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Ever Given and the non-binding contract

*English law recognises informal contracts concluded over email but in the absence of a signed document, when is a contract deemed to be binding if one of the parties denies one was ever agreed? The facts of the well-known grounding of the Ever Given in the Suez Canal on 21 March 2021 have given rise to a dispute where the English High Court considered the question in a salvage context. CJC Senior Associate, **Kaan Polat**, provides an overview.*

Background

The proceedings were commenced by a number of companies that had taken part to varying degrees in the refloating of the *Ever Given* and that were led by SMIT Salvage B.V. ("Salvors"). The defendants were the co-owners of the Vessel ("Owners").

The dispute arose out of a disagreement over whether a salvage contract, negotiated between Owners' legal representatives and the Salvors, was ever concluded.

Whilst a team from SMIT had been mobilised and sent to the Vessel forthwith, the Salvors denied a contract had been agreed and claimed salvage under the terms of the International Convention on Salvage 1989 and/or at common law whilst Owners argued that the Salvors had "*provided technical assistance … under a contract concluded on 26 March 2021 … pursuant to which the parties agreed the scope of, and remuneration for, the technical services*".

The Court was therefore asked to consider as a preliminary issue whether "*a binding contract for salvage services [was] concluded by the parties as alleged [in Owners'] Defence*".

Alleged Contract

Two emails were pertinent enough for the judge to quote in the body of his judgment.

- At 11:35 UTC on 26 March 2021 Owners' representative stated:

"We refer to our telephone conversation subsequent to my previous email and my further conversation with Japan.

As agreed over phone, I am please to confirm as below on behalf of Owners of Ever Given.

Owners agree to the following :

The tugs, dredgers, equipment engaged by SCA and their subsequent salvage claim are separate to the Smit's offer of assistance.

a) SMIT personnel and equipment to be paid on Scopic 2020 rates

b) Any hired personnel and equipment, out of pocket expenses of SMIT to be paid on Scopic 2020 rate + 15% uplift

c) Refloatation Bonus of 35% of Gross invoice value irrespective of the type of assistance rendered.

ci) Refloatation bonus not to be calculated on amounts chargeable for quarantine or isolation waiting period.

cii) Refloatation bonus to SMIT will be applicable if refloatation attempt by SCA on 26 March 2021 is unsuccessful.

We look forward to your confirmation. We can then start ironing out the wreck hire draft agreement so that the same can be signed at the earliest."

- At 11:40 UTC, Salvors, in reply, stated:

" Thank you Captain and confirmed which is very much appreciated. I shall inform our teams accordingly and we shall follow up with the drafting of the contract upon receipt of your/your client's feedback to our draft as sent last night. "

Owners' primary case was that, although exchanges between the parties had started on the morning of the grounding, the messages quoted above had led to the conclusion of a 'Main Terms' agreement that stipulated how the Salvors' remuneration would be calculated. Owners admitted that at that point in time there was no agreement on the scope of the services to be provided by the Salvors nor indeed any obligation on the Salvors to provide any service at all. Owners argued that nothing more was needed for there to be a contract if such was the parties' intent.

If this was not enough for the Court to hold that there was a contract, Owners made the alternative case that there were express or implied terms to the effect that the scope of the services was set out in a proposal sent by Salvors before the 'Main Terms' were agreed (the draft mentioned in the Salvors' response quoted above) and/or that the parties' agreement incorporated the standard Wreckhire 2010 form.

Law

Andrew Baker J helpfully summarised the legal test for whether a contract is concluded. Accordingly, parties entered into a contract only if they communicated with each other so as to make it appear, judged objectively, that they had reached agreement upon terms sufficient in law to constitute a contract and that they intended to be bound by those terms whether or not they agreed any more detailed set of contract terms.

In other words, a binding contract can come into existence while negotiations continue on minor points. However, an intention to be legally bound by the terms already agreed is essential, and the parties had not stated clearly whether their intention was to be bound immediately or only upon agreeing further terms or only upon signing a written contract.

Baker J went on to add that an intention to be bound cannot be found where it is not the only reasonable connotation of the parties' exchanges and conduct, taken as a whole. Exchanges and conduct not consistent only with an intention to be bound are ambiguous, and a contract can only be found in and constructed from unambiguous communication. Moreover, the Court will not 'stop the clock' at the point in time one party says a contract is concluded and will look at the whole of the parties' communications. Nor will the Court strain to impose on parties a binding contract it is not clear they had reached.

Held

The preliminary issue was decided in favour of the Salvors.

The judge took the view that the tenor of the parties' communications was that they had only reached an agreement on how Salvors would be paid for a contract that still under negotiation, enabling them to progress negotiations to the detailed contract terms by which they were willing to be bound.

Owners admitted that they understood Salvors had in mind finalising and signing a contract on Friday 27 March. When Salvors followed up on their draft, Owner's representative said that there was "*nothing*

remarkably major to amend". This was unduly optimistic. Exchanges continued from Friday evening into Saturday when the terms upon which one of the salvage tugs was to be fixed were being discussed, giving the appearance that a contract was close, albeit not yet agreed. The falseness of the optimism became apparent when on Sunday Salvors sent a counteroffer widening the gap between the parties as to the contract terms. The gap was not resolved by the late morning on Monday when at 13:05, Ever Given was refloated leading to the Salvors and tugs being stood down, and finally an email from Salvors sent at 19:39 UTC asserting the absence of any contract and the availability, therefore, of a claim for salvage.

Baker J held that the failure to agree contract terms was therefore never resolved.

Commentary

The case is a good example that in contractual negotiations, it can be difficult to identify if and when the parties have reached the point where a binding contract exists. Where there is a lack of clarity as to the parties' intentions, a Court may well find that there is no contract.

It also shows that negotiations over salvage services will not be given a different treatment by the courts and tribunals simply because of the urgency of the operations. Shipowners favouring bespoke or LOF terms ought to be alive to the need to conclude negotiations without delay.

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