Contractual Disputes: The “Last Shot” Dilemma

By Andreas Dracoulis, Fiona Cain, Tautvydas Medziukevicius | March 19, 2026

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The English Commercial Court recently considered certain issues arising out of a contract for the supply of tubing for installation on water injection wells on the Jubilee Oil Field offshore Ghana. In this alert, we consider the following aspects of the decision in *Tullow Ghana Limited v. Vallourec Oil and Gas France S.A.S.*[1]:

1. The circumstances in which a battle of the forms arises and what may amount to the “last shot”.
2. The presumption that parties do not intend to abandon valuable contractual remedies without clear express words.
3. The circumstances in which implied terms under the Sale of Goods Act 1979 (the “**SGA**”) may be excluded.

Background

The case concerned an agreement between the supplier, Vallourec Oil and Gas France S.A.S. (“**Vallourec**”), and the oil field operator, Tullow Ghana Limited (“**Tullow**”), for the supply of 17,500 metres of 7-inch tubing (the “**Contract**”). The tubing was installed in six water injection wells offshore the Republic of Ghana. Shortly after installation, Tullow identified leaks in the tubing in five of the six wells.

Tullow, the claimant in the proceedings, contended that the cause of the leaks were manufacturing defects as well as or, alternatively, mechanical damage to the mill end pins and mill end boxes of the tubing. Therefore, Vallourec was in breach of sections 14(2), 14(2A) and 14(2B) of the SGA, as the tubing was not of satisfactory quality, lacked durability and was not fit for purpose. It claimed to be entitled to US$257 million in damages, even though the contract price was less than US$4.8 million.

Vallourec claimed that the leaks resulted from excessive tensile or compressive stress forces sustained either during the installation or operation of the wells. In relation to the SGA, Vallourec argued its General Conditions of Export Sale (the “**GCs**”) excluded the relevant sections of the SGA. An argument also arose as to whether the GCs were part of the contract between the parties.

Decision

Battle of Forms

A battle of forms situation arises when parties are negotiating the terms of a contract and each party wants to contract subject to its own standard terms. Often, one party will offer to buy goods on its standard terms and the other party will accept the offer on its standard terms. In such a situation, the battle is usually won by the party that fired the “last shot” – i.e., the last party to put forward its standard terms before the contract is concluded and without the other party explicitly rejecting them.

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Tullow argued that the prevailing terms of the Contract were in a purchase order, signed by both parties and incorporating the terms included in a previous contract. That previous contract included Tullow's standard terms, which had been amended by the parties. Vallourec claimed that the Contract incorporated the GCs, as these were enclosed with the acknowledgement letter returning the signed purchase order that Tullow accepted by proceeding with the order.

The judge considered that:

1. It was necessary "*to have regard to the contemporaneous evidence as a whole to determine when the [c]ontract was concluded*".
2. Not every negotiation where parties refer to their own set of standard terms will be regarded as a "battle of forms" situation.
3. Even when there is a "battle of forms," it is still necessary to examine, as a whole, the documents that constitute the "last shot" to determine whether the relevant party intended that communication to operate as a final counteroffer rather than as an acceptance of the other party's offer.

Applying this to the facts in the case, the judge held that this was not a classic "battle of forms" because the parties had previously negotiated and agreed upon bespoke terms, and the dispute was whether the GCs were to be overlaid onto those agreed terms. The GCs were not mentioned in the relevant correspondence and Vallourec's representatives never raised them in the negotiations. Their inclusion with the acknowledgement was merely an administrative exercise. The parties' conduct clearly demonstrated that the signed purchase order was intended to be the final agreement and not subject to any additional terms or "last shot".

Damages and limitations of liability

Tullow sought to recover the costs of: (1) investigating the leaks, (2) monitoring the wells and (3) the remedial works on the wells. Vallourec argued that Clauses 6 (*acceptance*) and 11 (*warranty*) of the Contract precluded Tullow from recovering these types of loss. The court considered that its task was to ascertain the objective meaning of the language that the parties had chosen to express their agreement and to keep in mind the *Gilbert-Ash* principle. This principle presumes that parties do not intend to give up valuable rights and remedies available in law without clear words.

The court held that neither of the clauses had the effect of excluding remedies available to Tullow. In particular, the acceptance clause provided a "code" for the either the acceptance or rejection of the tubing. Tullow's right to reject arose essentially if there was a fault or defect in the tubing. There was nothing in the language of the clause to justify a limitation or exclusion of Tullow's other remedies.

Statutory Implied Terms Under the SGA

Vallourec contended that an exclusion clause contained in the GCs (alternatively, an entire agreement clause in the Contract) had the effect of excluding the statutory implied terms of satisfactory quality, durability and fitness for purpose under the SGA.

The judge accepted that it is possible to exclude the SGA's implied terms by an express exclusion clause. However, Court of Appeal authority from 2010 dictates that the exclusion clause must refer to the SGA's implied terms as "conditions". Reference only to "warranties" or "representations" will generally not be sufficient.

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Here, even if the GCs were part of the Contract (which they were not, see above), there was no reference to "conditions" in the exclusion clause, so the statutory implied terms would not have been excluded. This raises an interesting point, because the modern approach to the interpretation of exclusion clauses has moved on. It is generally accepted that the use of formulaic tests, such as whether a particular word is used in the exclusion clause, is not appropriate. Recognising this tension, the judge therefore considered the issue as if the 2010 Court of Appeal authority was not binding upon him. He concluded that, even then, construing the provision in the round and in the context of the Contract as a whole, the exclusion clause in the GCs would not have been sufficient to exclude the statutory implied terms.

As to the entire agreement clause, which did form part of the Contract, this was a much simpler point. Generally, entire agreement clauses do not affect or prevent the implication of terms which are implied by statute, unless there are clear words to that effect. Here, the relevant clause was set out in the usual way, stating that "*the terms and conditions set out in the [Contract] … represent the entire terms and conditions of the agreement*". It plainly did not operate to exclude the SGA's implied terms.

Comments

The judgment does not create new law, but various practical considerations can be derived from it:

1. The mere inclusion of standard terms in an acceptance or acknowledgement communication is unlikely to constitute a final and effective counteroffer and therefore result in those terms applying (if accepted by the other party). Negotiations with reference to required standard terms, or a requirement for the other party to sign an acknowledgement confirming those terms apply, may support a case for an effective final counteroffer.
2. Clear words must be used to exclude any remedies or types of losses.
3. At present, to exclude implied statutory rights granted by the SGA, parties must agree to exclude "any other conditions" not included in the agreement. References to "warranties" or "representations" will not suffice.
4. An entire agreement clause does not automatically exclude terms implied by statute. Clear words to that effect must be used.

There is an extant application for permission to appeal this decision, which means that some of these issues may come before the court again soon.

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[1] [2025] EWHC 3059 (Comm)

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