12-2014

R1 International Pte Ltd v Lonstroff AG [2014] SGCA 56: Lessons in Contractual Formation

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5 December 2014

SINGAPORELAWBLOG

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The rules relating to contractual formation are easy to state but difficult to apply in the varied circumstances of practice. It is therefore helpful that the recent Court of Appeal decision of *R1 International Pte Ltd v Lonstroff AG* [2014] SGCA 56 ("*R1 International*") provides much guidance in this area of the law.

R1 International concerned whether a set of terms to arbitrate in Singapore, found in a detailed contract note sent by the appellant to the respondent shortly after their deal ("the deal") was concluded, was incorporated as part of the contract between the parties. The answer to this issue would determine whether the High Court was correct in dismissing the appellant's application for a permanent anti-suit injunction.

Background

The deal between the parties had come about in the context of the following background. Between January and December 2012, the respondent purchased rubber from the appellant. The deal concerned was the second transaction between the parties. The respondent had taken delivery of a shipment of rubber, but notified the appellant that the rubber emitted a foul smell. The appellant did not dispute the presence of the smell, but said that as "smell" was not a contractually specific parameter of the rubber, it was not in breach of contract in relation to this deal.

The respondent commenced proceedings in Switzerland against the appellant, and the appellant responded by commencing proceedings in Singapore. The appellant sought an anti-suit injunction to prevent the respondent from continuing with the Swiss proceedings. The appellant's basis for doing so was that the respondent was in breach of an agreement found in a contract note, sent by the appellant to the respondent in connection with the deal concerned, to arbitrate any disputes in Singapore.

Although the respondent never countersigned and returned the contract note, the Court of Appeal placed some emphasis on how each individual transaction was done. First, the parties would negotiate the sale of rubber by email or telephone. Secondly, after the basic terms had been concluded, the appellant

would send an "email confirmation" to the respondent. The respondent would then send a "purchase order" to the appellant. Thirdly, the appellant would send the respondent a contract note, with a request that the respondent countersign and return a copy. The appellant would then deliver the rubber and issue an invoice, which the respondent would accept and pay for.

Arguments on appeal

The appellant argued on appeal that it was typical in commodity trading transactions for parties to negotiate and agree on key commercial terms over telephone. This would be recorded in an email sent by the sellers to confirm the trade and key terms. A more detailed set of terms would follow to supplement those key terms. It was therefore argued that the respondent, being an experienced buyer in the rubber commodities market, would thus have expected the appellant's further terms, as contained in the contract note, to follow. Indeed, the appellant argued that the respondent's failure to countersign the contract note could not be construed as equivocal silence since the respondent had paid the invoiced amount only in the deal concerned, but also in the four other transactions. According to the appellant, this objectively constituted acceptance of the terms in the contract note. The true question was whether the parties were contracting on the terms of the email confirmation, supplemented by either the appellant's or respondent's standard terms, as contained in the contract note.

The Court of Appeal's decision

The Court of Appeal found for the appellant, holding that the terms of the email confirmation became binding when they were sent across. It also found that both parties did contemplate that the basic terms of the email conformations would be supplemented by a set of standard terms. In doing so, it reaffirmed the objectivity principle in relation to the concepts of contractual offer and acceptance.

Objective approach in ascertaining contractual formation

First, the Court of Appeal held that the law adopts an objective approach towards questions of contractual formation and the incorporation of terms. Thus, when the deal had come into being and whether the terms of the contract note had supplemented (or was incorporated) into the deal turned on ascertaining the parties' objective intentions as gleaned from their correspondence and conduct in light of the relevant background as disclosed by the evidence. Importantly, the Court of Appeal noted that the relevant background includes the parties' industry, the character of the document that contained the terms in question, as well as the course of dealings between the parties.

The Court of Appeal's holding in this regard must, with respect, be correct. The objective principle is neatly encapsulated in the words of Blackburn J in the oft-cited English decision of *Smith v Hughes* (1871) LR 6 QB 597, as follows:

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

The Singapore courts have affirmed the objective principle many times. For example, in the Singapore Court of Appeal decision of *Bakery Mart Pte Ltd (in receivership) v Sincere Watch Ltd* [2003] 3 SLR(R) 462, it was held that:

> Where negotiations are protracted the court is entitled to look at all the circumstances and apply an objective test to determine whether the parties had reached an agreement as far as the essential terms are concerned, or whether the parties intended to reserve their rights pending a formal agreement.

The Court of Appeal's reaffirmation of these principles in *R1 International* are to be welcomed for affirming their applicability across a broad spectrum of contracts, including those for the sale of commodities. This should come as no surprise, as these principles are general in their application. What is especially important is the Court of Appeal's emphasis in *R1 International* that the objectivity principle towards ascertaining formation must not be applied in a vacuum, but must be considered in light of the parties' characteristics such as, as was relevant in *R1 International*, the parties' industry and previous course of dealing.

Applying these principles to the case, the Court of Appeal found that it was indeed the practice in the international rubber commodities market for parties to initially only discuss the key terms of each trade, such as the specific product, quantity, price and destination at the time the trade was confirmed. The remaining terms would generally be concluded later. Thus, the respondent ought to have been aware of this practice and contemplated that the terms within the contract note could supplement those key terms in the email confirmation.

Certainty and completeness

The Court of Appeal found that it is not uncommon for parties to first agree on a set of essential terms that they are bound as a matter of law, even though there may be ongoing discussions and further incorporation of the other more detailed terms. The key point is that a contract comes into existence once it is certain and complete.

Put another way, before there can be a concluded contract in law, its terms must be certain and the agreement must similarly be complete. A term that is "uncertain" exists but is otherwise incomprehensible. On the other hand, an

agreement that is "incomplete" has certain terms that do not (but should) exist and the non-existence of these terms make the agreement incomprehensible. A contract may be unenforceable for uncertainty or incompleteness even though there has otherwise been both offer and acceptance between the parties. Thus Maugham LJ has said in the oft-cited English Court of Appeal decision of *Foley v Classique Coaches Ltd* [1934] 2 KB 1:

> [U]nless all the material terms of the contract are agreed there is no binding agreement. An agreement to agree in future is not a contract; nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it.

However, this in no way precludes the *further* incorporation of terms to the main contract, provided, of course, that these supplementary terms do not contradict the key terms of the contract.

The Court of Appeal in *R1 International* found that the key terms in the email confirmation would have been sufficient to satisfy the requirements of certainty and completeness and hence constitute a valid contract. However, the Court of Appeal also noted that, given the size and scope of the subject matter of the deal, it was improbable that the parties intended to contract on the bare bones of the email confirmation. Indeed, the email confirmation was silent on a few potentially important matters that are dealt with in the contract note.

Again, the Court of Appeal's holding in this regard is, with respect, commercially sensible, and is in line with the objective approach that permeates both the finding of formation and the ascertaining of the terms of the contract. In a sense, the Court of Appeal's finding in this regard is consistent with its earlier finding that the respondent ought to have expected, in line with industrial norms, that the key terms of the email confirmation would be supplemented by the terms of the contract note. Without this finding, it might have been difficult for a court to hold that a bare bones contract must always be supplemented by more detailed terms. Indeed, as the Court of Appeal itself noted in *R1 International*, it would have been possible, though inconvenient, for the parties to proceed on just the key terms of the email confirmation. However, construed objectively from industrial norms and their own previous dealings, it was clear that the parties' *objective*intentions were that more detailed terms were expected and indeed incorporated via the contract note.

Silence as acceptance?

Finally, the Court of Appeal found that silence is not necessarily fatal to a finding that terms have been accepted. The effect of silence is thus context-dependent. As a summary of the applicable principles, reference may also be made to the High Court decision of *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258, where it was affirmed that whether silence amounted to acceptance depended on whether the conduct of the parties, objectively ascertained, supports the existence of a contract. Thus a failure to object might at times be found to amount to assent to the incorporation of the other party's terms.

On the facts, it is important that the respondent did not ever demur from the applicability of the appellant's contract note. The Court of Appeal was satisfied that the payment of the invoice for the contract note without protest by the respondent signified unequivocal acceptance of its terms. Indeed, the contract note did not state that it was only accepted after it was countersigned and returned. The Court of Appeal noted that a party may request that a counter-signed copy of a document be returned but this may not be an essential act to constitute a contract; whether this was so depended on the objective assessment of all the facts and circumstances. The Court of Appeal's holding in this regard is thus again heavily premised on its earlier finding that the respondent ought to have expected the further terms in the contract note, given industrial norms.

Summary

In summary, *R1 International* provides us with three important guiding principles in relation to contractual formation:

- First, the objective approach governs the ascertainment of offer and acceptance, as well as incorporation. The objective approach is, however, to be applied with the parties' characteristics in mind, such as the industry they are in, their previous course of dealings, etc.

- Secondly, although a contract can come into being once its terms satisfy the bare minimal standards of certainty and completeness, that did not preclude further terms from supplementing those key terms through incorporation. Whether such further terms should be incorporated and supplement the key terms is to be assessed objectively. While the complexity of the transaction tends towards the incorporation of further terms to supplement bare key terms, this itself is not conclusive.

- Thirdly, silence may constitute acceptance at times; this is all dependent on the facts and circumstances of the case. A particular important factor is if the parties' industry and previous course of dealings show that silence had been taken to constitute acceptance, then silence without protest (and indeed, accompanied by positive acts of acceptance, such as payment of an invoiced sum) in the instant case would also likely be acceptance.

Of course, that relevant background could also lead a court to decide that the parties intended a detailed contract, rather than a bare bones contract supplemented by further terms through the process of incorporation. This can be seen in the UK Supreme Court decision of *RTS Flexible Systems v Müller* [2010] UKSC 14. In that case, RTS began work on the basis of a letter of intent whilst the parties continued to negotiate the final contract. The draft contract contained a counterparts clause which provided that no contract would come into existence until each party had executed and exchanged the counterparts. The Supreme Court unanimously found that the counterparts clause had been waived by conduct and that there was a contract on wider terms than those found by the trial judge. The Supreme Court stated an accurate

summary of the law, which was applied by the Court of Appeal in *R1 International* as well, as such:

> The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.

Thus, there could be a variety of outcomes, be it a detailed contract, a bare bones contract supplemented by a further contract, or no contract, but all are premised on an objective ascertainment of the parties' intentions with consideration of the relevant background.

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* This blog entry may be cited as Goh Yihan, "R1 International Pte Ltd v Lonstroff AG [2014] SGCA 56: Lessons in Contractual Formation", Singapore Law Blog (5 Dec 2014)
(http://www.singaporelawblog.sg/blog/article/62)