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UNWRITTEN, UNSPOKEN AND ESSENTIAL TERMS CONTRACTS

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The contracts of tomorrow may not take the form of the formal, signed written agreements that we now find familiar. The Singapore courts recently enforced a contract that was partly oral, partly written, partly implied by words or conduct, dealt only in essential terms, and was not signed or expressly confirmed by all parties. Its approach sets a precedent for how such unconventional contracts will be dealt with moving forward.

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1 Generally speaking, and apart from certain exceptions (such as s 6 of the Civil Law Act 1909),[1] the law imposes no requirements on the mode of communication through which contracts (that is, legally enforceable agreements) are formed, or the precise form that a contract should take. Yet, people tend to think of contracts only as formal written agreements containing the customary suite of legal clauses. However, contracts can be wholly written, wholly oral, wholly implied from words and conduct, or take the form of a mixture of written words, oral words, and words and conduct. The touchstone for the law is satisfaction that the parties reached "a meeting of the minds" or *consensus ad idem* and regarded themselves to be legally bound, regardless of the mode or modes of communication used.[2]

2 Equally, but perhaps less well known, is that the parties negotiating a contract can conclude a contract on essential

1 2020 Rev Ed.
2 *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [40].

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terms. An essential terms contract is often misunderstood as a contract that is formed by reason of the parties agreeing terms that the industry regards to be "important" commercial terms, for example, in an international sale, the nature of the goods, the price, payment terms, transportation terms, passing of risk and title, *etc*, such that once these "important" commercial terms are agreed, a contract is formed even though other subsidiary terms have yet to be agreed. The true position in law is that it is not the industry but the *specific parties* to the contract that decide what is "essential" and what is not.[3] Consistent with general contractual principles, the touchstone is that the parties agree on all terms which *they* consider to be at the core of the agreement (that is, essential or material), such that they intend from that point to be legally bound despite unsettled terms.[4] Such intention is assessed objectively, having regard to the unique context of each case. If such essential terms are clear, certain, workable and do not give rise to public policy objections, the law will enforce the contract even if the parties fail to agree on other terms.

3 Whilst less common in the past, future cases in dispute resolution are likely to involve more and more contracts that do not take the form of a formal written and signed agreement. The pace at which business is conducted is ever-quickening, and it has always been the nature of business to seek faster and less formal ways of communication to outpace the competition. Technological advancements also mean a plethora of different options for human communication (such as via text messages, online platforms or applications, video calls) as well as the availability of trace evidence. Instead of having to rely only on a smattering of letters and imperfect witness recollection, as would have had to be done in the past, there is now often a traceable electronic or forensic record to prove the fact and content of a communication. The prospect of proving unwritten, unspoken and/or essential terms contracts is greater today than before.

3 *Rudhra Minerals Pte Ltd v MRI Trading Pte Ltd* [2013] 4 SLR 1023 at [27], citing *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601.
4 *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 at [52].

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4 This is not mere theory. The Singapore courts have in *COT v COU*[5] recently enforced a contract that was partly oral, partly written, partly implied by words or conduct and which dealt only in essential terms.

5 *COT* concerned a dispute between four parties over the supply of energy products ("Modules") to the Rohan Group[6] for a power plant project. The claimant in the underlying arbitration (and the respondent in the appeal) ("Claimant") was the vendor/supplier of the Modules and its counterparty to the supply contract was another member of the Rohan Group, a central procurement entity whose primary function was to source and procure products for the Rohan Group for its various energy projects globally. The respondents in arbitration (and the appellants) ("Respondents") were, respectively: (a) the project company/owner of the power plant ("Project Company"); (b) the engineering, procurement and construction contractor ("EPC Contractor"); and (c) the 99.99% owner of both the Project Company and the EPC Contractor ("Holding Company"). The Claimant prevailed in arbitration, and all three Respondents sought to set aside the award in the Singapore court (as supervisory court).

6 The material events took place over a matter of days. The Claimant delivered the Modules directly to the project over several shipments. Midway through, the payments fell into arrears and the Claimant notified the procurement entity that it would be suspending deliveries until full payment was made. The procurement entity requested the Respondents' assistance to resolve the issue, and this led to a series of calls and e-mails between various personnel from the Respondents and the Claimant over three days in March 2016 ("March 2016 Negotiations"). The Respondents urgently needed the Modules to complete construction of the power plant in time to qualify for a preferred feed-in tariff. However, the Respondents were facing cashflow issues and could not pay the Claimant anything until after the project was completed and its project financing was released. The Respondents therefore offered the Claimant

5 [2023] SGCA 31.
6 Pseudonym employed by the court to protect confidentiality.

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security for payment in the form of a non-disposal undertaking ("NDU"), under which the Holding Company agreed not to dispose of a portion of its shares in the Project Company until full payment was made. The March 2016 Negotiations centred around the detailed terms of this NDU.

7 On 17 March 2016, the Respondents sent the Claimant a final NDU signed by the Holding Company. On 18 March 2016, the Claimant noticed some errors and inconsistencies in the final NDU and sought further discussions with the Respondents. There were several calls and e-mails exchanged on 18 March 2016, after which the Claimant released delivery of the Modules.

8 The Respondents eventually did not pay for the Modules. In April 2016, the Rohan Group's ultimate holding company (and several of its subsidiaries, including the central procurement entity) sought protection from creditors in rehabilitation proceedings commenced under Chapter 11 of the United States Bankruptcy Code. Later in 2016, the Holding Company proceeded to sell its shares in the Project Company, breaching the terms of the NDU.

9 The Claimant commenced arbitration to enforce its rights. It asserted that the Respondents had breached the contract concluded on or around 18 March 2016 (which the Singapore High Court called the "Modules Delivery Agreement" or "MDA"). The Respondents all denied entering into any contract (or arbitration agreement) with the Claimant. On this basis, they challenged the jurisdiction of the tribunal and denied the Claimant's claims.

10 The Project Company and EPC Contractor also refused to have the matter of jurisdiction determined by the tribunal at first instance, despite the principle of *kompetenz-kompetenz*. They sought *ex parte* anti-arbitration injunctions in the Gondorian court, contending that there was no arbitration agreement. After the Claimant set the injunctions aside, they exhausted all avenues of appeal. The arbitral proceedings were suspended for over 15 months in the interim. The Claimant eventually had to seek an anti-suit injunction to restrain further proceedings in the Gondorian court. This set the tone for a protracted and hotly

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contested arbitration, after which the Claimant prevailed on its claims. All three Respondents then, unsurprisingly, applied to set aside the award.

11 The first key issue considered by the tribunal, Singapore High Court and Court of Appeal was whether a partly oral, partly written, partly implied by words or conduct, essential terms contract could even be enforced at all. On the basis of the authorities mentioned above, all three unanimously confirmed that it could.

12 The second key issue was what ought to be the scope of the court's review. In this case, the formation of the arbitration agreement was co-terminus with the main contract. To what extent are issues of contract formation questions of merit that should be left within the remit of the tribunal? The Court of Appeal concluded that it remained entitled to review the issue of formation of the arbitration agreement (and contract) *de novo* but had to limit its inquiry only to the question of whether the contract *existed*. On this basis, the Court of Appeal declined to determine matters such as the terms of the contract, the parties' liability under the contract terms, and significantly, questions as to the capacity or authority of the parties' officers.[7] The latter issue formed a significant part of the EPC Contractor and Project Company's case, as they contended that the persons who purportedly participated in the March 2016 Negotiations lacked authority to represent or conclude any contract on their behalf.

13 The Singapore court also emphasised that the review ought to be conducted objectively and holistically to determine if there had been a meeting of the minds, without rigidly or mechanistically looking for an "offer" and "acceptance" in the traditional form.[8] The context within which the March 2016 Negotiations took place was considered to be of primary significance.

7 *COT v COU* [2023] SGCA 31 at [29]–[39] and [73].
8 *COT v COU* [2023] SGHC 69 at [59(h)] and [112]–[116]; *COT v COU* [2023] SGCA 31 at [48].

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14 In this regard, the Singapore court (as with the tribunal) first considered the organisation structure and business practices of the Rohan Group, and the fact that the Project Company was: (a) the ultimate party responsible for payment within the Rohan Group; and (b) the party that needed the Modules to complete the project. The court also considered it to be particularly significant that the Claimant had already taken the step of withholding deliveries of the Modules and demanding payment and security – it had already "crossed the bridge" to insist on a separate binding commitment to secure payment and would not have been satisfied with anything less.[9] The tribunal, Singapore High Court and Singapore Court of Appeal therefore all held that it should necessarily be inferred from the Claimant's release of the Modules at the conclusion of the March 2016 Negotiations that a valid and binding contract had been concluded between the parties.

15 What is not immediately evident from the written judgment is the fact that the Singapore court permitted the Respondents to produce fresh evidence at the setting-aside stage, including oral evidence from a witness that was not produced in arbitration (and therefore not cross-examined on his evidence). This was the first time that the Singapore High Court had occasion to consider whether parties seeking to set aside an arbitral award ought to be allowed to rely on evidence not put before the tribunal as part of its *de novo* review.

16 The Respondents argued that the court rules imposed no restrictions to its right to put in new evidence to support its case, and a *de novo* review meant that the court should consider the matter afresh. On the other hand, the Claimant contended that a "review" implied looking at the same evidence afresh, rather than considering a whole different set of evidence. A *de novo* review meant only that the court need not defer to the tribunal's earlier findings on the issue – it did not mean that the court should feel free to admit evidence as if the matter was being heard for the first time and no arbitration had taken place. The Claimant argued that a supervisory court's review of

9 *COT v COU* [2023] SGCA 31 at [49]–[51].

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arbitral proceedings ought to be regarded as akin to an appeal, in which case the *Ladd v Marshall*[10] principles (or a modified version thereof) should apply to restrict the Respondents' right to adduce fresh evidence at a late stage.

17 The Singapore High Court regarded the issue to be one of procedural discretion and admitted the evidence.[11] In so doing, the Singapore court made it clear that it would not easily exclude evidence that appeared to be relevant. However, the credibility and weight of this evidence would be assessed in the usual course. In this case, the new evidence did not affect the court's conclusion on contract formation.

18 The third, and possibly the most critical, issue was whether the arbitration agreement in this contract complied with the form and writing requirements under Singapore law. The NDU contained an arbitration clause, but the NDU was not signed by the EPC Contractor, Project Company or even the Claimant. It was signed only by the Holding Company (being the only party giving the undertaking not to dispose of its shares). The EPC Contractor and Project Company were not named as parties to the NDU, and the arbitration clause therein did not refer to resolution of disputes outside of the NDU. Yet, the tribunal, Singapore High Court and Court of Appeal all confirmed that the EPC Contractor and Project Company were bound by this arbitration agreement alongside the Holding Company.

19 Whilst this decision might seem surprising at first blush, it is well settled that courts construe arbitration clauses from the perspective of rational businessmen. Parties are therefore generally assumed to intend to resolve all disputes arising out of the same legal relationship in a single forum.[12] If all three Respondents were parties to the MDA, and the NDU was an integral part of the MDA, the arbitration agreement is presumed to apply to any dispute arising out of this same legal relationship. Moreover, the NDU made explicit reference to the EPC Contractor

10 [1954] 1 WLR 1489.
11 *COT v COU* [2023] SGHC 69 at [57]–[58].
12 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [124].

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and Project Company in its preamble and terms, including the notice provisions and arbitration clause (which expressly provided that all three Respondents shall jointly appoint an arbitrator in the event of a dispute).[13]

20 The tribunal, Singapore High Court and Court of Appeal were also unconcerned with the absence of a signature from the EPC Contractor and Project Company. Correctly so, as there is no such requirement in the International Arbitration Act 1994[14] ("IAA"). Section 2A of the IAA merely requires that an arbitration agreement be "in writing". Further, although the original 1985 version of the provision in the UNCITRAL Model Law (Art 7)[15] (which was previously adopted without amendment in the IAA) refers to a signature, this was only one of many options as to form. Even under the 1985 version, parties were entitled to prove an arbitration agreement in writing by way of an exchange of letters, telex, telegrams, or other means of telecommunication, or in an exchange of pleadings where an assertion of such agreement is not disputed. This is consistent with general contractual principles, which do not demand signatures for validity of contracts. Indeed, the writing requirement itself was substantially relaxed under the 2012 amendments to the IAA in order to bring it closer in line with modern commercial practices. In *AQZ v ARA*,[16] the Singapore court confirmed that the writing requirement may be fulfilled even with a unilateral record of an arbitration agreement by one party (which is neither signed nor confirmed by the other).

21 The key takeaway is that the Singapore courts have no difficulty enforcing an unwritten and unsigned contract which deals only in essential terms, and would treat such a contract no differently from any other. Contrary to appearances, the decision in *COT v COU* did not stray from established principles. In fact, it is an apt illustration of the Singapore courts preferring substance over form and taking a practical and commercial approach to

13 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [124].
14 2020 Rev Ed.
15 Which was based on Art II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention").
16 [2015] 2 SLR 972.

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contract formation so that the "reasonable expectations of honest men are not disappointed".[17]

22 That said, the road to enforcement may be longer and more difficult than for a standard written contract. While the Singapore courts generally eschew reliance on extrinsic evidence when interpreting a formal written contract,[18] there is no clear line when it comes to unwritten contracts. The Singapore courts' approach to admission of evidence in a challenge of an arbitral award[19] also means that one risks having to face an entirely different case in court as compared to the earlier arbitration.

17 *COT V COU* [2023] SGCA 31 at [47], citing *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407.
18 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029.
19 See paras 15–17 above.

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