R1 International Pte Ltd *v* Lonstroff AG
[2014] SGCA 56

Case Number	: Civil Appeal No 78 of 2014
Decision Date	: 21 November 2014
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Steven Chong J
Counsel Name(s)	: Paul Tan and Matthew Koh (Rajah & Tann Singapore LLP) (instructed) and Mohammed Ibrahim (Achievers LLC) for the appellant; Boey Swee Siang and Ow Sze Mun Cassandra Geraldine (ATMD Bird & Bird LLP) for the respondent.
Parties	: R1 International Pte Ltd — Lonstroff AG

Contract – Contractual terms

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2014] 3 SLR 166.]

21 November 2014

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 This is an appeal against the Judge's decision allowing the application brought by Lonstroff AG, the Respondent, to set aside an interim anti-suit injunction that had been granted in favour of R1 International Pte Ltd, the Appellant, and dismissing the Appellant's application for a permanent anti-suit injunction. The Judge's decision is reported as *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166 ("the Judgment").

2 The arguments in the appeal did not focus on the power of the court to grant an anti-suit injunction to support the arbitration. Rather, the appeal turned on whether a set of terms containing an agreement to arbitrate in Singapore, which is found in a detailed contract note that was sent by the Appellant to the Respondent shortly after the deal had apparently been agreed, was incorporated as part of the contract between the parties.

3 After hearing the oral arguments, we allowed the appeal and gave our brief reasons. We now set out the detailed grounds of our decision.

The parties

4 R1 International Pte Ltd, is a Singapore incorporated company which trades in natural rubber. It conducts its European operations through its authorized agent R1 Europe GmbH, a German incorporated company. For convenience only, we refer to R1 International Pte Ltd and R1 Europe GmbH collectively as "R1" although we state for the avoidance of doubt that R1 Europe GmbH is not a party to the proceedings.

5 Lonstroff AG (which we shall refer to as "Lonstroff"), is a Swiss incorporated company which processes natural rubber and other elastomers and obtains its supply of natural rubber from the international rubber commodities markets.

The background

6 Between January and December 2012, Lonstroff purchased "SVR" from R1 pursuant to five separate transactions. SVR is a type of "Technically Specified Rubber" which, as the descriptor suggests, is rubber that meets certain technical specifications.

7 The dispute between the parties concerned the second transaction. Pursuant to this transaction, Lonstroff took delivery of a shipment of SVR though it subsequently notified R1 that the rubber in question emitted a foul smell. R1 did not deny this assertion of a foul smell but maintained that as "smell" was not a contractually specific parameter of SVR, it was not in breach of the supply contract in relation to the second transaction ("the Second Supply Contract"). This is the subject matter of the substantive dispute between the parties and it does not arise before us.

8 Following the failure of the parties to reach a commercial solution to the problem, Lonstroff commenced proceedings against R1 in Switzerland in March 2013 on the basis that R1 had breached the Second Supply Contract by supplying defective goods.

9 R1 responded by commencing proceedings in Singapore, seeking an anti-suit injunction to prevent Lonstroff from continuing with the Swiss proceedings. R1 claimed that by commencing the Swiss proceedings, Lonstroff was in breach of an agreement to arbitrate any disputes in Singapore, which agreement, according to R1, had been incorporated as part of the terms of the Second Supply Contract.

10 The basis for R1's contention was a "sales contract" that R1 had sent to Lonstroff in connection with the second transaction. For clarity and to avoid confusion with the Second Supply Contract, we shall refer to a "sales contract" as a "Contract Note".

11 The Contract Note for the second transaction stated that the terms of the International Rubber Association Contract (IRAC) for "Technically Specified Rubber" would apply (to the second transaction). Under the IRAC, disputes were to be resolved by arbitration in London though parties were permitted to agree otherwise. To this end, the Contract Note included a rider which specified that arbitration would be conducted in Singapore. It is not disputed that Lonstroff never countersigned and returned this Contract Note.

12 Even though the dispute concerns only the Second Supply Contract, it would be helpful to set out some of the key features that emerge from the undisputed chronology of all five transactions that is evident on the face of the documents. This chronology suggests that in broad terms, each transaction was negotiated, concluded and performed in a largely similar manner, as follows:

(a) The parties would first conduct negotiations for the sale and purchase of a quantity of SVR by way of email or telephone.

(b) Once the basic terms had been concluded, R1 would send an email to Lonstroff setting these out. The parties referred to these emails as "Email Confirmations". Lonstroff would similarly send a "Purchase Order" to R1.

(c) Subsequently, R1 would send to Lonstroff a Contract Note (see [11] above), with a request that Lonstroff countersign and return a copy. R1 would then deliver the SVR and issue an invoice. On its part, Lonstroff would accept delivery and pay the invoice.

13 Against this general description, we turn to the salient details surrounding each of the

transactions.

First Transaction

14 The negotiations for the first transaction were concluded on 24 January 2012 whereupon R1 sent Lonstroff the first Email Confirmation. The first Email Confirmation set out the essential terms of the first transaction including the (i) type of commodity; (ii) quantity; (iii) price; (iv) terms of payment; (v) method of packing; and (vi) estimated date of delivery.

15 On 25 January 2012, Lonstroff sent R1 its Purchase Order. As with the first Email Confirmation, the first Purchase Order included the essential terms of the first transaction.

16 On 1 February 2012, R1 emailed Lonstroff a Contract Note and requested Lonstroff to "return us a signed copy."

17 This first Contract Note stated that R1 "confirmed having sold" to Lonstroff SVR and repeated the terms in the first Email Confirmation. The first Contract Note also stated:

> CONTRACT OTHER CONDITIONS:
>
> SUBJECT TO THE TERMS, CONDITIONS AND RULES (INCLUDING THE ARBITRATION CLAUSES AND RULES) OF THE INTERNATIONAL RUBBER ASSOCIATION CONTRACT FOR TECHNICALLY SPECIFIED RUBBER IN FORCE AT DATE OF CONTRACT.
>
> PLEASE RETURN A SIGNED COPY

As we noted above, this essentially sought to incorporate the terms in IRAC's standard form which included a default provision for arbitration in London though the parties could also agree to arbitrate their dispute elsewhere.

18 On 16 and 28 May 2012, R1 issued Lonstroff with invoices for the SVR sold under the first transaction. On 22 May and 1 June 2012, Lonstroff took delivery from R1 of the SVR ordered.

19 On 16 July 2012, Lonstroff made payment in respect of both invoices. At no point did Lonstroff sign and return the first Contract Note. There was also no protest from Lonstroff in respect of the terms stated in the first Contract Note.

Second Transaction

20 On 15 August 2012, R1 sent an Email Confirmation to Lonstroff. As with the first transaction, this Email Confirmation included the essential terms of the second transaction.

21 On 22 August 2012, R1 issued an invoice for the second transaction. On 27 August 2012, Lonstroff took delivery from R1 of the SVR ordered.

22 On 31 August 2012, R1 emailed Lonstroff with a Contract Note and again requested Lonstroff to "[k]indly sign and return it to us by e-mail."

23 The second Contract Note recited that R1 "confirmed having sold" to Lonstroff a quantity of SVR and repeated the terms contained in the second Email Confirmation. Like the first Contract Note, this too was expressed to be subject to IRAC terms. It, however, also had a rider which stated that "[i]n the event of any arbitration, it [the arbitration] will be conducted in Singapore".

24 We observed that Mr Andreas Schenker, the Head of Purchasing of Lonstroff, denied in his affidavits that Lonstroff had received R1's email of 31 August 2012 until July 2013. This appeared to be flatly contradicted by the documentary evidence produced by R1. It was therefore unsurprising that the arguments made by Mr Boey Swee Seng, counsel for Lonstroff, on appeal were made on the basis that Lonstroff did in fact receive the email on 31 August 2012.

25 On 20 September 2012, Lonstroff emailed R1 to complain that a foul smell was being emitted from the SVR which had been delivered pursuant to the second transaction. Mr Schenker said in his affidavit that Lonstroff complained to R1 about the smell of the rubber on 27 August 2012 (*ie*, the day Lonstroff took delivery of the rubber), but this did not seem to be consistent with an email sent by Mr Schenker (disclosed by R1) that suggested that R1 was informed of this problem for the first time around 20 September 2012. From that time until March 2013, the parties attempted to find a commercial solution to the problem.

26 On 5 October 2012, Lonstroff paid the invoice for the second transaction. Again, the second Contract Note was not signed and returned by Lonstroff; there was also no protest from Lonstroff against the terms set out in the second Contract Note.

Third transaction

27 On 10 October 2012, Lonstroff sent R1 a Purchase Order which contained the essential terms of the third transaction as well as the following statement:

> Unless otherwise agreed in writing *our General Terms and Conditions shall apply from 14.02.2011 as an integral part of the mutual contractual obligations. We generally do not recognize any of the suppliers terms and conditions*. [emphasis added]

28 Later that day, R1 sent Lonstroff an Email Confirmation. As with the first two Email Confirmations, the third Email Confirmation contained the essential terms of the third transaction but said nothing of Lonstroff's request to have its general terms incorporated into this supply contract for the third transaction.

29 On 11 October 2012, R1 emailed Lonstroff the usual Contract Note and again requested Lonstroff to "kindly return us a signed copy." This third Contract Note stated that R1 "confirmed having sold" to Lonstroff a quantity of SVR and repeated the terms in the third Email Confirmation. The Contract Note also stated that the IRAC terms would apply and also contained a rider in favour of arbitration in Singapore.

30 On 24 October 2012, Lonstroff took delivery from R1 of the SVR. On 7 December 2012, Lonstroff paid the invoice for the third transaction.

31 As was the case with the first two transactions, the third Contract Note was not signed and returned by Lonstroff; again, there was also no protest from Lonstroff against the terms stated in the third Contract Note. This was despite the fact that Lonstroff had in its Purchase Order of 10 October 2012 indicated that it wished to have its general terms incorporated into the supply contract for the third transaction.

Fourth and fifth transactions

32 The fourth and fifth transactions followed the same sequence as the third in that (i) Lonstroff

first sent across a Purchase Order which stated that its general terms were to apply; (ii) R1 responded with an Email Confirmation which made no reference to Lonstroff's Purchase Order, (iii) R1 sent a Contract Note stating that the IRAC terms would apply and contained a rider in favour of arbitration in Singapore; and (iv) Lonstroff did not return a signed copy of the Contract Note but nevertheless took delivery of and paid for the SVR without protest. The main difference between these two transactions and the third was that, in addition to stating that the IRAC terms would apply and that any arbitration would be held in Singapore, the Contract Notes for these latter transactions also stated that the arbitration would be conducted by the Singapore Commodity Exchange Limited ("SICOM").

R1's arguments below

33 R1 argued that the agreement to arbitrate in Singapore was a term of the Second Supply Contract on the basis of a "trade custom". In support of this contention, counsel for R1 at the hearing below, Mr Mohammed Ibrahim, relied on evidence from R1's witnesses that rubber contracts all over Asia and Europe are generally concluded based on IRAC terms. He also argued that the court should take judicial notice of the fact that IRAC terms are applicable in the rubber industry and that such disputes are resolved by arbitration in Singapore conducted by SICOM.

34 In the alternative, R1 contended that a previous course of dealing between the parties existed which provided for IRAC terms to be applicable and for disputes to be resolved by arbitration in Singapore conducted by SICOM.

35 In the further alternative, R1 contended that a previous course of dealing between the parties existed pursuant to which IRAC terms were applicable. Mr Ibrahim argued on the basis of this previous course of dealing that the arbitration agreement under the IRAC terms (which, based on the destination of delivery, provided for arbitration in London as a default) applied and that an anti-suit injunction ought to be granted by the Singapore courts in order to protect R1's contractual right to have the dispute resolved by arbitration.

The decision below

36 The Judge dismissed R1's application for an anti-suit injunction for the following principal reasons.

37 On the trade custom point, the Judge found that R1 had failed to discharge its burden of proof. In particular, the Judge observed that the evidence of trade custom did not come from any independent party but from R1's own employees. In addition, the Judge found that Lonstroff might not have been aware of the practice of international rubber traders since it was merely an end user of the product: Judgment at [24] and [25].

38 The Judge also pointed out that an agreement to arbitrate in Singapore was not part of the IRAC terms itself and that R1 did not lead evidence that this was part of trade custom when dealing with Singapore based suppliers: Judgment at [26].

39 On the previous course of dealing point, the Judge found that even if she was willing to assume that the IRAC terms (providing for arbitration in London) had been incorporated into the supply contract for the first transaction, there had been only one prior transaction between the parties before the disputed Second Supply Contract and that this was insufficient to found a course of dealing between them. Further, the inclusion of the Singapore arbitration rider in the second Contract Note which was not found in any of the documents relating to the first transaction showed that there

was no settled course of dealing: Judgment at [32].

The arguments on appeal

R1's arguments

40 R1's submissions on appeal were very different from those advanced before the Judge (and which have been summarized at [33]–[35] above). These submissions were further elaborated upon by Mr Paul Tan, the counsel instructed by R1 for the appeal.

41 In essence, R1's case on appeal was premised on the footing that it was typical in commodity trading transactions for parties to negotiate and agree on certain key commercial terms over the phone. This would then be recorded in an email sent by the sellers to confirm the trade and the core commercial terms. Finally, a set of more detailed terms would follow to supplement the key commercial terms already agreed upon. This was no different in the rubber industry. Lonstroff being an experienced buyer in the rubber commodities market would thus have expected R1's standard terms (as contained in the Contract Notes) to follow.

42 Mr Tan submitted that this standard industry practice was amply borne out by the chronology. Further, the Email Confirmations from R1 to Lonstroff were clearly not intended to memorialise all the terms of the agreement for each supply contract between the parties as was evident from (i) the limited terms contained in the Email Confirmations; and (ii) the consistent pattern of R1 sending the Contract Notes with standard terms to Lonstroff after the Email Confirmations had been sent.

43 Mr Tan further contended that Lonstroff's failure to countersign any of the Contract Notes cannot, in the circumstances, be construed as equivocal silence. It took active steps in all five transactions by paying the invoiced amount without once objecting to the terms under the Contract Notes sent by R1. This, Mr Tan submitted, objectively constituted acceptance of the terms stated in the Contract Notes. If anything, Lonstroff's attempt to introduce its own standard terms in the third, fourth and fifth transactions (see [27]–[32] above), aside from corroborating R1's case that the industry usually contracted on standard terms, was consistent with its acceptance that it would be bound by R1's standard terms unless it could impose its own terms. Yet, when its attempts were rebuffed, Lonstroff made no attempt re-assert its own standard terms when R1 sent across its standard terms in the third, fourth and fifth Contract Notes. Lonstroff simply accepted delivery and paid for the SVR.

44 Mr Tan in oral submissions was prepared to concede that in all the transactions, a contract had been formed when R1 sent Lonstroff the Email Confirmations setting out the bare commercial terms. However, he contended that it was evident from the course of dealings of the parties that neither of them thought that the Email Confirmations contained the entirety of their agreement. While R1 had consistently put forward its own standard terms to supplement each of the Email Confirmations, Lonstroff too had sought, albeit unsuccessfully, to put forward its standard terms for at least three of the transactions.

45 Hence, Mr Tan submitted that the issue was *not* whether the parties were contracting on (i) R1's standard terms or (ii) purely based on the terms of the Email Confirmations. Rather, the real issue was whether the parties were contracting on the terms of Email Confirmations *supplemented* either by (i) R1's standard terms or (ii) Lonstroff's standard terms. Mr Tan argued that in this case, it was clear that the Second Supply Contract would be governed by R1's standard terms since Lonstroff did not protest the terms but instead paid for the goods delivered.

Lonstroff's arguments

Lonstroff's arguments

46 Mr Boey argued that the Judge's decision should be affirmed. Mr Boey was in broad agreement with the applicable legal principles (which we shall set out in a moment). What he disputed was the result of applying those legal principles to the facts of this case.

47 According to Mr Boey, the supply contract for each of the five transactions was concluded orally before the Email Confirmation was sent. On that basis, Mr Boey contended that the entire Second Supply Contract was exhaustively encapsulated in the Email Confirmation sent by R1 on 15 August 2012. In Mr Boey's submission, the detailed terms that followed the Email Confirmation could not modify the terms of the concluded contract. The negotiations leading to the second Email Confirmation did not feature any discussion about agreeing to refer disputes to arbitration nor even about any further standard terms applying. Even the second Email Confirmation did not give any indication that it would be subject to any further terms.

48 Mr Boey submitted that any attempt by R1 to impose new terms should be construed as an attempt to vary the already concluded contract governing the second transaction (which he contended was encapsulated in the second Email Confirmation). Mr Boey also relied on the fact that each time a Contract Note was sent, Lonstroff was asked to countersign and then return it, something which they never did. Moreover, R1 only sent the second Contract Note *after* it had performed its principal obligation under the Second Supply Contract (*ie*, delivering the agreed quantity of SVR). Thus, seen objectively, Mr Boey submitted that Lonstroff's silence in the second transaction should be viewed as a rejection of R1's attempt to vary a contract in which R1 had no further substantial obligations to perform.

49 Mr Boey also submitted that the conduct of the parties in relation to the each of the third to fifth transactions was irrelevant as these events took place after the Second Supply Contract had been concluded. In any event, Mr Boey submitted that the evidence of subsequent conduct only went as far as to show that R1 had a practice of sending its standard terms to Lonstroff after an agreement had already been reached and recorded in the Email Confirmation. This by itself meant nothing – the fact of the matter was that Lonstroff did not countersign (and by implication, accept) any of the Contract Notes.

Our decision

The applicable legal principles

50 We start with the following observations of the law which appeared in the end to be accepted by both parties.

51 First, the law adopts an objective approach towards questions of contractual formation and the incorporation of terms. Put another way, the question of when the Second Supply Contract came into being and whether the terms of the second Contract Note had been incorporated into the Second Supply Contract turned on ascertaining the parties' objective intentions gleaned from their correspondence and conduct in light of the relevant background as disclosed by the evidence. The relevant background includes the industry in which the parties are in, the character of the document which contains the terms in question as well as the course of dealings between the parties: see for *eg*, *ABB Holdings Pte Ltd and others v Sher Hock Guan Charles* [2009] 4 SLR(R) 111 at [45]; *Tryggingarfelagio Foroyar P/F v CPT Empresas Maritimas SA M/V "Athena"* [2011] EWHC 589 (Admlty) ("*The Athena*") at [49] and [53]; *Henry Kendall & Sons (a firm) v William Lillico & Sons, Ltd* [1969] 2 AC 31 at 104E to 105B.

52 Second, it is not uncommon for parties to first agree on a set of essential terms which the parties may be bound by as a matter of law and on the basis of which they may act, even while there may be ongoing discussions on the incorporation of other usually detailed terms. The fact that the latter issue has yet to be resolved does not prevent the contract based on the essential core terms from coming into existence. Put another way, even if the parties are eventually unable to agree on the remaining terms, it does not necessarily follow that no contract will be found to have been concluded upon the agreed essential terms: see for *eg*, *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 at 619. On the other hand, the fact that this was the manner in which the parties approached their negotiations will generally mean that the subsequently specified terms may be more readily found to have been incorporated as part of the contract.

53 Third, although silence by one party may not by itself constitute acceptance of the terms sent by the other party, it does not follow from this that silence is fatal to a finding that the terms sent have been accepted. The effect of silence is context-dependent. In many cases, while there may not be actual communication of acceptance, the parties' positive, negative or even neutral conduct can still evince acceptance: *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 at [50] and [52].

54 Thus, a failure to object might in the circumstances be found to constitute assent to the incorporation of the other party's terms. In the English Court of Appeal case of *Papas Olio JSC v Grains & Fourrages SA and another* [2010] 2 Lloyd's Rep 152, the issue was whether the plaintiff was considered to have received notification by the arbitral institution of an award made against it for the purposes of determining whether the time for appealing against the award had expired in a situation where the award was sent to the plaintiff's previous business address. One of the plaintiff's arguments turned on whether the plaintiff was reasonably to be considered to be carrying on its business at the address found in the "contract confirmation" that was sent by the defendant's agent following the conclusion of an oral contract between the parties. In answering this question in the affirmative, Toulson LJ (with whom Richards and Mummery LJJ agreed) stated at [28]:

> It is commonplace in commercial life, particularly in markets where the use of standard forms of contract is common, for parties to agree on all the essential terms necessary to bring about the conclusion of an oral contract and for the oral contract then to be followed by a written document, often described as a confirmation or recap, which will not only set out the essential terms but other terms common in the market. If there is no comeback from the other party, it may be easy to infer assent. …

55 In the English High Court case of *Statoil ASA v Louis Dreyfus Energy Services LP* [2009] 1 All ER (Comm) 1035, a dispute arose as to whether a demurrage time bar provision had been incorporated into the contract between a charterer of a liquefied petroleum gas ("LPG") tanker and an LPG supplier. Even though Aikens J ultimately found that the time bar provision was not incorporated, he similarly accepted at [70] that:

> … If the principal terms have been agreed and the parties are, to use Bingham J's phrase in the *Pagnan* case "sorting out details against the background of a concluded contract", then the strict requirements of positive offer and positive acceptance are not necessarily appropriate. If one party makes a proposal for terms and the other does not object to it when asked if it has objections, that can, in appropriate circumstances, be taken as acceptance of that term: the *Pagnan* case at 614 per Bingham J.

56 Before turning to the facts of the present case, one more English High Court decision which neatly illustrates the points discussed above merits discussion. In *The Athena*, a ship had caught fire

off the Chilean coast. Thor, the ship owners, engaged CPT, the defendant salvage company, to provide emergency fire-fighting services. Subsequently, after TF, the claimant insurer of Thor, settled Thor's insurance claim, it commenced proceedings in Chile against CPT for the cost of ship repairs, alleging that CPT had been negligent in providing its fire-fighting services. In response, CPT sought an anti-suit injunction from the English courts restraining the Chilean proceedings on the basis of an English arbitration agreement found in the "BIMCO Wreckhire Form", a set of standard terms which was said to have been incorporated into the contract for services between Thor and itself.

57 Based on an objective assessment of the parties' conduct, David Steel J found (at [43]–[45]) that the parties had entered into a legally binding agreement when Thor accepted CBT's offer which contained essential terms (but no mention of any specific BIMCO contract) and that the parties expected this agreement to be further supplemented in the process by a number of additional detailed provisions "by way of sorting out the details". Steel J then accepted (at [49]–[50]), amongst other things, that (i) the industry practice of contracting on standard terms (as revealed by the evidence) and (ii) the emergency situation in which the parties found themselves provided the relevant background to the negotiations.

58 In the light of that background, David Steel J found (at [57]–[58]) that the absence of any rejection by Thor of CPT's "recap" email, which stated that a "finalised" version of the contract between the parties would be a BIMCO contract "as partly discussed earlier today", meant that Thor's acceptance of those terms could be inferred. He also found that the only BIMCO contract which the parties could have contemplated in the circumstances would have been the BIMCO Wreckhire Form. Accordingly, Steel J granted CPT the anti-suit injunction sought against TF.

The parties contemplated that the Email Confirmation would be supplemented with standard terms

59 On the facts before us, we were satisfied that the terms of the Email Confirmation became binding when they were sent across. We were also satisfied that both parties *did* contemplate that the basic terms of the Email Confirmations would be supplemented by a set of standard terms. We arrived at this conclusion for three principal reasons.

60 First, we did not accept Mr Boey's assertions in the oral arguments that there was *no evidence* to show that it was the practice in the international rubber commodities market for parties to contract on the basis of standard terms. In fact, it was evident from our review of the Record of Appeal that this was patently incorrect. There was evidence from Mr Oh Kian Chew and Mr Lorenzo Dufour, both senior employees of R1, that it is market practice in this industry for the parties initially to only discuss the commercial terms of each trade, *ie*, the specific product, quantity, price and destination at the time the trade was confirmed. According to both of them, the specification of the rest of the terms of the transaction was a matter that would generally be followed up by the operations team, and as such, these would usually only be specified subsequently.

61 In our judgment, it was notable that Mr Schenker, Lonstroff's sole witnesses, who took pains to deny and rebut extensive portions of Mr Oh and Mr Durfour's evidence, failed to make even a bare denial of this fact. In our judgment, given Mr Schenker's failure to do so, let alone provide evidence of contrary market practice, the court was entitled, indeed obliged to accept this evidence.

62 For the same reason, we did not accept Mr Boey's oral submission that Lonstroff could not, on the facts, have reasonably contemplated that detailed terms would follow after the Email Confirmation as there was only one prior transaction before the Second Supply Contract was entered into. If this was common in the industry, as emerged from the undisputed evidence led by R1, then Lonstroff

could and should reasonably have contemplated this. We noted that according to the documents tendered by Lonstroff's Swiss counsel in the Swiss legal proceedings, Lonstroff held itself out to be known in the rubber trade.

63 Second, given the size and scope of the subject matter of the supply contracts, it seemed to us improbable that the parties would have expected to contract purely on the bare bones of the Email Confirmations. Even though the Email Confirmations set out the key commercial terms, they are silent on a number of potentially important matters that are instead more fully dealt with in the Contract Notes which incorporated the IRAC terms. For example, the IRAC terms contained provisions dealing among other things with (i) the determination if the rubber supplied conformed to the requisite international quality standards; (ii) the obligation of the supplier to accompany each lot of rubber sold with a test certificate; (iii) the amicable resolution of claims concerning the quality of rubber supplied before resorting to arbitration; (iv) how risk is allocated upon the occurrence of an event of frustration; and (v) the governing law of the parties' agreement.

64 To be clear, it would in principle have been possible for the parties to contract without these terms. The failure to agree these terms would not have been fatal to the existence of a legally binding agreement based on the terms set out in the Email Confirmations even though it might have been highly inconvenient for the parties. However, that does not detract from the fact that the parties in this case, having regard to the industry practice and the size and scope of the subject matter of the supply contracts, would have reasonably expected terms dealing with such matters to be incorporated into each of those supply contracts.

65 Third, it was evident from the parties' conduct throughout the course of the five transactions that they *both* in fact contemplated that the basic terms would be supplemented by a set of standard terms. In each of the five transactions, R1 sent Lonstroff a Contract Note containing supplementary terms. As far as Lonstroff was concerned, its own actions in seeking to impose its terms, after the dispute concerning the rubber supplied in the second transaction arose, evidenced a similar understanding.

66 In the Purchase Order it sent for the third transaction on 10 October 2012 before the third Email Confirmation (sent by R1 on 11 October 2012), Lonstroff sought to contend that this transaction should be governed by its own general terms and not by those of the supplier. In these circumstances, the reference to the supplier's terms could only be a reference to the terms which it had received from R1 in the course of the first two transactions. Further, the general terms which Lonstroff sought to impose were its general terms dated 14 February 2011, which had therefore been in existence even before the parties had entered into a commercial relationship. Similarly, the Purchase Orders which Lonstroff sent in respect of the fourth and fifth transactions also sought to impose its own general terms in relation to those transactions.

67 As we pointed out during the oral arguments, the fact that Lonstroff had its own standard terms and had proposed them to govern the third to fifth transactions showed that Lonstroff recognised that the Email Confirmations, while containing the essential commercial terms, did not contain all the terms of the various supply contracts between the parties. It was an acknowledgement that standard terms would supplement the essential terms found in the Email Confirmations. The real question, in the final analysis, was whether this would be Lonstroff's standard terms or R1's.

Lonstroff's silence in the circumstances amounted to assent

68 Mr Tan conceded that one key obstacle which R1 had to overcome was the fact that Lonstroff

did not sign the second Contract Note.

69 In his written submissions, Mr Boey relied on the phrase "please return a signed copy accepted" in the Contract Note to support Lonstroff's position that a countersignature was a pre-condition to acceptance. While there was some force in this contention, in our judgment, this had to be weighed against the objective evidence. We have outlined the key aspects of this above but there were some further points.

70 In our judgment, once we were satisfied that the Email Confirmation was not expected to be a complete contract without being supplemented by a set of standard terms, the position becomes clear. In relation to the first transaction, Lonstroff accepted delivery and paid for the SVR supplied under the first transaction without protest even after it had sight of the first Contract Note. It was evident in these circumstances that Lonstroff was bound by R1's terms in respect of the first transaction.

71 When it came to the second transaction, at no point did the Respondent ever demur from the applicability of R1's Contract Note. In these circumstances, we were satisfied that, on an objective view, the payment of the invoice for the Second Supply Contract without protest signified unequivocal acceptance that the terms of this Second Supply Contract were as set out in (i) the second Email Confirmation read with (ii) the Contract Note that was sent pursuant to this transaction. For this reason, we found that Lonstroff was bound by the arbitration agreement in favour of Singapore.

72 Mr Boey submitted in oral argument that the conduct of Lonstroff in attempting to impose its own standard terms in the third to fifth transactions was a point for – rather than against – it. According to him, after the first two transactions, Lonstroff realised that R1 was going to contract on its standard terms in every transaction and so it wanted to make clear that it did not – and was not going to – accept R1's standard terms and instead it wanted to contract on its own standard terms.

73 Aside from the fact that this completely contradicted Mr Schenker's averment that Lonstroff only had sight of the second Contract Note in July 2013 and not on 31 August 2012 (see [24] above), there were serious difficulties with this submission.

74 When Lonstroff sent its Purchase Order for the third transaction on 10 October 2012, it was not disputed that R1 simply ignored Lonstroff's attempt to impose its terms. R1 sent its third Email Confirmation containing only the bare commercial terms of the transaction and then followed up (as it did in the previous two transactions) with the Contract Note which contained its own standard terms. At that point, Lonstroff did not come back again with its standard terms or inform R1 that in absence of an agreement on which standard terms should apply, the parties would be deemed to contract on the bare terms of the third Email Confirmation. Instead, Lonstroff kept silent even after it had sight of R1's terms, accepted delivery of the SVR and paid the invoice.

75 Even though this was not a point that was particularly material to our decision, it appeared to us, in light of the industry practice (established by the evidence) that parties contract on the basis of standard terms, the most reasonable inference was this: Lonstroff accepted it would have been bound by the terms imposed by R1 in the first two transactions and that it was seeking to ensure (unsuccessfully as it turned out) that this would not happen in the third to fifth transaction.

76 We would also note that the relevant language in the cover emails sent by R1 attaching the Contract Notes did not go so far as to suggest that the terms of the Contract Notes would *not* be binding unless a countersigned copy was returned. A party may request that a counter-signed copy

of a document be returned but whether this is an essential act to constitute a contract will depend on an objective assessment of all the facts and circumstances, and as is evident from the foregoing analysis, that assessment pointed us to the conclusion that the request that the Contract Notes be counter-signed and returned did not affect the contractual force of the unsigned Contract Notes. Finally, we note that each of the Contract Notes began with the preamble "we confirm having sold to you". The use of past tense suggests that R1 was merely seeking to record the terms on which it thought it was dealing with Lonstroff.

Conclusion

77 For these reasons, we allowed the appeal and granted R1 International Pte Ltd the anti-suit injunction sought. We further ordered that R1 International Pte Ltd should be entitled to its costs on appeal and below. Those costs were fixed at $40,000 (inclusive of disbursements). Finally, we ordered that the usual consequential orders would apply.