

Commercial Litigation

A Free Lunch? Singapore High Court Considers Whether Agent is Entitled to Commission Despite Not Being Effective Cause of Transaction

Introduction

When a principal engages an agent to bring about a transaction, many would reasonably assume that to claim their commission, the agent should have been the effective cause of, or minimally have done some work on, the transaction. After all, there is no such thing as a free lunch – or is there?

In *Turms Advisors APAC Pte Ltd v Steppe Gold Ltd* [2024] SGHC 174 ("**Turms v Steppe**"), the Singapore High Court ("**Court**") found that the contract between the parties did not contain an express term that the agent had to be the effective cause of the transaction ("**effective cause term**"). This raised the following questions – could an effective cause term then be implied into the contract? If the agent was not entitled to its commission, could it claim a reasonable *quantum meruit*, i.e. a reasonable sum in respect of services supplied?

In this Update, we look into the Court's reasoning as to why the agent was not required to be the effective cause of the transaction in the circumstances, as well as its answers to these questions.

The defendant was successfully represented by Deputy Managing Partner Kelvin Poon, SC, Partner Devathas Satianathan, and Associate Timothy James Chong of Rajah & Tann's International Arbitration Practice.

Background

The defendant had engaged the claimant pursuant to a contract ("**Mandate Letter**") as its "exclusive financial adviser in connection with the structuring, arrangement and placement of a US[\$]50-80m debt financing ... (the "**Transaction**")".

Under the Mandate Letter, the claimant was to provide deal advisory and deal execution services for the Transaction. In return, the defendant was to pay the claimant certain fees, including a success fee equal to 2.5% of the deal value in the event of a Transaction pursuant to clause 6. Importantly, parties could amend the terms of the Mandate Letter "only by written agreement signed by the party against whom enforcement of any ... modification ... is sought" ("**NOM clause**").

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The defendant eventually secured a US\$65m debt facility advanced by the Trade and Development Bank of Mongolia ("TDB") ("TDB Facility"). It was undisputed that the claimant had no contact with TDB.

After the defendant advised that it was unable to continue with the claimant's engagement, the claimant commenced proceedings before the High Court to recover, among others, a success fee of US\$1.625m in relation to the TDB Facility ("**Success Fee**").

High Court Decision

It fell to the Court to determine the following issues:

1. Did the Mandate Letter include a term, whether express or implied, that the claimant must be the effective cause of the Transaction to be entitled to the Success Fee?
2. Was the TDB Facility excluded from the scope of the Mandate Letter on the basis of an oral agreement, notwithstanding the NOM clause?
3. If it was excluded, was the claimant entitled to a reasonable *quantum meruit* in relation to its preparation of a term sheet?

We summarise the Court's approach on each issue in turn.

No requirement to be effective cause

On the first question, the Court found in the Claimant's favour, i.e. that there was no requirement for it to be the effective cause of the Transaction.

Clause 6 of the Mandate Letter stated that "success fee [is] payable in cash in the event of a Transaction". The Court contrasted the simplicity of clause 6 with a separate 'tail-gunner' provision in the Mandate Letter, which entitled the claimant to a success fee post-termination only if it had previously contacted and worked with an investor to provide a proposal to the defendant. The failure to include similar requirements in clause 6 meant that the claimant may be entitled to a success fee so long as a Transaction had been concluded *during* its engagement, even if it had not done any work.

This was not an absurd outcome, given the intended structure of the Mandate Letter. The defendant was to engage the claimant to assist with potential investors, including those introduced by the defendant. If the defendant chose not to engage the claimant to close the transaction, the claimant would still be entitled to a success fee.

In the absence of an express effective cause term, the Court then examined whether such a term could be implied into the Mandate Letter. As a matter of Singapore law, a term would only be implied into an agency contract if the parties did not contemplate the issue at all and so left a "gap". As there was an express clause governing the claimant's entitlement to commission, there was no "gap" to address.

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The Court noted that in the absence of vitiating factors, the Court would give effect to a contract voluntarily entered into by the parties, especially for contracts negotiated between two sophisticated commercial parties as in the present case. Although the outcome would entitle the claimant to a free lunch, it was not the Court's role, the Court noted, to imply an effective cause term to prevent that outcome.

However, TDB Facility was excluded from Mandate Letter by parties' agreement

While the Court left open the possibility of the claimant getting a free lunch, it then found that the parties had agreed to exclude the TDB Facility from the scope of the Mandate Letter by way of an oral agreement ("**Oral Agreement**").

The Court also found that the NOM clause did not affect this analysis. An NOM clause merely raised a rebuttable presumption that there would be no variation in the absence of an agreement in writing. To rebut this presumption, "compelling" or "cogent" evidence would be required. On the present facts, there was such "compelling" evidence. The Oral Agreement had been recorded in an email between the parties ("**Email**") and was further supported by the parties' contemporaneous and subsequent behaviour.

Even if the TDB Facility had not been excluded, the Court agreed with the defendant that the claimant would have been estopped from denying that the TDB Facility was excluded. The claimant had stayed silent despite the Email and both parties had also acted on the assumed exclusion of the TDB Facility. It would thus be unjust to allow the claimant to go back on that assumption.

Claimant not entitled to a claim for *quantum meruit*

The Court noted that a claim for *quantum meruit* would be either contractual or restitutionary in nature. A claim in contractual *quantum meruit* arises when the contract is silent on the quantum of remuneration, while a claim in restitutionary *quantum meruit* would be to correct the otherwise unjust enrichment of the other party.

On the facts, both types of claims failed. The Mandate Letter contained an express term governing the claimant's remuneration for additional services, thereby closing the door to a contractual *quantum meruit* claim. In relation to a restitutionary claim, the Court agreed that the defendant had not been enriched by the claimant's services. The term sheet prepared by the claimant was not a complex legal or commercial work product, being a basic template.

As such, the claim for *quantum meruit* failed.

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Conclusion

When entering a principal-agent relationship, parties should address their minds as to the requirements to be satisfied for the agent to be entitled to its commission. Although there are circumstances under which the Singapore courts may imply an effective cause term into the parties' contract, it would be best, particularly for sophisticated parties, to expressly set out the terms they wish to include, in particular the requirements to earning a commission.

If you have any queries on the above, please feel free to contact our team members below who will be happy to assist.

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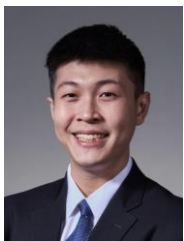
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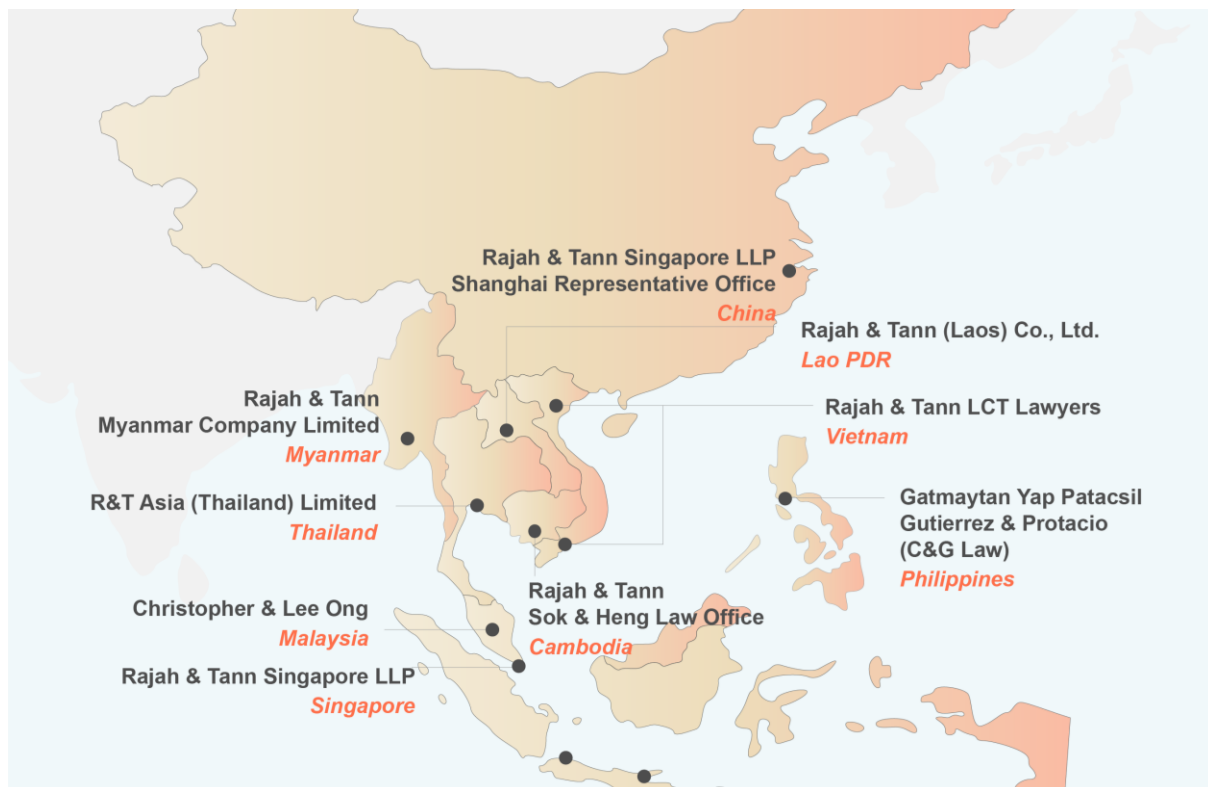
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