CNPLAW LLP REPRESENTED INTERNATIONAL RESEARCH CORP PLC BEFORE THE COURT OF APPEAL - CASE UPDATE: INTERNATIONAL RESEARCH CORP PLC V LUFTHANSA SYSTEMS ASIA PACIFIC PTE LTD AND ANOTHER [2013] SGCA 55

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Introduction

In the landmark decision of ***International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another SGCA 55*** delivered on 18 October 2013, the Singapore Court of Appeal departed from the strict rule governing the incorporation of arbitration clauses from one contract into another.

The strict rule of incorporation of arbitration clauses requires a clear and express reference to an arbitration clause contained in one contract before the arbitration clause may be incorporated into a separate, albeit related, contract.

This strict rule was first established by the English House of Lords in *TW Thomas & Co Limited v Portsea Steamship Company Limited* AC 1. In 1996, it was imported into our jurisprudence when the Singapore Court of Appeal applied the strict rule in *Star-Trans Far East Pte Ltd v Norske-Tech Ltd and others* 2 SLR(R) 196 at . *Star Trans* has been, till now, the authority on the incorporation of an arbitration clause from one contract into a separate contract. The decision in *IRCP v Lufthansa* has now effectively reversed *Star Trans* on this issue.

In addition, the Court of Appeal authoritatively ruled that strict compliance with multi-tier dispute resolution clauses was required as a precondition to arbitration. The Court observed that substantial compliance with such clauses was not sufficient to discharge the obligations under the clauses. CNPLaw LLP, formerly known as Colin Ng & Partners LLP represented the successful Appellant, International Research Corporation PLC of Thailand, before the Court of Appeal in this matter.

The Facts

International Research Corporation PLC (the "**Appellant**") successfully appealed to the Singapore Court of Appeal against the decision of the High Court.

The High Court had dismissed the Appellant's application to set aside an arbitral tribunal's ruling that it had jurisdiction over a dispute. This dispute had been referred to the arbitral tribunal by Lufthansa Systems Asia Pacific Pte Ltd ("**the Respondent**"). The Appellant had relied on Article 16(3) of the UNCITRAL Model Law 1985 ("**the Model Law**") read with Section 10 of the International Arbitration Act ("**the IAA**") in its application.

The dispute between the Appellant and the Respondent arose under the following agreements:

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The Two-Party Agreements

Three two-party commercial agreements were made among the parties.

First, Datamat entered into an agreement ("**the EDP System Agreement**") to provide Thai Airways International PLC ("**Thai Airways**") with an electronic data protection system ("**the EDP System**").

Second, Datamat entered into an agreement with the Respondent ("**the Cooperation Agreement**") for the Respondent to supply Datamat with the Maintenance, Repair and Overhaul System ("**the MRO System**"). The MRO System was a component of the EDP System that was to be provided to Thai Airways.

Third, Datamat entered into an agreement with the Appellant ("**the Sale and Purchase Agreement**"). The Appellant agreed to: (1) supply hardware and software products for the EDP System; and, (2) provide a banker's guarantee on behalf of Datamat to the Respondent. The banker's guarantee would allow Datamat to meet its obligations under the EDP System Agreement.

In return, Datamat assigned its right to receive payments from Thai Airways under the EDP System Agreement to Siam Commercial Bank ("**SCB**"). These payments were to be deposited into an account that Datamat had opened with SCB. The Appellant would then be able to use the SCB account to deduct payments due from Datamat under the Sale and Purchase Agreement. In addition, once Thai Airways made the payments into the SCB account, the Appellant was to pay the Respondent for goods and services provided by the latter under the Cooperation Agreement.

The Three-Party Supplemental Agreements

Shortly after entering into the Two-Party Agreements, the Respondent threatened to cease all work under the Cooperation Agreement with Datamat. The Respondent was concerned about Datamat's ability to meet its payment obligations and wanted to institute a formal payment mechanism to secure future payments from the latter.

This prompted the Appellant, the Respondent and Datamat to enter into Supplemental Agreements No. 1 and 2 (collectively, the "**Supplemental Agreements**"). These agreements were expressly stated to be "annexed to and made a part of" the Cooperation Agreement.

The terms of the Settlement Agreements were as follows: payments due to the Respondent from Datamat under the Cooperation Agreement were to be settled by the Appellant deducting those sums directly from the SCB account. In addition, the Appellant would only make those payments after the deposit of payment from Thai Airways into the same account. In effect, parties agreed that the Appellant would only "pay when paid".

Dispute Resolution Mechanism

The Cooperation Agreement contained a multi-tiered Dispute Resolution Mechanism which set out specific

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procedures forming preconditions to the commencement of arbitration proceedings. In contrast, the Supplemental Agreements did not contain any dispute resolution provisions. They also did not contain any reference to the Dispute Resolution Mechanism in the Cooperation Agreement.

The Arbitration Proceedings

As a result of a payment dispute, the Respondent terminated the Cooperation Agreements as well as the Supplemental Agreements. In addition, the Respondent filed a notice of arbitration with the Singapore International Arbitration Centre ("**the SIAC**") and named Datamat and the Appellant as respondents. The Appellant raised its preliminary objection to the arbitral tribunal's jurisdiction on two grounds:

1. the Appellant was not a party to the arbitration agreement contained in the Cooperation Agreement; and/or
2. the Respondent had not fulfilled the preconditions for the commencement of the arbitration.

The tribunal dismissed the Appellant's objection to its jurisdiction and addressed each of its objections as follows:

1. The Cooperation Agreement and Supplemental Agreements were "one composite agreement" between the three parties. This meant that the Dispute Resolution Mechanism contained in the Cooperation Agreement was binding on the Appellant.
2. The preconditions to commence arbitration were unenforceable for uncertainty. This meant that there were no obstacles to the commencement of the arbitration.

The High Court Proceedings

The Singapore High Court dismissed the Appellant's application to set aside the arbitral tribunal's ruling on jurisdiction.

1. The High Court applied the contextual interpretation approach endorsed in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* 3 SLR(R) 1029 ("***Zurich Insurance***") to interpret the Cooperation Agreement and Supplemental Agreements. In this regard, it held that the strict rule of incorporation did not apply to the facts in issue.
2. In applying the principles of *Zurich Insurance*, the High Court looked at whether the objective intention of the three parties was for the Dispute Resolution Mechanism to bind all of them. On its analysis, the High Court held that all three parties intended to be bound by the Dispute Resolution Mechanism.
3. In addition, the High Court held that the preconditions to commence arbitration was enforceable. Furthermore, these preconditions had been met by the parties. They had met the spirit of the procedure relating to the Dispute Resolution Mechanism by substantially complying with it. In its

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analysis, the High Court applied the principles stated in *HSBC Institutional Trust Services (Singapore) Ltd (Trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte. Ltd.* 4 SLR 738.

4. The High Court also passed a remark that Section 10 of the IAA presented a lacuna - a Singapore court could not "set aside" an arbitral tribunal's preliminary ruling on jurisdiction because a ruling of this nature could not be characterised as an "award".

The Issues

The issues before the Singapore Court of Appeal:

1. Was the Appellant bound by the Dispute Resolution Mechanism (in particular, the arbitration agreement) stated in the Cooperation Agreement?
2. Assuming that the Appellant was bound by the Dispute Resolution Mechanism, were the preconditions for arbitration enforceable? If so, had they been met?
3. Is there a lacuna in Section 10 of the IAA (and correspondingly, Article 16(3) of the Model Law) that prevents the court from setting aside an arbitral tribunal's preliminary ruling on jurisdiction?

The Decision

The Singapore Court of Appeal decided that:

1. The Appellant was not bound by the arbitration agreement. The Court applied the contextual interpretation approach endorsed in *Zurich Insurance* in its analysis. Based on this analysis, the Court ruled that the parties did not intend for the Dispute Resolution Mechanism (including the arbitration clause) in the Cooperation Agreement to be incorporated into the Supplemental Agreements.
2. The High Court was correct in ruling that the preconditions to commence arbitration were enforceable. However, the Court of Appeal disagreed with the High Court that substantial compliance with these preconditions was sufficient. The Court of Appeal took the view that there must be actual compliance with the preconditions to commence arbitration. This is particularly the case where parties agree to the relevant procedures in significant detail. In this instance, it was insufficient for personnel who were not specified in the Dispute Resolution Mechanism to attend "various apparently random meetings" (at) discussing "some variety of matters" (at) to constitute compliance with the preconditions.
3. There is no lacuna in Section 10 of the IAA because the court is empowered under Article 16(3) of the Model Law to "decide the matter" (at) and reverse the arbitral tribunal's positive ruling.

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The Strict Rule of Incorporation

In the 20th century, the English House of Lords in *TW Thomas & Co Limited v Portsea Steamship Company Limited* AC 1 ("***Thomas***") first laid down the strict rule that distinct and specific words of reference to an arbitration clause found in one document were required before the clause could be incorporated into a separate document
In *Star-Trans Far East Pte Ltd v Norske-Tech Ltd and others* 2 SLR(R) 196, the Singapore Court of Appeal accepted the law in *Thomas* in the context of cases involving bills of lading and charterparties. In such cases, the courts will construe words of incorporation narrowly (at).

Nevertheless, the Court noted (at) that the strict rule has been adopted by the English courts in other contexts such as construction or reinsurance contracts. In *Aughton Ltd (formerly Aughton Group Ltd) v MF Kent Services Ltd* (1991) 31 Con LR 60, Sir John Megaw's observed that the policy reasons for adopting the strict rule are as follows:

1. an arbitration agreement could preclude the parties from bringing a dispute before a court of law;
2. the statutory requirement for an arbitration agreement to be in writing clearly ensures that a party will not be deprived of his right to have a dispute decided by a court of law unless he has consciously and deliberately agreed that it should so; and
3. an arbitration clause is an independent and self-contained contract., It is not to be regarded as merely another term in the main contract which can be incorporated by reference to that main contract.

In the 21st century, the English Commercial Courts in *Sea Trade Maritime Corporation v. Hellenic Mutual War Risks Association (Bermuda) Ltd* ("**The Athena**") (No. 2) 1 Lloyd's Law Rep 280 and *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* EWHC 29 (Comm) refined the strict rule of incorporation. Both courts have drawn a distinction between "single contract" and "two-contract" agreements.

A "single contract" agreement consists of multiple, closely-related agreements with identical contracting parties. In such an agreement, parties have recourse to the ordinary rules of construction. Hence, general terms may be used to incorporate an arbitration clause contained in one document into a separate document.
A "two-contract" agreement consists of multiple, closely-related agreements with different contracting parties. In such an agreement, parties have to abide by a stricter rule of incorporation. An arbitration clause contained in one document may only be incorporated into a separate document through express words of incorporation.

Departing from the Strict Rule

This appeal presented the Singapore Court of Appeal with the opportunity to revisit its earlier decision of *Star-Trans*.
The Court undertook a detailed analysis of the development of the strict rule of incorporation in England

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and Singapore. The Court felt that it was time for Singapore to put aside the English authorities in order for the law to develop in accordance with the changing legislative scheme. Singapore is well placed to do so because English authorities, whilst persuasive, are not binding on the Court.

The Court endorsed the view expressed by the court in the Hong Kong case of *Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd 3 HKC 328*. The Court agreed that expressions of reservations in Thomas about ousting the court's jurisdiction were an attribute of the 20th century. In the 21st century, the enactment of the Model Law in Singapore has transformed "the role of the court to basically one of support for the arbitral process and gives full effect to the principle of full party autonomy" (at). Returning to the Preparatory Works to the Model Law, the Court concluded that the Model Law "does not place the same restrictive constraints as do the English authorities" (at).
Bearing this in mind, the Court was of the view that the strict rule of incorporation has been stretched beyond its original application in the context of bills of lading and charterparties. The rule ought not to be used as a rule of general application. The Court also found the 21st century English distinction between "single contract" and "two-contract" arrangements to be unhelpful in resolving the issue.

Instead, the Court framed the question as one of contextual interpretation to ascertain the parties' objective intentions. The contextual interpretation approach endorsed in *Zurich Insurance* more adequately answered the question because it examined the context and the objective circumstances which led to the agreements.
It is not entirely clear whether the departure from the strict rule of incorporation nonetheless allows for a limited application of the rule in cases involving bills of lading and charterparties. It remains to be seen whether the strict rule will continue to be useful in ascertaining the parties' objective intentions in limited contexts such as bills of lading and charterparties cases.

The Contextual Interpretation Approach

In applying the contextual interpretation approach, the Court made the purpose and objective of the Supplemental Agreements its main consideration. The Supplemental Agreements came into place because of the Respondent's concerns overpayment from Datamat and its subsequent threat to cease all work under the Cooperation Agreement unless a formalized payment mechanism was instituted.

The Court undertook a review of the words of the Supplemental Agreements and concluded that the Appellant's obligation was expressly and only to act as a payment conduit. Furthermore, the Appellant undertook no obligations under the Cooperation Agreement. The Supplemental Agreements were merely "annexed to" the Cooperation Agreement. The arrangement between the Respondent and Datamat under the latter remained intact and unaffected by the former. In this context, the Appellant could not have expected to become involved in an arbitration of disputes under the Cooperation Agreement

The Court allowed the appeal because the parties had not intended for the Dispute Resolution Mechanism (including the arbitration agreement) in the Cooperation Agreement to be incorporated into the

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Supplemental Agreements. The arbitral tribunal had no jurisdiction over the Appellant.

Lessons to be Learnt

In putting aside the century-old strict rule of incorporation of arbitration clauses, our Singapore Court of Appeal has ventured forward with a modern and liberal approach in ascertaining parties' intentions to arbitrate.

Going forward, it would be prudent for commercial parties to incorporate arbitration clauses found in one contract into subsequent, related contracts by way of express wording. It would be a risk to assume that the presence of a clause in one agreement will apply, without more, to a subsequent related contract.

Increasingly, more commercial agreements contain multi-tiered dispute resolution clauses. This case highlights that strict compliance of these clauses is absolutely necessary in the commencement of legal proceedings. Commercial parties should focus their attention on the details and particularity of these clauses to ensure strict compliance, without which arbitration or court proceedings may be rendered invalid.

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