# Court of Appeal accepts frustration in 'Sand Ban' case appeal

## Singapore Court of Appeal overturns High Court decision and rules that 'Sand Ban' by Indonesian authorities frustrated supply contracts (*Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] SGCA 35).

The Court of Appeal's latest decision in one of the 'Sand Ban' cases has reiterated that there must be truly exceptional circumstances for a contract to be frustrated. The Court gave helpful guidance as to what amounts to exceptional circumstances:

- A mere increase in cost *per se* will not result in a frustrating event, although an astronomical increase might.
- Literal impossibility is not required. It is sufficient that the obligation in the contract has become "radically or fundamentally different" from the one agreed to.
- It is of primary importance that the law be applied to the "precise facts" of the case.

On the facts, the Court of Appeal found that even if the supply contracts did not specify a source for the concreting sand used to make the ready-mixed concrete ("**RMC**"), both parties had a common assumption that Indonesian sand would be used. The 'Sand Ban' meant that the supplier could no longer produce and supply RMC and the supply contracts were frustrated.

This decision in favour of the supplier is significant given the long-running saga involving 'Sand Ban' cases and that the Court was prepared to allow frustration on the basis of an unwritten common assumption regarding the source of sand.

**High Court decision**

In our previous Briefing Note from July 2013 we reported on the first instance decision of the High Court. In summary, the High Court rejected Alliance Concrete Singapore Pte Ltd's ("**Alliance**") arguments that the supply contracts for RMC between it and Sato Kogyo (S) Pte Ltd ("**SK**") were frustrated due to the abnormal increase in costs for sand due to the 'Sand Ban'.

In reaching this decision, the High Court found that even after the 'Sand Ban' came into effect, Alliance had access to sand from the Building and Construction Authority of Singapore (the "**BCA**") as well as from other countries and that SK was willing to and did procure sand from the BCA for Alliance.

**Court of Appeal accepts frustration because the parties contemplated the use of Indonesian sand**

The High Court's decision was recently overturned by the Court of Appeal. Having reviewed the facts of the case in detail the Court of Appeal found that:

- the 'Sand Ban' was a "supervening event" and "not within the reasonable control" of either contracting party; and
- this event rendered the performance of Alliance's contractual obligations impossible.

Whilst the Court of Appeal accepted that the source of the sand for the RMC was not a term of the supply contracts it found that both parties contemplated the use of Indonesian sand. The Court based its decision on the following:

- First, the "whole market" knew that Indonesia was the primary source of sand for the production of RMC used in Singapore.

### Key issues

- There must be truly exceptional circumstances for a contract to be frustrated.
- A mere increase in cost *per se* will not result in a frustrating event, although an astronomical increase might.
- Literal impossibility of performing the contract is not required. It is sufficient that the obligation has become "radically or fundamentally different" from the one agreed to.

- Secondly, SK's client preferred Indonesian sand to be used to produce the RMC.
- Thirdly, any change in the source of sand would entail delays in the supply of RMC because tests on the RMC would have to be completed.

**Operative date of frustration**

Having found that the supply contracts had been frustrated the Court of Appeal then considered the operative date of frustration.

Whilst the Indonesian authorities initiated the 'Sand Ban' on 23 January 2007, the Court noted that the authorities allowed a grace period up until 5 February 2007. In light of this, the Court found that the operative date was 6 February 2007 as the 'Sand Ban' was only fully effective from that date. It disregarded the fact that sand was available on the open market on a dwindling basis up until 16 February 2007 as this was a direct consequence of the 'Sand Ban' having full effect from 6 February 2007.

This finding had important implications for SK's argument that it was willing to and did obtain sand for Alliance after the 'Sand Ban' came into effect on 6 February 2007. In effect, this argument became irrelevant as the supply contracts were frustrated before that date with both parties being discharged from their obligations under those contracts.

**Breach of supply contracts prior to frustration**

The Court of Appeal also considered whether there was any breach (repudiatory or otherwise) by Alliance before 6 February 2007 in attempting to negotiate a variation of the supply contracts due to the announcement of the 'Sand Ban'.

Having reviewed the correspondence the Court noted the tension that existed between the parties due to their conflicting commercial aims, i.e. that Alliance was seeking a variation of the supply contracts and an increase of the price for sand whilst SK was seeking to resist this. However, the judge found that there was no obvious evidence that Alliance was trying to breach the contracts and that Alliance was merely "trying its level best" to negotiate a variation in relation to the price.

The Court made clear that it was necessary to read the exchange of correspondence between the parties in the context of the difficult situation that the parties suddenly found themselves in.

**Relief**

In accordance with the Court of Appeal's findings that the supply contracts were frustrated on 6 February 2007, the Court ordered SK to pay for any RMC supplied prior to 6 February 2007 at the rates stipulated in the contracts. For any RMC supplied after that date SK had to pay a reasonable sum to be assessed by the Registrar.

**Conclusion**

The doctrine of frustration is an exception to the norm of sanctity of contract and is only allowed in exceptional cases. In this case the Court of Appeal examined the facts in detail and found that a common assumption of the parties that the sand was to be sourced from Indonesia was sufficient to allow such a departure.

However, whilst it demonstrates that the Singaporean courts take a pragmatic approach and decide each case on its facts it also demonstrates the uncertainty involved in relying on unwritten terms and that it is always prudent for parties to include all material terms in their contract. As such, it will always be prudent for a contractor to specify the source of its materials if it hopes to assert that the contract has been "frustrated" if serious supply chain problems arise.

## Read our other publication

If you would like to receive copies of our other publications on this topic, please email: **singapore.bd@cliffordchance.com**

**Supplier Beware: An abnormal increase in costs will not frustrate a contract** (July 2013)

# Contacts

## Singapore

**Paul Sandosham**
Partner

Clifford Chance Asia

T: +65 6661 2055
E: paul.sandosham
@cliffordchance.com

**Kelvin Teo**
Senior Associate

Clifford Chance Asia

T: +65 6661 2059
E: kelvin.teo
@cliffordchance.com

## Seoul

**Thomas Walsh**
Counsel

Clifford Chance

T: +82 2 6353 8110
E: thomas.walsh
@cliffordchance.com



**Clifford Chance Asia**
Clifford Chance Asia is a Formal Law Alliance between Clifford Chance Pte Ltd and Cavenagh Law LLP.
12 Marina Boulevard, 25th Floor Tower 3,
Marina Bay Financial Centre,
Singapore 018982

SINGAP-1-#209543-v4a

www.cliffordchance.com
www.cavenaghlaw.com.sg

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.