

## Negotiating contracts by email

The recent case of *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd and Salgaocar* illustrates the risk of unintentionally accepting binding obligations when negotiating a contract by email.

### The Facts

Golden Ocean Group Ltd (“Golden Ocean”) contacted Mr Salgaocar to inform him of a number of newly built ships they had available for purchase. Golden Ocean began negotiating the terms of a ten year charter with Salgaocar Mining Industries PVT Ltd (“SMI”), a private company owned by Mr Salgaocar’s family. The vessel was to be chartered to what was in effect the chartering arm of SMI, Trustworth Shipping Pte Ltd (“Trustworth”), and guaranteed by SMI.

Negotiations were conducted by email. The only reference to any guarantee in the exchanges was in the description of the charterer, which was Trustworth “*fully guaranteed*” by SMI. The last term of the charter to be agreed concerned the time for paying the deposit. The concluding emails between the shipbrokers for the parties made no reference to SMI’s guarantee.

Shortly before the scheduled delivery of the vessel, Trustworth told Golden Ocean that it was unable to proceed with the charter. Golden Ocean sought to bring proceedings against SMI as guarantor of Trustworth (as well as against Mr Salgaocar). SMI asserted that there was neither an agreement nor a memorandum or note of the agreement between Golden Ocean and Trustworth that was in writing and signed on behalf of SMI as guarantor. As a result, its guarantee was unenforceable because the legal requirements of the Statute of Frauds Act 1677 were not satisfied.

### The Consequences

As SMI (and Mr Salgaocar) were based in India, Golden Ocean had to show that its claim had a reasonable prospect of success before being able to proceed against them. The Court held that it was well arguable that there was an enforceable guarantee between Golden Ocean and SMI.

When Trustworth accepted Golden Ocean’s proposal for the time for paying the deposit, a contract between them was formed. The concluding emails agreeing the final term were the culmination of negotiations conducted in writing and therefore led to an agreement in writing. Although the concluding emails did not refer to either SMI or its guarantee, the Court was able to look back through the earlier emails to discern the terms of the agreement. There was no limit on the number of documents the Court was able to refer to. The negotiations

proceeded on the basis that the charterer was “*Trustworth fully guaranteed by SMI*”. The form of this guarantee remained constant throughout the negotiations without limitation or qualification. There was no indication that SMI would have to approve the agreement between Trustworth and Golden Ocean for the guarantee to apply.

The Court further held that it did not matter that SMI’s agreement to guarantee Trustworth was given before the contract between Trustworth and Golden Ocean was agreed. Whilst negotiations were ongoing, SMI’s guarantee had not become contractual because the obligations of Trustworth that were to be “fully guaranteed” had not been determined. Once the contract between Golden Ocean and Trustworth was agreed, the guarantee was complete and could be relied upon against SMI.

## **The Lesson**

The agreement of business contracts usually follows some form of negotiation between the parties over the key terms. One party makes an offer; the other party then has the option of either accepting this offer or making a counter offer. Once the deal is “done”, as a matter of best practice and in the interest of commercial certainty, a written document containing all of the terms of the agreement will usually be prepared.

Instantaneous and easily accessible, emails are an invaluable tool for conducting negotiations. Often, they will clearly show the sequence of offer, counter offer and acceptance in the “chain” of exchanges. In any negotiation, the parties’ primary concern will be the substance of the agreement. However, thought must also be given to the presentation of the content of each email to avoid unintentionally entering into binding agreements. A party to a potential contract not directly involved in negotiations, such as a guarantor, must take particular care to avoid automatically being bound to any resulting agreements over which they have no input. If a party intends to only assume obligations once it has actually signed a written agreement, they must make this clear in the language they use. Otherwise, any such document may simply serve as a record of a contract that already exists, making it too late to raise any objections.

For more information, please contact

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