The sound of silence - An analysis of the incorporation of arbitration terms after contract formation

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The Sound of Silence – An Analysis of the Incorporation of Arbitration Terms after Contract Formation (R1 International Pte Ltd v Lonstroff AG [2015] 1 SLR 521)

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R1 International Pte Ltd v Lonstroff AG [2015] 1 SLR 521 (‘R1 International’) is significant for it affirms the position that an arbitration clause may be incorporated into a contract subsequent to its formation if there was a prior understanding to that effect. In its decision, the Court of Appeal overruled the decision of the trial judge and held that an arbitration clause stating that arbitration is to be held in Singapore was incorporated subsequent to the formation of the contract. An analysis of the case is worthwhile, since the court’s view was that the arbitration term was incorporated as a result of one party’s silence. On that note, it is suggested that the court’s decision can be better analysed on the basis of the party’s conduct instead of his silence.

A. Introduction

The incorporation of arbitration clauses is an important issue in the world of arbitration. It determines (1) where arbitration will take place and (2) the scope of matters arising under the arbitration clause.

R1 International was a case which concerned the issue of whether and when standard terms containing arbitration clauses can be incorporated subsequent to contract formation. In that case, the substantive dispute (which was irrelevant to the outcome) concerned rubber delivered under the second out of five contracts (‘the Second Contract’) between R1 International Pte Ltd (‘R1’) and Lonstroff AG (‘Lonstroff’). Due to certain alleged defects, Lonstroff had commenced proceedings against R1 in Switzerland on the basis that R1 had breached the Second Contract by supplying defective rubber. In response, R1 instituted proceedings in Singapore to seek an anti-suit injunction to restrain the Swiss proceedings as it held the opinion that the Second Contract contained an agreement to arbitrate in Singapore (‘the Singapore Arbitration Clause’).

The outcome of the application in Singapore turned on whether the Singapore Arbitration Clause was incorporated as part of the Second Contract even though it was sent by R1 to Lonstroff after the deal had apparently been concluded. If the agreement to arbitrate in Singapore was validly incorporated, the court could grant the anti-suit injunction sought by R1. In its decision, the Court of Appeal (‘CA’) granted the anti-suit injunction and held that (a) that parties had concluded the Second Contract knowing that it would be supplemented by standard terms; and (b) R1’s standard terms containing the Singapore Arbitration Clause were incorporated by Lonstroff’s silence in the face of those clauses amounted to assent.

This case note will seek to examine (a) the circumstances in which the court found that there was such an understanding that terms would follow; and (b) whether acceptance by silence is the most correct analysis on the facts. Consequently, the analysis has significant implications for contracting parties, as arbitration clauses often form part of a set of standard terms on which parties will rely to regulate their dealings with each other and settle their disputes.

B. The facts

R1 was a rubber supplier while Lonstroff was a company which processed natural rubber. The following steps illustrate their method of dealing:

(a) Negotiations were carried out via email or telephone.
The basic terms of sale would be agreed upon and R1 would send an email to Lonstroff setting out those terms. This will be called ‘Email Confirmations’ and they set out the basic terms of the sale such as (a) the specific product; (b) the quantity; (c) the price; and (d) the destination at the time the trade was confirmed. Lonstroff would also send a ‘Purchase Order’ to R1.

Subsequently, R1 would send out a ‘Contract Note’, specifying that the sale would be subject to the International Rubber Association Contract (‘IRAC’) terms. It would request Lonstroff to countersign it and return a copy. Lonstroff never signed the Contract Note and never returned a copy of it to R1.

R1 would then proceed to deliver the rubber and issue an invoice. On its part, Lonstroff would accept delivery of the rubber and make payment pursuant to the invoice.

There were five transactions between the parties and each transaction was negotiated and concluded in largely the same manner. The suit arose out of the Second Contract, where the Contract Note included a rider term specifying that arbitration would be conducted in Singapore. This rider had not been present in the first transaction and the CA noted that Lonstroff did not protest against the terms set out in the Contract Note for the Second Contract.

Three more transactions followed the second. In those transactions, Lonstroff included a statement in the Purchase Orders that their ‘General Terms and Conditions’ would apply and that R1’s terms and conditions would not be recognised. In its Email Confirmations, R1 would ignore Lonstroff’s statement. Instead, it would send out the usual Contract Notes which purported to incorporate the IRAC terms. Nevertheless, Lonstroff would take delivery of the rubber and make payment pursuant to the invoice.

The issue was therefore whether the Singapore Arbitration Clause had been incorporated into the Second Contract. In the High Court, R1 argued that the Singapore Arbitration Clause had been incorporated as part of the Contract via (a) trade custom; and (b) by the parties’ previous course of dealing. Both arguments were rejected by the High Court. In Judith Prakash J’s view, R1 had failed to prove that trade custom existed or that they parties’ previous course of dealing was sufficient to incorporate the IRAC terms.

C. The Court of Appeal proceedings

R1 advanced a very different set of arguments at the CA. Its main contention was that it was typical in commodity transactions for parties to first negotiate key commercial terms with the understanding that a later set of terms would follow. It argued that as Lonstroff was an experienced buyer in the rubber commodities market, it would have expected R1’s standard terms to follow. The CA found that there was indeed such an understanding between R1 and Lonstroff and found that the IRAC terms had been incorporated by the parties’ subsequent course of dealing.

First, the CA affirmed the objective approach in ascertaining whether a contract had been formed – a contextual approach was adopted. This was consistent with its previous decision in International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another where it was held that the contextual approach should be adopted in construing whether an arbitration agreement was incorporated into a contract. The CA made specific reference to (a) the industry in which the parties were in; (b) the character of the document in which the terms in question were contained; and (c) the course of dealings between the parties as part of the relevant context that would have informed its decision.

Second, the CA held the Second Contract came into being when the Email Confirmation was sent from R1 to Lonstroff. The CA observed that it was not uncommon for parties to first agree to a set of essential terms to which the parties would be legally bound even while there may be ongoing discussions regarding the incorporation of other more detailed terms. In deciding which terms had been subsequently incorporated, the CA appeared to be of the view that the ‘strict requirements of offer and acceptance’ were not necessarily appropriate.

Third, the CA found that the parties had contemplated that the Email Confirmations would be supplemented with standard terms. The court reached its conclusion on the basis of the following:
(a) R1’s senior employees had provided evidence that it was the industry’s market practice for parties to only agree on the essential terms of each transaction, with the rest of the terms to be followed up by the operations team and specified subsequently. (12) Lonstroff’s witness did not deny that fact. (13)

(b) Given the size and scope of the sales, it was improbable that the parties would have expected to contract on the bare bones of the essential terms in the Email Confirmations – the Contract Notes which contained the IRAC terms dealt with important issues such as the determination of whether the rubber supplied conformed to international quality standards, the obligation of the seller to supply the rubber with a test certificate, the amicable resolution of claims before resorting to arbitration, how risk should be allocated in the event of frustration and the governing law of the parties’ agreement.

(c) The parties’ conduct showed that both of them contemplated the addition of standard terms supplementing the basic terms already agreed to. R1 had sent over a sales contract with supplementary terms and Lonstroff’s actions in sending over its own set of terms showed a similar understanding. (14)

Fourth, the CA held that the standard terms sent over by R1 were accepted by Lonstroff through its silence. For the first contract, Lonstroff had made payment without protest even after seeing the Contract Note which had referred to the IRAC terms that R1 sought to incorporate. (15) For the Second Contract, the CA found that R1 did not ‘demur’ from the application of R1’s Contract Note and made payment again without protest even after it knew that the Contract Note referred to the IRAC terms and the Singapore Arbitration Clause. (16)

D. Comments

1. Certainty and Completeness – Filling in the Blanks Later

The CA found that the Second Contract had been validly constituted before it was supplemented with detailed terms. This finding is consistent with the High Court’s decision in Norwest Holdings Pte Ltd v Newport Mining Ltd (‘Norwest Holdings’). (17)

Norwest Holdings concerned a substantial but incomplete agreement with mechanics to be supplied later; the plaintiff had attempted to sell shares that it owned in a wholly-owned subsidiary in the course of its liquidation and the defendant had made an offer for the shares. In the defendant’s letter of offer, it was stated that the sale was subject to terms and conditions in the sale and purchase agreement to be negotiated. This letter of offer was duly accepted by the plaintiff. Subsequently, the defendant refused to complete the sale and the plaintiff brought a suit alleging breach of contract. One of the issues that arose was whether a legally binding contract existed between the parties. The High Court found that the contract was validly formed as the parties had reached substantial agreement as to the terms of the contract. It further emphasised that: (18)

[What is required is substantial or essential agreement and not complete agreement. 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 certainty.]

In light of R1 International and Norwest Holdings, it appears that the Singapore courts will not shy away from finding the existence of a binding agreement even if the parties had intended to subject the transaction to further terms to be negotiated at a later date. (19) This would bring Singapore up to speed with recent developments in jurisdictions such as Australia. The Court of Appeal of the New South Wales recently held that an in-principle agreement that was ‘subject to formal deed that will contain further terms not inconsistent’ was binding on the parties. (20) In its view, the conduct of the parties before and after signing the in-principle agreement evinced an intention to be bound by the essential terms that were set out in the in-principle agreement. (21)

Such developments have important implications for parties who conclude ‘in-principle agreements’ – a term often used to indicate that parties have agreed on key terms and that further work had to be done before the agreement takes its final form. An agreement
that is labelled ‘in-principle’ may nevertheless be binding on the parties if the court finds that the ‘parties’ objective intentions as gleaned from their correspondence and conduct in light of the relevant background support such an interpretation. Moving forward, it is important that parties use clear language to document their intentions if they have no wish to be bound by agreements that have not been thoroughly negotiated or where they have not completely agreed on all the terms, especially arbitration clauses.

2. The Relevance of Market Practice with respect to Trade Custom and Finding an Understanding between the Parties that Subsequent Terms are to follow

In its judgment, the CA referred to market practice that supported an understanding between the parties that subsequent standard terms would follow. This analysis should not be confused with incorporation by trade custom, an argument that R1 tried but failed to advance in the High Court.

a. Incorporation by Trade Custom

In the High Court, R1 argued for the incorporation of the Singapore Arbitration Clause on the basis of trade custom. Prakash J rejected this argument on the basis that R1 had failed to prove the trade practice since the only supporting evidence came from its own representatives. It is submitted that the trial judge had rightly rejected this argument.

The standard to prove trade custom is an exacting one. One must be able to show that the course of conduct is (a) certain; (b) notorious; (c) recognised as legally binding on the parties; (d) reasonable; and (e) consistent with the contract's express terms. In Chan Cheng Kim v Wah Tat Bank Ltd, the Privy Council observed that the custom must be so generally known that an outsider who makes reasonable enquiries could not fail to be made aware of it. In light of the scant evidence tendered by R1 to support the existence of a trade custom, the trial judge's rejection of incorporation by trade custom is sensible.

b. Incorporation of Standard Terms subsequent to Contract Formation

In contrast, the argument mounted at the CA was comparatively easier to establish. In the CA, R1 succeeded in its contention that it was market practice for commodity traders to first agree on the core commercial terms before subsequently agreeing on the standard terms that were to govern the rest of the issues. In this instance, the crucial term was the Singapore Arbitration Clause. Market practice used in this context should not be conflated with incorporation by trade custom. Here, the Singapore Arbitration Clause was not incorporated by market practice – market practice was merely used as a factor going towards establishing an understanding between the parties that subsequent incorporation of standard terms was to follow. The use of market practice is also specific to the parties and based on an understanding that operated between themselves as opposed to establishing a trade custom, which would have a far more extensive impact on the rest of the industry. Thus, the CA's decision contrasted with the High Court's decision shows the different ways in which market practice can be utilised – with vastly different results.

It is also interesting to consider if one can ever succeed in arguing that there exists a trade custom with respect to that it is customary for traders to first agree on the essential terms thus forming a contract before incorporating standard terms which would govern the rest of the issues – the CA commented on Tryggingarfelagio Foroyar P/F v CPT Empresas Mantilmes SA M/V 'Athena' and observed that David Steel J accepted that there was, inter alia, an industry practice of contracting on standard terms. It is suggested that in light of the high evidential threshold to establish a trade custom, there should be a distinction between industry practice on the one hand and trade custom on the other – the former would mean that there is a common practice of agreeing on basic terms before incorporating standard terms subsequently but it would fail short of the high evidential threshold which is needed to establish trade custom. Practically, it would be difficult to establish any fixed trade custom by which parties negotiate – parties are free to negotiate
in whatever manner they wish and agree on whatever terms they like. (31) As noted by the English Court of Appeal in Pagnan SpA v Feed Products, negotiations between parties may range from protracted negotiations conducted in writing between lawyers to a series of quick-fire exchanges between fellow professionals who have many previous dealings and with a wide measure of common experience, knowledge, language and understanding between them. (32) In that light, it would be unlikely that any trade custom can be established that basic terms would be agreed upon first with standard terms to follow.

3. Acceptance by Silence vs Acceptance by Conduct

The traditional rule laid down in Felthouse v Bindley is that silence ipso facto is insufficient to amount to acceptance; it is only where one party had undertaken a duty to speak, whether expressly or impliedly, that his silence can amount to acceptance. (33) The circumstances in which silence can amount to acceptance have been classified by the learned authors of Chitty on Contracts to fall within the following categories: (a) an express undertaking; or (b) an implied obligation to speak arising from the course of dealing between the parties. (34) The origins of the duty to speak in the context of offerees accepting offers appears to be premised upon the recipient of an offer either assuming responsibility to speak (as per Re Selectmove) (35) or as the CA commented in R1 International, where the relationship of the parties imposes a duty on one to speak. (36)

In R1 International, it was not the failure to object per se that led to the finding that the IRAC terms were incorporated into the Second Contract. Instead, the CA’s finding was also premised the prior understanding between the parties that (a) the Email Confirmation was to be supplemented by further terms; (37) and (b) Lonstroff’s payment for the rubber without protest even though it had sight of the Contract Note which, inter alia, contained the Singapore Arbitration Clause. It is suggested that a crucial fact which lent credence to the CA’s decision was the fact that Lonstroff had made payment without protest, since silence in that context would unequivocally point towards acceptance of the IRAC terms. It is, however, uncertain if the same outcome would be achieved if Lonstroff had failed to make payment, as it would then be questionable why either an express or implied duty to speak would arise in the sole context of their relationship as commodity traders. Indeed, it is respectfully submitted that the reliance on the holding in Midlink Development Pte Ltd v The Stansfield Group Pte Ltd seems misplaced as that case cited authorities which dealt with the parties’ relationship in the context of a duty to speak when one party is acting under a mistaken belief that there is a binding contract in existence. (38) Correspondingly, if no duty to speak arises, it is submitted that the decision cannot be rationalised on the basis of acceptance by silence.

Given the significance that the CA placed on Lonstroff’s act of making payment without protest, the CA’s decision reveals that the distinction between acceptance by silence as opposed to conduct might be more apparent than real in so far as Lonstroff’s payment without protest can amount to positive conduct. The difficulty with making a clear distinction between the two forms of acceptances can be seen in The Law of Contract in Singapore, which comments that purported silence can amount to acceptance by implied conduct and that conduct can give rise to acceptance. (39) It is suggested that R1 International shows definitively that there is an overlap between the two categories of acceptance – a party might undertake positive actions which enforces his acceptance in addition to his failure to protest and those facts would be sufficient to show that the party has accepted the terms by its conduct.

In Brogden v Metropolitan Railway (‘Brogden’), (40) acceptance was found in circumstances where (a) there was an informal longstanding relationship between the parties for the supply of coal; and (b) the parties did not have a practice of keeping with formalities but yet coal was delivered by the supplier. (41) Similarly in its judgment, the CA referred to Lonstroff’s positive acts of accepting delivery and making payment without protest, which are facts similar to that of Brogden. On that premise, it is suggested that Lonstroff’s acceptance of delivery and payment of the invoice for the order in dispute could very well be sufficient to constitute acceptance by conduct and that would be a better way of making sense of the facts in R1 International.

While mainly to do with the contractual principles of offer and acceptance, the above analysis has ramifications for commodity traders who typically rely on arbitration clauses to resolve any
disputes arising under their contracts. *R1 International* could result in parties unwittingly consenting to the incorporation of standard terms with arbitration clauses due to their failure to protest. The law could therefore benefit from further analysis as to why the silence of one party can result in the incorporation of terms – there has to be a basis for silence being deemed to be acceptance of standard terms containing arbitration clauses. As seen on the facts, this has significant ramifications as to whether arbitration should be conducted in Singapore and whether an anti-suit injunction can be obtained to injunct legal proceedings from being commenced elsewhere. Parties and lawyers should also be alive to the fact that while it is normal in the course of commodity trades that subsequent standard terms might follow, a third possibility is plausible that there are two sets of competing standard terms, neither set applied as parties did not agree to either being incorporated.\(^{(42)}\)

**E. Conclusion**

*R1 International* is a pragmatic decision that recognises the reality of the present commercial world in which commodity trades are typically done on the basis of barebone essential terms first before standard terms containing arbitration clauses would follow.\(^{(43)}\) The question then would be what and whose standard terms follow. On that note, *R1 International* recognised that acceptance of arbitration clauses contained within standard terms could then flow from the silence of one party, although in this article it has been suggested that the analysis is incorrect for the reasons given above. In that light, courts should also be very alive to the possibility of acceptance by conduct as a more rational basis for the incorporation of standard terms subsequently -- as exemplified by *R1 International*, the difference might be more apparent than real and there might exist an overlap between the two forms of acceptances.

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\(^{2}\) *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, at [9].

\(^{3}\) *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, at [59]–[67].

\(^{4}\) *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, at [75].

\(^{5}\) *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, at [23].

\(^{6}\) *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, at [26].

\(^{7}\) *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, at [27] and [32].

\(^{8}\) *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, at [36]–[37].

\(^{9}\) *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, at [41].

\(^{10}\) *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, at [51].

\(^{11}\) *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 at [34].

\(^{12}\) *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, at [55], which referred to *Statoil ASA v Louis Dreyfus Energy Services LP* [2009] 1 All ER (Comm) 1035 at [70].

\(^{13}\) *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, at [60]. The salient terms were (i) the specific product; (ii) the quantity; (iii) the price; and (iv) the destination at the time the trade was confirmed.

\(^{14}\) *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, at [61].

\(^{15}\) *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, at [65]–[67].

\(^{16}\) *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, at [71].

\(^{17}\) *Norwest Holdings Pte Ltd v Newport Mining Ltd* [2010] 3 SLR 966.

\(^{18}\) *Norwest Holdings Pte Ltd v Newport Mining Ltd* [2010] 3 SLR 966, at [28].

\(^{19}\) See Edwin Peel, *The Law of Contract* (Sweet & Maxwell, 13th Ed, 2010) at para 2-017 where the courts acknowledge such a
possibility.

20 Sayed v National Australia Bank Limited [2013] NSWCA 304 at [58].

21 Sayed v National Australia Bank Limited [2013] NSWCA 304 at [58].

22 R1 International Pte Ltd v Lonstroff AG [2015] 1 SLR 521, at [51].

23 But note RTS Flexible Systems v Muller [2010] UKSC 14 in which the UK Supreme Court held that a counterparts clause reserving the formation of contract until each party had executed and exchanged the counterparts had been waived by conduct.

24 R1 International Pte Ltd v Lonstroff AG [2014] 3 SLR 166 at [20].

25 R1 International Pte Ltd v Lonstroff AG [2014] 3 SLR 166, at [24].


28 See Michael Furmston and GJ Tolhurst, Contract Formation: Law and Practice (Oxford University Press, 2010), at para 4.131 where terms may still be incorporated if there is an assumption by the parties that they are to apply.

29 Midlink Development Pte Ltd v The Stansfield Group Pte Ltd [2004] 4 SLR(R) 258, at [52] where VK Rajah JC cited George Spencer Bower and Alexander Kingcome Turner, The Law Relating to Estoppel by Representation (3rd Ed, 1987) at para 59 that 'Where A and B are parties to a negotiation or transaction, and, in the course of the bargaining or dealings between them, A perceives that B is labouring under a mistake as to some matter vital to the contract or transaction, he may come under an obligation to undeceive B, at all events if the circumstances are such that his omission to do so must inevitably foster and perpetuate the delusion. In such cases silence is in effect a representation that the facts are as B mistakenly believes them to be, and A is accordingly estopped from afterwards averring, as against B, any other state of facts.'


42 *Lidl UK GmbH v Hartford Foods Ltd* [2001] EWCA Civ 938; see also Richard Christou, *Drafting Commercial Agreements* (Sweet & Maxwell, 5th Ed, 2013), at p 136.

43 Goh Yihan, ‘R1 International Pte Ltd v Lonstroff AG [2014] SGCA 56: Lessons in Contractual Formation’, *Singapore Law Blog* (5 Dec 2014) (http://www.singaporelawblog.sg/blog/article/62); see also Michael Furmston and GJ Tolhurst, *Contract Formation: Law and Practice* (Oxford University Press, 2010), at para 9.64 comments that ‘Perhaps the fourth category has grown out of a need to give effect to a transaction despite the fact that further terms are still to be negotiated. In many instances the parties do intend or expect such legal obligations to arise, particularly where obligations must be performed under the preliminary agreement. This could be a response to statements made in numerous cases that the preliminary agreement cannot be given effect to if the formal contract may contain further terms as that would suggest the parties are still in negotiation. But such an arrangement has, in many cases, been dealt with under the other categories and the possibility of such an agreement being effective has been recognized in many modern decisions. So long as an agreement is sufficiently certain and complete and does not fall foul of the view courts take of agreements to agree at the time, then it can be enforced if there is an intention to contract.’