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# SINGAPORE COURT OF APPEAL SHEDS LIGHT ON WHEN COMMERCIAL NEGOTIATIONS CAN GIVE RISE TO A CONCLUDED CONTRACT

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In commercial trade, it is a common practice for commodity traders to agree on key terms via email or mobile messaging before execution of a formal contract with the complete terms of agreement. In cases where the parties do not go on to execute a formal contract, the question arises as to whether a contract has nonetheless been concluded, such that one party's failure to perform will entitle the other to claim for damages. In a recent decision (*China Coal Solution (Singapore) Pte Ltd v Avra Commodities Pte Ltd* [2020] SGCA 81), the Singapore Court of Appeal has provided some clarity as to the approach to be taken in addressing this question.

## Background Facts

In March 2017, Avra and China Coal exchanged four emails agreeing on the quantity, quality, price, laycan and type of vessel to be used in respect of three shipments of Indonesian coal (the "**Four Emails**"). Avra then sent China Coal a draft contract setting out the matters agreed upon in the Four Emails and Avra's standard terms, which included a particular clause stating that the contract would only come into force after being signed by both parties or China Coal's nomination of a performing vessel (hereinafter referred to as the "**Commencement Clause**"):

> "
>
> …
>
> [2] ***This Agreement shall only come into force after being signed by both the Buyer and the Seller.*** Any amendments to this Agreement shall be in the form of an addendum to the Agreement and shall come into force only after both Parties will have signed the addendum, where after it will form an integral part of this Agreement.
>
> [3] ***In spite of the foregoing*** and notwithstanding the Buyer's obligation to return the Agreement duly signed, ***the Buyer's nomination of a performing vessel shall signify binding acceptance of all the terms and conditions of this Agreement, even if the Buyer has not executed this Agreement***."
>
> [emphasis added in italics and bold italics]

Following negotiations over the terms, Avra signed the final draft of the contract. China Coal did not.

Avra subsequently commenced an action in the Singapore High Court, seeking damages for China Coal's failure to perform its obligations under the contract. At first instance, the High Court took the view that a binding contract had been concluded by way of the Four Emails and gave judgment in favour of Avra. On appeal, the Court of Appeal found that a contract had not been concluded and proceeded to overturn the decision of the High Court.

## Findings of the Court of Appeal

Before proceeding with its analysis, the Court of Appeal reiterated that the question of whether a contract has been concluded involves a close examination of the facts underlying the transaction. This includes the background to

the negotiations, the parties' previous course of dealing, the nature of the contractual documents and the parties' conduct and/or correspondence during and after the alleged date of contracting.

The Court of Appeal gave the following reasons for its decision:

- The Commencement Clause made clear that the parties' intention was for the contract to *only* come into force upon the performance of a subsequent act, this being (i) the execution of the final draft contract by both parties or (ii) the nomination of the performing vessel by China Coal. This is consistent with the fast-moving business context, where parties do not intend to be bound by a short-form contract pending a full-length one.

- The Commencement Clause was part of Avra's standard terms, which Avra had insisted upon in this case and in all previous transactions between Avra and China Coal. It was therefore not open to Avra to deny its operation.

- The parties' past conduct in respect of a similar incident in 2015 (where Avra had failed to sign the contract) evidenced the parties common understanding that the contract would only come into force if the Commencement Clause was complied with. In particular, Avra had refused to perform in accordance with the agreement made in 2015 and China Coal had not followed up with legal action.

## Significance

The decision provides welcome guidance on the factors that a Singapore Court is likely to take into account when determining whether or not a contract of this nature has been concluded. While each case falls to be decided on its own particular facts, the decision signals the Court's willingness to acknowledge the realities of business transactions and to adopt a commercial perspective when approaching the question of contract formation. Moving forward, parties that frequently enter into contracts in this manner should be careful to make clear their intention that the conclusion of the contract is subject to certain acts and/or conditions.

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