SUPREME COURT OF QUEENSLAND

CITATION:	*AMCI (IO) Pty Ltd v Aquila Steel Pty Ltd* [2009] QSC 139
PARTIES:	**AMCI (IO) PTY LTD ACN 123 253 485** (applicant) v **AQUILA STEEL PTY LTD ACN 097 803 063** (respondent)
FILE NO/S:	1487/09
DIVISION:	Trial Division
PROCEEDING:	Civil trial
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	4 June 2009
DELIVERED AT:	Brisbane
HEARING DATE:	15 May 2009
JUDGE:	Douglas J
ORDER:	**Application dismissed.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – OFFER AND ACCEPTANCE – MATTERS NOT GIVING RISE TO BINDING CONTRACT – STATEMENTS OF INTENTION, NEGOTIATIONS AND INVITATIONS TO TREAT - Where the parties are participants in an iron ore mining venture constituted by an agreement – whether the dispute resolution clause in the agreement is unenforceable as an agreement to agree and should be severed from it – whether the role of the arbitrator appointed under the clause is arbitrary and uncertain. *Commercial Arbitration Act* 1985 (WA) s 22 *Industrial Relations Act* 1988 (Cth) s 170QK *National Labor Relations Act* 1935 (US) s 8(d) *Australia Pacific Airports (Melbourne) Pty Ltd v The Nuance Group (Australia) Pty Ltd* [2005] VSCA 133 referred; *Carr v Brisbane City Council* [1956] St R Qd 402, 411 considered; *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 considered and applied; *Con Kallergis Pty Ltd v Calshonie Pty Ltd* (1988) 14 BCL

201, 211 referred;
Godecke v Kirwan (1973) 129 CLR 629 cited;
Himbleton Pty Ltd v Kumagai (NSW) Pty Ltd (1991) 29 NSWLR 44, 63 cited;
Petromec Inc v Petroleo Brasileiro SA Petrobras [2005] EWCA Civ 891; [2006] 1 Lloyds Rep 121, 153-154 at [120]-[121] considered;
Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 76 ALJR 436, 445 at [40], 452-453 at [86]-[88] and 463 at [156] referred;
The Queensland Electricity Generating Board v New Hope Collieries Pty Ltd [1989] 1 Lloyd's Rep. 205, 210 cited;
United Group Rail Services Pty Ltd v Rail Corporation NSW [2008] NSWSC 1364 cited;
Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd (1968) 118 CLR 429, 436-437 cited;
Walford v Miles [1992] 2 AC 128, 138 referred;
Wellington City Council v Body Corporate 51702 (Wellington) [2002] 3 NZLR 486, 495-496 discussed;
Xstrata Queensland Ltd v Santos Ltd [2005] QSC 323 referred.

COUNSEL: W Sofronoff QC and A Pomerenke for the applicant

AJ Myers QC and MG Lundberg for the respondent

SOLICITORS: Allens Arthur Robinson for the applicant

Mallesons Stephen Jaques for the respondent

[1] **Douglas J**: The applicant, AMCI (IO) Pty Ltd, and the respondent, Aquila Steel Pty Ltd, are participants in an iron ore mining joint venture in Western Australia constituted by an agreement made on 14 February 2005. The certainty of the dispute resolution clause in that agreement is itself in dispute, AMCI seeking a declaration that it is unenforceable as a whole or that certain parts of it are unenforceable and should be severed from the agreement. The first submission for the applicant is that the clause evidences an agreement to negotiate in good faith which is illusory. The second argument focuses on the role of the arbitrator who may be appointed under the clause, determining which of the participants should be required to sell its interest to the other, a role criticised because of the absence of explicit criteria for the making of that decision.

The agreement

[2] The clause, cl.12, reads as follows:

> "12. DISPUTE RESOLUTION
>
> 12.1 The Participants agree to use all reasonable efforts in good faith to resolve any dispute which arises between them in

connection with this Agreement and in particular any deadlock at a meeting of the Management Committee.

12.2 If the Representatives are unable to agree on a matter before the Management Committee, any Participant may give to the other Participant a notice of a dispute and that it requires the provisions of this clause 12 to apply to that dispute.

12.3 Unless otherwise agreed, where there is a dispute:

(a) each Participant must in seeking to resolve the dispute, act in good faith, act in the best interests and with regard to the purpose of the Joint Venture as set out in Recital C of this Agreement, make timely decisions, be genuine and open in communication with other Participant and attend all meetings scheduled for the resolution of the dispute;

(b) Representatives of the Management Committee or other senior executives of the Participants must meet to try and resolve the dispute within 30 days of the notice of dispute being given;

(c) if the dispute is not resolved in that period, a Participant may require the chief executive officers of each of the Participants to meet within a further period of 14 days;

(d) if:

(i) notwithstanding the above procedures, the dispute is not resolved by the expiry of the period referred to in clause 12.3(c); and

(ii) where the dispute relates to a decision of the Management Committee, the decision has been before the Management Committee at two Meetings held not less than 6 weeks apart,

either Participant may require the dispute to be submitted to non-binding arbitration by a single arbitrator in accordance with and subject to the Institute of Arbitrators and Mediators Australia Rules for the Conduct of Commercial Arbitrations. That arbitration is to be conducted in Perth, Western Australia and the arbitrator will be asked to identify a Participant ('**Vendor Participant**') who he thinks should sell its Venture Interest if the dispute cannot be resolved under this clause 12;

(e) if the Participants cannot agree upon a single arbitrator the arbitrator is to be appointed by the President of the Western Australia Chapter of the Institute of Arbitrators and Mediators Australia;

(f) the award of the arbitrator is not binding on the Participants except to the extent that the Vendor Participant is identified;

(g) until the arbitrator gives his decision the Participants must continue to observe their obligations under this Agreement other than those obligations that are the subject of the dispute;

(h) if the Participants have not resolved the dispute within a further 30 days following the non-binding arbitration the dispute will be referred back to the chief executive officers of each of the Participants for a further period of 14 days; and

(i) if, following the further period of 14 days the Participants have not resolved the dispute, the Vendor Participant will be regarded as being a Defaulting Participant for the purpose of clause 10 (and only for that purpose) such that the other Participant will have the option to purchase the Venture Interest of the Vendor Participant."

[3] The more limited relief sought focuses on the words "and the arbitrator will be asked to identify a Participant ('**Vendor Participant'**) who he thinks should sell its Venture Interest if the dispute cannot be resolved under this clause 12" appearing in cl.12.3(d) and all of cl.12.3(i), and seeks a declaration that they are unenforceable.

[4] Some other provisions of the agreement are relevant. Recital C provides:

> "The Participants have agreed to establish an unincorporated joint venture to undertake the Venture Activities including, to explore and undertake Feasibility Studies in respect of the Tenements and, where viable, for the Mine Development and Mining Operations of a mine or mines and associated activities to be located on any of the Tenements."

[5] Clause 2.1 records that the participants have associated themselves for the purpose of carrying out the venture activities. Clause 2.3 says that each of them has a 50 per cent interest as at the commencement date. AMCI is, in fact, an assignee of an interest originally held by a company called West Iron Pty Ltd. The number of parties is still two, each holding 50 per cent of the venture, but the agreement contains provisions permitting assignments of interests in it with the potential to create a situation where the numbers of participants are larger and the percentage interests held by them are different from each other and not necessary equal as they are at present.

[6] Clause 2.12 provides that the participants will at all times act in good faith and in the best interests of the joint venture and make their respective interests in the tenements issued to them and held by them and the other venture property available for the purpose of the joint venture.

[7] Clause 4.1 establishes a management committee responsible for the control and direction of the Joint venture.

[8] Clause 10 deals with the position of a defaulting participant who may be bought out at a price to be determined by an independent expert acting as such and not as an arbitrator. Clause 11 deals with the election by a participant to limit its contributions to an approved program and budget and what is to happen in respect

of a shortfall thus arising. Clause 14 deals with assignment of interests and pre-emptive rights of the participants in those circumstances.

[9] Clause 16.1(a) provides:

> "neither Participant may, nor may allow any Related Body Corporate of that Participant to, (in this clause 16 referred to as an '**Acquirer**') acquire any legal or equitable interest in any mining tenements (as that term is defined in the Act) within Western Australia where, at the time of the proposed acquisition, the mining tenement was considered by the Acquirer to be prospective for iron ore, unless such interest is assignable to the other Participant of this Joint Venture (subject only to any necessary Approvals or the observance of mere formalities, such as execution of a deed of assumption with a third party)."

[10] Clause 26 provides:

> "26. SEVERABILITY
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> 26.1 If reading down a provision of this Agreement would prevent the provision being invalid or voidable it must be read down to the extent that it is necessary and capable of being read down.
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> 26.2 If, notwithstanding clause 26.1, a provision of this Agreement is still invalid or voidable:
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> (a) if the provision would not be invalid or voidable if a word or words were omitted, that word or words must be deleted; and
> (b) in any other case, the whole provision must be deleted,
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> and the remainder of this Agreement continues to have full force and effect."

The parties' submissions

The certainty of the whole of cl. 12

[11] Mr Sofronoff QC for the applicant submitted that cl.12 was an agreement to negotiate which was illusory and conferred no legal rights, relying on passages in decisions such as *Carr v Brisbane City Council* [1] and *Walford v Miles.*[2] Each of those decisions dealt with a situation where there was, in effect, an agreement to negotiate a further agreement. In *Carr v Brisbane City Council* it was an offer to negotiate with a contractor to make good to him any increased costs he had necessarily and actually incurred under an existing contract. In *Walford v Miles* there was an oral agreement to deal with the first plaintiff exclusively for the sale of

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1 [1956] St R Qd 402, 411.
2 [1992] 2 AC 128, 138.

an interest in a company and to terminate negotiations with a competing prospective purchaser. That "agreement" did not contain any term about the duration of the obligation to negotiate and was itself "subject to contract". It is not surprising that, in each case, the agreement was found to be uncertain. The applicant also relied, however, on this passage in Lord Ackner's speech in *Walford v Miles*:

> "**While accepting that an agreement to agree is not an enforceable contract, the Court of Appeal appears to have proceeded on the basis that an agreement to negotiate in good faith is synonymous with an agreement to use best endeavours and as the latter is enforceable, so is the former. This appears to me, with respect, to be an unsustainable proposition. The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours.** This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, *subjectively*, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith.' However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adverserial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. Mr Naughton, of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question--how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an 'agreement?' A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly a bare agreement to negotiate has no legal content." (emphasis added)

[12] The passages emphasised, it was submitted, operated to negate any argument that a process of negotiation in good faith could be enforced in the same way as an agreement to use best endeavours. A similar possibility had been contemplated, however, about six months before the decision in *Walford v Miles* by Kirby P in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*[3] where his Honour said:[4]

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3 (1991) 24 NSWLR 1

4 See at 26-27.

> "From the foregoing it will, I hope, be clear that I do not share the opinion of the English Court of Appeal that no promise to negotiate in good faith would ever be enforced by a court. I reject the notion that such a contract is unknown to the law, whatever its term. I agree with Lord Wright's speech in *Hillas* that, provided there was consideration for the promise, in some circumstance a promise to negotiate in good faith will be enforceable, depending upon its precise terms. Likewise I agree with Pain J in *Donwin* that, so long as the promise is clear and part of an undoubted agreement between the parties, the courts will not adopt a general principle that relief for the breach of such promise must be withheld. It follows that in this regard I agree with the conclusion of Clarke J on the principle presented by the first issue before him - and now before this Court.
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> Nevertheless, alike with Goff LJ in *Mallozzi* and the substantial body of United States authority which has been cited in this case, I believe that the proper approach to be taken in each case depends upon the construction of the particular contract: see *Australia & New Zealand Banking Group Ltd v Frost Holdings Pty Ltd* [1989] VR 695; see note (1991) 65 ALJ 59. In many contracts it will be plain that the promise to negotiate is intended to be a binding legal obligation to which the parties should then be held. The clearest illustration of this class will be cases where an identified third party has been given the power to settle ambiguities and uncertainties: see *Foster v Wheeler* (1888) LR 38 Ch D 130; *Axelsen v O'Brien* (1949) 80 CLR 219 and *Biotechno!ogy* (at 136). But even in such cases, the court may regard the failure to reach agreement on a particular term as such that the agreement should be classed as illusory or unacceptably uncertain: *Godecke v Kirwan* (at 646f) and *Whit!ock v Brew* (1968) 118 CLR 445 at 456. In that event, the court will not enforce the arrangement.
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> In a small number of cases, by reference to a readily ascertainable external standard, the court may be able to add flesh to a provision which is otherwise unacceptably vague or uncertain or apparently illusory: see, eg, *Powell v Jones* [1968] SASR 394 at 399; *Sweet and Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699; cf *Meehan v Jones* (1982) 149 CLR 571 at 589; *Jillcy Film Enterprises* (at 521); *Ridgeway Coal Co* (at 408).
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> Finally, in many cases, the promise to negotiate in good faith will occur in the context of an 'arrangement' (to use a neutral term) which by its nature, purpose, context, other provisions or otherwise makes it clear that 'the promise is too illusory or too vague and uncertain to be enforceable': see McHugh JA in *Biotechnologv* (at 156) and *Adaras Development Ltd v Marcona Corporation* [1975] 1 NZLR 324 at 331."

[13] Waddell A-JA agreed generally with his Honour's reasons but Kirby P's approach was not adopted by Handley JA who regarded a promise to negotiate in good faith as illusory and not binding.[5]

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[5] See at 41-43.

[14] *Coal Cliff Collieries Pty Ltd* was, again, a clear case of an agreement to agree. The parties stated in heads of agreement for a proposed complex joint venture for a coal mine that they would "proceed in good faith to consult together upon the formula of a more comprehensive and detailed joint venture agreement". The whole Court took the view that it was too uncertain to be enforceable. But the comments of Kirby P are relevant to this dispute and to the proper characterisation of the obligations imposed on the parties by the agreement.

[15] Other intermediate Courts of Appeal have expressed views on the topic. It is fair to say that the New Zealand Court of Appeal, in *Wellington City Council v Body Corporate 51702 (Wellington)*[6] agreed generally with *Walford v Miles* with the significant rider about "process contracts" referred to in these passages:[7]

> "[31] As we indicated a little earlier, the same theory of consensus applies by analogy to a process contract which obliges the parties to negotiate in good faith for the purpose of trying to reach agreement on all essential terms. Good faith in this context is essentially a subjective concept, as the House of Lords pointed out in *Walford.* There is thus no sufficiently certain objective criterion by means of which the Court can decide whether either party is in breach of the good faith obligation. The Court is unable in such cases to resolve the question whether a particular negotiating stance was adopted in good faith. The law regards the task of reconciling self-interest with the subjective connotation of having to act in good faith as an exercise of such inherent difficulty and uncertainty as not to be justiciable. The ostensible consensus is therefore illusory.
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> [32] It is implicit in what we have just said that there will be some circumstances in which a process contract is enforceable. The tender cases, although sui generis, provide some analogy: see for example *Transit New Zealand v Pratt Contractors Ltd* [2002] 2 NZLR 313. In such cases a specific procedure is in issue, and the Court can reasonably determine what the parties are required to do and whether they have done it. If a contract specifies the way in which the negotiations are to be conducted with enough precision for the Court to be able to determine what the parties are obliged to do, it will be enforceable.
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> …
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> [34] The law being as discussed, we are led inexorably to the view that the process contract between the council and Alirae was unenforceable. It was a contract to negotiate in good faith with no more definition than that of what the obligations of the parties were. Essentially we agree with the English approach which seems to us to have been accepted, at least implicitly, by this Court in ECNZ. There is of course the rider to that approach that process contracts can be enforceable if sufficiently definitive of the parties' obligations. That

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6 [2002] 3 NZLR 486, 495-496.

7 See at 495-496, [31]-[34].

> is how we would see Kirby P's judgment in *Coal Cliff* fitting into the general approach which we favour."

[16] The ability of the Court to determine what parties are required to do in these situations was addressed in passing by Hayne JA speaking for the Victorian Court of Appeal in *Con Kallergis Pty Ltd v Calshonie Pty Ltd*[8] where his Honour said:

> "The argument before us assumed that Norris was obliged by its agreement with Sun Lighting to conduct the negotiations with the builder in good faith (or honestly and reasonably). Although there may be difficult questions of fact and degree about whether evidence of particular conduct reveals a lack of good faith or lack of honestly or reasonableness, the obligation to act in good faith or honestly or reasonably is an obligation that is certain. See e.g. *Meehan v. Jones* (1982) 149 C.L.R. 571 at 589 per Mason J.) As his Honour there said:
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> > "The limitation that the purchaser must act honestly, or honestly and reasonably, takes the case out of the principle that:
> >
> > '…where words which by themselves constitute a promise are accompanied by words which show that the promisor is to have a discretion or option as to whether he will carry out that which purports to be the promise, the result is that there is no contract on which an action can be brought'."

[17] The respondent relied on that passage, arguing that it was possible to give content to the participants' obligation to negotiate in good faith while trying to resolve their differences. Mr Myers QC referred to the "minimal attraction" of arguments alleging uncertainty in the machinery available to the courts for making contractual rights effective.[9] In particular, he pointed to the fact that this clause did not require the participants to negotiate a further agreement. Rather, it deals with the steps required to attempt to resolve the dispute and the consequences of their failure to resolve it.

The position of the arbitrator

[18] The narrower argument of the applicant focused on the role of the arbitrator in identifying the vendor participant. The submission was that the arbitrator was required to act in a vacuum because of the absence of criteria for determining which of the participants should be required to sell its interest to the other. In this context Mr Sofronoff QC pointed to the decision in *Xstrata Queensland Ltd v Santos Ltd*[10] where McMurdo J said:

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8 (1998) 14 BCL 201, 211.

9 Referring to *The Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep. 205, 210 per Sir Robin Cooke. Reference was also made to the rejection of any narrow or pedantic approach to the search for intention in commercial contracts adopted in decisions such as *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429, 436-437 per Barwick CJ.

10 [2005] QSC 323 at [29].

> "A dispute is not capable of decision in a judicial manner absent the existence of certain criteria which define how a decision for its resolution is to be reached. If the decision maker is free to apply his or her idiosyncratic view the decision making process cannot in substance be a judicial one. It is only if the decision maker is bound by certain measures, standards or criteria, which are known to the parties, that the process can resemble a judicial one. An arbitration requires the existence of a dispute which is to be resolved according to such defined criteria."

[19] The respondents' argument contrary to this submission pointed to the preconditions that had to be met before the arbitrator would be able to identify the vendor participant, namely the use of all reasonable efforts to resolve any dispute, in particular any deadlock at a meeting of the management committee, to be followed by the prescribed meetings of the senior and chief executives. Mr Myers QC submitted that that presupposed a significant dispute which had not been readily compromised after progression through the senior executives and chief executives of the participants. He also emphasised the fact that this was a 50:50 joint venture where the risk of deadlock was apparent. In that context he submitted that the clause was designed to put both participants at risk of being forced to sell their joint venture interest in the event that a deadlock occurred which they had been unable to resolve at two management committee meetings and after a detailed process of meetings and negotiations.

[20] He submitted that the decision of the appointed arbitrator had to be consistent with the terms of the joint venture agreement and fair and reasonable by reference to its terms.[11] He also pointed out that any questions that arose for determination in proceedings under the agreement had to be determined according to law pursuant to s.22(1) of the *Commercial Arbitration Act* 1985 (WA). He drew support from the decision of Nettle JA in *Australia Pacific Airport (Melbourne) Pty Ltd v The Nuance Group (Australia) Pty Ltd*[12] where his Honour noted in passing that the character of an arbitrator depended upon the nature of the duties which he or she was appointed to perform and that an arbitrator may be appointed to perform or implement an act which is arbitral in the sense of legislative. His Honour went on to conclude that:

> "It is implicit in a commercial agreement that the terms to be imposed by arbitration should [be] fair and reasonable between the parties. Consequently, even in the absence of specific guidance, an arbitrator appointed to resolve a difference about what is to be agreed has a base from which to work. And despite such uncertainty as that may create, these days arguments about uncertainty rendering commercial agreements unenforceable tend to be given the short shrift which they usually deserve. In the words of Sir Robin Cooke in *The Queensland Electricity Generating Board v. New Hope Collieries Pty. Ltd.*:

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[11] Referring to *The Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep. 205, 210 per Sir Robin Cooke; *Xstrata Queensland Ltd v Santos Ltd* [2005] QSC 323 at [35]-[38] per McMurdo J; *Australia Pacific Airports (Melbourne) Pty Ltd v The Nuance Group (Australia) Pty Ltd* [2005] VSCA 133 at [50] per Nettle JA and *Himbleton Pty Ltd v Kumagai (NSW) Pty Ltd* (1991) 29 NSWLR 44, 63 per Giles J.

[12] [2005] VSCA 133 at [50], footnotes omitted.

> 'At the present day, in cases where the parties have agree on an arbitration or valuation clause in wide enough terms, the Courts accord full weight to their manifest intention to create continuing legal relations. Arguments invoking alleged uncertainty, or alleged inadequacy in the machinery available to the Courts for making contractual rights effective, exert minimal attraction. *Sudbrook* is now the leading English case in the field. The same tendency has been apparent elsewhere in the Commonwealth, as illustrated by *Calvan Consolidated Oil and Gas Co. Ltd. v. Manning; Attorney-General v. Barker Bros. Ltd;* and *Booker Industries Pty. Ltd. v. Wilson Parking (Qld) Pty. Ltd.*'"

[21] Mr Myers QC also argued that the arbitrator would be informed of the competing contentions of the parties as to the considerations which the arbitrator should take into account in identifying the vendor participant and identified some clauses of the joint venture agreement potentially relevant as considerations to which the arbitrator could have regard, such as a party's stated intentions as to its future plans in relation to the joint venture activities, each party's technical abilities in respect of the venture activities, its financial ability to undertake those activities and meet the required cash calls, a participant's financial position generally and whether a participant had breached the joint venture agreement previously or was unlikely to perform the obligations set out in the joint venture agreement in the future.[13]

[22] He relied upon the decision of the High Court in *Godecke v Kirwin*[14] where Gibbs J said:[15]

> "It is well established that the parties to a contract may leave terms – even essential terms - to be determined by a third person … In such a case the contract is not bad for uncertainty because if the third person settles the terms the contract will thereby be rendered certain."

Discussion

Clause 12 as a whole

[23] Subclauses 12.3(b), (c) and (h) were criticised as almost entirely devoid of context in requiring meetings or referencing the matter back to the chief executive officers of the participants without specifying what they are expected to do. They are, however, required by cl.12.3(a) to seek to resolve the dispute, act in good faith, act in the best interests and with regard to the purpose of the joint venture as set out in recital C, make timely decisions, be genuine and open in communication with the other participant and attend all the meetings scheduled for the resolution of the dispute. Clause 12.3(a) was said to be infected by the same uncertain concepts criticised generally by the applicant but, in the context of efforts to resolve a dispute, seems to me to set up objective standards which are capable of assessment by a court required to determine whether the participants have acted in accordance with them. The obligation seems to me to be more analogous to the "agreement to use best endeavours" referred to by Lord Ackner as compared to the agreement to

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13 The respondent referred to recital C cll.2.1, 2.12, 6, 10.1(a), 10.1(b), 10.1(c), 11 and 14.6 of the joint venture agreement.

14 (1973) 129 CLR 629.

15 See at 645 and see also Walsh J at 642.

negotiate or the agreement to agree also referred to by him in *Walford v Miles.*[16] This is especially so when it is considered in context, not as an agreement to agree, but as the machinery to resolve disputes within an existing agreement.

[24] That consideration clearly influenced Longmore LJ in *Petromec Inc v Petroleo Brasileiro SA Petrobras* where his Lordship said:[17]

> "The authority chiefly relied on by Mr Hancock in support of blanket unenforceability was the decision of the House of Lords in *Walford v Miles*, which (of course) binds us for what it decides. The main distinction between that case and this was that in that case there was no concluded agreement at all since everything was 'subject to contract'; there was, moreover, no express agreement to negotiate in good faith. There were negotiations for the sale of a business in the course of which the defendant prospective vendor agreed not to negotiate with any third party and to negotiate only with the claimant prospective purchaser. All the negotiations were subject to contract and the House of Lords held that the 'lock-out agreement' was unenforceable because there was no provision saying how long it was to last. The claimants sought to resolve this difficulty by asserting that it was an implied term of the agreement that, while the defendant wanted to sell the business, they would negotiate in good faith with the claimants. The House of Lords held that it was impossible to imply such a term since it was unworkable in practice and inherently inconsistent with the position of a party negotiating 'subject to contract'. The lock-out agreement was therefore too uncertain to be enforceable. As Lord Ackner (with whom the rest of their Lordships agreed) said at page 138G:-
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> > '. . . . while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content.'
>
> That shows the difference from the present case. Clause 12.4 of the Supervision Agreement is not a bare agreement to negotiate. It is not irrelevant that it is an express obligation which is part of a complex agreement drafted by City of London solicitors and issued under the imprint of Linklater & Paines (as Linklaters were then known). It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered. I have already observed that it is of comparatively narrow scope. To decide that it has 'no legal content' to use Lord Ackner's phrase would be for the law deliberately to defeat the reasonable expectations of honest men, to adapt slightly the title of Lord Steyn's Sultan Azlan Shah lecture delivered in Kuala Lumpur on 24th October 1996 (113 LQR 433 (1977)). At page 439 Lord Steyn hoped that the House of Lords might reconsider *Walford v Miles* with the benefit of fuller argument. That is not an option open to this court. I would only say that I do not consider that *Walford v Miles* binds us to hold that the express

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16 [1992] 2 AC 128, 138.

17 [2005] EWCA Civ 891; [2006] 1 Lloyds Rep 121, 153-154 at [120]-[121].

> obligation to negotiate as contained in clause 12.4 of the Supervision Agreement is completely without legal substance."

[25] In this agreement cl. 12 is not properly characterised as an agreement to agree; it does not purport to impose an obligation to negotiate a further agreement with open terms. It is an agreement about the process to adopt when the participants disagree. The process is directed to the resolution of the dispute but they have not agreed to reach any particular result. As one recent commentator has said of such cases: "what is sought to be enforced is the journey and not the destination".[18] The observations of the New Zealand Court of Appeal in *Wellington City Council v Body Corporate 51702 (Wellington)*[19] about "process contracts" being enforceable if sufficiently definitive of the parties' obligations and as to how Kirby P's judgment in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* fits into the general approach which they favour are apposite. With respect, I agree with Kirby P's views that the proper approach to be taken in each case depends upon the construction of the particular contract and that obligations to negotiate in good faith will be enforceable in some circumstances.

[26] The process under this contract requires the participants to act in good faith in seeking to resolve the dispute and to act in the best interests and with regard to the purpose of the joint venture as set out in Recital C. They have to attend all meetings scheduled for the resolution of the dispute. Those include meetings of the senior executives of the participants who must meet to try to resolve the dispute. Further possible meetings of their chief executives are then envisaged to be followed by a non-binding arbitration if those negotiations are inconclusive. The respondent's argument that there was good commercial sense in involving senior representatives of the parties in the process for resolving disputes is valid.[20] The award is non-binding except to the extent that the arbitrator identifies the vendor participant. While the task of determining whether parties have negotiated in good faith with a view to resolving their differences may sometimes be difficult it is not something beyond the ability of courts to decide such issues for the reasons expressed by Hayne JA in *Con Kallergis Pty Ltd v Calshonie Pty Ltd*.[21] Nor is the result of a failure to negotiate a resolution of the dispute itself uncertain under this agreement. It will permit either participant to require the dispute to be submitted to arbitration.

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18 Trevor Thomas, *The enforceability of agreements to negotiate in major construction projects*, (2009) 25 BCL 94, 95.

19 [2002] 3 NZLR 486, 495-496.

20 *United Group Rail Services Pty Ltd v Rail Corporation NSW* [2008] NSWSC 1364 at [15] per Rein J.

21 (1998) 14 BCL 201, 211. Such a process has also been treated by parliaments as one capable of possessing a degree of certainty; see s 170QK of the former *Industrial Relations Act* 1988 (Cth) which enabled the Australian Industrial Relations Commission to make orders for the purpose of "ensuring that the parties negotiating for an agreement … do so in good faith" a provision based on the *National Labor Relations Act* 1935 (US) s 8(d); see Creighton and Stewart, *Labour Law*, (4th ed., 2005) at p.220 para. [8.36]. Obligations to negotiate in good faith are familiar in other legal systems also; see Trevor Thomas, *The enforceability of agreements to negotiate in major construction projects*, (2009) 25 BCL 94, 102 fn 42 and Beatson and Friedmann, *Good Faith and Fault in Contract Law* (Clarendon Press, 1995) at 35-36, 38, 40. They should not be confused with any reluctance of the common law to imply an obligation to act in good faith into contracts; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436, 445 at [40], 452-453 at [86]-[88] and 463 at [156].

[27] The threat that a third party's decision identifying a vendor participant would intrude itself into the participants' affairs may well be designed intentionally to spur the participants to reach earlier agreement and limit the potential for dispute within the joint venture. Viewed in that light, Longmore LJ's comment bears repetition:[22]

> "It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered … To decide that it has 'no legal content' … would be for the law deliberately to defeat the reasonable expectations of honest men."

The position of the arbitrator

[28] In my view it is also possible to give content to the issues to be determined by the arbitrator in identifying a vendor participant by the process argued for the respondent. The terms of the agreement envisaged the development of a mine or mines and associated activities to be located on the tenements identified in the agreement. Taking that as a primary focus of the agreement and recognising the ability of the participants to identify issues that may, in a particular dispute, be relevant to that end, I am of the view that objective criteria can be identified to enable the arbitrator's task to be performed according to law as is required by s.22(1) of the *Commercial Arbitration Act* 1985 (WA). The arbitrator's task can be made certain by reference to the objects of the agreement and the facts giving rise to any dispute that may arise between the participants about its performance. Those facts will also give content to the decision of the question which of the participants should be identified as the vendor participant.

[29] It was also argued that the arbitrator could determine any question that arose by reference to considerations of general justice and fairness, pursuant to s.22(2) of that Act, but it did not seem to me that the parties to this agreement had agreed in writing to permit such an approach.

Conclusion and order

[30] The participants' agreement to use all reasonable efforts in good faith to resolve any dispute which arises between them in connection with the joint venture agreement and, in particular, in respect of any deadlock at a meeting of a management committee, is not an uncertain agreement to agree. Rather it is an agreement to pursue a process to attempt to resolve a dispute under an existing agreement which is outlined in more detail in the balance of cl.12 and which requires them to act in a way which can be assessed objectively by a court called on to decide if they have adhered to their agreement. It does not require that the parties resolve their dispute by agreement and provides for arbitration if they cannot agree. I do not regard it as illusory.

[31] Nor is the obligation of the arbitrator who may be appointed pursuant to cl.12 itself uncertain. The arbitrator's obligation to identify the vendor participant should not require a decision that is merely idiosyncratic. It must be made according to law and can be made certain by reference to the objects and terms of the joint venture agreement and to the issues that may be made relevant from time to time by the participants in respect of any dispute that may arise under the agreement and as to

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[22] *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891; [2006] 1 Lloyds Rep 121, 153 at [121].

who should be identified as the vendor participant in the event that they are unable to resolve their own differences.

[32] The application should be dismissed.