

Shipping & International Trade

Court of Appeal Determines Between Conflicting Set-Off Agreement and Standard Terms and Conditions

Introduction

In light of recent market pressures, the area of trade finance has seen a number of disputes arising from the enforcement of debentures, pledges and assignments pursuant to trade finance facilities. These cases have demonstrated the potential complications involved in trade finance disputes, where multiple parties and contracts are involved in a trade arrangement.

One such case is *Italmatic Tyre & Retreading Equipment (Asia) Pte Ltd v CIMB Bank Berhad* [2021] SGCA 56, where the Singapore Court of Appeal had to tackle these very issues. The lender in this case sought to enforce book debts assigned from the borrower. The Court considered whether the debtor was entitled to raise the defence of set-off in light of conflicting contractual clauses – the borrower and debtor had entered into a set-off agreement, but the borrower's standard terms and conditions required the debtor to make payment without set-off.

The Court held that the standard terms and conditions did not preclude the debtor from exercising its right of set-off under the set-off agreement, but the debtor had failed to exercise this right by notice and confirmation. The Court also affirmed the finding of the trial judge that the letters which were alleged to serve as notice and confirmation were in fact fabrications.

In reaching its decision, the Court followed the recent Singapore Court of Appeal decision of *CIMB Bank Bhd v World Fuel Services (Singapore) Pte Ltd* [2021] SGCA 19 ("**World Fuel Services**"), which involved the same lender and borrower, as well as similar issues including claims under assignment, the resolution of competing contracts, and the right of set-off. For a discussion of that decision and the issues that should be considered by banks and borrowers alike when entering into trade finance agreements, please see our earlier Update on "Hazards in Trade Finance: Court of Appeal Considers Issues of Assignment, Set-Off and Competing Agreements", available [here](#).

Brief Facts

The respondent bank ("**CIMB**"), extended trade financing facilities to the borrower ("**Panoil**") by way of a debenture which provided for CIMB's security interest in Panoil's book debts. Panoil entered into contracts to sell marine fuel to the appellant ("**Italmatic**"), pursuant to which it issued seven invoices.

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The sale confirmations issued in respect of these contracts incorporated Panoil's standard terms and conditions ("**Panoil T&C**"), Clause 8.2 of which obliged Panoil's customers to pay Panoil "without deduction, set-off or counterclaim".

When Panoil went into financial difficulties, CIMB issued a notice of assignment to Italmatic in respect of the debts owed by Italmatic to Panoil under the seven invoices, and brought suit against Italmatic to enforce that debt. However, Italmatic contended that the debt it owed Panoil under the seven invoices had been entirely set-off or cancelled.

For the set-off defence, Italmatic relied on a set-off agreement entered into between Italmatic and Panoil ("**the Set-off Agreement**"), which allowed either party to set-off any "undisputed" debts owed to the other. Italmatic alleged that Italmatic and Panoil had subsequently re-affirmed the Set-off Agreement and agreed to set-off the amounts "owing by each other against the amounts owing to each other" by an exchange of letters ("**Set-off Letters**").

As regards the cancellation defence, Italmatic pleaded that the party to whom it resold the marine fuel purchased from Panoil ("**Eastern Pacific**") had instructed Panoil to bill Eastern Pacific directly, and that Panoil had accepted Eastern Pacific's request by letter ("**the Cancellation Letters**"). Italmatic alleged that it had thus cancelled the seven invoices and notified Panoil accordingly.

Holding of the Court of Appeal

The Court of Appeal rejected both Italmatic's defences of set-off and cancellation, finding that the Set-off Letters and the Cancellation Letters were fabrications.

Set-off

Italmatic contended that the recent decision in *World Fuel Services* was indistinguishable from the present case and that its appeal should therefore succeed. However, while the Court of Appeal followed the reasoning in *World Fuel Services*, it found that Italmatic had failed to prove set-off on the facts.

The Court of Appeal held that Clause 8.2 of the Panoil T&C did not preclude Italmatic from exercising its right to set-off under the Set-off Agreement. The Set-off Agreement was specifically agreed to between the parties while Clause 8.2 was not. Accordingly, as observed in *World Fuel Services*, the Set-off Agreement gave Italmatic a right to set off the amounts it owed Panoil against the amounts owing from Panoil, and this right was not superseded by Clause 8.2.

However, the Court of Appeal found that, on its proper construction, the Set-off Agreement did not contemplate an automatic set-off, merely conferring on both parties the right to effect the set-off which must be exercised by notice and confirmation.

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In determining whether Italmatic had exercised its right of set-off against Panoil in respect of the seven invoices, the Court of Appeal considered the Set-off Letters, but ultimately affirmed the High Court's finding on the facts that the Set-off Letters were fabrications. Therefore, the Court of Appeal agreed set-off defence was not established on the evidence before the High Court.

Cancellation

Italmatic's defence of cancellation relied entirely on the Cancellation Letters. As the Court of Appeal had affirmed the High Court's factual finding that the Cancellation Letters were also fabrications, the cancellation defence failed as well.

Concluding Words

Similar to the case of *World Fuel Services*, the financing bank was faced with the possibility that it would be prevented from enforcing its assigned rights due to a separate set-off agreement between the borrower and the debtor. While CIMB was able to avoid such an outcome in this decision due to the relevant correspondence having been found to be fabrications, the decision highlights the inherent risks faced by financing banks.

Our earlier Update on *World Fuel Services* (available [here](#)) discussed the risk of hidden contractual arrangements forming the backdrop to debts assigned to the bank. Parties wishing to know more in this regard may refer to the Update for practical measures and steps that may be taken to effectively manage such risks.

For further queries, please feel free to contact our team below.

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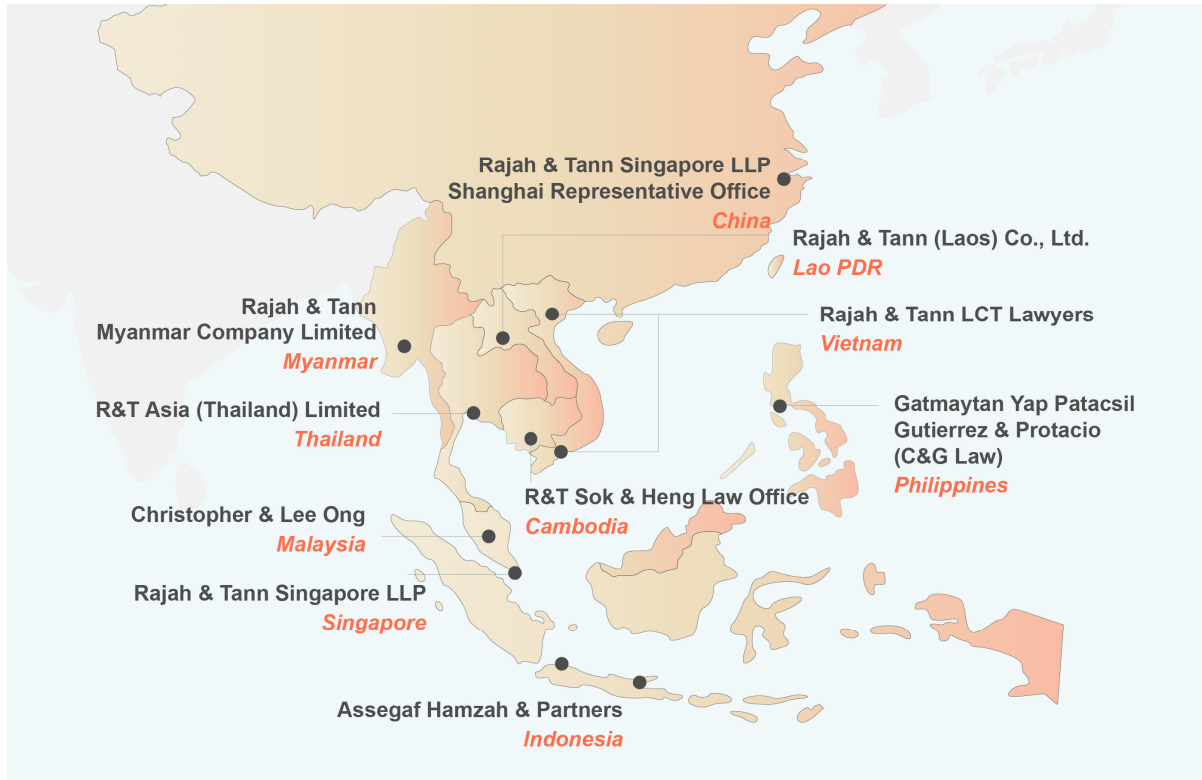
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