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Terms of Trade Incorporated by Reference: A Click Away or a Click Too Far?

Case update on *Open Country Dairy Limited v Able Food Sdn Bhd*¹

Terms incorporated by reference

Before we proceed to discuss the case law in question, it is vital to define what terms incorporated by reference means. Terms incorporated by reference simply means that parties to a contract make reference to a document without the need of having to produce the whole of that document in order for it to form part of the documentation which together form the contract between the parties. This document is essential and makes liabilities and obligations of the parties but is often overlooked.

Background

The plaintiff, a company incorporated in Malaysia, entered into an agreement with the defendant, a company incorporated in New Zealand, to purchase instant whole milk powder (**IWMP**) for reselling as consumable instant whole milk powder via contracts that were entered into between November 2016 and September 2017.

The plaintiff filed an action alleging that the milk powder was not of merchantable quality and served the Notice of Writ on the defendant in New Zealand, having obtained leave to serve under O 11 r 1(1) and r 4 of the Rules of Court 2012.

The defendant filed an application, among others, to challenge the jurisdiction of the courts in Malaysia on the ground that the “Terms of Trade” were incorporated by reference in each of the sales contracts, wherein the parties had agreed that the forum for any dispute is in New Zealand.²

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Court of Appeal Civil Appeal No W-02(IM)(NCC)-1793-11/2020
Clauses 19.1 and 19.2 of the Terms of Trade read with the First Schedule of the Reciprocal Enforcement of Judgments Act 1658 (Revised 1972)

First instance

On 9 November 2020, the High Court dismissed Enclosure 19³ and held that the Malaysian court has jurisdiction⁴ as the dispute is most closely connected to it and is the most appropriate forum to hear the dispute as to meet the ends of justice.

With regard to the defendant's contention that the foreign jurisdiction formed part of the contract between the parties as per the Terms of Trade, the High Court held that there was no consensus on the Terms of Trade as the "modified" terms were not attached to the sales contract and therefore, not applicable. The defendant then lodged an appeal to the Court of Appeal.

Before the Court of Appeal

The main consideration by the Court of Appeal was ultimately whether the parties had entered into the contracts for the sale/purchase of the IWMP on the basis of the Terms of Trade which was incorporated by reference.

In doing so, the court considered the established principles for terms incorporated by reference to be validly incorporated which are as follows:

- (i) For a term to be incorporated into a contract, notice of that term must be given either before or at the time when the contract was formed.⁵
- (ii) The representation as to terms to be incorporated should be found in a document that one would expect to find terms to be printed thereon.⁶
- (iii) If a party signed a contractual document, then it is automatically considered to be binding, even if the party had not read the terms.⁷
- (iv) For clauses to be considered incorporated, reasonable steps must be taken by the party who inserted the term to bring it to the attention of the other party.⁸

Applying the principles above and dismissing the respondent's arguments, the Court of Appeal allowed the appeal and made the following findings:

- (i) The Terms of Trade are found in the web link and they formed part of the contracts for the purchase of IWMP. The Terms of Trade are binding upon the parties.
- (ii) Notice of the Terms of Trade referred in the sales

³ *Able Food Sdn Bhd v. Open Country Dairy Ltd* [2021] 4 CLJ 614; [2021] 2 AMR 246; [2020] AMEJ 1879; [2021] 9 MLJ 723 (HC)
⁴ Section 23(1)(a) and (c) of the Courts of Judicature Act 1964 and paragraphs (F) and/or (G) under O 11 r 1(1) of the Rules of Court 2012
⁵ *Olley v Marlborough Court Hotel* [1949] 1 KB 532 CA
⁶ *Chapelton v Barry Urban District Council* [1940] 1 KB 532 CA
⁷ *L'Estrange v F Graucob Ltd* [1934] 2 KB 394
⁸ *Parker v South Eastern Railway Company* [1877] 2 CPD 416

contracts was given at the time when the contract was formed.

- (iii) Clause 19.2 of the Terms of Trade dealt with the express choice of jurisdiction being the courts of New Zealand. The Malaysian court is obliged to give effect to this clause since there are no exceptional circumstances to justify the contrary.⁹
- (iv) Terms of Trade which were duly incorporated by reference, will apply, regardless of whether the respondent had accessed them via the web link provided.¹⁰
- (v) The appellant was under no duty or obligation to furnish the respondent with a copy of the Terms of Trade as the Terms of Trade were, as the appellant put it, just a “click away”. The burden was on the respondent to look up the Terms of Trade via the web link.
- (vi) The endorsement with the word “modified” did not appear in the final sales contract dated 8 September 2017.
- (vii) There was no ambiguity whatsoever as to where the Terms of Trade were located.
- (viii) The appellant had taken reasonable steps to bring the Terms of Trade to the respondent’s attention and incorporating it in the sales contracts.

The Court of Appeal did not accept the reasoning of the High Court that there was no consensus on the Terms of Trade as the “modified” terms were not attached to the sales contract and therefore were not applicable.

Watch out!

It is essential that the party who is receiving the contractual document read not only the terms and conditions appearing in the contractual document that are provided, but also the terms and conditions which appear in the extrinsic document which are incorporated by reference. Based on the earlier Court of Appeal case of *Ajwa*¹¹ and this case, it is clear that terms of trade, which is duly incorporated by reference, will apply, regardless of whether the party who accepts the contract had accessed them. Therefore, before signing the contract, be sure to understand all the terms incorporated by reference.

It is also good practice for the maker of the agreement to prepare a checklist for incorporation based on the established principles discussed above. When the maker is intending to incorporate by reference the wording used must be absolutely clear that the

⁹ *World Triathlon Corporation v SRS Sports Centre Sdn Bhd* [2019] 4 MLJ 394; [2018] 6 AMR 122; [2018] AMEJ 0843; [2019] 1 CLJ 381 (CA)
¹⁰ *Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395; [2011] MLJU 1537 CA
¹¹ *Ibid*

parties intend to incorporate a specific document and the specific document is described accurately. A good rule of thumb is to expressly identify the purpose for which documents are referenced.

Points to ponder

For completeness, the Court of Appeal referred to other terms in the Terms of Trade, in particular Clause 19.8 which gave the defendant the absolute right to amend the terms from time to time. Since the Court of Appeal found that the parties were bound by the Terms of Trade incorporated by reference, then the issue was whether the plaintiff was obliged to be bound by Clause 19.8.

The question then arises as to the validity of a contract where one party is given an absolute right and/or discretion to amend once the terms are crystallised in writing by parties. Would the Court of Appeal have arrived at the same conclusion if the defendant was seeking to rely upon Clause 19.8?

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