Case No: 2013 Folio 1559

Neutral Citation Number: [2014] EWHC 2104 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 01/07/2014

Before :

MR. JUSTICE TEARE

- -

Between :

EMIRATES TRADING AGENCY LLC	**Claimant**
- and -	
PRIME MINERAL EXPORTS PRIVATE LIMITED	**Defendant**

- -
- -

Miss V. Selvaratnam QC (instructed by **Clyde & Co. LLP**) for the **Claimant**
Mr D. Brynmor Thomas (instructed by **Addleshaw Goddard LLP**) for the **Defendant**

Hearing dates: 19 & 20 May 2014

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Judgment

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Mr. Justice Teare :

1. This is an application pursuant to section 67 of the Arbitration Act 1996 for an order that the arbitral tribunal, Dr. Gavan Griffith QC, Sir Gordon Langley and Mr. Ali Al Aidarous, lacks jurisdiction to hear and determine a claim brought by Prime Mineral Exports Private Limited ("PMEPL") against Emirates Trading Agency LLC ("ETA").

2. The applicant, ETA, agreed to purchase iron ore from the respondent, PMEPL, pursuant to the terms of Long Term Contract dated 20 October 2007 (LTC). However, ETA failed to lift all of the iron ore expected to be taken up during the first shipment year and accordingly PMEPL raised a debit note in the sum of US$1,472,800 in respect of liquidated damages pursuant to the terms of the LTC. During the next shipment year ETA failed to lift any iron ore and so, on 1 December 2009, PMEPL served notice of termination of the LTC claiming the sum of US$45,472,800 in respect of liquidated damages pursuant to the terms of the LTC and stated that if the claim were not paid within 14 days they reserved the right to refer the claim to arbitration in accordance with clause 11.2 of the LTC forthwith and without further notice to ETA. The claim was referred to arbitration in June 2010.

3. Clause 11 of the LTC provided as follows:

> 11. Dispute Resolution and Arbitration
>
> 11.1 In case of any dispute or claim arising out of or in connection with or under this LTC including on account of a breaches/defaults mentioned in 9.2, 9.3, Clauses 10.1(d) and/or 10.1(e) above, the Parties shall first seek to resolve the dispute or claim by friendly discussion. Any party may notify the other Party of its desire to enter into consuLTCtion to resolve a dispute or claim. If no solution can be arrived at in between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause and refer the disputes to arbitration.
>
> 11.2 All disputes arsing out of or in connection with this LTC shall be finally resolved by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce ("ICC"). The place of arbitration shall be in London ("UK"). The arbitration shall be conducted in the English language.
>
> 11.3 The arbitration shall be referred to a tribunal of three (3) arbitrators, each Party shall appoint one arbitrator and the third shall be appointed by the ICC. Any award of a majority of the arbitrators shall be final and binding upon the parties thereto, and may be entered for enforcement in any court having jurisdiction.

4. Miss Selvaratnam QC submitted on behalf of ETA that clause 11 required a condition precedent to be satisfied before the arbitrators would have jurisdiction to hear and determine the claim and that such condition precedent was not satisfied with the result that the tribunal lacked jurisdiction. The condition precedent was "a requirement to

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engage in time limited negotiations". That requirement was not fulfilled because there had not been "a continuous period of 4 weeks of consuLTCtions to resolve the claims" which were the subject of the notice of termination.

5. Mr. Thomas submitted in response on behalf of PMEPL that the suggested condition precedent was unenforceable, because it was a mere agreement to negotiate, but that if it were enforceable then it had been satisfied and therefore the arbitrators had jurisdiction.

6. The arbitrators held that clause 11.1 does not contain an enforceable obligation but that if it did it had been complied with and therefore they had jurisdiction. However, it is common ground that the application before the court is a re-hearing of the jurisdiction challenge. I have accordingly heard evidence from the parties as to the course of such discussions as took place between the parties prior to the commencement of the arbitration.

7. I shall summarise those discussions before dealing with the construction and enforceability of clause 11.1.

Discussions between the parties

8. After PMEPL served their first debit note in December 2008 but before PMEPL served their notice of termination and demand for US$45m. in December 2009 there were several meetings between ETA and PMEPL. The first was in January 2009 in Dubai when ETA said they had failed to find buyers for the iron ore and requested more time to find buyers and to make payment of the liquidated damages which were due. Mr. Hussain, the executive director of the cement and raw materials department of ETA, gave evidence, which I accept, that at the meeting he had suggested that the liquidated damages could be "adjusted" (by which I think he meant paid) by shipments in the future. The second meeting was in March 2009 in Goa. ETA sought price concessions on future shipments. The request was discussed but not agreed. The third and fourth meetings were in April 2009 and also in Goa. At these meetings ETA's request was again discussed but no agreement reached. Also discussed was the possibility of shipping ore to other Chinese buyers but no acceptable terms were agreed upon. PMEPL would not accept alternative buyers unless a substantial down payment was made. ETA was unable to accept that condition. The fifth meeting was in June 2009 in Dubai. ETA said that some Chinese buyers had expressed interest in resuming supplies but PMEPL stressed that that was an internal issue between ETA and their buyers and that PMEPL was seeking a concrete proposal from ETA to resolve the past defaults. A further meeting was suggested once a concrete proposal from ETA emerged. By this time ETA had failed to lift any iron ore in 2009 and therefore its liability to pay liquidated damages had increased considerably. ETA wanted a further meeting in Goa to "formulate workable systems for the continuation of the existing contracts". Mr. Hussain accepted that PMEPL had a right to cancel the LTC (though not before 30 November 2009) but he said ETA hoped that PMEPL would appreciate their efforts to bring in new buyers to carry on with the contract. Those efforts had apparently been made for almost a year but with no success.

9. By letter dated 24 November 2009 PMEPL addressed the subject of ETA's non-performance in both the first and second shipment years. PMEPL recounted the history of non-performance and noted that ETA had "failed to evidence its willingness

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and readiness to perform the Contract as per its terms". PMEPL further noted that the second shipment year would end on 30 November 2009 and reserved all their rights with respect to the short lifting.

10. By letter dated 1 December 2009 PMEPL terminated the LTC pursuant to clause 9.3 of the LTC.

11. On 1 and 2 December 2009 a further meeting took place in Goa. It was attended by, amongst others, Mr. Timblo (a shareholder in PMEPL) and Mr. Sawkar (a director of PMEPL who attended on 1 December only) on behalf of PMEPL and, amongst others, Mr. Hussain on behalf of ETA. The meeting had been requested by ETA to discuss the unlifted quantities, new buyers from China and an extended period of shipments. Mr. Hussain gave evidence that he was informed that PMEPL had served a notice of termination after the start of the meeting. Mr. Sawkar gave evidence that when he shook hands with Mr. Hussain he said he had received the letter. Precisely when Mr. Hussain learnt of the letter does not matter. It was sent on the morning of the meeting and Mr. Hussain was aware of it during the morning at the latest.

12. Mr. Hussain said that the letter of termination was a surprise. It was perhaps a disappointment (because ETA had proposed the meeting for the purpose of discussing how to continue their relationship with PMEPL) but I am unable to accept that it was a surprise. Mr. Hussain knew that PMEPL had a right to terminate and in circumstances where ETA had not taken up any ore in 2009 he must have realised that there was a real risk that the right would be exercised. PMEPL's sister company SFI (who had also entered into a contract for the supply of iron ore to ETA) had served notice of termination of their LTC on 7 November 2009.

13. The meetings on 1 and 2 December were the subject of correspondence between the parties shortly afterwards.

14. ETA sent a minute of the meeting to PMEPL on 6 December. The meeting was said to have started at 11 am on 1 December and to have ended at 12.45 on 2 December. The matters discussed were noted over 13 paragraphs. Reference was made to PMEPL's notice of termination and to ways in which the "penalties" for the unlifted quantities could be paid and how the contracts might be continued. It was recorded that PMEPL would wait for ETA's proposal and in the meantime the matter "will be kept pending". ETA was recorded as appreciating the positive attitude shown by PMEPL "in resolving this issue in an amicable manner rather than seeking legal opinion."

15. By letter dated 9 December PMEPL strongly objected to the minute as an attempt to "create a false record". They made clear that PMEPL had met "at ETA's request …..only to explore possibilities by friendly discussions" of ETA paying the claims raised by PMEPL in their termination notice dated 1 December. Objection was taken to certain of the statements attributed to PMEPL and they denied that any agreement or understanding had been reached. There was "a mere airing of various proposals by you, none of which were accepted" by PMEPL. They ended by saying that "our meetings and attempts to amicably resolve the matter have been/are always entirely without prejudice."

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16. Three matters are tolerably clear from this exchange. First, PMEPL was anxious to make clear that it had terminated the LTC and that neither their attendance at the meeting on 1 and 2 December nor anything said at the meeting had been intended to detract from that position. Second, without prejudice to that position they were willing to discuss with ETA how to resolve the issues between the parties resulting from ETA's failure to take up supplies of iron ore under the LTC. Third, some ideas as to how those issues could be resolved were discussed at the meeting on 1 and 2 December.

17. Mr. Hussain said in his witness statement that the purpose of the meeting was to discuss performance, not settlement of a claim for US$45 million. He confirmed in his oral evidence that he wished to find a way of continuing the contract. He hoped to persuade PMEPL to withdraw the termination notice. So far as the liquidated damages for the first and second years were concerned he hoped to secure an agreement that they would be paid off by later shipments. If the termination notice were withdrawn liquidated damages for the subsequent years would "not come into the picture". They would "go away". Mr. Hussain was keen on "mutual cooperation and extending the contract to complete".

18. Although Mr. Hussain gave evidence that if he had known about the demand for US$45 million before the meeting on 1 and 2 December he would have discussed the matter with management and gone there with "the probable solution to continue the contract", he did not leave the meeting when he learnt of the termination and consequent demand but remained with a view to persuading PMEPL to continue the LTC. The discussions about finding a way to continue the LTC were, in reality, discussions aimed at resolving the claims made in PMEPL's letter of termination.

19. Mr. Hussain was anxious in his evidence to say that the claim for US$45 million had not been discussed. However, the claim for that sum was consequential on the termination of the LTC and Mr. Hussain hoped to avoid liability to pay that sum by persuading PMEPL to continue the LTC and so withdraw the letter of termination. Whether the claim for US$45 million was discussed in terms does not matter. The reality was that both parties were aware of it. PMEPL were demanding it and ETA hoped to avoid paying it by persuading PMEPL to continue the LTC. Mr. Hussain said in his written statement that "the general idea was that we would try to find new sub-buyers or persuade the existing sub-buyers to provide new prices reflective of the current market rate so that the contract would work. This was to be mutually agreed after a sub-buyer was found."

20. After the meeting Mr. Hussain continued with his efforts to find new Chinese buyers. He informed PMEPL by telephone that he was doing so and reiterated that ETA wished to continue the LTC.

21. By letter dated 16 January 2010 ETA responded formally to PMEPL's letter of termination. They said the reasons for their failure to perform were "beyond our control" and therefore were not a reason for terminating the LTC. They referred to "ongoing settlement talks" and requested PMEPL to continue with the supply of cargo.

22. By letter dated 11 February 2010 PMEPL replied. They denied that there were grounds beyond ETA's control which entitled ETA to commit breaches of the LTC

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and denied that there were ongoing settlement talks. They said there were without prejudice talks on 1 and 2 December which were not continued after 2 December and "are not ongoing".

23. On 25 February 2010 a meeting took place in Goa between ETA and PMEPL. It lasted at least two hours. Mr. Ahmed Salahuddin (a director of ETA and the son of the managing director of ETA) went to discuss continuation of the LTC with Mr. Timblo. Mr. Salahuddin's written evidence was that he attended the meeting to discuss "the performance issues" of the LTC. He said he emphasised to PMEPL that "ETA wished to continue the agreement and the commercial relationship." Although Mr. Hussain did not attend the meeting he accepted that at that meeting PMEPL demanded payment for the unlifted quantities as a condition of continuing the contract but that Mr. Salahuddin did not agree to that that. Mr. Timblo said that the meeting on 25 February 2010 was directed at "business matters, as to how to continue the relationship forward without going into liquidation." It is likely that the claim for US$45 million was not specifically mentioned (Mr. Timblo accepted that numbers or figures were not mentioned) but what was discussed was a solution which avoided arbitration in respect of such claim. If "a conceptual solution" could have been agreed the "nuts and bolts" would have been taken care of by others. But no solution was found.

24. On 9 March 2010 there was a further meeting between in Goa between Mr. Timblo and Mr. Hussain. It also lasted two to three hours. They discussed continuing the LTC and Mr. Hussain reported on the progress he had made in locating and identifying buyers in China. Mr. Hussain asked Mr. Timblo to "wait, bear with us and we will make good the wrong". Mr. Timblo agreed to wait for a couple of months after which he would file for arbitration.

The construction of clause 11.1

25. Clause 11 is a dispute resolution clause. It provides, first, that the parties shall seek to resolve a claim by friendly discussion. The use of the word "shall" indicates that the obligation is mandatory. Second, it provides that any party may notify the other of its desire to enter into consuLTCtion to resolve a claim. The use of the word "may", in distinction from the word "shall" in the first part of the clause, indicates that this was not a mandatory obligation. Third, the clause provides that if no solution could be achieved "for a continuous period of 4 (four) weeks" then a party may refer the claim to arbitration. Clause 11.2 provided that such arbitration would finally determine the claim.

26. I accept that the first part of clause 11.1 provides that before a party can refer a claim to arbitration there must be friendly discussions to resolve the claim. Such friendly discussions are a condition precedent to the right to refer a claim to arbitration. Miss Selvaratnam submitted that the second part of the clause required the friendly discussions to continue for 4 weeks. I doubt that this is the meaning which could reasonably have been intended by the parties. The scope of a claim may be modest (for example a dispute about the specification of iron ore supplied) and it would be unrealistic to suppose that the parties intended that they must seek to resolve such a claim by friendly discussions lasting 4 continuous weeks. Moreover, the clause does not provide in terms that the friendly discussions must last 4 continuous weeks. It provides that "if no solution" can be found "for a continuous period of 4 (four)

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weeks" then arbitration can be invoked. In my judgment the meaning reasonably to be attributed to those words, in the context of the clause as a whole, is that if, notwithstanding the friendly discussions to resolve the dispute required by the first part of the clause (which may last one day or one week or more depending upon the nature of the dispute and the proposals put forward to resolve it), no solution can be found for a continuous period of 4 weeks, then arbitration can be invoked. The clause therefore provides not only for friendly discussions to resolve a dispute but also for a period of time to elapse before which arbitration may be invoked. Thus the discussions may last for a period of 4 weeks but if no solution is achieved a party may commence arbitration. Or the discussions may last for less than 4 weeks in which case a party must wait for a period of 4 continuous weeks to elapse before he may commence arbitration.

27. There is obvious commercial sense in such a dispute resolution clause. Arbitration can be expensive and time consuming. It is far better if it can be avoided by friendly discussions to resolve a claim. Thus the clause obliges the parties to seek to resolve a claim by friendly discussions before a claim can be referred to arbitration. The reference to a period of 4 continuous weeks ensures both that a defaulting party cannot postpone the commencement of arbitration indefinitely by continuing to discuss the claim and that a claimant who is eager to commence arbitration must have the opportunity to consider such proposals as might emerge from a discussion of his claim for a period of at least 4 continuous weeks before he may commence arbitration.

Enforceability of clause 11.1

28. Mr. Thomas submitted that the obligation to seek to resolve a claim by friendly discussions was a mere agreement to negotiate and was therefore unenforceable. It followed that the condition precedent to arbitration contained in clause 11 was unenforceable and that, notwithstanding the commercial sense underlying the clause, a party was free to commence arbitration without having sought to resolve his claim by friendly discussions. Several authorities were referred to in support of this submission.

29. In *Walford v Miles* [1992] 2 AC 128 the owner of a business undertook to terminate negotiations to sell the business to a third party in exchange for the plaintiff's promise to continue negotiations to buy the business. The House of Lords held that the plaintiff's promise was unenforceable and so the owner was not liable in damages when he broke off negotiations to sell the business to the plaintiff. It was contended that the owner was obliged to continue to negotiate for a reasonable time, namely, that which was necessary to reach a binding agreement but that the owner was entitled to terminate the negotiations if he had a proper reason for doing so, namely, a reason in which he honestly believed. He could behave irrationally so long as he behaved honestly. Lord Ackner held that a bare agreement to negotiate lacked the necessary certainty and is therefore unenforceable. Further a duty to negotiate in good faith is inherently inconsistent with the position of a negotiating party. In addition he said that such an agreement was unworkable in practice; "how is to the court to police such an agreement ?" The House of Lords upheld an earlier decision of the Court of Appeal in *Courtney & Fairbairn Ltd. v Tolaini Brothers* [1975] 1 WLR 297 to the same effect: The decision in *Walford v Miles* has been followed in comparable cases; see, for

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example, *Dhanani v Crasnianski* [2011] EWHC 926 (Comm) and *Shaker v Vistajet* [2012] EWHC 1329 (Comm).

30. Since *Walford v Miles* there have been several cases exploring the extent to which agreements to settle disputes by means of ADR are enforceable. In *Cable & Wireless v IBM* [2002] EWHC 2059 (Comm), [2002] CLC 1319 Colman J. considered an application to stay an action pending the dispute being referred to ADR on the basis of clause 41 of the parties' contract which provided:

> The Parties shall attempt in good faith to resolve any dispute or claim arising out of or relating to this Agreement or any Local Service Agreement promptly through negotiations between the respective senior executives of the Parties who have authority to settle the same pursuant to Clause 40.
>
> If the matter is not resolved through negotiation, the Parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the Parties by the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any Party or Local Party from issuing proceedings.

31. Colman J. held that the obligation to attempt in good faith to settle a dispute through ADR was sufficiently certain to be enforced because the procedure to be followed was that recommended by CEDR. By contrast he would have held that an obligation to attempt in good faith to settle a dispute would have been unenforceable. He said:

> There is an obvious lack of certainty in a mere undertaking to negotiate a contract or settlement…….That is because a court would have insufficient objective criteria to decide whether one or both parties were in compliance or breach of such a provision. No doubt therefore, if in the present case the words of clause 41.2 had simply provided that the parties should "attempt in good faith to resolve the dispute or claim", that would not have been enforceable.

32. In *Holloway v Chancery Mead Limited* [2007] EWHC 2495 (TCC) Ramsey J. had to consider whether a provision in a building contract that the parties shall seek to resolve a dispute through conciliation by the NHBC (clause 24.1) and a further provision that the making of a determination by an NHBC investigator (clause 24.6) were conditions precedent to the commencement of an arbitration. He held that they were not for reasons which it is unnecessary to summarise. He then set out his views, obiter, on a further submission, namely, that if the NHBC Resolution Scheme applied its terms amounted to an agreement to agree and could not give raise to an enforceable obligation or a condition precedent. Having reviewed the authorities concerning agreements to agree and authorities concerning the enforceability of ADR agreements he identified three requirements for such agreements to be enforceable.

> 81…….First, that the process must be sufficiently certain in that there should not be the need for an agreement at any stage

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> before matters can proceed. Secondly, the administrative processes for selecting a party to resolve the dispute and pay that person should also be defined. Thirdly, the process or at least a model of the process should be set out so that the detail of the process is sufficiently certain.

33. In *Sul America v Enesa Engenharis* [2012] 1 Lloyd's Reports 671 the Court of Appeal had to consider whether an undertaking by the parties that, "prior to a reference to arbitration, they will seek to have the Dispute resolved amicably by mediation" was an enforceable obligation. The mediation could be terminated on notice or after the expiry of 90 days from service of a notice initiating meditation. Moore-Bick LJ said that he had no doubt that the parties intended that the clause should be enforceable but that in order for it to be enforceable it must define the parties' rights with sufficient certainty to enable it to be enforced. In circumstances where the clause did not set out a defined mediation process or refer to the services of a specific mediation provider the clause was not apt to create an enforceable obligation to commence or participate in a mediation process.

34. In *Wah v Grant Thornton* [2013] 1 Lloyd's Law Reports 11 Hildyard J. had to consider whether an arbitral tribunal had jurisdiction to determine a partnership dispute in circumstances where (i) a clause in the agreement between the parties provided that any dispute should be referred to a panel of three members of the Board of the partnership and that no party shall commence arbitration until the earlier of such date as the panel determine that it cannot resolve the dispute and the date one month after the dispute has been referred to it and where (ii) the Board's attempt to constitute a panel had been unsuccessful. The learned judge reviewed the relevant authorities and summarised their effect in a passage cautiously entitled "Relevant guidelines emerging". He began by noting at paragraph 56:

> 56. ……the tensions, in the context of provisions for conciliation or mediation of disputes prior to arbitration or court proceedings, between the desire to give effect to what the arties agreed and the difficulty in giving what they have agreed objective and legally controllable substance.

35. He stated, at paragraph 57:

> 57. Agreements to agree and agreements to negotiate in good faith, without more, must be taken to be unenforceable: good faith is too open-ended a concept or criterion to provide a sufficient definition of what such an agreement must as a minimum involve and when it can objectively be determined to be properly concluded. That appears to be so even if the provision for agreement is one of many provisions in an otherwise binding legal contract, with an exception where the provision in question can be construed as a commitment to agree a fair and reasonable price.

36. With regard to agreements to utilise ADR he said, at paragraphs 59-61:

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> 59. The court has been in the past, and will be, astute to consider each case on its own terms. The test is not whether a clause is a valid provision for a recognised process of ADR: it is whether the obligations and/or negative injunctions it imposes are sufficiently clear and certain to be given legal effect.
>
> 60. In the context of a positive obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or bringing proceedings the test is whether the provision prescribes, without the need for further agreement: (a) a sufficiently certain and unequivocal commitment to commence a process; (b) from which may be discerned what steps each party is required to take to put the process in place; and which is (c) sufficiently clearly defined to enable the court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach.
>
> 61. In the context of a negative stipulation or injunction preventing a reference or proceedings until a given event, the question is whether the event is sufficiently defined and its happening objectively ascertainable to enable the court to determine whether and when the event has occurred.

37. Applying those principles to the case before him Hildyard J. held that the obligations in the dispute resolution clause were too nebulous to be given legal effect as an enforceable condition precedent to arbitration.

38. The authorities to which I have referred suggest that in English law as it is presently understood the obligation in clause 11 of the LTC is unenforceable. The obligation to seek to resolve a claim by friendly discussions is no more than an agreement to negotiate with a view to settling the dispute between the parties. Thus in *Itex Shipping v China Ocean Shipping* [1989] 2 Lloyd's Reports 522 Steyn J. observed (following *Courtney & Fairbairn Ltd. v Tolaini Brothers*) that a provision that "any dispute on this agreement will be settled amicably" before it could be arbitrated was not enforceable and in *Paul Smith v H&S International Holding* [1991] 2 Lloyd's Reports 127, where there was an obligation to "strive to settle" disputes "amicably" before they could be arbitrated, it was conceded (again following *Courtney & Fairbairn Ltd. v Tolaini Brothers*) that such a provision could not create an enforceable obligation.

39. Miss Selvaratnam submitted that the provision in the present case barring arbitration until 4 weeks had elapsed made all the difference. That provision made express the circumstances in which a party could withdraw from the discussions and commence arbitration. It avoided the difficulty identified in *Walford v Miles* of having to imply a term as to the period of time during which the parties were obliged to negotiate. It is true that the four week provision avoids that difficulty but there remains the principal reason underlying Lord Ackner's judgment in *Walford v Miles*, namely, that an obligation to negotiate is inherently inconsistent with the position of a negotiating party. "Each party to the negotiations is entitled to pursue his (or her) own interest, so

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long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms." For the same reason an obligation to negotiate is regarded as so uncertain as to render it impossible of performance; the court has no objective criteria to enable it to decide whether a party is in breach or not. Thus it is that, in recent years, following the frequent insertion in commercial contracts of mediation or ADR provisions, judges have stated that mere agreements to negotiate are unenforceable; see, for example, Colman J. in *Cable & Wireless v IBM* and Hildyard J. in *Wah v Grant Thornton.*

40. However, where commercial parties have entered into obligations they reasonably expect the courts to uphold those obligations. The decision in *Walford v Miles* arguably frustrates that expectation. For that reason there has been at least one clear indication (though not in the context of a dispute resolution clause) that the decision in *Walford v Miles* may in appropriate circumstances be distinguished; see *Petromec Inc v Petroleo Basileiro SA Petrobas* [2005] AER 209 paragraph2 120-121 per Longmore LJ who observed that *Walford v Miles* concerned a case where there was no concluded contract at all (since it was "subject to contract") and he contrasted it with a case where the agreement to agree was but one term of an otherwise concluded contract.

Enforceability; the applicant's argument

41. Miss Selvaratnam relied upon Australian authority, Singaporean authority and the approach of ICSID tribunals in an endeavour to persuade me not to follow what appears to be the present settled state of English law on the question whether agreements to negotiate a settlement of a dispute are enforceable or not.

42. In *United Group Rail Services v Rail Corporation New South Wales* (2009) 127 Con LR 202 a contract for the design and build of rolling stock contained a dispute resolution clause which provided that the parties should "meet and undertake genuine and good faith negotiation with a view to resolving the dispute"; failing such resolution the dispute could be arbitrated. The New South Wales Court of Appeal held that the obligation to negotiate was enforceable. Alsopp P. carried out an extensive examination of the English and Australian authorities. He accepted that an agreement to agree was unenforceable but said that it did not follow that an agreement to undertake negotiations in good faith to settle a dispute arising under a contract was unenforceable.

43. With regard to certain of the English authorities Alsopp P said:

> **[64]**……In relation to the *Courtney & Fairbairn* case [1975] 1 All ER 716, [1975] 1 WLR 297, the reasoning of Lord Denning MR equated an agreement to negotiate with an agreement to agree. The latter is, of course, not enforceable: see the *Booker Industries Pty* case (1982) 149 CLR 600 at 604 (Gibbs CJ, Murphy and Wilson JJ), as Kirby P recognised in the *Coal Cliff Collieries* case. It does not follow, however, that an agreement to undertake negotiations in good faith fails for the same reason. An agreement to agree to another agreement may be

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> incomplete if it lacks essential terms of the future bargain. An agreement to negotiate, if viewed as an agreement to behave in a particular way may be uncertain, but is not incomplete. The objection that no court could estimate the damages because no one could tell whether the negotiations 'would be' successful ignores the availability of damages for the loss of a bargained-for valuable commercial opportunity: see *Chaplin v Hicks* [1911] 2 KB 786, [1911-13] All ER Rep 224 and *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 349ff. The relevant question is whether the clause has certain content.
>
> **[65]** Nor, with respect, do I find the views of Lord Ackner in *Walford v Miles* [1992] 1 All ER 453, [1992] 2 AC 128 persuasive. An obligation to undertake discussions about a subject in an honest and genuine attempt to reach an identified result is not incomplete. It may be referable to a standard concerned with conduct assessed by subjective standards, but that does not make the standard or compliance with the standard impossible of assessment. Honesty is such a standard: cf *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 All ER 97, [1995] 2 AC 378 and *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 All ER 377, [2002] 2 AC164. Whether it is capable of assessment depends on whether there is a standard of behaviour that is capable of having legal content. Asserting its uncertainty does not answer the question. The assertion that each party has an unfettered right to have regard to any of its own interests on any basis begs the question as to what constraint the party may have imposed on itself by freely entering into a given contract. If what is required by the voluntarily assumed constraint is that a party negotiate honestly and genuinely with a view to resolution of a dispute with fidelity to the bargain, there is no inherent inconsistency with negotiation, so constrained. To say, as Lord Ackner did, that a party is entitled not to continue with, or withdraw from, negotiations at any time and for any reason assumes that there is no relevant constraint on the negotiation or the manner of its conduct by the bargain that has been freely entered into. Here, the restraint is a requirement to meet and engage in genuine and good faith negotiations. For the reasons expressed below that expression has, in the context of this contract, legal content.

44. With regard to the dispute resolution clause in the contract before him Alsopp P said

> **[70]**…The content and context here is a clearly worded dispute resolution clause of an engineering contract. It is to be anticipated at the time of entry into the contract that disputes and differences that may arise will be anchored to a finite body of rights and obligations capable of ascertainment and resolution by the chosen arbitral process (or, indeed, if the parties chose, by the court). The negotiations (being the course

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of treaty or discussion) with a view to resolving the dispute will be anticipated not to be open-ended about a myriad of commercial interests to be bargained for from a self-interested perspective (as in the *Coal Cliff Collieries* case). Rather, they will be anticipated to involve or comprise a discussion of rights, entitlements and obligations said by the parties to arise from a finite and fixed legal framework about acts or omissions that will be said to have happened or not happened. The aim of the negotiations will be anticipated to be to resolve a dispute about an existing bargain and its performance. Honest and genuine differences of opinion may attend the parties' views of their rights and obligations. Such things as difficulties of proof and uncertainty as to fact or law may perfectly legitimately strike the parties differently. That accepted, honest business people who approach a dispute about an existing contract will often be able to settle it. This requires an honest and genuine attempt to resolve differences by discussion and, if thought to be reasonable and appropriate, by compromise, in the context of showing a faithfulness and fidelity to the existing bargain.

……

[73]…An honest and genuine approach to settling a contractual dispute, giving fidelity to the existing bargain, does constrain a party. The constraint arises from the bargain the parties have willingly entered into. It requires the honest and genuine assessment of rights and obligations and it requires that a party negotiate by reference to such. A party, for instance, may well not be entitled to threaten a future breach of contract in order to bargain for a lower settlement sum than it genuinely recognises as due. That would not, in all likelihood, reflect a fidelity to the bargain. A party would not be entitled to pretend to negotiate, having decided not to settle what is recognised to be a good claim, in order to drive the other party into an expensive arbitration that it believes the other party cannot afford. If a party recognises, without qualification, that a claim or some material part of it is due, fidelity to the bargain may well require its payment. That, however, is only to say that a party should perform what it knows, without qualification, to be its obligations under a contract. Nothing in cl 35.11 prevents a party, not under such a clear appreciation of its position, from vindicating its position by self-interested discussion as long as it is proceeding by reference to an honest and genuine assessment of its rights and obligations. It is not appropriate to multiply examples. It is sufficient to say that the standard required by the notion of genuineness and good faith within a process of otherwise tactical and self-interested behaviour (negotiation) is rooted in the honest and genuine views of the parties about their existing bargain and the controversy that has

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arisen in connection with it within the limits of a clause such as cl 35.1.

45. Alsopp P. stressed that difficulty in proving a breach did not mean that the obligation lacks real content.

> **[74]** With respect to those who assert to the contrary, a promise to negotiate (that is to treat and discuss) genuinely and in good faith with a view to resolving claims to entitlement by reference to a known body of rights and obligations, in a manner that respects the respective contractual rights of the parties, giving due allowance for honest and genuinely held views about those pre-existing rights is not vague, illusory or uncertain. It may be comprised of wide notions difficult to falsify. However, a business person, an arbitrator or a judge may well be able to identify some conduct (if it exists) which departs from the contractual norm that the parties have agreed, even if doubt may attend other conduct. If business people are prepared in the exercise of their commercial judgment to constrain themselves by reference to express words that are broad and general, but which have sensible and ascribable meaning, the task of the court is to give effect to, and not to impede, such solemn express contractual provisions. It may well be that it will be difficult, in any given case, to conclude that a party has not undertaken an honest and genuine attempt to settle a dispute exhibiting a fidelity to the existing bargain. In other cases, however, such a conclusion might be blindingly obvious. Uncertainty of proof, however, does not mean that this is not real obligation with real content.

46. Alsopp P. considered that his approach to the question of enforceability was consistent with public policy:

> **[78]** This is a dispute resolution clause. To require in such a clause this degree of constraint on the positions of the parties reflects developments in dispute resolution generally. The recognition of the important public policy in the interests of the efficient use of public and private resources and the promotion of the private interests of members of the public and the commercial community in the efficient conduct of dispute resolution in litigation, mediation and arbitration in a fair, speedy and cost efficient manner attends all aspects of dispute resolution: cf 'just, quick and cheap resolution of the real issues': Civil Procedure Act 2005 (NSW), s56. Parties are expected to co-operate with each other in the isolation of real issues for litigation and to deal with each other in litigation in court in a manner requiring co-operation, clarity and disclosure: see for example *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd* [2008] NSWCA 243 at [160]-[165] and *Bellevarde Constructions Pty Ltd v CPC Energy Ltd* [2008] NSWCA 228 at [55]-[56]. As part of its procedure, the court

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> can order mediation: see Civil Procedure Act, s 26. Section 27 of that Act states that it is the duty of each party to the proceedings that have been referred to mediation to participate 'in good faith' in the mediation. Costs sanctions can attend this duty: cf *Capolingua v Phylum Pty Ltd* (1991) 5 WAR 137.
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> ……..
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> **[80]** The public policy in promoting efficient dispute resolution, especially commercial dispute resolution, requires that, where possible, real and enforceable content be given to clauses as cll 35.11 and 35.12 to encourage approaches by, and attitudes of, parties conducive to the resolution of disputes without expensive litigation, arbitral or curial.

47. This cogent reasoning can be applied to the present case as follows. The clause in the present case obliged the parties to seek to resolve a dispute by friendly discussions and provided for 4 weeks to expire before arbitration could be commenced. Such an agreement is complete in the sense that no essential term is lacking. Since it is an obligation to seek to resolve a dispute arising under the LTC the discussions would concern the rights and obligations arising from the LTC with a view to reaching a compromise of the dispute which reflects the existing bargain between the parties. There would not be an open-ended discussion concerning each party's commercial interests without regard to the rights and obligations under the LTC. Thus the agreement has sufficient certainty to be enforceable. Whilst it may be difficult in some circumstances to establish a breach of the obligation there will be other circumstances in which a court is likely to be able to identify conduct, if it exists, which departs from the conduct expected of parties who have agreed to seek to resolve contractual disputes by friendly discussions. For example, a party who refused to discuss his claim at all could easily be shown to have breached the obligation to seek to resolve his claim by friendly discussion. Difficulty of proof of breach in some cases does not mean that the clause lacks real content. If a party were to seek damages for breach of the obligation it might be difficult to establish what the outcome of the discussions would have been but in such a case damages could, in appropriate cases be awarded for loss of a chance. Concluding that the obligation was enforceable would be consistent with the public policy of encouraging parties to resolve disputes without the need for expensive arbitration or litigation.

48. Alsopp P's reasoning is undoubtedly attractive and merits close attention. There is, however, with respect, one aspect of it which causes me concern. The scope of the negotiations contemplated by Alsopp P. appears to me to be unrealistically narrow. He states that the negotiations will be "anchored" in the parties' assessment of their rights and obligations under their contract. A party cannot negotiate with reference to its wider commercial interests save where it is proceeding by reference to an honest and genuine assessment of its rights and obligations in which case it may seek to vindicate its position "by self-interested discussion". But amicable resolution of a commercial dispute (whether by the parties themselves or by mediation, that is, discussions led, encouraged or facilitated by a mediator) typically involves consideration, not only of the contractual rights and obligations which parties have assumed, but also of the parties' wider commercial interests reference to which might enable the parties to settle disputes which otherwise might be difficult to settle.

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Indeed, the skill of the mediator is to discover those wider commercial interests reference to which might enable a dispute to be settled. Whereas Alsopp P. envisages compromise resulting from "honest and genuine differences of opinion" as to the parties' rights and obligations or from "difficulties of proof or uncertainty as to fact or law" in reality disputes are settled not only by reference to such matters but also by reference to the parties' appreciation of their own commercial interests "from a self-interested perspective". Indeed in some cases a party may be unable to justify its actions by reference to the underlying contract (as may have been the case with ETA in the present case) and yet that party may still hope to settle the claim against it (as ETA wished to do in the present case). In that context, and having regard to that reality, I do not consider that an agreement to seek to resolve a dispute by discussion or negotiation is apt to exclude consideration of the parties' wider commercial interests. Thus, in my judgment, the friendly discussions required by clause 11 of the LTC were not intended to be limited by "faithfulness and fidelity to the existing bargain" (though that will usually be the starting point of any such discussions) or to exclude consideration of the parties' wider commercial interests. The type of matter which can be legitimately raised in such discussions is therefore unlimited.

49. I therefore have difficulty in accepting Alsopp P.'s view that an agreement to seek to settle a contractual dispute by negotiation requires the parties to be faithful to their existing bargain. Whilst the parties must have expected that fidelity to the existing bargain would or might be an important part of their negotiations I do not consider that they must have expected that other considerations must be excluded from their negotiations.

50. However, where commercial parties have agreed a dispute resolution clause which purports to prevent them from launching into an expensive arbitration without first seeking to resolve their dispute by friendly discussions the courts should seek to give effect to the parties' bargain. Moreover, there is a public interest in giving effect to dispute resolution clauses which require the parties to seek to resolve disputes before engaging in arbitration or litigation.

51. The obligation to seek to resolve disputes by friendly discussions must import an obligation to seek to do so in good faith. In traditional terms such an obligation goes without saying and is necessary to give business efficacy to the contract. In modern terms that is what the contract would be reasonably understood to mean. See *Yam Seng Pte Ltd. v International Trade Corporation Ltd.* [2013] EWHC 111 (QB) at paragraphs 131-154 for a masterly discussion by Leggatt J. of the circumstances in which a duty of good faith may be implied.

52. There is, it seems to me, much to be said for the view that a time limited obligation to seek to resolve a dispute in good faith should be enforceable. Such an agreement is not incomplete. Whilst it may be difficult to establish that a party has not sought to resolve a dispute in good faith there will be cases where that can be shown, for example, where a party asserts his claim, refuses to negotiate and seeks to commence arbitration. In such a case it would be unfortunate were the court to say that the obligation to seek to resolve the dispute was uncertain and therefore unenforceable. For that would mean that a party could ignore his apparent obligation. In the field of dispute resolution clauses in commercial contracts the court ought not to be, as Colman J. said in *Cable & Wireless PLC v IMB UK,* "astute to accentuate uncertainty". Further, as Alsopp P. has explained in *United Group Rail Services v Rail*

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Corporation New South Wales, in the field of dispute resolution clauses the court ought not to regard an obligation to seek to resolve a dispute in good faith as inherently inconsistent with the position of a negotiating party. It is not inconsistent where there is a material, voluntarily accepted, restraint on the parties' freedom of action, namely, a promise to seek to resolve a dispute by friendly discussions in good faith.

53. I have well in mind the considered observation by Hildyard J. in *Wah v Grant Thornton* that good faith is too open-ended a concept or criterion to provide a sufficient definition of what such an agreement must as a minimum involve but I must, with great respect, differ. Good faith connotes an honest and genuine approach to settling a dispute as Alsopp P. said in *United Group Rail Services v Rail Corporation New South Wales.* In his *Lecture on Contract Law: fulfilling the reasonable expectations of honest men* (1997) LQR 433 Lord Steyn said that good faith connoted both honesty and the observance of reasonable commercial standards of fair dealing. Where a party clearly fails to honour such standards of conduct judges and commercial arbitrators will have no particular difficulty in recognising and identifying such failures.

54. Recent developments in the law of Singapore support this approach. In *International Research Corp. PLC v Lufthansa Systems Asia Pacific Pte Ltd.* [2012] SGHC 226 the High Court of Singapore had to consider whether a clause which referred to arbitration disputes "which cannot be settled by mediation" provided for a condition precedent to arbitration which was too uncertain to be enforceable. The arbitral tribunal had held that it was. But the High Court held that it was enforceable. Reference was made to a decision of the Singapore Court of Appeal in *HSBC Institutional Trust Service v Toshin Development Singapore Pte Ltd.* [2012] 4 SLR 378 which concerned a contract which obliged parties to endeavour in good faith to agree a new rent. *Walford v Miles* was distinguished on the basis that that case concerned a stand alone agreement where there was no other overarching contractual framework which governed the parties' relationship. The Court of Appeal said:

> 40. In our view there is no good reason why an express agreement between contracting parties that they must negotiate in good faith should not be upheld. First, such an agreement is valid because it is not contrary to public policy. Parties are free to contract unless prohibited by law. Indeed, we think that such "negotiate in good faith" clauses are in the public interest as they promote the consensual disposition of any potential disputes
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> ……..
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> 45. The choice made by contracting parties, especially when they are commercial entities, on how they want to resolve potential differences between them should be respected. Our courts should not be overly concerned about the inability of the law to compel parties to negotiate in good faith in order to reach a mutually-acceptable outcome. As mentioned earlier (at [40]) above, "negotiate in good faith" agreements do serve a useful commercial purpose in seeking to promote consensus

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> and conciliation in lieu of adversarial dispute resolution. These are values that out legal system should promote.

55. In the light of those statements in the earlier case Chan Seng Onn J. said:

> 93……Given the Court of Appeal's attitude towards mediation clauses, any doubt about an obligation to negotiate in good faith under a multi-tiered dispute resolution clause should be laid to rest.

56. That decision was not challenged in the Singapore Court of Appeal. The Court of Appeal stated that it agreed with the judge on the question of principle whilst disagreeing with him on the question whether there had been compliance with the clause; see [2013] SGCA 55 at paragraphs 54-63.

57. It is also to be noted that (at least some) ICSID tribunals regard obligations to seek to resolve disputes by negotiation in good faith as binding and enforceable; see for example *Tulip Real Estate Investment and development Netherlands BV v Republic of Turkey* (ICSID Case No. ARB/11/28) at paragraphs 56-72.

58. However, the question arises whether, sitting at first instance in England, I am free to hold that a time-limited obligation in a dispute resolution clause to seek to resolve a dispute by friendly discussions is enforceable or whether authority obliges me to hold that it is unenforceable.

59. *Walford v Miles* (like *Courtney & Fairbairn Ltd. v Tolaini Brothers* which it approved) was not a case of a dispute resolution clause within a binding contract obliging the parties to seek to settle a dispute under that contract within a time limited period whereas the present case is. It can therefore be distinguished on the facts. Moreover, given the clear public policy in enforcing obligations in dispute resolution clauses which are designed to avoid the expense of litigation or arbitration that factual distinction is material.

60. *Sul America v Enesa Engenharis* is a decision of the Court of Appeal that an obligation on the parties to "seek to have the Dispute resolved amicably by mediation" was unenforceable. Moore-Bick LJ held that the clause did not define the parties' rights and obligations with sufficient certainty to enable it to be enforced. The clause did not set out any defined mediation process or refer to the procedure of a specific mediation provider. Since the obligation in that case was to seek to have the dispute resolved amicably through mediation rather than by friendly discussions in good faith I have considered whether this is a material distinction given that mediation is merely a supervised form of discussion or negotiation with a view to resolving a dispute. However, I consider that it is a material distinction because in the absence of a named mediator or an agreed process whereby a mediator could be appointed the agreement was incomplete. An agreement to seek to resolve a dispute by friendly discussions in good faith is not incomplete.

61. There is therefore no appellate authority which obliges this court to hold that the agreement in this case is unenforceable.

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62. Judges at first instance have observed that an agreement to seek to settle disputes arising under an existing and enforceable contract by negotiation is unenforceable. Whilst such observations are of persuasive, not binding, authority the observations were not necessary for the decision in the case. (In *Itex Shipping v China Ocean Shipping* the clause was held not to create a condition precedent and in any event the parties were unable to reach an amicable settlement. In *Paul Smith v H&S International Holding* the court approved a concession by counsel. In *Cable & Wireless v IBM* the decision was on an ADR clause. In *Holloway v Chancery Mead Limited* the clause in question did not apply. In *Wah v Grant Thornton* the decision was on a clause which referred disputes to a panel of board members.) More significantly, in none of the previous cases was consideration given to the cogent arguments expressed in the Australian case of *United Group Rail Services v Rail Corporation New South Wales.*

63. I have therefore concluded that I am not bound by authority to hold that a dispute resolution clause in an existing and enforceable contract which requires the parties to seek to resolve a dispute by friendly discussions in good faith and within a limited period of time before the dispute may be referred to arbitration is unenforceable.

64. In my judgment such an agreement is enforceable. My reasons (which largely echo those of Alsopp P. in *United Group Rail Services v Rail Corporation New South Wales*) may be summarised as follows. The agreement is not incomplete; no term is missing. Nor is it uncertain; an obligation to seek to resolve a dispute by friendly discussions in good faith has an identifiable standard, namely, fair, honest and genuine discussions aimed at resolving a dispute. Difficulty of proving a breach in some cases should not be confused with a suggestion that the clause lacks certainty. In the context of a dispute resolution clause pursuant to which the parties have voluntarily accepted a restriction upon their freedom not to negotiate it is not appropriate to suggest that the obligation is inconsistent with the position of a negotiating party. Enforcement of such an agreement when found as part of a dispute resolution clause is in the public interest, first, because commercial men expect the court to enforce obligations which they have freely undertaken and, second, because the object of the agreement is to avoid what might otherwise be an expensive and time consuming arbitration.

<u>"Friendly discussions"; the facts</u>

65. The question then arises whether, on the facts of this case, there were friendly discussions between ETA and PMEPL in good faith seeking to resolve PMEPL's claim for US$45 million.

66. Miss Selvaratnam submitted there were no such discussions because the meeting on 1 and 2 December 2009 had not been arranged with a view to discuss such claim and because that claim was not discussed in terms at the meeting. She said that PMEPL had not served notice of its desire to enter into friendly discussions under clause 11.1. She further relied on PMEPL's acceptance in its letter dated 11 February 2010 that there were no settlement discussions after 2 December 2010. In any event she said the claim for US$ 45 million was not discussed at the meetings in February and March 2010.

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67. In my judgment the discussions on 1 and 2 December 2009 (which it is common ground were friendly) were discussions in which the parties sought to resolve PMEPL's claim for US$45 million. That claim was advanced in the letter of termination dated 1 December 2009 and ETA were aware of it at the latest during the morning of 1 December 2009. The claim included the claims for liquidated damages in respect for the first and second years of the LTC. Mr. Hussain was aware of those claims when he went to Goa for the meeting. He went to the meeting hoping to persuade PMEPL to carry on with the LTC and to pay the liquidated damages by means of later shipments. He must have been aware that there was a risk that after 30 November 2009 PMEPL might terminate the LTC and advance a larger claim which included, in addition, liquidated damages for the third to fifth years. He continued to seek to persuade PMEPL to continue the LTC after he learnt of the termination of the LTC. There was sense in so doing because if he persuaded PMEPL to continue with the LTC the letter of termination would necessarily be withdrawn and the claim for liquidated damages in relation to the third to fifth years would fall away. To this end "various proposals were aired" but ETA were unable to put forward any actual proposal because, although prospective buyers had been approached, they had found no actual buyer. They had been looking for alternative Chinese buyers for most of 2009 but had found none. They were still looking for them in December 2009 and January 2010. Thus the discussions did not resolve the claim because ETA were unable to persuade PMEPL to withdraw the notice of termination and continue with the LTC. There is no reason to suppose that the discussions were other than in good faith on both sides.

68. The giving of a notice to enter into friendly discussions was not a mandatory requirement. If notice to resolve the dispute by friendly discussions was a mandatory requirement sufficient notice must have been given in circumstances where the parties had assembled in Goa to discuss the issues between the parties, the notice of termination had been given and the parties continued to discuss the issues between the parties. If clause 22 of the LTC required a written notice such requirement (in the circumstances just described) must have been waived.

69. After the meeting on 1 and 2 December 2009 ETA continued with its efforts to find alternative buyers and continued to keep PMEPL informed that they were doing so. They continued to suggest that the LTC be continued (see their letter dated 16 January 2010) but were unable to make any concrete proposal. Thus no further meetings took place in December or January. That is why PMEPL said in their letter dated 11 February 2010 that the without prejudice discussions on 1 and 2 December had not been continued. Nevertheless PMEPL was prepared to meet with representatives of ETA in February and March 2010 to see if a solution could be found. No solution was found, though PMEPL agreed to give ETA more time to find one.

70. In my judgment these further discussions in February and March 201 were also friendly discussions in which the parties sought in good faith to resolve PMEPL's claim for US$45 million notwithstanding that such claim may not have been mentioned in terms. It must have been obvious to those attending the meetings that the parties were seeking to find a solution which avoided the need for PMEPL to take their claim to arbitration.

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71. PMEPL did not refer their claim to US$45 million to arbitration until June 2010. More than four continuous weeks had elapsed since the meeting on 1 and 2 December and, in so far as it is relevant, since the meetings in February and March 2010.

72. If, contrary to the view I have expressed earlier in this judgment, it is necessary to show that the friendly discussions lasted for four continuous weeks then they did so. Although no meetings lasted for four continuous weeks the discussions can fairly be regarded as doing so, notwithstanding the contrary view expressed by PMEPL in their letter dated 11 February 2010. The claim for US$45 million had been made on 1 December 2009 in the letter of termination. Discussions aimed at resolving that claim (by finding a way whereby the LTC could be continued) took place on 1 and 2 December 2009. The meeting ended on 2 December but ETA continued to keep PMEPL informed about its efforts to find alternative Chinese buyers with a view to persuading them to continue the LTC. Indeed by letter dated 16 January 2010 ETA referred to "ongoing settlement talks" and requested PMEPL to continue with the supply of cargo. Further meetings took place in February and March 2010 with a view to seeing if a solution could be found which would avoid the need for PMEPL to refer their claim to arbitration. Thus the discussions aimed at resolving PMEPL's claim lasted from 1 December 2009 until, at least, 9 March 2010.

Conclusion

73. The arbitrators have jurisdiction to decide the dispute between ETA and PMEPL because the condition precedent to arbitration, although enforceable, was satisfied.

74. For these reasons ETA's application under section 67 of the Arbitration Act 1996 must be dismissed.

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