Case No: 2014 FOLIO 1243

Neutral Citation Number: [2015] EWHC 1452 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 20/05/2015

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

Emirates Trading Agency LLC	**Claimant**
- and -	
Sociedade de Fomento Industrial Private Limited	**Defendant**

- -
- -

Ms Vasanti Selvaratnam QC (instructed by **Clyde & Co LLP**) for the **Claimant**

Mr David Brynmor Thomas (instructed by **Reed Smith LLP**) for the **Defendant**

Hearing dates: 27, 28, 29 April 2015

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Judgment

Mr Justice Popplewell :

Introduction

1. This is primarily an application under section 67 of the Arbitration Act 1996 ("the Act"), seeking to set aside a final merits award of an ICC Tribunal dated 2 September 2014 on the grounds of lack of jurisdiction. There is also an application under section 68 of the Act.

2. Under a long term contract dated 23 November 2006 ("the LTC") between the Claimant ("ETA") agreed to purchase from the Defendant ("SFI") 500,000 mt of 58% iron ore fines per annum for 5 years, 10% more or less in SFI's option. The cargo was to be delivered FOB at Indian ports, with detailed provisions in Annexure 2 for agreeing shipment schedules and vessel nominations. The LTC, as amended, provided for lifting of a minimum of 50,000 metric tonnes per month except for the monsoon months of June to September, and for liquidated damages of US$ 10 per wet metric tonne ("wmt") to be payable in the event of failure to lift the contractual quantity. In the event of failure to lift the minimum quantity, ETA had the option to carry forward up to 100,000 mt into the next shipping year. ETA was not the end user of the iron ore and did not intend to take physical delivery itself. It entered into the LTC with a view to fulfilling sales to Chinese buyers for physical delivery there.

3. The LTC was governed by English law. Clauses 10 and 11 of the LTC, as amended, provided as follows:

> "10 TERMINATION AND CONSEQUENCES OF TERMINATION"
>
> Any Party may without prejudice to any claim for any antecedent breach, be entitled at its option, on the happening of any of the following events to terminate this Agreement:
>
> a) By delivering a written notice to the other Party, if the other Party becomes or is declared bankrupt or goes into voluntary or compulsory liquidation ……; or
>
> b) by delivering a written notice to the other Party if any distress or attachment is levied, or any receiver or administrator is appointed in respect of the business or a substantial part of the property or assets of the other Party ……..; or
>
> c) by delivering a written notice to the other Party if there is a government expropriation, nationalisation or condemnation of all or a substantial part of the assets or capital stock of the other Party……..; or
>
> d) the other Party commits any substantial breach of this LTC.

In case of a breach mentioned in 10 (d) above, if such breach is not caused by an event of Force Majeure, the Parties shall seek to resolve any dispute or claim arising out of or under this LTC by friendly discussion. Any Party may notify the other Party of its desire to enter into consultation to resolve a dispute or claim. If no solution can be arrived in between the parties for a continuous period of three (3) months, then the non-defaulting Party can invoke the arbitration clause and the defaulting Party shall be liable to pay liquidated damages at the rate of USD ten (10) per wet metric tonne of the Cargo that remained to be supplied/taken delivery of for the balance of the Term of the LTC if it had been performed in full. The Parties hereby agree that the sum of USD 10 per wet metric tonne is a genuine pre-estimate of the damages which would be suffered in case of default.

Provided however that for the purpose of this Clause, the Seller shall not be considered in substantial breach of this LTC in the event it does not carry out its obligations required to be carried out at the relevant time under this LTC if the Buyer fails to comply with its duty under Annexure 2 in agreeing upon the schedule of shipment as proposed by the Seller.

Termination of this LTC shall not relieve any Party of any obligation or liability, under this Contract.

11. ARBITRATION

11.1 All disputes arising 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.**

11.2 The arbitration shall be referred to a tribunal of three (3) arbitrators who shall be appointed by the ICC. Any Award of a majority of the arbitrators shall be final binding upon the parties thereto, and may be entered for enforcement in any court having jurisdiction."

4. In the first shipment year (23 November 2006 to 22 November 2007), SFI exercised its 10% option to ship 450,000 mt. ETA lifted only 368,200 mt, leaving a shortfall of 81,800 mt which was carried forward into the next shipment year.

5. In the second shipment year (2007/8) SFI again exercised its 10% option for shipment of 450,000 mt. Of the 531,800 mt required to be lifted in this shipment year, ETA lifted only 350,145 mt leaving a shortfall of 181,655 mt.

6. As a result of the global economic situation and the refusal of its Chinese buyers to continue to take cargoes, ETA failed to lift any further quantities under the LTC after May 2008.

7. On 7 November 2009, some 18 months after ETA had lifted the last shipment, SFI served a Notice of termination terminating the contract on the grounds that ETA's failure to lift cargo was a repudiatory and/or renunciatory breach, alternatively a substantial breach giving rise to the contractual right to terminate pursuant to clause 10(d). The Notice of Termination included a claim for US$17,816,550 comprising (a) liquidated damages for short lifting which had taken place in the second and third shipment years and (b) liquidated damages in relation to the quantities remaining to be shipped in the unexpired term of the LTC in the fourth and fifth shipment years.

8. On 15 June 2010 SFI commenced arbitration by filing a Request for Arbitration with the ICC. It took a little while to constitute the tribunal, ETA having failed to nominate an arbitrator. On 13 January 2011 the Tribunal was constituted with Mr Douglas as chairman and Mr Males QC (as he then was), and Dr Al Owais as co-arbitrators. As a result of SFI instructing counsel from the same barristers' chambers as that in which Mr Douglas practised, he resigned and was replaced as chairman on 21 April 2011 by Mr Jagusch.

9. By a letter of 16 May 2011 ETA objected to the jurisdiction of the Tribunal, and on 10 August 2011 served written submissions in support of the objection. In summary, ETA argued that SFI had failed to comply with the requirement to undertake friendly discussions for a continuous period of 3 months which was a condition precedent to the right to commence arbitration proceedings, and accordingly that the Tribunal lacked jurisdiction.

10. The Tribunal heard evidence and received written and oral representations from the parties' legal advisors. On 21 December 2011 it issued a Partial Final Award pursuant to s. 47 of the Act determining that it had jurisdiction ("the Jurisdiction Award"). The relevant findings were set out in paragraphs 7.2 to 7.8 in the following terms:

> "7.2 The LTC was entered into on or about 23 November 2006 and SFI purported to terminate it by letter dated 7 November 2009.
>
> 7.3 Meetings and various discussions occurred between the parties both before and after the Notice of Termination, including 1 and 2 December 2009. The existence of such discussions is evidenced generally by ETA's letter dated 16 January 2010 and more specifically by Respondent's email dated 6 December 2009, where Respondent provided its draft minutes of the meetings, and also Claimant's reply to Respondent's letter dated 16 January 2010, Furthermore, during oral testimony, the existence of, and its attendance at, the December meetings was confirmed by ETA. Testimony given by Mr Mubarak Hussain, ETA's witness, admits that the

purpose of the discussions was to find an "alternative solution which avoided arbitration".

7.4 Following these meetings, the Parties understood that the next step in the discussions would be for ETA to make a proposal concerning settlement of the claim. ETA failed to make any such proposal, save for a repeat of its suggestion that the LTC be reinstated, which SFI had already indicated was unacceptable.

7.5 Despite SFI making it expressly clear to ETA that it was willing to consider "any concrete payment schedule" in respect of the claim, no settlement was achieved.

7.6 Thus, the contemporaneous documentary record is supported by the oral testimony which establishes (in contrast with the position as it appeared from the witness statements) that:

(a) the Parties did have discussions about the claim, those discussions taking place (at least) at meetings on 1 and 2 December 2009,

(b) all discussions were "friendly";

(c) prior to 7 November 2009 the claim which was discussed at meetings, over the phone, and through written correspondence, was SFI's claim resulting from what it alleged to be ETA's failure to perform its obligations under the LTC and which led to the Notice of Termination. After 7 November 2009 the claim discussed was SFI's claim set out in the Notice of Termination. In these later discussions the parties considered a possible settlement of that claim by means of reinstatement of the LTC, but did not reach any agreement;

(d) it was ETA that requested the meetings which took place on 1 and 2 December 2009, thereby notifying SFI of its desire to have such discussions;

(e) following the meetings it was understood by the Parties that the next step would be for ETA to make a proposal for the resolution of the dispute;

(f) ETA made no such proposal, save for a repeat of its suggestion the contract be reinstated, which SFI had already made clear that it was not willing to do;

(g) it was also understood by the Parties that SFI was at all times willing to consider any further proposal made by ETA for a settlement of the claim; and

(h) no settlement was achieved either within three months of ETA's request for the meetings, or at all.

7.7 On 15 June 2010 the Claimant commenced arbitration by filing its Request for Arbitration.

7.8 These facts lead to only one possible conclusion, namely that the Objection fails on the facts. The Parties sought to resolve the disputes by friendly discussion, such discussions took place and did not, over a continuous period of three months, lead to any solution. Only subsequently did SFI commence these arbitration proceedings."

11. The Tribunal went on to record its view that in any event the friendly discussion provision was too uncertain to be enforceable as a matter of law.

12. ETA did not seek to appeal or challenge the Jurisdiction Award within the 28 day time limit imposed by section 70(3) of the Act, or at all.

13. There were further delays in the progress of the arbitration. As a result, the two co-arbitrators resigned and were replaced by the ICC Court, at the request of the parties, with Sir Jonathan Parker and Mr Fathallah on 16 October 2012 and 14 March 2013 respectively.

14. Article 12 (4) of the ICC Rules applicable at the time provided that:

> "When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the Arbitral Tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted Arbitral Tribunal."

15. On 30 May 2013 the Tribunal invited the parties to make representations on whether and to what extent there should be any repetition of prior proceedings. ETA sought a fresh hearing and decision on its jurisdiction challenge, which SFI resisted. Having considered the submissions, the Tribunal declined to repeat the earlier proceedings or rehear the jurisdiction objection, giving the following reasons in an email of 26 June 2013:

> "The Tribunal has given close and careful consideration to the Respondent's request that the Tribunal conduct a re-hearing of the objection to jurisdiction. The Tribunal considers that no sufficient basis has been advanced for the requested re-hearing. In arriving at this conclusion, which is unanimous, the Tribunal notes, without seeking to delineate the circumstances when such a request might succeed, that:
>
> - no issue has been alleged, much less demonstrated, to undermine the independence or impartiality of any of the

> arbitrators who produced the Award dated 21 December 2011 (the Award);
>
> - no issue has been alleged, much less demonstrated, concerning the process leading to, or the substantive correctness of, the Award;
>
> - the Respondent chose not to challenge the Award under the Arbitration Act within the time limit for so doing (or at all);
>
> - although other evidence is now said by the Respondent to exist that may have been relevant to the Award, the Respondent has not explained how or why such evidence was not put on the record prior to the Award and, more importantly, how such evidence contradicts the evidence of the Respondent's own witness, which was key to one of the central findings in the Award, namely that friendly discussions had taken place between the parties in advance of the Claimant commencing these proceedings."

16. A final hearing on the merits took place on 9 September 2013. The Tribunal issued its reasoned final award on 2 September 2014 ("the Final Award"). It held that SFI's claim for US$17,816,550 succeeded in full, and awarded that sum together with interest and costs.

17. At the merits hearing, counsel for ETA argued again that SFI had failed to comply with the friendly discussion provision in clause 10 of the LTC. At paragraph 139 of the Final Award, the Tribunal held that in so far as it was an objection to jurisdiction, it raised no new grounds, and had already been dealt with and rejected by the Tribunal. At paragraph 140 of the Final Award, the Tribunal acknowledged that the same point was presented by ETA not as an objection to jurisdiction but as a condition precedent to the right to terminate. The thrust of ETA's case on this point was that on a proper construction of clause 10(d), the non-defaulting party was obliged to give the defaulting party 3 months notice of its intention to terminate where it was contended that the defaulting party was in substantial breach of the LTC. The Tribunal rejected that construction at paragraph 141 of the Final Award.

18. It appears from the Final Award that the Tribunal would also have rejected the argument on its facts. At paragraph 137 the Tribunal recited ETA's arguments that the discussions which took place in the months prior to termination, which were addressed more fully in the Jurisdiction Award, were about methods by which ETA might fulfil its commitments under the LTC rather than discussions about resolving any stated intention of SFI to terminate the LTC. In this context at paragraph 138 of the Final Award, the Tribunal expressed the opinion that the argument ignored the conclusions in the Jurisdiction Award under clause 10(d) both on the facts and at law, which the Tribunal adopted as part of its Final Award.

Issues

19. On this application ETA advances what are essentially the same arguments as were advanced to the Tribunal and rejected in the Jurisdiction Award. It contends that the friendly discussions provision in clause 10 is a condition precedent to the right to arbitrate and that the failure by SFI to conduct qualifying discussions deprives the Tribunal of jurisdiction. It contends that the provision should be construed with a view to giving effect to the desideratum of encouraging commercial parties to engage in negotiation or mediation so as to make arbitration proceedings the method of dispute resolution of last resort. It contends that discussions prior to termination cannot qualify for the purposes of the clause as relevant discussions, and that any discussions thereafter did not fulfil the terms of the clause.

20. An application under s.67 of the Act is a rehearing with evidence: see ***Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*** [2011] 1 AC 763 per Lord Mance at paragraphs [26] and [30] and Rix J in ***Asov Shipping Co v Baltic Shipping Co (No1)*** [1999] 1 Lloyd's Rep 68. I heard oral evidence on behalf of ETA from Mr Mubarak Hussain who was the executive director for the trading and shipping division of ETA; and on behalf of SFI from Mr Jayesh Timblo who was the deputy general manager for marketing and sales, having responsibility for the LTC, and from Mr Auduth Timblo who is SFI's managing director and chairman with overall responsibility for its business, although not concerned with this contract on a day to day basis. In addition each side adduced evidence by way of witness statements from witnesses who did not appear to give oral evidence.

21. SFI contends that the application must fail for each of four reasons:

    (1) The issue has been finally and conclusively decided by the Tribunal in the Jurisdiction Award, from which there was no appeal. Accordingly an issue estoppel arises and the present application is barred by s. 73(2) of the Act.

    (2) The friendly discussion provision in clause 10 is too uncertain to be legally enforceable.

    (3) The friendly discussion provision was fulfilled on the facts of this case.

    (4) The friendly discussion provision is not a condition precedent to the right to commence arbitration but only sounds in damages; accordingly it cannot affect the jurisdiction of the Tribunal.

Does the failure to challenge the Jurisdiction Award preclude ETA's s. 67 application?

22. The Jurisdiction Award was an award which was final and binding on the parties as to the matters it decided. This is the effect of section 58 of the Act, which applies as much to awards under section 47 as to final awards. Such awards are now commonly termed "partial awards" but their status is more clearly reflected in the description "interim final awards", which is what they were called under the Arbitration Act 1950. Such an award is final as to what it decides, but interim in the reference so as to make clear that the tribunal remains seised of matters within

the reference which have not yet been determined. Article 28 of the ICC Rules also provides that "every award" shall be binding on the parties.

23. This has two consequences. The first is that absent contrary agreement between the parties, the ability to challenge the validity of such an award in this Court is limited by the rights of challenge and appeal conferred by ss. 67-69 of the Act. If no such challenge is made timeously, or is made and rejected, the finality of the award creates an issue estoppel between the parties which precludes either party challenging it before the tribunal or as a ground of challenge to a subsequent decision of the tribunal: see ***Fidelitas Shipping Ltd v V/O Exportchleb*** [1966] 1 QB 630 and ***Westland Helicopters Ltd v Sheikh Salah Al-Hejailan (No 1)*** [2004] 2 Lloyd's Rep 523.

24. This applies as much to a partial award on jurisdiction as to any other partial award which finally determines some matter in issue in the reference. Section 30 of the Act provides that the tribunal is competent to rule on its own substantive jurisdiction, and that any such ruling can be challenged by the processes of arbitral appeal or review provided for in the Act. A party is not required to participate in an arbitration by a tribunal which it contends lacks jurisdiction. If it does not do so, it may maintain its objection to jurisdiction when it comes to enforcement. If it does so by asking the tribunal to determine jurisdiction, it can challenge the decision of the tribunal insofar as permitted by ss. 67-69 of the Act. Until the expiry of the time for doing so the partial award on jurisdiction is not final. But once final it becomes binding and gives rise to an issue estoppel both so far as concerns further proceedings before that tribunal, and for any arbitral process of appeal or review of any subsequent award of the same tribunal before the English Court as the curial court.

25. Where the partial award is one in which the tribunal determines its own jurisdiction the position is reinforced by s. 73(2) of the act which provides:

> "(2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling-
>
> (a) by any available arbitral process of appeal or review, or
>
> (b) by challenging the award,
>
> does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to that tribunal's substantive jurisdiction on any ground which was the subject of that ruling."

26. The second consequence of an award being binding is that, subject to limited exceptions, the tribunal no longer has power to review or reconsider the subject matter of the award. There is a longstanding rule of common law that when an arbitrator makes a valid award, his authority as an arbitrator comes to an end and, with it, his powers and duties in the reference: he is then said to be functus officio (see Mustill and Boyd's *The Law and Practice of Arbitration* 2nd Edition pp. 404–

405 and Companion Volume 404-414). This applies as much to a partial award as to a final award: see ***Fidelitas*** per Diplock LJ at p. 644B-E. Absent agreement of the parties, the tribunal may only reconsider or review its decision if the matter is remitted following a successful challenge to the award in Court, or pursuant to the express powers of correction or reconsideration conferred by section 57 of the Act or by the arbitral rules which the parties have agreed to govern the reference. Otherwise the tribunal has no authority or power to do so. None of these exceptions apply in this case.

27. Application of these well known principles leads to the conclusion that the present attempt to challenge the Final Award under section 67 is not open to ETA because the issue was decided against it in the Jurisdiction Award, in respect of which ETA has made no challenge under the 1996 Act, whether timeously or at all.

28. Ms Selvaratnam QC on behalf of ETA sought to escape this conclusion on a number of grounds.

29. First she submitted that a decision of a tribunal as to its own jurisdiction could never give rise to an issue estoppel, a proposition she sought to derive from the decision of the Supreme Court in ***Dallah***. That case is not authority for any such proposition, which would be contrary to the principles reflected in ***Fidelitas*** and to the whole scheme of speedy finality provided for in the Act in cases where the parties have invited the tribunal to determine jurisdiction. ***Dallah*** was a case in which the English Court was considering an application by Dallah to enforce an award made under the auspices of the ICC in Paris under Part III of the Act, which gives effect to the New York Convention. The Government of Pakistan resisted an enforcement order on the grounds that it was not party to the arbitration agreement so that the tribunal lacked jurisdiction. Dallah's contention that the Government was precluded from advancing the argument because it had failed to challenge the tribunal's ruling as to its own jurisdiction in the French Courts with supervisory jurisdiction was rejected. The decision was that where a party seeks to enforce a foreign award under s. 103 of the Act, a person who denies being party to the arbitration agreement has no obligation to participate in the foreign arbitration or take steps in the country of the seat of what he maintains is an invalid arbitration leading to an invalid award against him, and can resist enforcement by denying the validity of the award, irrespective of the tribunal's decision that it has jurisdiction: see per Lord Mance at paragraphs [23] and [30]. In this case SFI is not seeking enforcement, let alone enforcement of a foreign award under s. 103 of the Act. If it were to seek enforcement in the UAE or elsewhere, the status of the Final Award would be a matter for the foreign court applying its own conflicts rules. ETA is seeking to mount a challenge to the validity of the award under s.67 of the Act before the English Court exercising its supervisory jurisdiction as the curial court. There is nothing in the decision or reasoning in ***Dallah*** which suggests that on such an application the principles of issue estoppel do not apply.

30. Ms Selvaratnam submitted next that the Tribunal as reconstituted had reached a further decision on its jurisdiction in paragraph 138 of the Final Award, such that this application was against that decision, made timeously, and unaffected by any earlier decision in the Jurisdiction Award.

31. There are two reasons why I cannot accept this argument. First, the Final Award did not involve the Tribunal making a fresh decision on its jurisdiction or addressing the objection to jurisdiction advanced by ETA on its merits. At the final hearing counsel for ETA reserved the position on jurisdiction and indicated to the Tribunal that the grounds for doing so were the same as those previously advanced for the purposes of the Jurisdiction Award. Although the argument was not expounded, it can fairly be said that it was advanced, by adoption, as a challenge to jurisdiction. But the decision of the Tribunal in the Final Award was that the issue had already been decided in the earlier Jurisdiction Award. It did not reach a decision on the merits of the jurisdiction objection and only adopted the findings of the Jurisdiction Award for the purposes of dealing with the substantive argument on the merits that clause 10(d) required three months of friendly discussion as a condition precedent to the right to terminate. There was therefore no fresh decision on jurisdiction.

32. Secondly the Tribunal's decision that it was bound by the Jurisdiction Award is unassailable. The principles of issue estoppel, and the functus doctrine, meant that it was not open to the Tribunal to revisit the question of jurisdiction on the same grounds of objection as previously advanced.

33. Ms Selvaratnam argued that the functus doctrine was displaced by Article 12(4) of the ICC Rules, which also prevented any issue estoppel arising because the decision was not final if capable of being reopened by the Tribunal. Again I am unable to accept the argument. Article 12(4) confers a discretionary power to repeat part of the proceedings. Section 27 of the Act contains an equivalent power. That power is only exercisable for the purpose of determining matters which remain to be determined in the reference. For example, if there has been no award, the tribunal may consider it appropriate that oral evidence or submissions are reheard before the new member(s) of the tribunal. If there has been an award on liability, a reconstituted tribunal may consider it appropriate to revisit oral evidence or submissions which remain relevant to its decision on quantum. But neither Article 12(4) of the ICC Rules nor s. 27 of the Act enables a reconstituted tribunal to review or change a decision which has been reached by the tribunal on an issue and which is final and binding as to the matters it decided. Any other conclusion would again be contrary to the scheme of speedy finality inherent in the Act and international arbitration. It would allow, for example, an arbitrator who replaces a sole arbitrator who has already issued awards on liability and quantum to reopen all such issues if any aspect of the reference remained on foot, such as assessment of costs.

34. That this is the effect of Article 12(4) is supported by two authoritative commentaries. In *A Guide to the New ICC Rules of Arbitration* by Yves Derains and Eric Schwartz, both former Secretaries General of the ICC, (pub Kluwer) they say:

> "There would also not seem to be any legitimate basis upon which a newly-constituted Arbitral Tribunal could choose, without the parties' agreement, to reopen proceedings that had already been the subject of a partial Award regarded as final under the law applicable to the arbitration proceedings,

> although prior decisions of a purely interlocutory or interim nature could conceivably be revisited, if necessary."

35. In *The Secretariat's Guide to ICC Arbitration on the 2012 ICC Rules* (in which Article 15(4) is in identical terms to Article 12(4) of the version applicable to these proceedings) the authors say:

> "Another question that has arisen in connection with the repetition of prior proceedings is the status of partial awards rendered by the previous arbitral tribunal. In general, an award has *res judicata* effect once rendered and cannot be revisited by either the arbitral tribunal that rendered it or a newly constituted tribunal in the same case. Therefore, arbitral tribunals have usually rejected as irrelevant the repetition of prior proceedings that have already resulted in a partial award. Usually, arbitral tribunals allow proceedings to be repeated only insofar as they relate to issues that have not yet been decided upon. It is of course an entirely different matter if a partial award has been set aside by a competent court and the arbitral tribunal is subsequently replaced. In such circumstances, the reconstituted arbitral tribunal may well be required to decide some or all of the same issues that were dealt with in the partial award that was set aside."

36. Ms Selvaratnam relied on the word "usually" to suggest that the authors envisaged that there nevertheless remains a power to reopen partial awards. The text is more suggestive of the qualification taking account of cases where the curial law does not provide for res judicata effect of partial awards. But even where it does, reopening may be appropriate in some circumstances without derogating from the principle of issue estoppel or the functus doctrine, as where the challenge to the jurisdiction or competence of the new tribunal is specific to the persons by which it is reconstituted, for example where the argument is that a new member is biased or does not fulfil the qualifications laid down in the arbitration clause. In such circumstances neither the issue estoppel principle nor the functus doctrine would have any application because the issue would be different from that previously decided.

37. Ms Selvaratnam argued that if the reconstituted Tribunal did not reach its own decision on jurisdiction, the Jurisdiction Award cannot create an issue estoppel because the majority of the reconstituted tribunal making the Final Award were not party to the Jurisdiction Award. This is to elide the distinction between the Tribunal as an institution and its members from time to time. Article 2 of the ICC Rules defines an "Arbitral Tribunal" as including one or more "arbitrators". Article 7(6) provides that the "Arbitral Tribunal" shall be constituted in accordance with the provisions of Articles 8, 9 and 10. Articles 8, 9 and 10 provide the procedure whereby the Arbitral Tribunal is established and confirmed by the Court. These provisions distinguish "the Arbitral Tribunal" from "arbitrators". The Tribunal is an institution and remains a single entity throughout the course of the reference, as is evidenced by the single case reference being applied throughout the reference. The arbitrators from time to time are the individuals who "constitute" the Tribunal in the sense of peopling it, but it is the

constitution which changes if new arbitrators are appointed, not the Tribunal. Were it otherwise, any change in constitution would necessarily mean that the Tribunal would have to start again, because there would be a new Tribunal which had not previously done anything in the reference. The true position is that the newly constituted Tribunal is still the same "Arbitral Tribunal" and is bound by what the Arbitral Tribunal has previously done in the reference to the same extent, but only to the same extent, as would be the case if there had been no change. It is to be noted that Article 7(6) defines the Arbitral Tribunal as that constituted in accordance with Articles 8, 9 and 10 but makes no reference to Article 12, which deals with replacement of arbitrators. This reinforces the conclusion that the Arbitral Tribunal, once initially constituted by the ICC Court, remains a single entity irrespective of the replacement of "arbitrators".

38. Ms Selvaratnam submitted that section 73(2) of the Act was of no application for two reasons. The first was that in this case the "tribunal" referred to in the penultimate line of the subsection whose substantive jurisdiction was being challenged was the tribunal as constituted at the time of the Final Award, and was not the "arbitral tribunal" referred to in the first line whose decision required challenge, because of the change in the majority of the arbitrators. This involves the same illegitimate elision between the tribunal as an institution and the individual arbitrators by which it is populated from time to time. For the purposes of section 73(2) it is one and the same tribunal, despite the change in the majority membership.

39. Ms Selvaratnam also argued that s. 73(2) was not engaged because ETA fulfilled the "questioning" requirements in subparagraph (a) and (b): there was an arbitral process of review conferred by Article 12(4) which ETA sought to invoke, and ETA protested jurisdiction after the Jurisdiction Award before the reconstituted Tribunal and at the final merits hearing. I have already explained my conclusion that Article 12(4) was not an arbitral process of review which enabled ETA to revisit the jurisdiction objection. Nor is a reservation of position before the Tribunal the "challenge" in subparagraph (b) which falls for consideration. The relevant available arbitral process of appeal or review (sub paragraph(a)), and the relevant method of challenging the award (sub paragraph (b)), by which ETA could have questioned the ruling in the Jurisdiction Award, was an application appealing or challenging such award under sections 67-69 of the 1996 Act. No such application was made, either timeously or at all.

40. Finally it is this context that ETA's application under s. 68 of the Act is arises. It is a challenge to the failure by the reconstituted Tribunal to exercise its powers under Article 12(4) to rehear the jurisdiction objection. It is brought on a very narrow ground. It is not brought under s. 68(2)(a) of the Act as involving a failure to comply with the general duty of fairness under s. 33. It is brought under subsections (f) and (h) which are in the following terms:

> "(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-
>
> …

(f) uncertainty or ambiguity as to the effect of the award;

…

(h) failure to comply with the requirements as to the form of the award;"

41. The factual basis for the application is the evidence before the Tribunal, and before me, that under UAE law the fact that the Final Award was made by a majority who were not party to the Jurisdiction Award may give rise to "significant problems" for SFI in enforcing the Final Award against ETA in UAE. There can be no question of sub paragraph (h) applying. The Award is in conventional terms which comply with the statutory requirements, awarding money sums by way of principal, interest and costs. I will assume, without deciding, that subparagraph (f) can be engaged by considerations of the enforceability of the award, and that as Ms Selvaratnam averred, without evidence, that the only place the Final Award could be enforced against ETA is in UAE. Nevertheless the s.68 point fails for three reasons. The first is that the Tribunal was functus in relation to its jurisdiction and had no power to consider altering the decision made in the Jurisdiction Award, for the reasons I have identified. There was therefore no irregularity in failing to do so. Secondly, under s. 68(2) the serious irregularity must be one which has caused or will cause substantial injustice to the applicant, i.e. ETA. Any difficulties which SFI might have in enforcing an award in UAE cannot cause prejudice to ETA. Thirdly, the exercise of discretion by the Tribunal not to revisit the issue of jurisdiction (if contrary to my findings it had one) was well within the boundaries open to it for the reasons it gave, and could not be characterised as a serious irregularity: there was no reason to believe that a different conclusion would be reached; and the decision has not caused substantial injustice because the argument would have failed for the reasons given later in this judgment.

42. For these reasons the applications under s. 67 and s. 68 must fail and are dismissed.

The other issues

43. It follows that it is unnecessary to deal with the other issues which were argued, and I express no view on whether the provision is enforceable as a matter of law, or whether it is a condition precedent to the jurisdiction of the arbitrators. However having heard the evidence, I shall record my findings of fact and conclusions on the question of whether SFI complied with the friendly discussion provision.

44. The last lifting by ETA was in May 2008. During a visit by Mr Auduth Timblo to Dubai on 12 October 2008, representatives of ETA explained to him that ETA was unable to lift the required quantities as a result of non cooperation by its Chinese buyers, and that ETA was going to "formulate a workable solution to the existing crisis" following a visit to China.

45. On 15 December 2008 SFI made a claim for US$1,816,550 for short lifting in the second shipment year (2007/8). That claim remained in dispute throughout the period thereafter up until commencement of the arbitration. On the Tribunal's

findings in the Final Award, the failure to pay that debt was sufficient of itself to justify the later termination of the LTC irrespective of the further default in respect of subsequent shipment periods.

46. There was from that moment, at the latest, a dispute between the parties in respect of ETA's continuing failure to lift cargo and its failure to pay any part of the increasing amount of liquidated damages accruing to SFI as a result. That dispute continued until the commencement of the arbitration. That was the dispute which was the subject matter of all the discussions between the parties which are identified below. That was the dispute which was referred to arbitration, irrespective of the precise quantification of the claim.

47. During 2009 the parties held discussions in meetings on 20 January, 13 March, 22 April, 16 June, July (date unknown) and by emails dated 5 April, 8 April, 15 April, 27 May, and 1 September. The context and content of the discussions may be summarised as follows. The purpose of the discussions was to seek a resolution of the dispute which arose from ETA's continuing failure to lift the required quantities. ETA recognised that it was in default and that the liquidated damages were increasing over time with the continuing failure to lift cargo, and the amount due was identified on at least one occasion (in March). ETA was also aware throughout that its failure to lift would entitle SFI to exercise its option to terminate if the latter chose to do so. ETA's failure to perform, and its liability for ever increasing sums, was the reason for those discussions taking place and formed the context for the solutions suggested by ETA. ETA referred to discussions it was itself having with its buyers and potential new buyers in China. ETA's proposals were to reach agreement with its Chinese buyers, and/or to find new Chinese buyers, so as to be able to propose to SFI an amendment to the LTC which would involve extending the shipping period and/or lifting greater quantities and/or adjusting the price to compensate for its failure to comply with the LTC terms. SFI's stance was generally that it required payment of the liquidated damages due for the shortlifting before considering any amendment or continuation of the LTC. ETA never reached any agreement with the Chinese buyers so as to put forward any concrete proposal to SFI for extended shipment, increased quantities or adjusted prices. Nor did it propose any cash payment in discharge of the accrued liability, even in part. It did however propose that SFI should accept letters of credit directly in its favour from some Chinese buyers who were prepared to take cargo, rather than letters of credit from ETA in the amounts and form required by the LTC. A difference in the terms of such letters of credit meant that SFI were not prepared to agree to this suggestion.

48. SFI's Notice of Termination dated 7 November 2009 purported to terminate the LTC, quantified its claim for past and future losses, and set out the legal grounds for the claim. That was the specific claim pursued (successfully) in the arbitration, which remained in dispute from the moment it was put forward.

49. A meeting took place between the parties in Goa over two days on 1 and 2 December 2009. It was organised in response to the Termination Notice at ETA's request. There is a dispute about the accuracy of the minutes of the meeting prepared by ETA and about exactly what was said at the meetings and how long they lasted. Nevertheless it is clear that what was discussed included:

(1) an exploration of the reasons being put forward by ETA for failing to lift the contractual quantities, including default by Chinese buyers and an increase in the JSM index which resulted in the LTC contract prices, which were calculated by reference to the index, exceeding spot prices;

(2) ETA's desire to continue the LTC;

(3) SFI's unwillingness to continue with the LTC unless or until ETA paid the liquidated damages due for the prior shortlifting.

50. It was left that ETA would bring forward a specific proposal following the meeting and that SFI would consider such proposal when it was made.

51. On 9 December 2009 SFI sent an email disputing various aspects of the minutes of the meeting which had been sent by ETA. The email concluded by inviting ETA to revert only if it wished to suggest a concrete payment schedule by which it would pay the claim raised in the Termination Notice, and referred to the fact that meetings and discussions to seek settlement were without prejudice to SFI's legal rights.

52. ETA did not respond with any proposal, whether for payment or for any other particular solution. Instead on 16 January 2010 it wrote to say that its non lifting of cargo was beyond its control and therefore could not justify termination. It went on: "Moreover if there are any issues, we shall discuss and come to a good understanding. Considering various discussions held between us following your notice and the ongoing settlement talks, and in light of our longstanding relation we request you to continue with supply of cargo". SFI's response of 13 February 2010 rejected the suggestion that ETA's default was to be excused by circumstances beyond its control and took exception to the description of there being "ongoing settlement talks". This latter point was justified: the matter had been left at the beginning of December 2009 on the basis that ETA would come forward with a concrete proposal, yet nothing of that sort had been proffered over six weeks later and the general request for continued supply of cargo "in light of our longstanding relation", without any proposal for payment in respect of existing liabilities, was not a realistic approach to negotiating a solution.

53. On 25 February 2010, Mr Ahmed Salahuddin, the son of ETA's Chairman, had a meeting with Mr Auduth Timblo in Dubai. He asked that SFI continue the contract, and Mr Timblo in turn insisted that the liquidated damages which had already accrued had to be paid.

54. On 9 March 2010 Mr Hussain went to Mumbai to meet Mr Auduth Timblo. Mr Hussain proposed in general terms that the claim should be addressed by some agreement to continue the LTC with an extended shipment period or adjusted prices and quantities. This was not acceptable to SFI who insisted on some payment of existing liabilities. There were similar discussions between the two in conversations between March and June 2010.

55. It was common ground that all relevant discussions were "friendly" within the meaning of the clause.

56. In those circumstances I have little hesitation in concluding that if the friendly discussion clause were an enforceable condition precedent to the right to terminate, it was fulfilled. The tenor of discussions throughout was that ETA had defaulted and what was being explored was whether or how that could be remedied to SFI's satisfaction. All discussions prior to termination in November 2009 were addressed to ETA's existing defaults and whether SFI could accept a solution which involved the LTC being continued rather than terminated. Following the termination the discussions were to the same effect in the specific context of the option to terminate having been exercised and a quantified claim having been put forward. The discussions continued for more than three months prior to commencement of arbitration and involved sufficient effort and frequency on the part of SFI that they could not possibly be characterised as involving a lack of good faith or the absence of any genuine desire or attempt to reach an amicable solution short of resorting to arbitration. SFI had a very strong legal claim, which was entirely vindicated by the arbitration tribunal, and ETA was not advancing any convincing legal argument for resisting the claim, but merely appealing to SFI's commercial sympathies without making any concrete proposals for discharge even in part of its legal liabilities. SFI cannot properly be criticised for adopting the stance that it wanted first a concrete proposal, secondly payment of at least some of the outstanding debt and thirdly a viable long term solution. ETA offered none of these.

57. Ms Selvaratnam submitted that no discussions prior to the notice of termination in November 2009 could qualify because it was not until that time that SFI had put forward the quantified claim which formed the subject matter of its request for arbitration. I am unable to accept the argument, although it does not affect my conclusion on this aspect of the case because even were qualifying discussions confined to those on and after 1 December 2009, such discussions were sufficient to fulfil the clause. Clause 11 provides that what is referable to arbitration is a dispute. If a dispute about whether someone is entitled to terminate a contract is submitted to arbitration, the dispute normally encompasses monetary claims consequent upon the resolution of such a dispute whether or not they have at that time been specifically identified or advanced. It is not necessary for a claimant to have quantified a claim before commencing arbitration; nor is it necessary to start a fresh reference once the claim is quantified, still less whenever there may be an amendment to the quantification, as is common. What is required by the friendly discussion provision in clause 10 is a discussion which seeks to resolve a "dispute or claim". The "or" is disjunctive. If and to the extent that the clause imports a condition precedent to the jurisdiction of the tribunal, it is the dispute which is referred to the tribunal which is required to have been the subject of discussion, not any particular or quantified claim within such dispute. Any other construction would be productive of commercial uncertainty and would run counter to the desideratum of speedy finality in arbitration. Since December 2008 at the latest there had been a dispute in respect of ETA's continuing default in failing to lift cargo and the consequent accrual of liquidated damages, which ETA was failing to pay. That was the dispute which was referred to arbitration.

58. It may also be observed that in any event what was referred to arbitration included SFI's specific and quantified claim in respect of the shortlifting for the second shipment year, which was set out in the December 2008 debit note and which the

tribunal held was sufficient in itself to justify termination. Moreover it was clear throughout 2009 that SFI was claiming the increasing liquidated damages for the third shipment year as they accrued and was also claiming to be entitled to terminate as a result of the continuing shortlifting. Accordingly even if it were the case that the jurisdiction of the tribunal depended upon friendly discussion of a specifically identified claim, the exclusion of discussions prior to November 2009 could only deprive the tribunal of jurisdiction in respect of the quantification of termination damages for the post termination shipment years. The claim to be entitled to terminate for shortlifting in the second and third shipment years, and the claim for liquidated damages for those years, were expressly advanced as claims prior to November 2009 and so even on ETA's argument would fall within the jurisdiction of the Tribunal.

59. Ms Selvaratnam further submitted that discussions could not qualify unless they contained a minimum content referable to the legal rights and obligations of the parties under the contract in question; the content of the discussion had to be such that it addressed the legal merits of the contractual rights and obligations of the parties to the contract; and that because there was no discussion in this case of legal defences which were subsequently raised by ETA in the arbitration, the discussions could not satisfy the requirements of the clause.

60. The argument is unsupported by principle or authority. It would require commercial parties to behave like lawyers when the very purpose of the provision is to encourage a businesslike resolution of differences with a view to avoiding the time and expense of a legal process. It would enable a party to prevent the other party from complying with the clause by professing ignorance or lack of interest in his contractual rights. It would deprive the tribunal of jurisdiction whenever a lawyer thought of an arguable point which had not occurred to the client during negotiations. This would be an uncommercial construction of the clause, whose language contains no such prescription.

61. The argument was based on a passage in the judgment of Allsop P in a decision of the New South Wales Court of Appeal in *United Group Rail Services v Rail Corporation New South Wales* (2009) 127 Con LR 202 at [70], [73]. I agree with the views expressed about this passage by Teare J in ***Emirates Trading Agency LLC v Prime Mineral Exports Pvt Ltd*** [2014] 2 Lloyd's Rep 457 at paragraphs [48]-[49] to the effect that an agreement to seek to settle a dispute, if enforceable, permits the parties to have regard to wider commercial interests and does not require them to confine their discussions simply to the terms of their contractual bargain. Indeed I see no reason why the parties should be bound to have regard to the terms of their bargain at all should they not wish to: good faith discussions might properly proceed from the premise that both parties' interests would be served by a compromise which involved future business dealings in the light of the changed commercial environment irrespective of the parties' existing legal rights.

62. However that may be, there is no doubt in this case that the discussions between the parties on and after 1 December 2009 were firmly rooted in the context of the legal contractual rights which SFI had set out clearly in the Termination Notice. It is no answer to say that in those discussions ETA did not advance such legal arguments as were arguably available to it in defence of the claim. Still less could

it be an answer that it failed to advance the unmeritorious arguments subsequently raised and rejected in the arbitration, which had it received correct legal advice it would not have been able to raise in good faith at the time.

63. Ms Selvaratnam also advanced an argument that none of the discussions could qualify because the friendly discussion provision included the words "Any Party may notify the other Party of its desire to enter into consultation to resolve a dispute or claim" and SFI had failed to notify ETA of such a desire in accordance with the formal notice requirements in clause 21 of the LTC. The argument fails because the use of the word "may", in contradistinction to the use of the word "shall" in the previous sentence, shows that the notification provision is permissive not compulsory.

Conclusion

64. The applications are dismissed.