# China Coal Solution (Singapore) Pte Ltd
# v
# Avra Commodities Pte Ltd

**[2020] SGCA 81**

Court of Appeal — Civil Appeal No 83 of 2019
Judith Prakash JA, Chao Hick Tin SJ and Woo Bih Li J
2 July 2020

Contract — Formation

20 August 2020 Judgment reserved.

**Judith Prakash JA (delivering the judgment of the court):**

1 In proceedings below, the High Court judge ("the Judge") held that the plaintiff ("Avra") and the defendant ("China Coal") had entered into a contract for the sale and purchase of coal on the basis of four e-mails exchanged in March 2017 ("the First Four E-mails"). The parties had intended to create legal relations on those e-mails alone, and the contractual terms were sufficiently certain and complete. In his grounds of decision ("GD"), the Judge found China Coal liable for about US$1.6m in damages and interest. China Coal appealed only in respect of the Judge's decision on liability.

2 We reserved judgment after hearing the parties and now deliver our decision. The point at issue in this appeal is one that courts have been asked to decide over and over again and that is whether a binding contract has come into

existence between the feuding parties. The decisions sometimes go one way and sometimes the other and the main explanation for differing outcomes in what seem to be the same factual situations is that in fact they are not the same once considered in sufficient detail. Thus, to determine any of these cases the utmost attention has to be paid to the facts and we therefore set them out below.

## The factual background

3 China Coal and Avra are Singapore companies involved in trading commodities. They started transacting with each other in 2015. The present dispute arises out of attempts to enter into one such transaction during the months of March and April 2017, involving three shipments of Indonesian steam coal ("the Cargo") which Avra asserted China Coal had agreed to buy from it.

### *The alleged contract for the Cargo*

4 In the exchanges recounted below, China Coal was represented by its deputy purchasing manager, Mr Wei Pengfei ("Mr Wei"), who is also known as "Richard". Avra was represented mainly by its coal marketer, Mr Zhou Jungang ("Mr Zhou", also known as "Gary"), and its director, Mr Benjamin William Burgess ("Mr Burgess").

5 On 29 March 2017, Avra and China Coal exchanged the First Four E-mails, which are reproduced in full in the GD at [9]–[13]. The exchange commenced in the morning at around 11.00am with an e-mail from Avra to China Coal offering to sell the latter about 185,000mt of Indonesian steam coal. China Coal responded at about 2.00pm with a counter-offer which included a revised price. In its reply at about 2.20pm, Avra accepted the price offered for

gearless vessels but put in a counter-offer regarding the price for geared vessels. At 4.14pm, China Coal sent the last of this series of e-mails stating "Confirm your good offer as below". Essentially, by the First Four E-mails, the parties agreed on the quantity and quality of cargo, price, laycan and type of vessel to be deployed. The first of these e-mails also indicated that in respect of sampling or analysis, an "Independent Surveyor [was] to be mutually agreed". It was the First Four E-mails that grounded the Judge's finding that there was a concluded contract for the sale of the coal. Mr Zhou testified that there were also telephone discussions between himself and Mr Wei on 29 March 2017 that touched on price, though he could not recall most of the other contents of the discussions.

6 Later on the evening of 29 March 2017, some four hours after the last of the First Four E-mails was sent out, Avra sent China Coal a draft contract entitled "FOB Coal Sale Agreement" containing its standard terms ("the Draft Contract") for China Coal's "review/confirmation". The Draft Contract contained terms reflecting the matters agreed on in the First Four E-mails, as well as other terms such as nomination of vessels, loading terms and allocation of risk. Relevant to this dispute are cll 7 and 8 ("the surveyor clauses") as well as cl 26 (an entire agreement clause with both "subject-to-signature" and "Buyer's nomination" provisos):

> 7. QUANTITY DETERMINATION
>
> The quantity of loaded Coal will be determined by means of a draught survey (the "Draught Suvey") at the loading port conducted by PT IOL Indonesia or PT Geoservices or PT Sucofindo ("Independent Surveyor or Laboratory") as appointed by the Seller [*ie*, Avra]. The surveyor shall issue a certificate of weight …
>
> 8. QUALITY DETERMINATION
>
> The quality of the loaded coal shall be determined according to ISO standards by sampling and analysis performed at loading

> by PT IOL Indonesia or PT Geoservices or PT Sucofindo as the Independent Surveyor as appointed by the Seller.
>
> …
>
> 26. ENTIRE AGREEMENT
>
> This Agreement *contains the entire agreement* between the Buyer [*ie*, China Coal] and the Seller with respect to the subject matter herein and supersedes all previous writings, understandings, negotiations, representations or agreements with respect thereto, except where provided otherwise.
>
> *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.
>
> 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 in original omitted, emphasis added in italics]

7 On 6 April 2017, China Coal replied to propose amendments to the Draft Contract. It did *not* revisit the matters agreed on in the First Four E-mails, the surveyor clauses, or the entire agreement clause in cl 26. Instead, China Coal proposed amendments to clauses dealing with the minimum specifications for the vessels China Coal was to nominate, demurrage, loading terms, *force majeure*, limitation of liability, payment conditions, and remedies. Avra rejected all of China Coal's proposed amendments, save for an amendment to cl 10.2, reiterating that the other clauses were either "non-negotiable terms from [the] shipper" or "standard terms as accepted in business confirmation and previous contracts". This exchange concluded with Avra executing the final draft of the Draft Contract on 18 April 2017 and sending it to China Coal asking the latter to execute the final draft and to return a scanned copy to Avra.

8 China Coal did not execute the final draft despite a reminder sent by Avra on 2 May 2017 and a "without prejudice" e-mail on 3 May 2017 seeking that China Coal confirm that it would perform its obligation to purchase the Cargo. This e-mail went on to state that the signing of the final draft was a mere formality and that a binding agreement had come into existence between the parties. On 4 May 2017, China Coal e-mailed Avra as follows:

> For the three cargoes, as the results of market downward, domestic demand of thermal coal is very weak, domestic price and internal price of thermal coal are both going down dramatically, therefore, we hope to carry out only one cargo of 55000t, and cancel other two cargoes.
>
> Additionally, we have dealt down a NAR3400 Indonesian cargo which is 21.00 USD/t, 45000t total amount in September 2015. However, you have not finally carried it out until now. We hope you can provide feasible solutions for this remaining issue.
>
> We have good and long-term foundation of cooperation with [Avra]. And we hope you can understand our difficulty and support the business. Thank you.

9 Parties met on 14 May 2017 to attempt to settle their differences but could not agree. Avra then sent a lawyers' letter to China Coal, reiterating the point made in its "without prejudice" e-mail that China Coal's execution of the final draft was only a formality that did not affect the conclusion of the contract. In a letter dated 19 May 2017, China Coal indicated its position that it did not breach any contract because no contract came into force by virtue of cl 26. There was a cryptic reference to "We didn't sent [*sic*] you our signed copy or nominated a performing vessel, so this Contract is not come into force … all these situations we have already noticed you through telephone in April and on the conference made on 4th May …", but counsel for both sides confirmed at the hearing before us that no evidence was led regarding the contents of the phone calls or conference. We therefore say no more about this.

10 On 29 May 2017, Avra's lawyers wrote to China Coal purporting to formally terminate the contract on the basis of the latter's "material breaches" or "anticipatory repudiatory and/or repudiatory breach" of contract. It is not disputed that China Coal never sent any vessel nomination to Avra or procured any letter of credit. On 7 August 2017, Avra filed the suit against China Coal claiming damages for breach of contract which led to the present appeal.

11 It is at this point relevant to introduce facts relating to previous dealings between the parties as they were relied on, mainly by China Coal, but also to an extent by Avra, to demonstrate what the parties' understanding and intentions were when they were dealing with each other in March and April 2017.

***Previous course of dealing***

12 The parties had transacted with each other on three previous occasions, making a total of four transactions with the inclusion of the one that is at issue in this appeal: GD at [35]–[39]. The previous transactions were as follows:

(a) On 7 September 2015, when Avra agreed to sell China Coal a cargo of 45,000mt of coal pursuant to an exchange of e-mails.

(b) On 19 July 2016, when Avra sold China Coal a cargo of 55,000mt of coal under a formal contract.

(c) On 15 March 2017, when Avra sold China Coal a cargo of 55,000mt of coal under a formal contract.

13 All three dealings were similar to that giving rise to the present dispute, in terms of how they originated and developed:

(a) Avra would e-mail China Coal to propose key terms for the sale, including the quantity of coal, the type of vessel, the laycan, the loading port, the loading rate, the quality of coal, the price, a price adjustment formula, the time of payment and the demurrage. Avra's proposal would not nominate a surveyor but instead indicate expressly that the surveyor was to be agreed.

(b) China Coal would respond with a counter-proposal on certain terms.

(c) The parties would reach agreement in their "business confirmation emails", similar in nature and function to the First Four E-mails.

(d) Avra would e-mail to China Coal a draft contract in its own standard form for comment and approval, incorporating not only the terms agreed in the preceding e-mail exchange but also other terms which had not been discussed or agreed.

14 Avra and China Coal agree that the 2016 and 2017 dealings gave rise to concluded contracts, but disagree over the status of the 2015 dealing. In the 2015 dealing, the parties' positions were reversed – it was Avra who failed to execute the draft formal contract and China Coal who insisted that the parties had nevertheless entered into a concluded contract. Avra informed China Coal that it was unable to meet the agreed laycan due to its supplier's difficulties, and proposed a new laycan which would delay delivery by 15 days. China Coal did not accept the new laycan, replying instead that Avra's delay had caused China Coal to breach its own delivery obligations in an onward sale and that its legal team would "follow [up on] the issue" with Avra soon. But China Coal did not

follow up with any legal action against Avra on the 2015 dealing: GD at [35] and [38].

**Decision below**

15 In the High Court, the main issue was whether a binding contract had been concluded. The Judge found in favour of Avra for reasons we recount below.

16 Avra argued that the First Four E-mails gave rise to a concluded contract. First, parties intended to create legal relations on the basis of the First Four E-mails alone. Avra made an offer to China Coal by the first e-mail. China Coal accepted the offer as the same was modified by the changes agreed to in the second and third e-mails, when Mr Wei "confirm[ed] [Avra's] good offer as below" in the fourth e-mail. This was supported by the parties' dealings in 2015, in which Avra allegedly never sought to argue that the parties had no intention to create legal relations. Second, although the identity of the surveyor was a material term which the parties left "to be mutually agreed", the contract was not unenforceable for uncertainty. Parties did subsequently reach agreement on the surveyor as reflected in the Draft Contract's surveyor clauses. The surveyor's identity was never a contentious point in any of the dealings between the parties.

17 China Coal argued that the First Four E-mails did not give rise to a contract. First, parties did not intend to create legal relations until they executed a formal contract recording the terms of their agreement in writing. The previous course of dealings showed that parties did not intend to create legal relations until they executed a formal contract recording the terms of their agreement in writing. Avra's failure to perform in 2015 was explicable only on the basis that

it did not intend the e-mails in 2015 to create legal relations. Even if the First Four E-mails gave rise to a concluded contract, an estoppel by convention arose from the parties' previous course of dealing (of needing a formal contract to be executed) which precluded Avra from asserting that the e-mails in themselves gave rise to a concluded contract. Second, the First Four E-mails contained no agreement on the surveyor's identity, rendering the agreement uncertain and incomplete.

18 The Judge relied on four objective indicators to conclude that the First Four E-mails constituted a binding contract, even if further terms remained to be agreed and even if a formal contract was never executed: GD at [60]–[74].

(a) The parties' express use of the language of offer and acceptance in the First Four E-mails was a "good objective indication that the parties saw themselves as engaged in a process intended to produce a consensus *ad idem* in order to conclude a commercial bargain between them", though this was not determinative.

(b) All of the terms agreed in the offer and acceptance set out in the First Four E-mails were never renegotiated, even after their incorporation into the Draft Contract. That the parties continued to negotiate the other details of the Draft Contract was no bar to finding that they intended objectively to be bound by the agreement which they reached on 29 March 2017.

(c) The final draft of the contract that Avra executed and sent to China Coal on 18 April 2017 was not dated 18 April 2017 but 29 March 2017. This showed that the parties saw their conduct on 29 March 2017 as conduct intended to create legal relations.

(d) China Coal's reason for non-performance was telling. Mr Wei did not refer to any alleged lack of intention to create legal relations and "[did] not adopt the position of a party entitled to disregard the offer and acceptance recorded in the [First Four E-mails]. He adopt[ed] instead the position of a supplicant, hoping to be permitted to resile from a commitment": GD at [71]. The Judge rejected China Coal's explanation for why it sought to take only one out of the three cargoes (which was that there was allegedly a market rumour about the quality of Avra's cargo and China Coal did not want to embarrass Avra by citing quality issues) as being unsupported by evidence: GD at [72].

19 Next, the Judge held that the parties intended to create legal relations even without the execution of a formal contract.

(a) The subject-to-signature proviso in cl 26 of the Draft Contract was never an aspect of parties' negotiations on 29 March 2017, and came into play only *after* the parties exchanged the First Four E-mails, when Avra sent the draft contract to China Coal in order to initiate the negotiations over those more detailed terms: GD at [75]–[85].

(b) The parties' conduct in relation to the 2015 dealing was ambiguous and capable of bearing many meanings. Given the Judge's finding that it could be objectively ascertained from the contemporaneous documents that the parties intended to create legal relations by the First Four E-mails, he did not have to rule on the true nature of the 2015 dealing: GD at [89].

(c) As for China Coal's argument on estoppel, there was no evidence that parties operated on the basis of a well-established assumption based

on their previous dealings that their intention to create legal relations through e-mails was subject to entry into a formal contract: GD at [90].

20 Finally, the Judge found that the parties' failure to agree on the identity of the surveyor at 29 March 2017 did not affect the parties' intention to create legal relations or render the contract uncertain or incomplete. It was more consistent with the parties' conduct that they intended to be bound by the transaction even though the choice of surveyor remained "to be mutually agreed" – they did not consider the surveyor's identity to be a condition precedent to the First Four E-mails giving rise to a concluded contract. They did not single it out for discussion in the e-mails or subsequent negotiations, and in all three previous dealings the surveyor's identity had never been a source of contention: GD at [95]. In any event, the parties indeed reached agreement on the surveyor, at the earliest on 6 April 2017 when China Coal did not comment on the relevant clauses in its e-mail to Avra (whilst discussing other clauses), and at the latest by 17 April 2017 when both parties were *ad idem* on the terms of the contract: GD at [100].

21 Accordingly, the Judge found that a contract was concluded on the basis of the First Four E-mails. It was not disputed that if a contract was found to exist China Coal would be in breach: GD at [2].

**Parties' cases on appeal**

22 China Coal repeated the arguments it advanced before the Judge, save that it also placed special emphasis on cl 26 of the Draft Contract – this being the entire agreement clause that was part of ***Avra's*** *standard form contract* that Avra had insisted on. Additionally, China Coal sought to rebut the four indicia relied on by the Judge, and to advance the alternative argument that even if the

First Four E-mails amounted to a contract, such contract was varied by the negotiations after 29 March 2017 (that led to the parties agreeing on all the terms of the contract by 17 April 2017) to now encompass the standard terms, including cl 26.

23 Avra defended the Judge's reasoning, in particular that parties intended to be legally bound by the contract formed through the First Four E-mails. Avra relied on the same four indicia, and further contended that the execution of the Draft Contract was only a formality with "additional agreed terms in substitution" for the former contract. Avra submitted that the court should disregard China Coal's variation argument as this was not pleaded and in any event unsupported by the evidence.

**Issues on appeal**

24 The issues are:

(a) whether (and, if so, when) a contract came into existence between China Coal and Avra; and

(b) whether that contract is unenforceable because it is uncertain or incomplete.

25 Both sides agree on the applicable legal principles, such as the need to ascertain the parties' objective intentions. As these are well-established principles, we will set them out only briefly.

26 The inquiry into the formation of a contract is an objective one. The court looks at the parties' objective intentions as disclosed by their correspondence and interactions and in the light of the relevant background

against which the contract has allegedly been made. This includes the industry the parties are in, the character of the documents allegedly containing the contract as well as the course of dealings between the parties. In order to conduct the objective assessment, the whole course of the parties' negotiations, both before and after the alleged date of contracting, must be considered. Finally, even if the parties have reached agreement on all the terms of the proposed contract, they may nevertheless intend that the contract shall not become binding until some further condition like the execution of a formal document has been fulfilled. The foregoing principles are expressed in various authorities including *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 ("*R1 International*"), *Global Asset Capital Inc and another v Aabar Block SARL and others* [2017] 4 WLR 163 and *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 ("*Pagnan*").

## Our decision

### *Intention to create legal relations*

27 At its core, this dispute turns on the characterisation of the First Four E-mails. China Coal claimed these are part of "one single transaction" governed by Avra's standard terms, including the subject-to-signature proviso. Avra's position was that the e-mails "can and do stand on their own" as a contract, though parties intended to execute a *further* contract on Avra's standard form with additional agreed terms which would *replace* the contract already concluded. Whilst in theory such a position is capable of acceptance, we find no evidence in the present case to support the notion that parties intended to enter into one contract first with the prospect of replacing it with a second contract after further negotiations took place. Instead, we accept China Coal's

characterisation and find that the parties did *not* intend to create legal relations on the basis of the First Four E-mails alone.

28 We begin with the wording of cl 26, reproduced again below with numbers ascribed to the paragraphs for ease of reference:

> 26. ENTIRE AGREEMENT
>
> [1] *This Agreement contains the entire agreement* between the Buyer [*ie*, China Coal] and the Seller [*ie,* Avra] with respect to the subject matter herein *and supersedes all previous writings, understandings, negotiations, representations or agreements with respect thereto, except where provided otherwise.*
>
> [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]

29 Clause 26 is not a plain vanilla entire agreement clause, as would have been the case had it only contained paragraph 1. The parties saw fit to provide, by way of paragraphs 2 and 3, for two exclusive situations in which the contract would come into existence (that is, by signature, or by the buyer's nomination of a performing vessel). Since the parties made careful provision for the mode of operation of their contract, the clear wording of cl 26 *in its entirety* should be upheld. In this regard, the present case may be contrasted with *R1 International*.

30 In *R1 International*, the parties entered into five transactions for the sale and purchase of rubber over the course of a year. Each time, the transaction proceeded according to the following steps: (a) parties would negotiate; (b) the seller would send an e-mail confirmation to the buyer with the basic terms agreed upon; (c) the buyer would send a purchase order; and (d) the seller would send a contract note, which in the second to fifth transactions contained an arbitration clause, with the request that the buyer countersign and return a copy. The buyer never countersigned but accepted delivery of the goods and paid without protest. A dispute arose in relation to the second transaction and the seller eventually commenced proceedings in Singapore seeking an anti-suit injunction in favour of arbitration. The buyer objected, alleging that the e-mail confirmations at step (b) above were exhaustive and the arbitration clause in the contract note at step (d) was not incorporated in the contract. Finding in favour of the seller, this court held that while the terms of the e-mail confirmation became binding when they were sent across, the parties had also contemplated that these contained basic terms that would be supplemented by a set of standard terms (*R1 International* at [59]). Significantly, however, the court noted at [76] that:

> … the relevant language in the cover e-mails sent by [the seller] 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 countersigned 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 …

31 As apparent from *R1 International*, whether a subsequent act such as countersigning a copy is essential to constitute a contract depends on all the facts and circumstances. In our judgment, a material fact here is the wording of cl 26, which makes it clear that parties intended to be bound *if and only if* the

formal contract document was *either* signed by both parties, *or* the buyer (*ie*, China Coal) nonetheless nominated a vessel to receive the cargo. As we pointed out to counsel for Avra during the hearing, business transactions can proceed at speed. Parties may choose to include clauses like cl 26 precisely to apply the brakes, by dispelling any notion that they intended for a short form contract (to fill the apparent legal void) that would be superseded by any full-length one eventually entered into.

32 Second, in our judgment, substantial weight should be placed on the fact that cl 26 was contained in *Avra's* standard terms, which *Avra* ***had insisted upon***. It is not disputed that the formal contract was on Avra's standard terms and that all previous transactions included similar formal contracts on Avra's terms (albeit that such contract was not signed in the 2015 dealing). We accept China Coal's submission that on the evidence, the parties were clear in March 2017 that they would enter into a contract, if at all, on Avra's standard terms and that they would be required to sign a formal contract. Notably, in cross-examination, Mr Burgess agreed that "when [Mr Zhou] and [Mr Wei] communicated with each other on 29 March, they were both operating under the common assumption that [Avra] and [China Coal] w[ould] contract on [Avra's] standard term template". Likewise, in Mr Zhou's cross examination, he accepted that the "common understanding between [himself] and [Mr Wei] at that point in time [was] that [China Coal] w[ould] proceed to contract based on [Avra's] standard form template".

33 Even more significantly, Avra staunchly refused to exercise any flexibility in modifying most of these terms despite China Coal's requests to that effect, as the correspondence mentioned at [7] above demonstrates. Having insisted on the terms of the formal contract, it does not lie in Avra's mouth to

now allege that China Coal cannot hold it to cl 26, which was part of the package of terms it initially refused to depart from.

34 Third, we do not set much store by the tone or stance adopted by China Coal in its e-mail of 4 May 2017 (see [8] above). In that e-mail China Coal sought to cancel two cargoes and accept one. Whether one regards China Coal as taking the position of "a supplicant, hoping to be permitted to resile from a commitment", as the Judge did, or as a trading counterparty wishing to maintain a cordial working relationship with Avra, as that e-mail expressly states by affirming the "good and long-term foundation of cooperation", is a question of perspective. We find that the latter characterisation better accords with the evidence on how parties conducted their business and managed their relationship, considering the parties' previous dealing in 2015 (referred to in the 4 May 2017 e-mail). In any event, it is not the subjective view of a party that prevails but the intention of the parties viewed objectively.

35 Fourth, how the parties approached the 2015 dealing is of some assistance. Although the Judge found this to be equivocal and counsel for China Coal conceded that it was not the best of evidence to rely on, we consider that the 2015 dealing, at minimum, sheds light on the parties' general attitude or approach towards their mode of contracting. Avra no doubt did not *expressly* allege that the exchange of e-mails was not binding without the execution of a formal contract, but the fact of the matter is that it *did not perform*. Nor did China Coal take any follow-up legal action. Parties appear to have preferred to let sleeping dogs lie, save for keeping alive the possibility of a *quid pro quo* in future transactions should their positions be reversed. That indeed came to pass with the exchange of the First Four E-mails and the non-execution of the Draft Contract, where it was China Coal who had not signed the Draft Contract and

Avra who was seeking to rely on it. This perspective is evident from China Coal's 4 May 2017 e-mail, where it referenced the 2015 dealing and stated that:

> Additionally, we have dealt down a NAR3400 Indonesian cargo which is 21.00 USD/t, 45000t total amount in September 2015. *However, you have not finally carried it out until now.* ***We hope you can provide feasible solutions for this remaining issue***. [emphasis added in italics and bold italics]

36 While it could be said that China Coal was admitting the binding contractual status of the 2015 dealing (even with the unsigned formal contract) by way of the phrase in italics above, the latter part in bold italics makes clear that the whole purport of the e-mail was to seek "feasible solutions" for resolving the dispute. In this connection, we note that Mr Wei had testified as to the importance he attached to the notion of personal relationships and favours.

37 Also in relation to the 2015 dealing, Avra relied on an e-mail from China Coal dated 22 September 2015, in which Mr Wei wrote that "we cannot accept the new laycan, due to your missing our *agreed and confirmed laycan 10.1-10.10* ***in our contract***, we had to miss the delivery to our client … our legal team will follow the issue soon" [emphasis added]. Mr Wei ended off by saying that "our legal team will follow [*sic*] the issue soon". When asked about the italicised words above, Mr Wei testified as follows:

> Q. I'm focusing on three words there you use in that short sentence. You say "agreed", you say "confirmed", and you say "contract".
>
> A. Yes.
>
> Q. Am I right to say that when you wrote this mail, you held the view that there was a valid and binding contract with Avra?
>
> A. Yes, that was my view.
>
> [emphasis added]

38 We do not find the 22 September 2015 e-mail to be fatal to China Coal's case. It must be recalled that the 2015 dealing was the parties' *very first dealing* with each other. Regardless of whether Mr Wei had subjectively believed, *when he wrote that e-mail*, that the 2015 dealing gave rise to a binding contract, subsequent events and dealings would have disabused him of that notion and made clear that the parties would be held to their bargains only if cl 26 was complied with. In the 2015 dealing, Avra did not perform and China Coal did not eventually follow up with legal action. In all subsequent dealings, Avra continued to use the standard form, with the remaining two transactions (before the one leading to the present dispute) proceeding smoothly after the respective formal contracts were executed.

39 For the foregoing reasons, we find that the parties did not intend to create legal relations by their exchange of the First Four E-mails. As the Draft Contract was never signed by China Coal and as China Coal did not nominate any vessel to load any of the shipments, this means that no contract came into existence. The appeal must therefore be allowed.

***Certainty and completeness***

40 For completeness, we address China Coal's argument that there could not have been a concluded contract because of the lack of a surveyor term. China Coal relied on Avra's acceptance, in the proceedings below, that the surveyor clause is an essential term of the contract, based on *Rudhra Minerals Pte Ltd v MRI Trading Pte Ltd (formerly known as CWT Integrated Services Pte Ltd)* [2013] 4 SLR 1023 ("*Rudhra Minerals*").

41 The certainty and completeness requirements are explained in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy

Publishing, 2012) ("*The Law of Contract in Singapore*") at paras 03.145 and 03.166 as follows:

> … before there can be a concluded contract in law, its terms must be certain and the agreement must similarly be complete. A term that is "uncertain" exists but is otherwise incomprehensible. On the other hand, an agreement that is "incomplete" has certain terms that do not (but should) exist and the non-existence of these terms make the agreement incomprehensible. A contract may be unenforceable for uncertainty or incompleteness even though there has otherwise been both offer and acceptance between the parties. …
>
> …
>
> **2. Incomplete agreement**
>
> In some cases, the parties may have agreed on some points but not others. The question for the court then is whether there is nonetheless a complete agreement. The requirement is for substantial or essential agreement. Thus, as the High Court stated in *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd*, an agreement will not be regarded as a binding contract if essential matters, without which the contract is too uncertain or incomplete to be workable, remain to be agreed upon. Conversely put, the parties must reach substantial or essential agreement before a contract can be regarded as concluded. A contract may be regarded as having been formed even though it has not been worked out in meticulous detail. Similarly if a contract calls for further agreement between the parties, the absence of further agreement between the parties will vitiate the contract only if it makes it unworkable or void for uncertainty. It is helpful to refer to the pertinent part of Lloyd LJ's summary of the applicable principles in the English Court of Appeal decision of *Pagnan SpA v Feed Products Ltd*:
>
> > (4) … the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled …
> >
> > (5) If the parties fail to reach agreement on such further terms, the ***existing contract is not invalidated*** unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.
> >
> > (6) … It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether

> important or unimportant. It is the parties who are, in the memorable phrase coined by the judge, 'the masters of their contractual fate'. Of course, the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'.
>
> As the High Court put it in *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd*, whether substantial or essential agreement has been reached is a question of fact to be decided with regard to all the circumstances of the parties' dealings with each other, including in particular the nature of the transaction envisaged by the parties. It is worthwhile to bear in mind Lloyd LJ's reminder in *Pagnan SpA v Feed Products Ltd* that, in deciding whether a matter is essential, it is the intention of the parties, and not the opinion of the court, which is decisive.
>
> [emphasis added in underline and bold italics]

42 This case concerns a situation where the putative contract called for further agreement between the parties, given that the first of the First Four E-mails states: "Sampling / Analysis: Independent Surveyor *to be mutually agreed*. Loading Port Analysis Final and Binding" [emphasis added]. Applying the reasoning in *The Law of Contract in Singapore*, the next question is whether there was agreement on the further term. We agree with the Judge that there was indeed such agreement. Mr Wei for China Coal admitted that as early as 6 April 2017, parties had agreed that Avra would appoint the surveyor from one of PT IOL, Geoservices or Sucofindo. There is thus no need to consider whether the absence of further agreement vitiated the contract.

43 China Coal argued that while parties can subsequently come to an agreement on an essential term so as to complete the contract, "that must mean that the contract can only come into existence on the date when all the essential

terms are agreed". This is inconsistent with proposition (5) of *Pagnan*, cited in *The Law of Contract* above. It is also inconsistent with the analysis in *Rudhra*, where the court considered whether the apparent gap in the contract was filled in *all the circumstances.* In *Rudhra*, the parties' relationship began with what was termed the CoalTrans meetings, and the issue was whether parties intended to enter into a binding agreement at the CoalTrans Meetings or, alternatively, by the acceptance of a Full Corporate Offer (*Rudhra* at [4] and [22]). The court found that although parties intended to create legal relations despite the failure to identify the load port surveyor, the parties never did reach agreement on this point, rendering the contract void for uncertainty and unenforceable. The court looked at the entire course of conduct to arrive at that view: "Looking at the evidence in totality, it is unlikely that the parties agreed at the CoalTrans Meetings *or at any point thereafter* that the default load port surveyor would be PT Carsurin …" (*Rudhra* at [37]) [emphasis added].

44 Hence, the lack of a surveyor term, which was in any case eventually agreed upon, would not have invalidated the contract between Avra and China Coal had such a contract come into existence by way of the First Four E-mails.

**Conclusion**

45 We therefore find that the parties had not entered into a binding contract. We allow the appeal and set aside the orders made below including the costs order. We award costs of the trial and the appeal to the appellant. The parties shall file written submissions on quantum of costs here and below, limited to seven pages, within ten days of the date of this judgment.

| | | |
|---|---|---|
| Judith Prakash | Chao Hick Tin | Woo Bih Li |
| Judge of Appeal | Senior Judge | Judge |

Tan Wee Kong and Poh Ying Ying Joanna
(JLex LLC) for the appellant;
Tan Boon Yong Thomas, Hoon Yi Shyuan and Nurulhuda Atiqah
binte Sawal (Haridass Ho & Partners) for the respondent.