

Bench: P Sathasivam

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO. 10 OF 2009

Trimex International FZE Ltd. Dubai .... Petitioner(s)

Versus

Vedanta Aluminium Ltd., India .... Respondent(s)

JUDGMENT

P. Sathasivam, J.

1) In this petition the Petitioner-Company seeks to invoke arbitration clause under Section 11(6) of the Arbitration & Conciliation Act, 1996 for appointment of an arbitrator as per the Arbitration Agreement contained in clause 6 of the Commercial Offer (purchase order) dated 15.10.2007 and clause 29 of the Agreement exchanged between the parties on 08.11.2007.

1

2) The case of the petitioner is as follows:

The Petitioner-Company is registered in Dubai and engaged in the business of trading in Minerals across the world. Based on the orders from their purchasers, they procure mineral Ores from the suppliers, negotiate and finalize shipments with the ship owners and arrange for the shipment of Minerals across the world. The Respondent is a Company registered in India using Aluminium Ore as one of the major inputs for their

operations.

3) On 15.10.2007, the petitioner submitted a commercial offer through e-mail for the supply of Bauxite to the respondent. After several exchanges of e-mails and after agreeing on the material terms of the contract, the respondent conveyed their acceptance of the offer through e-mail on 16.10.2007 confirming the supply of 5 shipments of Bauxite to be supplied from Australia to Vizag/Kakinada. On the basis of the acceptance by the respondent, the petitioner concluded the deal with the

2

Bauxite supplier in Australia on the same day and entered into a binding Charter Party Agreement with the ship owner in Oslo on 17.10.2007. A meeting was held between the representatives of the respondent and the petitioner at Lanjigarh, Orissa on 26.10.2007 and the minutes of this meeting were signed by them. The acceptance of the offer is acknowledged by the respondent in these minutes. A formal contract containing a detailed arbitration clause was also sent by the respondent to the petitioner on 08.11.2007 which was accepted by the petitioner with some changes and returned the same to the respondent the same evening. On 09.11.2007, the petitioner entered into a formal Bauxite sales Agreement with Rio Tinto of Australia for the supply of 225000 tonnes of Bauxite. On 12.11.2007, the respondent

requested the petitioner to hold the next consignment until further notice. On 13.11.2007, the petitioner informed the respondent that it was not possible to postpone the cargo and requested them to sign the

3

Purchase Agreement. On 13.11.2007 itself, the ship owners nominated the ship for loading the material on 28.11.2007. The petitioner terminated the contract on 16.11.2007 reserving the right to claim for damages. On 18.11.2007, the petitioner formally informed the ship owners about the cancellation of the carriage. On 19.11.2007, the ship owners made a claim of 1 million US\$ towards commercial settlement and on 30.11.2007, the petitioner informed the respondent to pay a sum of 1 million US\$ towards compensation for loss on account of the estimated loss for five shipments and 0.8 million towards compensation for loss of profit and other costs and expenses for cancellation of the order. The respondent rejected the claim of the petitioner on damages. On compensation not being paid, the ship owners served a notice on the petitioner. After negotiations, a settlement was arrived at between the ship owners and the petitioner to pay a lump-sum of 600,000 US\$ to be paid in two installments. The petitioner paid the amount in two

4

installments on 27.02.2008 and 31.03.2008. On

01.09.2008, the petitioner served a notice of claim-cum-arbitration on the respondent to make the payment immediately otherwise treat the notice for referring the dispute to arbitration as per Clause 29 of the Purchase Order and informed about nominating Mr. Shiv Shankar Bhatt, a retired Judge of the Karnataka High Court as the arbitrator from their side and requested the respondent to nominate their own arbitrator within 30 days. On 14.11.2008, the respondent rejected the arbitration notice stating that there was no concluded contract between the parties. Hence, the petitioner filed the present petition for appointment of an Arbitrator.

4) According to the respondent, as seen from the counter affidavit, there was no concluded contract between the parties and the parties are still not ad idem in respect of various essential features of the transaction. Further the draft contract received from the petitioner was yet to be accepted/confirmed by the respondent. The

5  
commercial offer provided two options of shipment lot, namely, 2 shipments and 5 shipments. The only understanding that had been arrived at between the parties as a result of the correspondence subsequent to the receipt of the commercial offer from the petitioner was that the transaction would be in respect of 5 shipments.

All other terms and conditions pivotal and essential to the

transaction were under negotiation as is evident from the correspondence between the parties. The product specifications, price, inclusions in the contract price, delivery point, insurance, commencement and conclusion dates of the contract, transfer of title, quality check and demurrage are all factors that are at large and remain undecided. In such a scenario, where the parties were not in one mind with respect to any aspect of the transaction, the contention of the petitioner that there existed a binding contract between the parties as also a binding arbitration agreement is wholly erroneous and misleading.

Apart from the commercial offer dated 15.10.2007, subject  
6

matter of the instant proceedings, the petitioner had sent another commercial offer on 05.09.2007 bearing No. TID/F/194/2007 also for 45000 MTs of Bauxite (of Australian origin) which offer had been followed up with a purchase order executed by and between the parties.

While the commercial offer, subject-matter of the instant petition, was being negotiated and the terms discussed, a shipment of Bauxite covered under the previous commercial offer dated 05.09.2007 was received by the respondent at its plant on or around 12.11.2007. The product was being analysed to determine its utility value for the respondent at its plant. On account of such analysis being conducted, the respondent on 12.11.2007

wrote to the petitioner bringing the factum of the ongoing analysis to its notice and instructed the petitioner to defer the new shipments till the analysis was completed and the results obtained with respect to the utility value of the said product. Despite being put on notice by the respondent for deferment of shipment, the petitioner

7

permitted the nomination of the Vessel to take place on 13.11.2007. Apart from there being no valid and binding contract/arbitration agreement between the parties, it is the stand of the respondent that in this petition, the petitioner seeks to commence proceedings to fasten a liability on to the respondent for which the respondent was not responsible in any manner whatsoever having informed the petitioner prior to the occurrence of the event giving rise to the alleged liability.

5) In the light of the above pleadings of both the parties, heard Mr. K.K. Venugopal, learned senior counsel for the petitioner and Mr. C.A. Sundaram, learned senior counsel for the respondent.

6) Mr. K.K. Venugopal, learned senior counsel for the petitioner, after taking me through the sequence of events which took place on 15.10.2007 and 16.10.2007, submitted that the contract between the petitioner and the respondent stood concluded by acceptance of the offer for five shipments by the respondent at 3.05 p.m. on

8

16.10.2007. He further contended that the commercial offer of 16.10.2007 was pursuant to the request of the respondent on 10.10.2007 and on the basis of a similar transaction which had been concluded in the previous month between the parties. By taking me through various e-mails exchanged between the parties, he contended that the charter was entered into a contract by the parties on 17.10.2007 i.e. the next day. He finally submitted that from the materials it was established beyond doubt that the intention of parties in case of any dispute between them arising out of the contract which was concluded on 16.10.2007 at 3.06 p.m. shall be settled through arbitration. On the other hand, Mr. C.A. Sundaram, learned senior counsel for the respondent contended that there was no concluded contract between the parties and that the agreement between the petitioner and the respondent was only in respect of the number of shipments (two or five) and nothing more. According to him, there is no arbitration agreement and that clause 6 is

9

vague and ambiguous. He further contended that even in the legal notice dated 01.09.2008 issued by the petitioner's counsel, there is no specific reference to clause 6 of the commercial offer but mentioned only clause 29 of the purchase order exchanged between the parties on

08.11.2007 but the present petition before this Court mentions both of them. He also pointed out that the Charter Party Agreement (CPA) entered into between the petitioner and the ship owner is only a draft. Further, there were differences in the purchase orders exchanged between the parties on 08.11.2007 and that it is only a draft form and prayed for dismissal of the present petition.

7) It is the categorical claim of the petitioner that a commercial offer containing an arbitration clause conveyed through e-mail dated 15.10.2007 for the supply of bauxite to the respondent is a valid offer. This offer was to expire by noon the following day i.e. on 16.10.2007. It is the definite case of the petitioner that after several exchanges of e-mails and agreeing on the material terms

10

of the contract, the respondent conveyed their acceptance of the offer through e-mail on 16.10.2007 confirming the supply of five shipments of bauxite to be supplied from Australia-Vizag/Kakinada. Based on the acceptance by the respondent, it is the claim of the petitioner that they concluded the deal with the Bauxite supplier in Australia on 16.10.2007 and entered into a binding Charter Party Agreement with the ship owner in Oslo on 17.10.2007. It was also pointed out that a formal contract containing further detailed arbitration clause was also sent by the respondent to the petitioner on 08.11.2007 which was

accepted with some minor changes by the petitioner in the same evening. Though exchange of e-mails were admitted by the respondent, it is their specific stand that there was no concluded contract and in the absence of the same, the petitioner cannot enforce certain obligations reflected in those e-mails and avail arbitration clause as if the respondent has executed a formal agreement. In the light of the controversy and in view of the fact that copies of e-

11

mails exchanged between the officers of the petitioner and respondent on various dates which are placed in the form of annexures, it is useful to refer the relevant correspondence in order to understand their claim:

A)

Annexure P 1

Shanika

From: Swaminathan G [swami@trimexgroup.com] Sent: Tuesday, October 09, 2007 2:37 PM To: Rajesh Mohata; Swayam Mishra

Cc: S R Subramanyam; Shanika

Subject: LM Grade Bauxite specs `1 (2). Doc Importance: High

Attachments: LM Grade Bauxite specs'1 (2). Doc

Dear Rajesh,

This has a reference to our earlier mails regarding the specs for the fresh cargoes. After discussions with RTA their comments are reproduced.

"Quote"

We maintain our position that we are not able to accurately measure reactive silica at our Weipa lab for us to place a bonus/penalty on and that any rejection criteria on silica is unreasonable. It is for this reason that we are only prepared to revise our offer on total silica with a Base Grade of 4.5%. We are prepared to increase this bonus/penalty to US\$1.50 per % total silica either side the Base Grade. This we believe is a fair

compensation to Vedanta and is our final offer. Unfortunately we cannot make this an open ended offer as we need to fill our shipping slots set aside for these cargoes in November and December. We have already lost the October opportunity. Freight and spot prices for bauxite have all moved up since we started this negotiation and we are making offers for 2008 cargoes at \$4 higher than your offer. Therefore, we have to put a validity on this until close of business Friday, 12 October after which this offer will be subject to re-confirmation.

12

"Unquote"

We have prepared a revised schedule of specs which is attached. This is not yet confirmed with RTA but once you agree to go by this then we can take up with them. Rejection points are also to be agreed by them. Further the freights have gone up substantially since we last made the shipment. Hence we have to freeze the quality specs first and then take up with RTA for confirmation and then get the vessel freight.

Hence we request you to revert urgently before closing today as this area is all closed from Thursday

Best regards

Swaminathan

Low Monohydrate Grade Bauxite

Typical Analysis

Parameter Range Base spec Bonus/Penalty Rejection Trihydrate 42-46% 45% Min. Bonus US \$0.50 per  
Below alumina tonne per percentage 41% (THA) point fraction pro-rate above 45%

Penalty US\$ 0.50 per

tonne per percentage

point fraction pro-rate

below 45%

Penalty US \$1.00 per

tonne per percentage

point fraction pro-rate

below 42%.

Monohydrate 3-5% 4.5% Bonus US \$0.50 per Above alumina Max. tonne per percentage 5.0% (MHA) point  
fraction pro-rate below 4.5%.

Penalty US\$ 0.50 per

tonne per percentage

point fraction pro-rate

13

above 4.5%.

Total Silica 4-6% 4.5% Bonus US \$1.50 per N/A Max. tonne per percentage

point fraction pro-rata

below 4.5%.

Penalty US\$ 1.50 per

tonne per percentage

point fraction pro-rata

above 4.5%

B)

Shanika

From: Swayam Mishra [swayam.mishra@vedanta.co.in] Sent: Wednesday, October 10, 2007 11:16 AM To: Swaminathan G

Cc: Rajesh Mohata; Shanika; SR Subramanyam; Chinmayee Panda; N. Chellappa; Hukum Chand Dahiya

Subject: Re: LM Grade Bauxite specs `1 (2). Doc Attachments: LM Grade Bauxite specs'1 (2). Doc

Dear Mr. Swaminathan,

Please find our observation in the attached sheet. Kindly give your confirmation for the same.

Thanks

Swayam Mishra

Commercial Department

Vedanta Aluminium Ltd., Lanjigarh Dist: Kalahandi

Pin: 766027

Orissa

9937251390

C)

14

Shanika

From: Swaminathan G [swami@trimexgroup.com] Sent: Wednesday, October 10, 2007 1:30 PM To: Swayam Mishra

Cc: Rajesh Mohata; Shanika; SR Subramanyam; Chinmayee Panda; N. Chellappa; Hukum Chand Dahiya

Subject: Re: LM Grade Bauxite specs `1 (2). Doc Importance: High

Dear Swayam,

We reviewed the reply below and this not acceptable to RTA or by ourselves.

We are unable to improve on the proposal given from our side which itself needs to be ratified by RTA. Please also keep in mind the time limit and we need to have time for obtaining freights which is the most difficult aspect in the present market.

Your final reply may be given to us before close of office hours today.

Regards

Swami

D)

Shanika

From: Swayam Mishra [swayam.mishra@vedanta.co.in] Sent: Wednesday, October 10, 2007 7:17 PM To: Swaminathan G

Cc: Chinmayee Panda; Hukum Chand Dahiya N. Chellappa; Rajesh Mohata; Shanika; SR Subramanyam;

Subject: Re: LM Grade Bauxite specs `1 (2). Doc Dear Mr. Swaminathan,

Please send your rates at your proposed quality parameters on FOB basis and on CIF basis, separately. We would also be interested to have separate rates for 2 shipments and for the complete offer of 2 Lac MT.

Thanks

15

Swayam Mishra

Commercial Department

Vedanta Aluminium Ltd. Lanjigarh

Distt: Kalahandi

Pin: 766 027

Orissa

E)

Annexure P-2

Shanika

From: Swaminathan G [swami@trimexgroup.com] Sent: Monday, October 15, 2007 4:46 PM To: Rajesh Mohata; Swayam Mishra

Cc: S R Subramanyam; Shanika

Importance: High

Attachments: Offer for Mono Bxt.Pdf

Dear Rajeshji,

Please find attached our offer for the two options as desired by you. Please note the validity of the offer until 1200 IST tomorrow. Freights are going up continuously and have jumped since we last gave you the offer. A quick decision will be helpful otherwise we may lose this freight offer too.

Awaiting an early response.

Best regards

G. Swaminathan

General Manager

Trimex International

P.O. Box 17056

Dubai-U.A.E.

Tel:971-4-8835544 Ext. 209

Fax:-971-4-8836410

Mob:-971-50-6455819

16

TRIMEX

The Mineral People

COMMERCIAL OFFER

Company: M/s Vedanta Alumina Ltd. Offer No: TID/F/223/2007 Lanjigarh Date: October 15, 2007 Kind  
Attn: Mr. Rajesh Mohata General Valid Until: October 16, 2007 Manager (Commercial) 1200 noon IST

Product Quantity Price per Delivery Terms Payment Description\* tonne Terms Low OPTION 1 US\$93.50  
CIF Free Out Irrevocable Monohydrate (2) pmt (US Visakhapatnam, L/c for Grade Shipments Dollars India  
(C) clause 100% Bauxite of 45,000 Ninety Cargo cover Invoice (Australian mt +/- 10% Three and value to be  
Origin) at Shipper's Cents Fifty established Option only) 30 days before each

OPTION II shipment (5)

Shipments -92.5% of 45, 000 payable at mt +/- 10% sight at Shipper's -7.5% option payable within 30  
days after

completion

of discharge

\*Please see attached Annexure I for detailed product specifications

Shipment Discharge port Discharge Demurrage/Desp. Shipment

17

Lot rate OPTION I (Non Oil Mooring 8000mt PD US\$ 75,000 per OPTION I (2) at SHINC. day pro rata Half  
In Nov. & Shipments Visakhapatnam, NOR Despatch Dec. 2007 OPTION II India) ATDN (5) SHINC  
OPTION II Shipments WIBON, From Nov. WIPON, 07 to WCCON March 08. WIFPON

12 hrs

turntime

USC Any

time used

to count

Additional Information/Comments:

Vessel details (all about): age-Not over 25 years, 4 x 20 mt gears, 8-10 cbm grabs

Draft: buyers to guarantee draft of 12 mtrs, at discharge port Quantity: Draft survey at discharge port by  
mutually agree independent surveyor will be final.

Quality: Invoice for initial payment as per Producer's Quality Certificate Balance 7.5% payment will be based  
on analysis done by Independent surveyor

Bonus/Penalty: As per Annexure I

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Wherever applicable any charges payable at discharge port (custom duty, taxes etc.) other than our stated sales  
conditions will be to buyers account.

Conditions of sale- all sales are concluded on the following terms, unless varied by written agreements between us. Neither our agents nor our associated companies are authorized to vary these terms.

18

1. We shall not be liable by reason of any defect (including non- conformity with specification or sample) unless we receive written notice of the defect within 15 days of delivery. Our liability in that event will be limited to product related compensation after discussions and suitable joint analysis wherever applicable. In case of joint analysis being agreed upon for confirming the product quality/penalty determination, the above should be arranged by the buyer within 30 days of product delivery to the customer.
2. We shall have no liability under this contract or by reason of any representation, warranty or duty for any direct, indirect, special or consequential loss or damage, costs or expenses arising out of the composition, supply, packaging, handling or use of products.
3. Unless stated otherwise, products are sold strictly to the offered sale condition and payments are due on the dates as applicable.
4. Prices are valid upto 1200 hrs IST 16.10.2007 unless withdrawn by notice from us during that period.
5. Interest may be charged on overdue amount wherever applicable as per our terms mentioned in commercial/payment invoice.
6. This contract is governed by Indian Law & Arbitration in Mumbai courts.

For Trimex International FZE

Name: G. Swaminathan

(computerized offer-Signature not required)

TRIMEX INTERNATIONAL FZE

P.O. BOX 17056,

Jabel Ali,

Dubai, UAI

Tel:971-4-8835544

Fax:-971-4-8836410

Telex: (893) 47804

Email Trimex@emiratesnet.ac.

www.trimexgroup.com

F)

Annexure P-3

Shanika

From: Swayam Mishra [swayam.mishra@vedanta.co.in] Sent: Monday, October 15, 2007 5:34 PM To: Swaminathan G

Cc: Rajesh Mohata; Shanika; SR Subramanyam; Chinmayee Panda

Subject: Offer for imported Bauxite Dear Mr. Swaminathan,

We have the following observations related to your offer:

1. Bonus/Penalty Clause for THA: Penalty US \$ 1.00 per tonne per percentage point fraction pro-rata below 42%.

19

2. Rejection Criteria for Total Silica: Since the range is between (4- 6%), so rejection will be for Total Silica > 6%.

3. Please let us have the FOB rates as well.

4. As you are stating that the freight market is expected to go up in the coming months, so the rate for the supply of 2 shipments should be less than the present rate quoted by you for 5 rates. Looking forward for your positive response. Swayam Mishra

Commercial Department

Vedanta Aluminium Ltd. Lanjigarh

Distt: Kalahandi

Pin: 766 027

Orissa Shanika

G)

From: Swaminathan G [swami@trimexgroup.com] Sent: Monday, October 15, 2007 6:04 PM To: swayam.mishra@vedanta.co.in

Cc: Rajesh.mohata@vedanta.co.in; Shanika; SR Subramanyam; ChinmayeePanda@vedanta.co.in

Subject: Re: Offer for imported bauxite Dear Swayam,

THA penalty rate is as agreed/ratified by RTA. Silica rejection cls not agreed by RTA. Given at our risk but we cannot make it coincide with maxm of range as it is too risky for us. In fact, we also refused rejn cls but Mr. SRS argued on this and persuaded us to put it in for your comfort. We only sell C N F basis.

Freight rates presently are even more firm than next year. But overall we have this package from ship owners. Trust this clarifies.

Best regards

Swami

H)

From: Swayam Mishra [swayam.mishra@vedanta.co.in] Sent: Tuesday, October 16, 2007 11:28 AM To: Swaminathan G

20

Cc: ChinmayeePanda@vedanta.co.in; Rajesh.mohata@vedanta.co.in; Shanika; SR Subramanyam

Subject: Re: Offer for imported bauxite Dear Mr. Swaminathan,

As assured by Mr. SRS that the material is homogeneous in nature, and looking at the result of the present shipment, we do not think that keeping a rejection limit at 6% is a risk for you.

Please let us have the cost break-up (Material+Coastal Freight). We would also like to have a rate for CIF Kakinada port.

Thanks

Swayam Mishra

Commercial Department

Vedanta Aluminium Ltd. Lanjigarh

Distt: Kalahandi

Pin: 766 027

Orissa

I)

Shanika

From: Swaminathan G [swami@trimexgroup.com] Sent: Tuesday, October 16, 2007 11:48 AM To: Rajesh.Mohata@vedanta.co.in; Swayam Mishra Cc: S R Subramanyam; Shanika

Subject: Offer for bauxite

Importance: High

Urgent

Dear Swayam,

The time has just expired. We still have a little more than 1 hour before our offer from Owners expires. Hence we can extend this by another 1 hour which is 1300 hrs IST today.

Please let us know your decision either way as we would like to keep all parties informed in time about the developments.

Regards

Swami

J)

Shanika

From: Swaminathan G [swami@trimexgroup.com]

21

Sent: Tuesday, October 16, 2007 11:54 AM To: Swayam Mishra

Cc: ChinmayeePanda@vedanta.co.in; Rajesh.mohata@vedanta.co.in S R Subramanyam; Shanika

Subject: Offer for imported bauxite Swayam,

Where will you discharge and store in Kakinada port? Is it permissible to take it to Berth and if so what is the draft you can guarantee?

If it is anchorage, it is heavily congested and also you cannot achieve the discharge rate of even 4000t per day. Freight will shoot up and it will be unworkable.

Regards

Swami

K)

Shanika

From: Swayam Mishra [swayam.mishra@vedanta.co.in] Sent: Tuesday, October 16, 2007 1:38 PM To: Swaminathan G

Cc: ChinmayeePanda@vedanta.co.in; Rajesh.mohata@vedanta.co.in; Shanika; S R Subramanyam; Sarika Singh

Subject: Offer for imported bauxite Dear Mr. Swaminathan,

The Demurrage rate should be decreased and made as per last shipment. Please negotiate the same with the Vessel Owners. Either reduce the freight rate or the demurrage rate.

Kindly confirm at the earliest.

Swayam Mishra

Commercial Department

Vedanta Aluminium Ltd. Lanjigarh

Distt: Kalahandi

Pin: 766 027

Orissa

22

L)

Shanika

From: Shanika[shani@trimexgroup.com] Sent: Tuesday, October 16, 2007 2:01 PM To: `Swayam Mishra' Swaminathan G' Cc: ChinmayeePanda@vedanta.co.in; Rajesh.mohata@vedanta.co.in; S R Subramanyam; Sarika Singh

Subject: RE: Offer for imported Bauxite

Dear Mr. Swayam,

As confirmed by Mr. Swaminathan the Demurrage rate is US\$ 69,000 per day. This is the offer given by owners and cannot be reduced any further.

Regards

Shanika Peiris

Assistant Manager-Commercial

TRIMEX INTERNATIONAL FZE

P.O. BOX 17056,

Dubai, UAI

Tel:971-4-8835544, Ext. 208

Fax:-971-4-8836410

971-6522083

M)

Shanika

From: Swayam Mishra [swayam.mishra@vedanta.co.in] Sent: Tuesday, October 16, 2007 2:41 PM To: shani@trimexgroup.com

`S R Subramanyam'; `Swaminathan G' Cc: ChinmayeePanda@vedanta.co.in; Rajesh.mohata@vedanta.co.in; Sarika Singh

Subject: Re: Offer for imported bauxite

Dear Swaminathan,

23

We confirm the order for 5 shipments as per our last discussions. At the same time we would like to have a termination clause after 2 shipments.

Thanks

Swayam Mishra

Commercial Department

Vedanta Aluminium Ltd. Lanjigarh

Distt: Kalahandi

Pin: 766 027

Orissa

N)

From: Swayam Mishra [swayam.mishra@vedanta.co.in] Sent: Tuesday, October 16, 2007 3:06 PM To: Swaminathan G'

Cc: ChinmayeePanda@vedanta.co.in; Rajesh.mohata@vedanta.co.in; sarika.singh@vedanta.co.in; Shanika; S.R. Subramanyam; T. Prasanna Kumar Patro; N. Chellappa

Subject: Re: Offer for imported bauxite

Dear Swaminathan,

We confirm the deal for 5 shipments.

Thanks

Swayam Mishra

Commercial Department

Vedanta Aluminium Ltd. Lanjigarh

Distt: Kalahandi

Pin: 766 027

Orissa

O)

Shanika

From: Swaminathan G [swami@trimexgroup.com] Sent: Tuesday, October 16, 2007 3:49 PM To: swayam.mishra@vedanta.co.in

Cc: ChinmayeePanda@vedanta.co.in; Rajesh.mohata@vedanta.co.in; sarika.singh@vedanta.co.in Shanika; SR Subramanyam; tpk. Patro@vedanta.co.in; n. chellappa@vedanta.co.in

24

Subject: Re: Offer for imported bauxite

Dear Swayam,

Thanks for the confirmation just in time to go to Owners

Regards

Swami

P)

Shanika

From: Swaminathan G [swami@trimexgroup.com] Sent: Tuesday, October 16, 2007 3:57 PM To: Shaun.Barry@comalco.riotinto.com.au; Chandra.Chandrashekhar@riotinto.com.au

Cc: Shanika

Subject: 200K Bauxite for Vedanta

Dear Shaun

Deal is through for 5 Shipments.

Shall give you shipping schedule agreed with owners and details by tomorrow.

Special word of appreciation to the RTA team led by Mark for the support and patience in putting this thru. It's like carrying coal to Newcastle!!!

Thanks & Regards

Swami

Q)

Shanika

From: Swaminathan G [swami@trimexgroup.com] Sent: Wednesday, October 17, 2007 11:12 AM To: swayam.mishra@vedanta.co.in

Cc: ChinmayeePanda@vedanta.co.in

Rajesh.mohata@vedanta.co.in; Shanika; SR Subramanyam; Suvendu.sahoo@vedanta.co.in

25

Subject: Re: Inactive Role of Agent.

Dear Swayam

Small check n revert and advise them suitably.

Meantime please send draft agreement.

Regards

Swami

-----Original Message-----

From: Swayam Mishraswayam.mishra@vedanta.co.in To: Swaminathan G

Cc:ChinmayeePanda@vedanta.co.in; <ChinmayeePanda@vedanta.co.in>

Rajesh.mohata@vedanta.co.in;<Rajesh.mohata@vedanta.co.in;> Shanika; SR Subramanyam;  
Suvendu.Sekhar Sahoo Suvendu.Sahoo@vedanta.co.in

Sent: Wed Oct 17 10:56:43 2007

Subject: Inactive role of Agent

Dear Mr. Swaminathan,

On one hand where we are going to do 5 future shipments of imported bauxite, it is sad to notice that your agent at Vizag port is not taking enough initiative to handle the first shipment even!!!

While our stevedores and representatives are constantly following up with the port authorities to grant us a berth, your agent is being too noncommittal. Please advice your agent to play a more active role in the whole process.

Thanks

Swayam Mishra

Commercial Department

Vedanta Aluminium Ltd. Lanjigarh

Distt: Kalahandi

Pin: 766 027

Orissa

26

R)

Shanika

From: Swaminathan G [swami@trimexgroup.com] Sent: Saturday, October 20, 2007 09:08 AM To: swayam.mishra@vedanta.co.in

Cc: Shanika; SR Subramanyam;

Subject: Contract for bauxite shipments Importance: High

Dear Swayam,

As per the agreements with Owners the following is the schedule of shipments:

1) Laycan agreed with owners:

November 2007-15th/30th

December 2007-Suggested 5th/20th (to be agreed) January 2008-15th/30th

February 2088-14th/28th

March 2008-15th/30th

In view of this, we need to quickly complete the execution of agreement and establishing of L/c as discussed on Thursday. I am awaiting the draft agreement so that we can move forward. Also please confirm if you have surrendered the Original B/L for the present consignment to Master as vessel is likely to finish soon. Matter most urgent.

Regards,

Swami

Annexure P-4

VAL SITE, Lanjigarh

Minutes of the Meeting

M/s Vedanta Aluminium Limited M/s Timex Group Mr. Rajesh Mohata Mr. G. Swaminathan Mr. Venkat Rao Mr. S.R. Subramaniam Mr. Swayam Mishra

Mr. N. Chellappa

Ms. Sarika Singh

\*The Agenda of the meeting was:

1. Supply of Bauxite from Katni

2. Supply of Bauxite from Gujarat

3. Imported Bauxite from Australia

Bauxite from Katni

27

1. Trimex will give its commercial offer within 20th Nov. 2007 to VAL.

Bauxite from Gujarat

1. VAL has asked Trimex to re-work the offer to provide a supply schedule till March 30th, 2008 against Trimex's deadline of June 2008.

2. The rate offered by Trimex is Rs. 1250 PMT (FOB) Okha/Portbander). VAL has asked for a decrease in rates. Trimex will provide its final offer by 29.10.2007.

3. For the existing contract of supply of 10000 MT of bauxite through rakes, further movements will ensue after the due discussions. For the punitive charges levied by railways against the 1st Rake moved from Okha, Trimex has been advised to take up the issue with the Railways officials at Okha. Imported Bauxite from Australia

1. For the shipments under the proposed new contract of 2 Lacs MT. Trimex requested to clearly mention the following clauses:

i) As per Trimex offer No. TID/F/223/2007 dated 15th October 2007 and accepted by VAL, the price is on CIF-FO basis. As per Trimex under such a situation the berthing responsibility should be with VAL. ii) A copy of base Charter Party Agreement and fixture terms shall be provided by Trimex, which should be deemed incorporated in the Purchase agreement.

iii) The Discharge rate agreed should be clearly mentioned in the Purchase agreement.

2. VAL will confirm on the feasibility of discharging the cargo at Kakinada port and accordingly TRIMEX will discuss with the Vessel Owners.

3. For the demurrage incurred in the shipment of MV Nena C vide Order No. VAL/OPRN/526 dated 10.09.07, Trimex claims that the same is on VAL's account as the agreement was on CIF- Visakhapatnam basis. VAL will give its opinion on the same.

4. Trimex has asked to finalise on the new contract and the demurrage by end of office hours on 30.10.2007.

Sd/- Sd/- (Rajesh Mohata) (G. Swaminathan) Sd/- Sd/- (N. Chellapa) (SR Subramaniam) Sd/-

(Venkat Rao)

Sd/-

(Sarika Singh)

Sd/-

(Swayam Mishra)

28

S)

Annexure P-5

Swaminathan G

From: Swaminathan G

Sent: Tuesday, October 30, 2007 12:23 PM To: `Swayam Mishra'; Rajesh.Mohata@vedanta.co.in

Cc: SR Subramanyam; Shanika; ChinmayeePanda@vedanta.co.in

Subject: FW:BULKHANDING TBN/TRIMEX-WEIPA/VIJZAG

Dear Swayam,

With reference to our discussions, please find the fixture terms for the new contract. We are getting the draft CP for this COA and hence we shall send that shortly instead of the base CP as it will contain all amendments for this business. We are expecting this any time today from Owner.

Regards

Swami

T)

Annexure P-6

srs

From: Shanika (shani@trimexgroup.com) Sent: Friday, November 02, 2007 6:40 PM To: `Swayam Mishra'

CC: `SR Subramanyam'; Rajesh.Mohata@vedanta.co.in

Subject: Draft CP for 5 x 45000 mt LM Bauxite Attachments: LM Bxt COA PC.pdf; LM Bxt COA RC.doc

Attn: Mr. Swayam Mishra

Copy of draft C/P just received from owners is attached. It is very likely that Owners will nominate the performing vessel for the first shipment in November 2007. Hence, we request you to expedite finalization of contract and L/c so as to avoid any delays.

Rgards

29

Shanika Peris

Assistant Manager-Commercial

TRIMEX INTERNATIONAL

P.O. BOX 17056,

Dubai, UAE

Tel:971-4-8835544 Ext. 208

Fax:-971-4-8836410, 971-5-6522083

U)

Shanika

From: Swaminathan G [swami@trimexgroup.com] Sent: Wednesday, November 07, 2007, 08:45 AM To: Swayam Mishra

Cc: ChinmayeePanda@vedanta.co.in

Rajesh.mohata@vedanta.co.in; Shanika, S R Subramanyam; Venkateshwar Rao; KS Bala

Subject: Re: Import Consignment (2 lacs) Importance: High

Top Priority/Most Urgent

Dear Swayam,

At the outset wish you all a very Happy Diwali.

We got a feed back from owners late last night that they will look at your request on arrival draft at 11.5 mts and Kakinada port on a case basis at the time of each nomination without Guarantee. This is due to the reason they are not sure what kind of vessel will be in position in that area.

Meanwhile, as already mentioned let us proceed with contract and L/c as we are left with bare minimum time before Owner will nominate a vessel for the first laycan starting 15-30 Nov anytime from tomorrow. We have to establish our L/c on RTA and this is already overdue.

We should have too much pressure at last minute and could result in demurrage at loadport as holidays are on from tomorrow in Middle East and India.

30

Please rush the agreement for signature.

Best Regards

Swami

V)

Shanika

From: Shanika [shani@trimexgroup.com] Sent: Wednesday, November 07, 2007, 11:20 AM To: Swayam Mishra

Cc: ChinmayeePanda@vedanta.co.in

Rajesh.mohata@vedanta.co.in; S R Subramanyam; `Swaminathan G'

Subject: Agreement for 5 x 45, 000 mt LM Bauxite Importance: High

Urgent

Attn: Mr. Swayam Mishra

We have just received feed back from Owners. On 11.5 meters Draft they have indicated an increase of US\$3.5 pmt which will make the price US\$97.00 pmt CIF Free Out Kakinada if you were to have an option additionally for Kakinada. The following terms would be applicable:

- Discharge port to be declared before vessels arrival at load port. - Discharge basis Kakinada "One Safe Berth" All other discharge port terms etc., will be the same. You may introduce this into the Contract as an additional clause and prepare draft urgently and sent it to us.

Regards

Shanika Peiris

Assistant Manager-Commercial

Shanika

W)

From: Swayam Mishra [swayam.mishra@vedanta.co.in] Sent: Thursday, November 08, 2007 12:28 PM To: shani@trimexgroup.com

Cc: ChinmayeePanda@vedanta.co.in; Rajesh.mohata@vedanta.co.in; Sarika Singh; S.R. Subramanyam; `Swaminathan G'; Venkateshwar Rao; N. Chellappa

31

Subject: Option on Draft and Port

Dear Shanika,

Please confirm if the increase in rate is due to the decrease in draft or change in port.

Thanks

Swayam Mishra

Commercial Department

Vedanta Aluminium Ltd. Lanjigarh

Distt: Kalahandi

Pin: 766 027

Orissa

X)

Annexure P-8

From: Swayam Mishra [swayam.mishra@vedanta.co.in] Sent: Thursday, November 08, 2007 2:28 PM To: Swaminathan G

Cc: Rajesh.mohata@vedanta.co.in; Shanika; S.R. Subramanyam; N. Chellappa; Sarika Singh; Chinmayee Panda; Venkateshwar Rao;

Subject: Draft Contract for Import Bauxite---5 shipments

Attachments: Trimex-imported-5 shipments 1.doc

Dear Mr. Swaminathan,

Please find attached the draft contract.

Thanks

Swayam Mishra

Commercial Department

32

PO NO: VAL/OPRN/719 Date-08.11.2007

PURCHASE ORDER

M/s Trimex International FZE

Dubai

Sub: Purchase Order for supply of Low Monohydrate Grade Bauxite

Ref: Offer No. TID/F/223/2007, Dated 15.10.2007 and our subsequent discussions held there on.

Dear Sir,

With reference to the above offer and subsequent discussions we had with you, we are pleased to place this Purchase Order on you for supply of 225000 +/- 10% MT Low Monohydrate Grade Bauxite as per the following terms and conditions..... .....Definition of Term

## 29. Arbitration

The Parties hereto shall endeavour to settle all disputes and differences relating to and/or arising out of the Contract amicably. In the event of the Parties failing to resolve any dispute amicably the same shall be referred to Arbitration in accordance with the Arbitration and Conciliation Act 1996, as is prevalent in India. Each Party shall be entitled to nominate an Arbitrator and the two Arbitrators so nominated shall jointly nominate a third presiding Arbitrator. The Arbitrators shall give a reasoned award.

The place of arbitration shall be Mumbai, Maharashtra in accordance with Indian Law and the language of the arbitration shall be English.

The Parties further agree that any arbitration award shall be final and binding upon both the Parties.

The Parties hereto agree that the Seller shall be obliged to carry out its obligations under the Contract even in the event a dispute is referred to Arbitration.

## 30. Governing Law

This Contract shall be construed in accordance with and governed by the laws of Indian and in the event of any litigation the Courts in Mumbai shall have exclusive jurisdiction.

33

This order is being issued in duplicate. You are requested to send the duplicate copy duly signed as a token of acceptance of the terms and conditions.

Thanking you

Yours faithfully

For Vedanta Alumina Limited

Rajesh Mohata

GM-Commercial

AA)

Re: Draft Contract

SHANIKA

From: Swaminathan G [swami@trimexgroup.com] Sent: Thursday, November 08, 2007 6:29 PM To: swayam.mishra@vedanta.co.in

Cc: SR Subramanyam; Shanika; Rajesh.Mohata@vedanta.co.in; Chinmayee.Panda@vedanta.co.in

Subject: Re: Draft Contract

In final stage

Shall send very soon

Regards

AB)

Annexure P-10

SHANIKA

From: Swaminathan G [swami@trimexgroup.com] Sent: Thursday, November 08, 2007 7:30 PM To: Swayam Mishra

Cc: Rajesh.Mohata@vedanta.co.in; Chinmayee.Panda@vedanta.co.in; SR Subramanyam; Shanika; n.chellappa@vedanta.co.in; sarika.singh@vedanta.co.in; Venkateshwar Rao

34

Subject: Trimex-Imported\_5 shipments 1.doc Importance : High

Attachments: Trimex-Imported\_5 shipments 1.doc

Dear Swayam,

Please find the draft contract with clarification on various points as discussed in meetings and on phone today.

Please confirm the same in order.

Best regards

Swami.

AC)

Annexure P-12

From: Rajesh Mohata [mail to: Rajesh.Mohata@vedanta.co.in] Sent: Monday, November 12, 2007 2:18 PM To: Swaminathan G; Shanika; SR Subramanyam Cc: Venkateshwar Rao; Swayam Mishra; Umesh Mehta

Subject: Trimex International

Dear Mr. Swaminathan,

We have recently received bauxite from first import consignment at Plant. Our operation team is in process to find out recovery and value addition for using this bauxite in actual plant condition. This may take some time. In view of this we may have to hold procurement for the next consignment.

We request you to put on hold the next consignment till further advise.

Regards

Rajesh Mohata

Vedanta Aluminium Ltd.

Mobile +91 99372 51229

(Please note with immediate effect our company name changed to "Vedanta Aluminium Ltd.")

35

AD)

SHANIKA

From: Swaminathan G [swami@trimexgroup.com] Sent: Monday, November 12, 2007 3:20 PM To: Rajesh Mohata

Cc: Venkateshwar Rao; Swayam Mishra; Umesh Mehta; Shanika; SR Subramanyam

Subject: Re: Trimex International Importance : High

Dear Mr. Rajesh,

This is a bit shocking at this juncture as vessel nomination is due from the Owners any time now against the COA. First, we have to go them urgently and ask them to defer the first vessel by 15 days until 1st December as proposed by you on phone. In that case there will be two vessels in December subject to RTA agreement. There might be claims from them. But before we talk to them we need VAL's confirmation that any claims from Owners for the delay or cancellation of any or all shipment(s) under this contract will be fully guaranteed to us and that VAL will pay the amount without demur.

Matter urgent as we have to act fast before Owners nominate any vessel. As far as RTA is concerned we shall take-up and hope they will agree to a revised schedule as they are fully booked for December and thereafter this will have also to be agreed with Owners. Please respond by return mail for us to talk to RTA/Owners. We shall try and do our best but before that we need VAL's clear confirmation on above.

Regards

Swami

From the materials placed, it has to be ascertained whether there exists a valid contract with the arbitration clause. It is relevant to note that on 15.10.2007 at 4.26

36

p.m. the petitioner submitted commercial offer wherein clause 6 contains arbitration clause i.e. "this contract is governed by Indian law and arbitration in Mumbai courts". At 5.34 p.m. though respondents offered their comments, as rightly pointed out by Mr. K.K.Venugopal,

no comments were made in respect of `arbitration clause'.

It is further seen that at 6.04 p.m. the petitioner sent a reply to the comments made by the respondent. Again on 16.10.2007, at 11.28 a.m. though respondents suggested certain additional information on the offer note, here again no suggestion was made with regard to arbitration clause.

At 11.48 a.m. the petitioner sent an e-mail extending validity of the offer by another one hour. At 01.38 p.m., the respondent made certain suggestions on the demurrage asking the petitioner to either reduce the freight rate or the demurrage rate. On the same day at 02.01 p.m., the petitioner sent a reply on the demurrage stating that the rates cannot be reduced any further. At 02.41 p.m., the respondent informed the petitioner that

37

they would like to have a termination clause after two shipments. At 03.06 p.m., the petitioner sent a mail stating that "no owner will accept this condition.

Respondent may accept two or five quickly". At 03.06 p.m. the respondent accepted the offer for five shipments.

In response to the same at 03.49 p.m., the petitioner thanked the respondent for acceptance and conveyed that it was "just in time" to go to the ship owners. At 03.57 p.m. the petitioner finalized the contract with the bauxite supplier in Australia. Apart from the above minute to minute correspondences exchanged between the parties

regarding offer and acceptance, as rightly pointed out by Mr. Venugopal the offer of 15.10.2007 contains all essential ingredients for a valid acceptance by the respondents namely, 1) Offer Validity period 2) Product Description 3) Quantity 4) Price per tonne 5) Delivery Terms (CIF) 6) Payment Terms (Irrevocable L/C) 7) Shipment Lots 8) Discharge Port 9) Discharge Rate with international shipping acronyms 10) Demurrage Rate

38

11) Period of Shipment 12) Vessel Details 13) Draft (Port/Berth Capacity corresponding to height of cargo) 14) Stipulations as to Survey by Independent Surveyors 15) Quality benchmark 16) Bonus/Penalty Rates & 17) Applicable Laws (Indian Law) and Arbitration.

The minute to minute correspondence exchanged between the parties, all the conditions prescribed which had been laid down, awareness of urgency of accepting the offer without any further delay to avoid variation in the freight or other factors, coupled with the e-mail sent on 16.10.2007 at 3.06 p.m. under the subject "re: offer for imported bauxite" stated in unequivocal terms, i.e. "we confirm the deal for five shipments", would clearly go to show that after understanding all the details and the confirmation by the respondent, the petitioner sent a reply stating that "thanks for the confirmation, just in time to go to the ship owners". All the above details clearly

establish that both the parties were aware of various conditions and understood the terms and finally

39

the charter was entered into a contract by the parties on 17.10.2007.

8) Mr. C.A. Sundaram, learned senior counsel for the respondent taking me through the same emails/correspondence submitted that such clauses being unclear and ambiguous, cannot be permitted to stand on its own footing so as to deprive the respondent of its valid defence. He also reiterated that in the absence of a concluded and binding contract between the parties, the arbitration clause contained in draft agreement cannot be relied on by the petitioner. He further pointed out that the arbitration clause as contained in the commercial offer suffers from vice of being unclear and ambiguous and, therefore, is not capable of being enforced.

9) In the light of the details which have been extracted in the earlier paragraphs, I am unable to accept the stand of the respondent. It is clear that if the intention of the parties was to arbitrate any dispute which arose in relation to the offer of 15.10.2007 and the acceptance of

40

16.10.2007, the dispute is to be settled through arbitration. Once the contract is concluded orally or in writing, the mere fact that a formal contract has to be

prepared and initialed by the parties would not affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract has never been initialed.

10) The acceptance conveyed by the respondent, which has already been extracted supra, satisfies the requirements of Section 4 of the Indian Contract Act 1872.

Section 4 reads as under:

"Communication when complete- The communication of an acceptance is complete.... as against the acceptor, when it comes to the knowledge of the proposer."

As rightly pointed out by the learned senior counsel for the petitioner, when Mr. Swaminathan of Trimex opened the email of Mr. Swayam Mishra of Vedanta at 3:06 PM on 16.10.2007, it came to his knowledge that an irrevocable contract was concluded. Apart from this, the mandate of  
41

Section 7 of the Indian Contract Act stipulated that an acceptance must be absolute and unconditional has also been fulfilled. It is true that in the first acceptance conveyed by the respondent contained a rider, namely, cancellation after 2 shipments which made acceptance conditional. However, taking note of the said condition, the petitioner requested the respondent to convey an unconditional acceptance which was readily done through his email sent at 3:06 PM with the words "we confirm the deal for 5 shipments", which is unconditional and unqualified. As rightly pointed out by the learned senior

counsel for the petitioner, the respondent was wholly aware of the fact that its agreement with the petitioner was interconnected with the ship owner. In other words, once the offer of the petitioner was accepted following a very strict time schedule, the respondent could not escape from the obligations that flowed from such an action.

42

11) The Court of Appeal in the case of Pagnan SPA vs.

Feed Products Ltd., [1987] Vol. 2, Lloyd's Law Reports

619 observed as follows:

"It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, "the masters of their contractual fate". Of course, the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'."

The above principle has been consistently followed by the

English Courts in the cases of Mamidoil-Jetoil Greek

Petroleum Co. S.A. v. Okta Crude Oil Refinery AD,

(2001) Vol. 2 Lloyd's Law Reports 76 at p. 89; Wilson

Smithett & Cape (Sugar) Ltd. vs. Bangladesh Sugar

43

and Food Industries Corporation, (1986) Vol. 1 Lloyd's

Law Reports 378 at p. 386. In addition, Indian law has

not evolved a contrary position. The celebrated judgment

of Lord Du Parcq in Shankarlal Narayandas Mundade

v. The New Mofussil Co. Ltd. & Ors. AIR 1946 PC 97

makes it clear that unless an inference can be drawn from the facts that the parties intended to be bound only when a formal agreement had been executed, the validity of the agreement would not be affected by its lack of formality.

In the present case, where the Commercial Offer carries no clause making the conclusion of the contract incumbent upon the Purchase Order, it is clear that the basic and essential terms have been accepted by the respondent, without any option but to treat the same as a concluded contract.

12) Though Mr. C.A. Sundaram, learned senior counsel heavily relied on the judgment of this Court in Dresser Rand S.A. v. Bindal Agro Chem Ltd., (2006) 1 SCC 751, the same is distinguishable because in that case only

44

general conditions of purchase were agreed upon and no order was placed. On the other hand, in the case on hand, specific order for 5 shipments was placed and only some minor details were to be finalized through further agreement. This Court in Dresser Rand S.A (supra) rejected the contention that the acceptance of a modification to the General Conditions would not constitute the conclusion of the contract itself. On the other hand, in the present case, after the suggested modifications had crystallized over several emails.

Further in para 32 in Dresser Rand S.A (supra) this Court held that "parties agreeing upon the terms subject to which a contract will be governed, when made, is not the same as entering into the contract itself" whereas in the case on hand, the moment the commercial offer was accepted by the respondent, the contract came into existence. Though in para 44 of the Dresser Rand S.A (supra), it is recorded that neither the Letter of Intent nor the General Conditions contained any arbitration

45

agreement, in the case on hand, the arbitration agreement is found in clause 6 of the Commercial Offer. In view of the same, reliance placed by the respondent on Dresser Rand S.A (supra) is wholly misplaced and cannot be applied to the case on hand where the parties have arrived at a concluded contract.

13) Mr. Venugopal pointed out that the Charter Party Agreements are governed as per international shipping practices. The normal procedure is that the brokers from both sides first agree on the vital terms over phone/telex (these terms relate to Freight, Type of Ship, Lay Can (Period of shipping), Demurrage Rate, Cranes, etc.) At this stage, no agreement is formally signed but the terms are binding on both the parties, as per the Contract of Affreightment (CoA), which in the present case was entered into on the next day, i.e. 17.10.2007. Certain

minor modifications could go on from either side on mutual agreement but in the absence of any further modification, the originally agreed terms of the CoA are

46

binding on both the parties. Till the agreement is actually signed by both the parties, the term draft is used. This does not mean that the terms are not binding as between the Petitioner and the Ship-owners. Further, according to him, the existence of the Charter Party, various international shipping practices etc. which are to be pleaded in detail before the Arbitral Tribunal once it is constituted and not before this Court since this means extensive quoting of shipping laws and decided cases which cannot be done in the present arbitration petition.

The above submissions cannot be under estimated.

14) Both in the counter affidavit as well as at the time of arguments Mr. C.A. Sundaram, learned senior counsel for the respondent has pointed out various differences between the version of the respondent and the petitioner. However, a close scrutiny of the same shows that there were only minor differences that would not affect the intention of the parties. It is essential that the intention of the parties be considered in order to conclude whether

47

parties were ad idem as far as adopting arbitration as a method of dispute resolution was concerned. In those

circumstances, the stand of the respondent that in the absence of signed contract, the arbitration clause cannot be relied upon is liable to be rejected.

15) Smita Conductors Ltd. vs. Euro Alloys Ltd. (2001)

7 SCC 728 was a case where a contract containing an arbitration clause was between the parties but no agreement was signed between the parties. The Bombay High Court held that the arbitration clause in the agreement was binding. Finally, this Court upholding the judgment of the Bombay High Court held that the arbitration clause in the agreement that was exchanged between the parties was binding.

16) In Shakti Bhog Foods Limited vs. Kola Shipping

Limited, (2009) 2 SCC 134, this Court held that from the provisions made under Section 7 of the Arbitration and Conciliation Act, 1996 that the existence of an arbitration agreement can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement.

17) It is clear that in the absence of signed agreement between the parties, it would be possible to infer from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of tele-communication.

18) Though, Mr. C.A. Sundaram, relied on several decisions, in view of clear materials in the form of emails/correspondence between the parties, those decisions are not germane to the issue on hand.

19) Before winding up, it is useful to refer the latest decision of this Court about the object of Arbitration and Conciliation Act, 1996. In *Great Offshore Ltd. vs. Iranian Offshore Engg. & Construction Co.*, (2008) 14 SCC 240, this Court while considering the objects and provisions of the Arbitration and Conciliation Act, 1996, held:

"59 The court has to translate the legislative intention especially when viewed in light of one of the Act's 'main objectives': 'to minimize the supervisory role of courts in the arbitral process.' [See Statements of Objects and Reasons of Section 4(v) of the Act.] If this Court adds a number of extra requirements such as stamps, seals and originals, we would be enhancing our role, not minimizing it. Moreover, the cost of doing business would increase. It takes time to implement such formalities. What is even more worrisome is that the parties' intention to arbitrate would be foiled by formality. Such a stance would run counter to the very idea of arbitration, wherein tribunals all over the world generally bend over backwards to ensure that the parties' intention to arbitrate is upheld. Adding technicalities disturb the parties' 'autonomy of the will' ('l' autonomie de la volonte') i.e. their wishes. (For a general discussion on this doctrine see *Law and Practice of International Commercial Arbitration*, Alan Redfern and Martin Hunter, Street & Maxwell, London, 1986 at pp.4 and 53.)

60. Technicalities like stamps, seals and even signatures are red tape that have to be removed before the parties can get what they really want--an efficient, effective and potentially cheap resolution of their dispute. The 'l' autonomie de la volonte' doctrine is enshrined in the policy objectives of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985, on which our Arbitration Act is based. (See Preamble to the Act.) the courts must implement legislative intention. It would be improper and undesirable for the courts to add a number of extra formalities not envisaged by the legislation. The courts' directions should be to achieve the legislative intention.

61. One of the objectives of the UNCITRAL Model Law reads as under:

"the liberalization of international commercial arbitration by limiting the role of national courts, and by giving effect to the doctrine 'autonomy of will', allowing the parties the freedom to choose how their disputes should be determined". [See Policy Objectives adopted by UNCITRAL in the preparation of the Model

50

Law, as cited in Law and Practice of International Commercial Arbitration, Alan Redfern and Martin Hunter, Street & Maxwell, London (1986) at p. 388 (citing UN doc.A/CN.9/07, Paras 16-27).]

62. It goes without saying, but in the interest of providing the parties a comprehensive review of their arguments, I note that once it is established that the faxed CPA is valid, it follows that a valid contract and a valid arbitration clause exist. This contract, the faxed CPA, does not suffer from a conditional clause, as did the letter of intent. Thus, the respondent's argument that the parties were not ad idem must fail."

20) In view of the settled legal position and conclusion based on acceptable documents, I hold that the petitioner has made out a case for appointment of an Arbitrator in accordance with Clause 6 of the Purchase Order dated 15.10.2007 and subsequent materials exchanged between the parties. Inasmuch as in respect of the earlier contract between the same parties, Justice B.N. Srikrishna, former Judge of this Court is adjudicating the same as an Arbitrator at Mumbai, it is but proper and convenient for both parties to have the assistance of the same Hon'ble Judge.

21) Accordingly, Hon'ble Mr. Justice B.N. Srikrishna, former Judge of this Court is appointed as an Arbitrator to

51

resolve the dispute between the parties. It is made clear that this Court has not expressed anything on the merits of the claim made by both parties and whatever conclusion arrived at is confined to appointment of an Arbitrator. It is further made clear that it is for the Arbitrator to decide the issue on merits after affording adequate opportunity to both parties. In terms of the Arbitration clause, the place of Arbitration is fixed at

Mumbai. The Arbitrator is at liberty to fix his remuneration and other expenses which shall be borne equally by both the parties.

22) Arbitration petition is allowed on the above terms.

No costs.

.....J. (P. SATHASIVAM)

NEW DELHI;

JANUARY 22, 2010.

52

53