recover outstanding sums under a Payment Claim). An Adjudication Determination was subsequently made in favour of the Plaintiff, and the Plaintiff sought to enforce this Determination, whilst the Defendant applied to set the Adjudication Determination aside.

Holding of the Assistant Registrar of the High Court

The Learned Assistant Registrar dismissed the Defendant's application to set aside the Adjudication Determination, resulting in this appeal by the Defendant against the dismissal.

Issues Before the Court

The 3 issues before the High Court were:

(a) whether the Adjudication Application, following the timelines set out in the *SIA Conditions*, was premature because the "dispute settlement period" under *Section 12(2)* of the *Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)* ("***SOP Act***") had not lapsed;

(b) whether the Final Payment Claim was a "repeat claim" made in breach of *Section 10(1)* of the *SOP Act*; and

(c) whether the dispute between the parties had been substantially settled by way of negotiations between parties such that the Plaintiff was not entitled to make the Adjudication Application.

Holding

The High Court dismissed the Defendant's appeal on the following grounds:

(a) the contractual provision setting out the timelines for the Payment Claims and Responses took precedence over clauses of the *SIA Conditions* in the event of inconsistency between the two contracts;

(b) pursuant to *Sections 11(1)(a)* and *10(2)(a)* of the *SOP Act*, the Payment Response should be served on the earlier of the 2 possible dates stated in those *Sections* – namely the date stated in the contract and 21 days after the Payment Claim was served.;

(c) to allow repeat claims would not be contravening *Section 10(1)* of the *Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)* ("*SOP Act*");

(d) there was no settlement agreement reached between parties in relation to backcharges (a billing made to collect an expense incurred during a previous billing period)that formed part of the Final Payment Claim that was included in the Adjudication Application, but merely inconclusive negotiations.

Premature Adjudication Application

In deciding whether the Plaintiff's Adjudication Application was made prematurely, the Honourable Lee Seiu Kin J held that when there are contradictory timelines set out in the Contract and *SIA Conditions* for the Payment Claim and Payment Response, the terms of the *SIA Conditions* are incorporated by virtue of the Contract only insofar as they are not inconsistent with terms of the Contract. In the present case, the Contract contained a clause specifically stating that the terms in the Contract should take precedence over those in the *SIA Conditions*.

Repeat Claims

On the issue of repeat claims, Lee Seui Kin J relied on *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401, which states that the *Act* only prohibits a repeat claim that has already been adjudicated upon and discussed on the merits, and that *Section 10* of the Act is equivocal as to whether a repeat claim is permitted. Lee Seui Kin J took the view that by disallowing repeat claims, a claimant would be pressured to apply for adjudication in respect of the works under that Payment Claim, leading to many more adjudication applications. Lee Seui Kin J also considered that on the flipside, allowing repeat claims opens the *Act* to abuse where the Claimant might be able to ambush the Respondent by serving repeat claims month after month. In balancing the two possible situations, Lee Seui Kin J was in

Settlement Agreement Between Parties

In addressing the Defendant's argument that a settlement agreement had been reached between the parties in respect of backcharges by way of a series of correspondences exchanged between them, Lee Seui Kin J held that there was no acceptance by the Plaintiff of the Defendant's offer to settle the backcharges, but merely a counter-offer made by the Plaintiff, and negotiations were still continuing after this counter-offer was made. As such, this was a case of inconclusive negotiations, and that no settlement agreement was reached between the parties as the Defendant alleged.

Concluding Views

It is the humble view that the decision was derived by performing a balancing exercise between two consequences – those that arise if repeat claims are allowed against those that arise when payment claims are precluded. The Court refrained from taking a strict interpretation of the provisions of the *SOP Act* to give effect to its underlying objectives, namely to provide a speedy and efficient method of payment recovery. However, the issue of repeat claims remains contentious as demonstrated in case law, and so long as the decision is based on the Court carrying out a balancing exercise on a case by case basis, it remains to be conclusively determined.

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If you would like more information on this or any other area of law, you may wish to contact us.

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