IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 287

Suit No 725 of 2017

Between

Avra Commodities Pte Ltd

… *Plaintiff*

And

China Coal Solution
(Singapore) Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Contract] – [Formation] – [Acceptance]
[Contract] – [Formation] – [Intention to create legal relations]
[Contract] – [Formation] – [Certainty of terms]

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Avra Commodities Pte Ltd
v
China Coal Solution (Singapore) Pte Ltd

[2019] SGHC 287

High Court — Suit No 725 of 2017
Vinodh Coomaraswamy J
23–24, 30–31 October 2018; 11, 29 March 2019

24 December 2019

Vinodh Coomaraswamy J:

Introduction

1 The central dispute in this case is whether the parties concluded a contract by an exchange of four emails in March 2017. The plaintiff's case is that they did. The defendant's case is that they did not. The plaintiff brings this action against the defendant seeking damages for breach of that contract.

2 The plaintiff's claim against the defendant was tried before me as to both liability and quantum. On liability, I have found that the parties did conclude a contract by the four emails which they exchanged. It is not disputed that, in that event, the defendant is in breach of contract. On quantum, I have assessed the damages which the defendant must pay to the plaintiff at US$1,465,850.

3 Judgment has accordingly been entered against the defendant for: (a) the principal sum of US$1,465,850; (b) interest on that sum from the date of the writ in this action to the date of my judgment; and (c) the costs of and incidental to this action, which I have fixed at S$129,000 including disbursements.

4 The defendant has appealed against my decision in its entirety. I now set out my reasons.

Facts

5 The parties exchanged the four emails which the plaintiff claims gave rise to a concluded contract on 29 March 2017.[1] The defendant admits – as it must – that the exchange of emails took place.[2] Its defence is that the emails were insufficiently certain and insufficiently complete to give rise to a contract;[3] alternatively that the parties had no intention to create legal relations when they exchanged the emails.[4]

6 To support their respective positions, both parties also rely on a previous course of dealings between the parties. I shall describe the events of 29 March 2017 before coming on to the parties' course of dealings.

The 29 March 2017 emails

7 The four emails were exchanged between Mr Zhou Jungang (also known as Gary Zhou) and Mr Wei Pengfei (also known as Richard Wei). Mr Zhou is

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1 Statement of Claim (Amendment No. 1), para 4.

2 Defence, para 5.

3 Defence, para 6.

4 Defence, para 7.

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employed by the plaintiff as a coal marketer. He is in charge of arranging both the plaintiff's sales and purchases of coal.[5] Mr Wei is employed by the defendant as its deputy purchasing manager.[6] It is not disputed that these individuals had the authority to represent and to bind their employers.

8 The plaintiff refers to these four emails exchanged on 29 March 2017 as the "business confirmation emails".[7] I shall do the same.

First email

9 Mr Zhou sent the first of the four emails to Mr Wei at 11.11 am on 29 March 2017. The email proposed – to use a neutral term for the time being – the plaintiff selling to the defendant of a total of 185,000 MT of Indonesian steam coal in three cargoes for delivery fob Tanjung Pemancingan Anchorage in May 2017. The email reads, in relevant part, as follows:[8]

> Dear Richard,
>
> We are pleased to *offer* you the following coal.
>
> Indo 3400 NAR
>
> Material: Indonesian Steam Coal
>
> Quantity: *1x70,000 MT* +/- 10% MOLOO
>
> Vessel: Glearless [*sic*]
>
> LAYCAN: *20-26 May, 2017*.
>
> Loading rate: …
>
> Quantity: *2x55,000 MT* +/-10% MOLOO

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5 Affidavit of Evidence in Chief ("AEIC") of Gary Zhou, para 3.

6 AEIC of Richard Wei, para 1.

7 Plaintiff's closing submissions ("PCS"), para 14.

8 AEIC of Richard Wei, pp 27 to 29.

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LAYCAN*: 15-21 May and 17-23 May 2017*.

Vessel: geared and grabbed

Loading Rate: …

7 days delivery period to be mutually agreed by both parties.

Loading Port: Tg pemancingan anchorage, South Kalimantan, Indonesia

Quality: …

Sampling / Analysis: *Independent Surveyor to be mutually agreed.* Loading Port Analysis Final and Binding

Pricing:

Gearless vessel USD 40.3 FOB Tg pemancingan anchorage, South Kalimantan, Indonesia basis 3400 NAR

Geared and grabbed vessel USD 39.3 FOB Tg pemancingan anchorage, South Kalimantan, Indonesia basis 3400 NAR

Other important terms and clauses:

Price adjustment:

NET CALORIFIC VALUE (NCV)

If Actual NCV KCAL/KG is above or below the stated NCV rejection limit, then invoice price shall be adjusted using the following formula: …

Payment:

- Out of an irrevocable letter of credit ("LC") to be established by buyer in favor of seller
- …
- LC to be fully workable at least *14 days prior* to commencement of respective load port laycan.

…

[emphasis added]

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10 This email proposes that the plaintiff sell three cargoes of coal to the defendant as part of a single agreement. The first two cargoes were to be sold on identical terms save as to laycan. The third cargo was to be sold on terms which differed as to quantity, type of vessel, laycan and price:

(a) First, the sale of 55,000 MT of 3400 NAR Indonesian steam coal (+/- 10% in the carrying vessel's option) with a laycan of 15 to 21 May 2017 at the proposed price of US$39.30 per MT, loaded onto a geared and grabbed vessel;

(b) Second, the sale of 55,000 MT of 3400 NAR Indonesian steam coal (+/- 10% in the carrying vessel's option) with a laycan of 17 to 23 May 2017 at the proposed price of US$39.30 per MT, loaded onto a geared and grabbed vessel; and

(c) Finally, the sale of 70,000 MT of 3400 NAR Indonesian steam coal (+/- 10% in the carrying vessel's option) with a laycan of 20 to 26 May 2017 at the proposed price of US$40.30 per MT, loaded onto a gearless vessel.

The second email

11 At 1.58 pm, Mr Wei replied to Mr Zhou's email. He made a counterproposal differing from Mr Zhou's proposal in only two respects: (a) a lower price; and (b) a longer deadline for the defendant to issue an operational letter of credit:[9]

Dear Gary

[9] AEIC of Richard Wei, p 30.

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> …
>
> For Glearless [*sic*] vsl, Quantity: 1x70,000 MT +/- 10% MOLOO, *USD 40.20* FOB Tg pemancingan anchorage, South Kalimantan, Indonesia basis 3400 NAR
>
> For Geared and grabbed vessel, Quantity: 2x55,000 MT +/- 10% MOLOO, FOB *USD 39.00* FOB Tg pemancingan anchorage, South Kalimantan, Indonesia basis 3400 NAR
>
> LC to be fully workable at least *5 days* prior to vsl arrived at loading port
>
> [emphasis added]

The third email

12 At 2.20 pm, Mr Zhou responded to Mr Wei, accepting his counterproposal on price for the third cargo but proposing a price US$0.10 higher for the first and second cargoes:[10]

> Hi, Richard,
>
> Thanks for your reply.
>
> For gearless vessel, *we accept your price of FOB$40.2*.
>
> For geared and grabbed vessel, our best price is FOB$39.1. *Pls kindly accept and confirm.* Thanks !
>
> [emphasis added]

The fourth email

13 At 4.14pm, Mr Wei's reply simply confirmed Mr Zhou's email:[11]

> Dear Gary
>
> *Confirm* your good offer as below
>
> [emphasis added]

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10 AEIC of Richard Wei, p 31.

11 AEIC of Richard Wei, p 32.

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The draft contract

14 At 8.12pm that very night, 29 March 2017, Mr Zhou emailed to Mr Wei a draft contract titled "FOB Coal Sale Agreement". Mr Zhou's covering email says:[12]

> Hi Richard,
>
> Attached the draft contract for your review/confirmation. Thanks

15 The draft contract attached to Mr Zhou's email is in the plaintiff's standard form.[13] It begins as follows:[14]

> This Agreement no. AC17S069 is made the 29th day of March 2017 by and between
>
> [the defendant]
>
> and
>
> [the plaintiff]

16 The first six clauses of the draft contract incorporate the substance of the business confirmation emails.[15] Clause 1 specifies the material and quantities of the three cargoes. Clause 2 names the load port as Tanjung Pemancingan Anchorage, South Kalimantan, Indonesia. Clause 3 sets out the laycan for each cargo. Clause 4 lists the specifications for the coal. Clause 5 sets out the price, being US$39.10/MT for the first two cargoes and US$40.20/MT for the third, in accordance with Mr Zhou's price confirmation in the third email (see [12]

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12 AEIC of Richard Wei, p 33.

13 Notes of Evidence ("NE"), 23 October 2018, p 12, lines 17 to 20; AEIC of Richard Wei, para 34.

14 AEIC of Richard Wei, p 34.

15 AEIC of Richard Wei, pp 34 to 36, cll 1 to 6.

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above). Clause 6 incorporates the price adjustment formula which Mr Zhou proposed in the first email (see [9] above). The draft contract also incorporates other terms agreed in the four emails, such as demurrage and payment methods (see cll 10.4 and 11).

17 But the draft contract also includes a number of terms that were not proposed or agreed anywhere in the business confirmation emails. These terms include clauses covering the nomination of vessels, loading terms, allocation of risk and other fairly standard clauses relating to events of default and dispute resolution.

18 Two clauses in the draft contract are particularly relevant to the parties' dispute:

(a) Clauses 7 and 8 allows the seller to choose one of two independent load port surveyors named expressly in the clause to determine the quantity and quality of the coal actually delivered.[16]

(b) Clause 26 begins as an entire agreement clause in the usual form, but goes on to provide expressly that "[t]his Agreement shall only come into force after being signed by both [the defendant] and [the plaintiff]".[17]

19 Mr Wei did not respond to Mr Zhou's email or comment on the draft contract until about a week later, on 6 April 2017. That is when Mr Wei emailed to Mr Zhou the draft contract marked up with the defendant's proposed

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16 AEIC of Richard Wei, p 36.

17 AEIC of Richard Wei, p 48.

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amendments.[18] The defendant proposed no amendments to any of the clauses in the draft contract which incorporated the terms set out in the business confirmation emails. The defendant proposed amendments only to the clauses dealing with the minimum specifications for the vessel the defendant was to nominate, demurrage, loading terms, force majeure, limitation of liability and remedies.[19]

20 The plaintiff replied to Mr Wei's email on the same day. The plaintiff accepted a few of the defendant's proposed amendments but rejected the majority, saying that "most of the proposed changes [by the defendant] were made from our standard terms which reflected from our shipper terms, so please maintain those clauses as per ours". [20]

21 The next day, 7 April 2017, Mr Wei replied to the plaintiff's email with another marked-up version of the draft contract, saying "[a]ttached with final version for your reference".[21]

22 The plaintiff replied with further comments on the same day. The plaintiff commented on cl 9.1 (nomination of vessel), cl 10.2 (notice of readiness for loading), cl 11 (payment conditions) and cl 19 (limitation of liability). The plaintiff rejected all of Mr Wei's proposed amendments, save for an amendment to cl 10.2, reiterating that the three other clauses were either

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18 AEIC of Richard Wei, p 51; see also pp 55 to 66, cll 9.1 to 22.

19 AEIC of Richard Wei, pp 55 to 66, cll 9.1 to 22.

20 AEIC of Richard Wei, p 70.

21 AEIC of Richard Wei, p 89.

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"non-negotiable terms from shipper" or "standard terms as accepted in business confirmation and previous contracts".[22]

23 Between 13 April 2017 and 17 April 2017, the parties attempted to reach agreement on the remaining disputed clauses (*ie*, cll 9.1, 11 and 19) of the draft contract.[23]

24 The parties eventually reached agreement on the terms of the draft contract. On 17 April 2017, Mr Zhou emailed to Mr Wei a clean copy of the final draft of the contract.[24] Within 45 minutes, Mr Wei replied to say: "confirm the draft good in order".[25]

25 On 18 April 2017, the plaintiff executed the final draft of the contract and sent it to the defendant, asking the defendant to execute it and return a scanned copy.[26]

26 The defendant never did execute the final draft of the contract.

Letters before action

22 AEIC of Richard Wei, pp 108 to 109.

23 AEIC of Richard Wei, paras 42 to 44; pp 110 to 112.

24 AEIC of Richard Wei, p 113.

25 AEIC of Richard Wei, p 132.

26 AEIC of Richard Wei, p 133.

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27 On 2 May 2017, Mr Zhou reminded Mr Wei to execute and return the final draft of the contract. His email said: "[K]indly stamp the contract within today. We have pushed you so many times."[27]

28 On 3 May 2017, the plaintiff sent an email to Mr Wei taking the position expressly that the parties were contractually bound by the business confirmation emails, and in particular by the defendant's acceptance of the plaintiff's offer set out in those emails. The plaintiff made the point that the defendant's failure to execute and return the final draft of the contract was a mere formality which did not affect the defendant's contractual obligation to purchase the coal:[28]

> WITHOUT PREJUDICE
>
> Dear Richard,
>
> We refer to your email of 29 March 2017 where on behalf of [the defendant] you accepted our offer and agreed to purchase the following three shipments of Indonesian steam coal from us…
>
> …
>
> We also refer to the subsequent emails exchanged between [the defendant] and us pursuant to which the draft of the coal sale and purchase agreement for all the three shipments was agreed to and confirmed by both the parties. Particularly, we refer to your email of 17 April 2017, wherein you confirmed the draft contract sent by us and stated that "Confirm the draft good in order". However, despite of our repeated reminders you have subsequently failed to sign the contract.
>
> *Please note that signing of the contract is a mere formality and pursuant to the above referred email exchange, a binding agreement has come into existence between [the defendant] and us for purchase and sale of the above mentioned shipments of coal.*
>
> We would therefore appreciate a confirmation that you shall be performing your obligation to purchase all the three

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27 AEIC of Richard Wei, p 152.

28 AEIC of Richard Wei, p 153.

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> abovementioned shipments. For the first shipment, we look forward to receiving a vessel nomination from you under Clause 9.1 of the Contract and the draft LC.
>
> …
>
> [emphasis added]

29 On 4 May 2017, Mr Wei replied to the plaintiff. He informed the plaintiff that there was weak domestic demand for coal and indicated that the defendant hoped to purchase only the first cargo of 55,000 MT from the plaintiff and to cancel the remaining two cargoes. The contents of this email are instructive:[29]

> Dear Gary
>
> For the three cargoes, *as the results of market downward, domestic demand of thermal coal is very weak, domestic price and internal price of thermal coal are both going down dramatically, therefore, we hope to carry out only one cargo of 55000t, and cancel other two cargoes.*
>
> Additionally, we have dealt down a NAR3400 Indonesian cargo which 21.00 USD/t, 45000t total amount in September 2015. However, you have not finally carried it out until now. We hope you can provide feasible solutions for this remaining issue.
>
> We have good and long-term foundation of cooperation with [the plaintiff]. And we hope you can understand our difficulty and support the business. Thank you.
>
> [emphasis added]

30 On 9 May 2017, the plaintiff wrote to the defendant taking the position that the defendant was contractually obliged to purchase all three cargoes of coal and that its refusal to do so amounted to a "material breach".[30] The plaintiff

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29 AEIC of Richard Wei, p 154.

30 AEIC of Richard Wei, pp 155 to 156.

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repeated its demand for the defendant to confirm that it would purchase all three cargoes.

31 On 14 May 2017, Mr Burgess – a director of the plaintiff and Mr Zhou's supervisor – met representatives of the defendant to "make a last ditch attempt" to get the defendant to perform.[31] According to the plaintiff, the attempt failed because the defendant's proposed alternatives to performance were unacceptable to the plaintiff.[32]

32 The plaintiff engaged solicitors. The plaintiff's solicitors exchanged further correspondence with the defendant.[33] The solicitors demanded formally that the defendant comply with its contractual obligations. The defendant denied that it had any contractual obligations at all.

33 On 29 May 2017, the plaintiff's solicitors wrote to the defendant formally terminating the parties' contract on the basis of the defendant's "anticipatory repudiatory and/or repudiatory breach" of contract.[34]

Previous course of dealings

34 As I have mentioned, both parties also rely on their previous course of dealings to support their respective positions. I describe those dealings now.

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31 AEIC of Benjamin Burgess, para 36.

32 AEIC of Benjamin Burgess, paras 37 to 39.

33 AEIC of Benjamin Burgess, paras 39 to 41.

34 AEIC of Benjamin Burgess, para 44; pp 196 to 198.

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35 Before they exchanged the business confirmation emails on 29 March 2017, the parties had had similar dealings with each other on three previous occasions:[35]

(a) The plaintiff agreed to sell the defendant a cargo of 45,000 MT of coal pursuant to an exchange of emails on 7 September 2015.

(b) The plaintiff sold the defendant a cargo of 55,000 MT of coal under a formal contract dated 19 July 2016.

(c) The plaintiff sold the defendant a cargo of 55,000 MT of coal under a formal contract dated 15 March 2017.

The parties are agreed that the 2016 and 2017 dealings each gave rise to a concluded contract and that each of those two contracts was duly performed on both sides. The parties do not agree on whether the 2015 dealing gave rise to a concluded contract.

36 In any event, all three of the parties' previous dealings bear a remarkable similarity to the fourth dealing on 29 March 2017 which is the subject-matter of this action. All four of these dealings had the following features in common. The plaintiff sends an email to the defendant proposing key terms for a sale of coal by the plaintiff to the defendant. These key terms include the quantity of coal, the type of vessel, the laycan, the loading port, the loading rate, the quality of coal, the price, a price adjustment formula, the time of payment and the demurrage. The plaintiff's proposal does not nominate the independent surveyor

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35 AEIC of Richard Wei, p 21, para 66, pp 190, 207, 228.

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but instead indicates expressly that the independent surveyor is to be agreed.[36] The defendant receives and considers the plaintiff's proposal and responds by making a counter-proposal on certain terms. The parties reach agreement on the terms. The plaintiff emails to the defendant a draft contract in its own standard form for comment and approval. The draft incorporates the terms agreed in the preceding email exchange but also includes other terms which have been neither discussed nor agreed.

37 In two of these four dealings, the parties went on to execute a formal contract and to perform without dispute.[37] These two dealings were the 19 July 2016 contract and the 15 March 2017 contract.

38 In the other two of these four dealings, the parties did not execute a formal contract and did not perform. One of these two dealings, of course, is the 29 March 2017 dealing, which forms the subject matter of this action. For the 29 March 2017 dealing, as I have set out above, the plaintiff executed the formal contract but the defendant did not. For the 2015 dealing, the defendant executed the formal contract dated 7 September 2015 and the plaintiff did not. Instead, the plaintiff informed the defendant that it was unable to meet the agreed laycan due to its supplier's difficulties.[38] The plaintiff proposed a new laycan which would delay delivery by 15 days.[39] The defendant did not accept the new laycan. Instead, the defendant informed the plaintiff that the plaintiff's delay had caused the defendant to be in breach of its own delivery obligations to its own buyer

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36 AEIC of Benjamin Burgess, pp 254 to 265; pp 229 to 236; pp 208 to 211.

37 AEIC of Richard Wei, para 67.

38 AEIC of Richard Wei, para 74; p 373.

39 AEIC of Richard Wei, p 373.

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and that the defendant's legal team would "follow [up on] the issue" with the plaintiff soon.[40] The defendant did not, however, follow up with any legal action against the plaintiff on the 2015 dealing.[41]

39 It will be appreciated that the parties' positions in the 2015 dealing were inverted as compared to their position in the 29 March 2017 dealing. In the 2015 dealing, it was the plaintiff who failed to execute the draft formal contract and the defendant who insisted that the parties had nevertheless entered into a concluded contract.

40 Each party seeks to persuade me that the 2015 dealing supports the position which they take in this action on the contractual effect of the business confirmation emails. This is a point that I examine in greater detail from [86] below.

The parties' cases

The plaintiff's case

41 As I have mentioned, the plaintiff's case is simply that the business confirmation emails of 29 March 2017[42] gave rise to a concluded contract. The plaintiff made an offer to the defendant by the first email. The defendant accepted the offer – subject only to the changes agreed in the second and third emails – when Mr Wei "confirm[ed] [the plaintiff's] good offer as below" in the fourth email.

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40 AEIC of Richard Wei, p 375.

41 AEIC of Gary Zhou, para 14.

42 PCS, para 25.

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42 The plaintiff acknowledges that the identity of the load port surveyor is a material term of the contract and that the parties had left that "to be mutually agreed" later,[43] without even agreeing a method for doing so. But the plaintiff argues that this omission does not render their contract unenforceable for uncertainty. Instead, the fact that the parties did not agree on a particular method means that any method would be acceptable. The parties reached agreement on the load port surveyor soon after 29 March 2017,[44] and this was an acceptable method to agree on a load port surveyor. That agreement is reflected in cll 7 and 8 of the draft contract which provides that the plaintiff would appoint one of two named surveyors, at its own option, as the load port surveyor. Although the defendant proposed several changes to the draft contract, at no point did the defendant make any comment on, let alone propose any change to, cll 7 and 8.[45]

43 The plaintiff also points out that in all of their previous dealings, the parties likewise reached an agreement on the identity of the load port surveyor, either in the equivalent of cll 7 and 8 in those contracts or in the business confirmation emails itself. Therefore, the identity of the surveyor was in reality never a contentious point in any of the dealings between the parties. The failure to agree on the surveyor's identity in the business confirmation emails did not prevent those emails from giving rise to a concluded contract.[46]

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43 PCS, paras 35 to 36.

44 PCS, paras 37 to 40.

45 PCS, para 39.

46 PCS, paras 43 to 44.

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The defendant's case

44 The defendant's case is that business confirmation emails did not give rise to a contract for the following three reasons:[47]

(a) the parties had no intention to create legal relations until they executed a formal contract recording the terms of their agreement in writing;

(b) the business confirmation emails are incapable of giving rise to a concluded contract because they contain no agreement on the identity the load port surveyor, making the agreement which the parties reached in those emails uncertain and incomplete;

(c) the previous course of dealings between the parties shows that they always conducted themselves on the basis that they had no intention to create legal relations until they executed a formal contract recording the terms of their agreement in writing.

45 The defendant also pleads an alternative defence.[48] If the business confirmation emails are found to give rise to a concluded contract, the parties' previous course of dealings establishes a common understanding or assumption that any agreement which the parties reached would not bind them unless they went on to execute a formal contract recording the terms of that agreement in writing. That common understanding or assumption raises an estoppel by

47 Defendant's closing submissions ("DCS"), para 6.

48 Defence, para 9.

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convention against the plaintiff which precludes it from now asserting that the business confirmation emails in themselves gave rise to a concluded contract.

Issues

46 The central issue in this action is therefore whether the business confirmation emails gave rise to a concluded contract. This deceptively simple question entails an examination of two of the classic requirements for contract formation: (a) an intention to create legal relations; and (b) certainty.

47 A subsidiary issue in this action is whether the parties' previous dealings gives rise to an estoppel by convention in the terms pleaded by the defendant.[49]

48 My findings, in summary, are as follows. I find that the business confirmation emails did give rise to a concluded contract. The emails contain all the necessary elements for contract formation, in particular intention to create legal relations and certainty of terms. I also find that there was no convention between the parties to support an estoppel by convention.

The law

49 This action engages well established principles on contract formation. I summarise below the three principles which are relevant to this action.

50 First, the law adopts an objective approach to questions of contractual formation. As the Court of Appeal held in *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 ("*R1 International*") at [51], this involves the court:

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[49] Defence, para 9.

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> …ascertaining the parties' objective intentions gleaned from their correspondence and conduct in light of the relevant background as disclosed by the evidence. The relevant background includes the industry in which the parties are in, the character of the document which contains the terms in question as well as the course of dealings between the parties ….

51 Second, an offeree can accept an offer in any manner that is a "final and unqualified expression of assent to the terms of an offer": Edwin Peel, *Treitel on The Law of Contract* (Sweet & Maxwell, 2015) ("*Treitel*") at para 2-016. An offeree can accept by words or by conduct, so long as the words or conduct satisfy this test. Negative conduct, *ie* a failure or omission to speak or to act, can amount to acceptance: *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 at [50]. But it must be said that silence, in itself, is often equivocal and therefore will not in general easily lead to the inference that the offeree is thereby expressing "final and unqualified … assent".

52 One situation where it is easier to infer acceptance from silence is where the parties discuss and agree a set of terms which are sufficiently certain to give rise to a concluded contract, but leave the remaining terms of their contract for future discussion and agreement. It is not always necessary to analyse the contractual effect of those additional terms by applying the usual rules of offer and acceptance. When a party proposes *additional* terms to a counterparty in this situation and the counterparty remains silent, it is easier to infer that the counterparty has accepted the additional terms so as to be contractually bound by them. In particular, a counterparty's silence may justify an inference of acceptance: (i) if the party expressly asks the counterparty for objections when proposing the additional terms (*R1 International* at [55]); or (ii) if the additional terms are common in a given market (*R1 International* at [54]).

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53 For the former proposition, the Court of Appeal in *RI International* cited the following passage from the decision of Aikens J in *Statoil ASA v Louis Dreyfus Energy Services LP* [2009] 1 All ER (Comm) 1035 ("*Statoil*") at [70]:

> … If the principal terms have been agreed and the parties are, to use Bingham J's phrase in [*Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601] 'sorting out details against the background of a concluded contract', then the strict requirements of positive offer and positive acceptance are not necessarily appropriate. *If one party makes a proposal for terms and the other does not object to it when asked if it has objections, that can, in appropriate circumstances, be taken as acceptance of that term* … [emphasis added]

54 Third, the parties may intend to be contractually bound – even after they have agreed all or some of the terms of their contract – only when a final and further condition is fulfilled. This further condition could be the execution of a formal contract recording their agreement in writing. Or it could be the parties' agreement on a particular term not yet agreed. By the same token, the parties may intend to be contractually bound as soon as they reach agreement on a set of terms even though they go on to discuss and negotiate additional terms (*R1 International* at [52]).

55 The authority for this third principle is *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 ("*Pagnan*") at 619, cited in *R1 International* at [52]:

> …
>
> (2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case.
>
> (3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed; …
>
> (4) *Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled … .*

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> (5) *If the parties fail to reach agreement on such further terms, the existing contract is not invalidated* unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.
>
> …
>
> [emphasis added]

56 *Pagnan* expressly envisages that the parties may be contractually bound when they have reached agreement only on a subset of their contractual terms. That subset of terms is usually called the "essential" terms. The question then arises how to define what are the essential terms in any given case. As Lloyd LJ (as he then was) said in *Pagnan* (at 619):

> (6) 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 parties agreeing to be bound now while deferring important matters to be agreed later… [emphasis added]

57 In endorsing this passage in *Pagnan*, Andrew Ang J in *Rudhra Minerals Pte Ltd v MRI Trading Pte Ltd* [2013] 4 SLR 1023 ("*Rudhra Minerals*") remarked (at [27]):

> … whether or not a term is objectively important is a different question from whether the parties intended to be bound. It is not for the court to decide which terms are important such that

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> parties must agree on those terms before any binding contract can be concluded. Rather, it is for the parties to decide whether and when they wish to be bound and, if so, by what terms. …

58 The third principle is subject to two caveats. The first, of course, is that the inquiry into the subset of terms which must be agreed for the parties to have concluded a contract does not look into the parties' subjective intention or into their subjective desire to manifest or withhold assent to being contractually bound when that subset is agreed. The question is whether the parties, by their words and conduct, have demonstrated objectively that they intend to be bound *despite* the terms which remain to be agreed: *Rudhra Minerals* at [27]. The second caveat is that all of this is subject to the requirement of contractual certainty. To put it another way, the parties cannot contract out of the requirement imposed by the law of contract that the parties' agreement must be sufficiently certain to constitute a contract.

59 I now apply these principles to the facts.

Liability

60 For the reasons which follow, I find that the parties' communications and conduct in and after the business confirmation emails manifest four objective indicators that the emails set out a concluded bargain binding on both parties, even if further terms remained to be agreed and even if a formal contract was never executed to record the terms of their agreement in writing. I find also that the parties' failure to agree on the identity of the load port surveyor as at 29 March 2017 is not fatal to a concluded contract arising on that date.

Intention to create legal relations

The parties reached a concluded contract on 29 March 2017

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(1) Language of offer and acceptance

61 The first of the four indicators of an intention to create legal relations is a striking feature of the business confirmation emails of 29 March 2017, patent to any objective observer. It is the parties' express use of the language of offer and acceptance.[50] These words are not, of course, determinative in and of themselves either as terms of legal art or even merely as semantic labels. But the words are a good objective indication that the parties saw themselves as engaged in a process intended to produce a consensus *ad idem* in order to conclude a commercial bargain between them.

62 I have reproduced the contents of the emails, so far as relevant, at [7]–[13] above. Mr Zhou begins the exchange in the first email by making an explicit "offer" to Mr Wei. He informs Mr Wei that the plaintiff was "pleased to offer [the defendant] the following coal" (see [9]). He then sets out a number of details in relation to the offer: price, quantity, laycan, loading rate and the quality and specifications of the coal.

63 Although the first email is phrased as an unqualified offer, intended to elicit the defendant's unqualified assent, the defendant withheld that assent. Instead, the defendant responded with a counter offer. The classical Victorian paradigm of contract formation is, after all, rooted in reality. Thus, in the second email, Mr Wei responds within three hours to counter offer a lower price per metric tonne for the different types of vessel and to counter offer a longer timeline for the defendant to open a letter of credit (see [11]).

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50 PCS, para 25.

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64 The third email from Mr Zhou to Mr Wei is important for two reasons. First, Mr Zhou confirms that the plaintiff "*accept[s]*" the defendant's price of US$40.20/MT of coal for gearless vessels. Second, Mr Zhou counter counter offers US$39.10 per metric tonne as the plaintiff's "best price" for geared and grabbed vessels. Mr Zhou goes on to add, "[please] kindly *accept and confirm*" [emphasis added] (see [12]).

65 In the fourth and final email, Mr Wei states simply: "*[c]onfirm your good offer as below*" [emphasis added] (see [13]).

66 The defendant does not and cannot deny what is plain: the parties were using the language of offer and acceptance. The consistent refrain of "offer", "acceptance" and "confirmation" is an objective indicator that parties were searching for a consensus *ad idem* in order to conclude a commercial bargain between them.

(2) Agreed terms never renegotiated

67 Second, it is telling that all of the terms agreed between the parties in the offer and acceptance set out in the business confirmation emails were incorporated faithfully into the first draft of the contract which the plaintiff presented to the defendant on 29 March 2017 (see [16] above). Further, they were never again the subject of discussion throughout the parties' negotiations right until the plaintiff sent the final draft of the contract to the defendant for execution on 18 April 2017. The draft contract even incorporated terms from the defendant's counter offer in the second email (see [11]). Thus, cl 11 of the draft contract records the defendant's counter offer that the letter of credit "must

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be fully operational ultimately on or before 5 days prior to vessel arrival at loading port".[51]

68 That the parties continued to negotiate other details of the draft contract is no bar to finding that they intended objectively to be bound by the agreement which they reached on 29 March 2017. The statement of principle in the fourth numbered proposition in *Pagnan* (*supra* [55]) encapsulates this situation perfectly: parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled.

(3) Final draft of the contract is dated 29 March 2017

69 The third indicator is that the final draft of the contract which the plaintiff executed and sent to the defendant on 18 April 2017 is not dated 18 April 2017 but is instead dated 29 March 2017. It begins with "[t]his Agreement no. AC17S069 is made the *29th day of March 2017* by and between" the plaintiff and the defendant. 29 March 2017 is, of course, the date of the business confirmation emails. The defendant never objected to or even commented on this aspect of the draft contract. This is again an objective indicator that the parties saw their conduct on 29 March 2017 as conduct intended to create legal relations.

70 The three previous dealings between the parties (see [35] above) followed the same pattern. All of the dealings produced a draft contract which bears the date of the business confirmation emails preceding it. That is so even

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51 AEIC of Richard Wei, pp 30 and 98.

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though the parties went on, after that date, to negotiate the other terms of the contract.[52]

(4) The defendant's reason for non-performance

71 The fourth and final indicator is in Mr Wei's email to Mr Zhou on 4 May 2017 (see [29] above). In that email, Mr Wei explains that the defendant hopes to purchase only one out of the three cargoes from the plaintiff and to cancel the remainder because of weak domestic demand for coal. Mr Wei's explanation does not refer to any alleged lack of intention to create legal relations when they exchanged the business confirmation emails and does not adopt the position of a party entitled to disregard the offer and acceptance recorded in the business confirmation emails. He adopts instead the position of a supplicant, hoping to be permitted to resile from a commitment:

> … For the three cargoes, *as the results of market downward, domestic demand of thermal coal is very weak, domestic price and internal price of thermal coal are both going down dramatically*, therefore, we hope to carry out only one cargo of 55000t, and cancel other two cargoes. … [emphasis added]

Implicit in Mr Wei's email, and in particular from his precatory words to the plaintiff about the other two cargoes, is that Mr Wei accepts that the parties did intend to create legal relations when they exchanged the business confirmation emails, and that the defendant is contractually bound to purchase all three cargoes from the plaintiff.

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52 1ABOD 151 (FOB Coal Sale Agreement No. AC15S096 dated 7 September 2015); 1ABOD 173 (FOB Coal Sale Agreement No. AC16S064 dated 19 July 2016); 1ABOD 297 (FOB Coal Sale Agreement No. AC17S062 dated 15 March 2017).

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72 The defendant seeks to downplay this email. It alleges that the real reason it sought to take only one out of the three cargoes was not weak domestic demand for coal but a market rumour about "ongoing issues relating to the quality of [the defendant's] cargoes".[53] The obvious difficulty with this allegation is that there is no trace of it in Mr Wei's email. The defendant explains the omission on the basis that the defendant "did not want to embarrass" the defendant.[54]

73 I do not accept the defendant's allegation or its explanation for omitting it from this email. The defendant has produced no evidence of these alleged quality issues. But even if the defendant's allegation were true, its explanation for the omission makes no sense. It would mean that the defendant was prepared to take the risk of purchasing one cargo of potentially poor quality coal from the plaintiff when it could have avoided all risk by relying on the lack of a concluded contract to refuse to purchase *all three* cargoes of coal.

74 In my view, the defendant's own words and conduct, examined objectively, is consistent with a conclusion that the parties intended the business confirmation emails of 29 March 2017 to create legal relations.

The agreement was not subject to contract

75 At this juncture, I turn to address the defendant's argument that the parties did not intend to create legal relations until they executed a formal contract which recorded in writing the terms set out in the business confirmation emails and the additional terms agreed in the subsequent negotiations.

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53 AEIC of Richard Wei, paras 51 and 56.

54 AEIC of Richard Wei, para 57.

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76 The defendant seeks to argue, first, that the parties' negotiations in the business confirmation emails proceeded on the assumption that they would contract on the basis of the plaintiff's standard form contract, *ie* the plaintiff's standard form used to generate the draft contract.[55] One of these standard terms is cl 26, which provides that "[t]his Agreement *shall only come into force after being signed by both the Buyer and the Seller*" [emphasis added].[56] A clause like this is commonly called a "subject to contract" or "subject to execution" clause. Lloyd LJ (as he then was) expressly adverted to this in numbered paragraph 2 in the extract from *Pagnan* (cited at [55] above). The defendant therefore argues that the parties intended their negotiations to be subject to contract, in keeping with the effect of cl 26.[57] The parties never having executed the final draft of the contract, the parties' intention to create legal relations is nullified.

77 For this argument, the defendant relies on *Benourad v Compass Group PLC* [2010] EWHC 1882 ("*Benourad*"). The defendant submits that *Benourad* is a case where the court legitimately inferred from the contents of a draft contract and from the circumstances surrounding it that it was the parties' intention that the agreement they had reached should not be contractually binding unless the parties executed a formal contract recording its terms.[58]

78 In my view, *Benourad* is wholly distinguishable. In *Benourad*, the claimant and the defendant were negotiating the terms on which the defendant would pay the claimant a commission for introducing the defendant to a joint

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55 DCS, paras 16 to 19.

56 1ABOD 418 to 419, cl 26.

57 NE, 11 March 2019, p 14 line 24 to p 15 line 24.

58 DCS, para 11; NE, 11 March 2019, p 19, lines 2 to 21.

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venture partner (at [32]). The claimant emailed the defendant a draft contract. There were three indicators in the draft contract that the parties envisaged their agreement to be subject to a condition that the parties execute a written contract recording the terms of their agreement. First, the claimant asked the defendant to initial the draft and send it back to him for signature (at [36]). Second, the draft provided in cl 1 that the "… agreement will be effective… for…a period of 36 months starting from the signature of the present agreement". Finally, cl 9 was an entire agreement clause excluding any prior oral agreement (at [38]).

79 The defendant emailed the plaintiff a month later with its comments on the draft contract. The defendant sought to alter the identity of the counterparty to the contract and to alter the triggering event upon which the claimant would be paid his commission. The defendant asked the claimant to "confirm [his] agreement" to the new basis so they could "draft a document accordingly" (at [49]). The claimant did not agree to the defendant's changes (at [50]). He sued for his commission based either on an oral agreement reached in the course of the negotiations or on a *quantum meruit*.

80 The draft contract in *Benourad* did not contain a "subject to contract" clause. Nevertheless, Beatson J (as he then was) was prepared to draw the inference that the parties had no intention to create legal relations until they signed a formal contract simply from the parties' references to "signatures" and "documents" in the parties' email communications as well as in the draft contract itself (at [109]):[59]

> … the exchanges about the need for the document to be initialled or signed and [the defendant's] request … that the claimant "confirm your agreement with the above so we can

[59] DCS, para 11.

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> draft an agreement accordingly" suggest they both thought a signed agreement was necessary. *These exchanges are not conclusive. But the terms of the draft document itself provide a strong indication that any agreement did not bind until it was signed. So, the provision in clause 1 is that "the agreement will be effective… for a period of 36 months starting from the signature of the present agreement", and there is an entire agreement provision in clause 9. These tend to show that it was the intention of the parties that unless the document was executed any oral agreement did not bind.* [emphasis added by the defendant]

81 The defendant relies strongly on Beatson J's observations in this passage and urges me to adopt the same approach. But the defendant has taken Beatson J's observations out of context. The first point to note is that what Beatson J said at [109] of *Benourad* is *obiter*. Beatson J had by then already found that there was no oral agreement because the parties were never *ad idem* on the critical issue of the triggering event for the claimant's commission. It was therefore unnecessary for him to determine whether parties' intention to create legal relations was subject to a condition that they execute a formal contract. He went on to consider the issue only because the point had been fully argued before him (at [105]). Second, Beatson J himself acknowledged (at [109]) that the parties' references to signing a written document were "not conclusive". That was only one of the facts he had regard to in a fact-sensitive exercise (at [111]):

> Accordingly, had an oral agreement been reached…on the broad lines of the [the plaintiff's draft contract], I would have concluded that, *in the light of the exchanges and the negotiations about the identity of the parties and the basis of remuneration and the request for the draft to be signed*, there was no intention to be bound unless a written agreement was concluded and executed. … [emphasis added]

Accordingly, *Benourad* does not detract from the general principle that whether the parties have an intention to create legal relations must depend on the totality

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of the facts and circumstances in each case. Those circumstances *include* a subject to contract clause if there is one. But its presence is not conclusive.

82 In the present case, the subject to contract clause in cl 26 of the draft contract was never an aspect of the parties' negotiations on 29 March 2017. Subject only to what I say at [86] to [90] below about the parties' previous course of dealings, the subject to contract clause came into play only *after* the parties exchanged the business confirmation emails, when the plaintiff sent the draft contract to the defendant in order to initiate the negotiations over those more detailed terms. The business confirmation emails themselves give no indication at all that any agreement reached in them will be subject to the parties executing a formal contract.

83 I also reject the defendant's submission that the parties' negotiations after the business confirmation emails on the other terms in the draft contract and the plaintiff's insistence as late as May 2017 that the defendant execute the contract indicate that the parties intended their agreement to be binding only when a formal contract had been executed.[60] For this submission, the defendant appears to rely on the following statement in *Rudhra Minerals* at [31]:[61]

> … *The fact that there were substantial amendments to the draft contract as well as the fact that the draft contract incorporated numerous new terms not found in the FCO diminishes the Plaintiff's submission that the written contract was merely a formality meant to embody what was already agreed in the FCO*: see *Cendekia Candranegara Tjiang v Yin Kum Choy* [2002] 2 SLR(R) 283 at [25] and [33]). However, as I have stated above, parties may conclude a binding contract even though there are some terms yet to be agreed between them. *As for the urgency for the written contract on the part of the Plaintiff's*

60 DCS, paras 24 to 28.

61 DCS, para 10.

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> *representatives*, I do not think that this can be interpreted to mean only that the Plaintiff knew that they did not yet have a binding agreement with the Defendant. *It is equally likely that the Plaintiff, knowing that there were further terms and conditions as well as the choice of the load port surveyor to be mutually agreed upon after the date of acceptance of the FCO, simply wanted the signed contract to ensure that all these details were finalised before the first shipment date on 21 July 2011.* [emphasis added by the defendant]

84 This passage does not take the defendant's case very far. It is true that Andrew Ang J notes here that the "substantial amendments" to the draft contract undermined the plaintiff's case that the written contract was "merely a formality". But that was not sufficient to displace his finding that parties *did* intend their agreement to be binding while leaving detailed terms to be negotiated (see *Rudhra Minerals* at [21]). Ang J also took the view that the plaintiff's insistence on getting the contract executed did *not* lead to a clear inference that it did not intend to create any legal relations until that happened. In his view, it was equally likely that the plaintiff's actions in insisting on getting the draft contract executed was consistent with the plaintiff simply ensuring that all details were administratively finalised before the time of first shipment, rather than evincing awareness that there was yet no concluded contract.

85 In any case, I have found that the parties' conduct on 29 March 2017 evinced an intention to create legal relations on that day, even though there were further details to be negotiated and agreed. That the plaintiff and the defendant continued to negotiate or make amendments to terms *other* than the terms already agreed in the 29 March 2017 emails is perfectly consistent with this finding.

The parties' previous course of dealings

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86 A final point on intention to create legal relations is the proper inference to be drawn from the parties' previous course of dealings. In particular, each party invites me to draw inferences from the 2015 dealing (see [35(a)] above) to support its own position in this action.

87 The defendant submits that the parties' conduct in relation to the 2015 dealing establishes that both parties do not intend an exchange of business confirmation emails to create legal relations. On the plaintiff's side, it failed to render performance of the transaction contemplated by the 2015 dealing and made no excuse for its failure. That behaviour can be explained only on the basis that the plaintiff did not intend the business confirmation emails in 2015 to create legal relations. Otherwise, the plaintiff had no legal basis for refusing to sign the draft contract and for failing perform the 2015 dealing.[62] On the defendant's side, its decision not to pursue legal action against the plaintiff for breach of the 2015 dealing shows that the defendant too did not intend the business confirmation emails in 2015 to create legal relations. In cross-examination, Mr Wei testified that the defendant took no action because it accepted that the contract was unsigned and therefore not binding.[63]

88 The plaintiff rejects the defendant's submission on the 2015 dealing. Mr Burgess testified that, even though the transaction contemplated by the 2015 dealing was never performed, the plaintiff has never sought to argue that the parties had no intention to create legal relations in 2015.[64] He also suggests that the plaintiff's requests for the defendant to agree a different laycan is evidence

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62 DCS, para 60.

63 NE, 11 March 2019, p 16 lines 11 to 23.

64 AEIC of Benjamin Burgess, p 27, para 61; NE, 23 October 2018, p 25, lines 12 to 23.

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that the plaintiff saw the parties as contractually bound even though no formal contract was ever executed.[65] The plaintiff also argues that the defendant's own conduct in 2015, such as its threat of legal action, is evidence that the defendant considered the 2015 business confirmation emails to have given rise to a concluded contract in themselves.[66]

89 The parties' conduct in relation to the 2015 dealing is ambiguous and capable of bearing many meanings. Given my finding that it can be objectively ascertained from the contemporaneous documents that the parties intended to create legal relations by the business confirmation emails of 29 March 2017, it is not necessary for me to reach a conclusion on the true nature of the 2015 dealing. It suffices to say that I do not find the plaintiff's conduct in 2015 inconsistent with its case that the parties intend business confirmation emails to create legal relations. Whether the plaintiff is liable to the defendant in damages for breach of the 2015 dealing is not a matter before me and I express no view on it.

90 For the same reason, the defendant's argument on estoppel by convention also falls away. There is no evidence before me suggesting that the parties operate on the basis of a well-established assumption based on their previous dealings that their intention to create legal relations through the business confirmation emails is subject to the parties entering into a formal contract.

Certainty and completeness

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65 NE, 23 October 2018, page 25, lines 12 to 23.

66 PCS, paras 48 to 54.

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91 I now consider whether the parties' agreement reached through the business confirmation emails on 29 March 2017 was sufficiently certain to be a concluded contract. I find that it was. All but one of the essential terms of the parties' agreement were negotiated and accepted in the business confirmation emails. These essential terms include: the quantity, quality, price, laycan and type of vessel to be deployed (see [9] above). The only essential term which the parties failed to agree in the business confirmation emails is the identity of the load port surveyor.[67]

92 The defendant submits that that failure renders the alleged contract void for uncertainty. The main case on which the defendant relies for this submission is *Rudhra Minerals*. In that case too, coincidentally, the dispute was over whether the parties had reached a concluded contract for the sale of Indonesian steam coal, given that they had not agreed the identity of the load port surveyor. On the evidence before him, Andrew Ang J found himself unable to conclude that parties had reached agreement on the identity of the load port surveyor (at [37] and [39]). He held that the choice of load port surveyor was an essential term of the contract, without which the contract could not be enforced (at [35]). The plaintiff's claim in *Rudhra Minerals* therefore failed, even though the parties had an intention to create legal relations and had agreed all the other essential terms of their contract.

93 As a preliminary point, although both the plaintiff and the defendant appear to agree that the identity of the load port surveyor is a material term,[68] I do not think that the parties considered the identity of the surveyor to be a

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67 DCS, paras 39 to 51.

68 PCS, para 36; DCS, para 39.

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condition precedent to the business confirmation emails of 29 March 2017 giving rise to a concluded contract. As noted in *Pagnan* in the passage cited at [56] above, "[i]t is for the parties to decide whether they wish to be bound, and if so, by what terms, whether important or unimportant". Similarly, as Andrew Ang J also noted in *Rudhra Minerals* (at [27]), the determination of whether a term is essential is not a purely objective inquiry by the court. It seems to me more consistent with the conduct of the parties, for the reasons set out at [61]–[74] above, that they intended to be bound by the transaction even though the choice of load port surveyor remained "to be mutually agreed" (see [9] above).

94 My views on this are strengthened by the fact that parties did not appear to have contemplated any dispute between them as to the identity of the surveyor. The issue of the surveyor's identity was not so essential to the parties' commercial bargain that they singled it out for discussion in the business confirmation emails or in the emails which followed to negotiate the detailed terms of the draft contract.

95 In fact, in all three of the parties' previous dealings, the identity of the load port surveyor was never a source of contention:

(a) In the 2015 dealing, before it fell through, the plaintiff nominated the load port surveyor. The defendant did not object.[69]

(b) In the 2016 contract, the plaintiff again nominated the load port surveyor. The defendant suggested two alternatives. The plaintiff did not

[69] 1ABOD 19 to 30.

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accept the defendant's suggestion.[70] The defendant then accepted the plaintiff's nomination.[71]

(c) In the 2017 contract, the identity of the load port surveyor was not even a point of discussion.[72]

96 Therefore, much like in *Rudhra Minerals*, the identity of the load port surveyor did not affect the parties' intention to create legal relations. The only question remaining is whether factually, there *was* such further agreement reached on the load port surveyor after the 29 March 2017 emails as would complete the contract.

97 On the facts of the present case, I find that there is sufficient material to conclude that the parties did reach an agreement on the choice of load port surveyor.

98 When Mr Zhou sent the first draft contract to Mr Wei on the night of 29 March 2017, it included provisions nominating the load port surveyor. These provisions were found in cll 7 and 8 of the draft contract:[73]

> 7. QUANTITY DETERMINATION
>
> The quantity of loaded Coal will be determined by means of a draught survey (the ("Draught Survey") at the loading port conducted *by PT IOL Indonesia or PT Geoservices or PT Sucofindo ("Independent Surveyor or Laboratory") as appointed by the Seller*. The surveyor shall issue a certificate of weight according to the Draught Survey (the "Certificate of Weight").

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70 1ABOD 194.

71 1ABOD 190 to 197.

72 1ABOD 314 to 319.

73 AEIC of Richard Wei, p 36.

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> The Certificate of Weight shall be final and binding on the Parties. The costs of the Draught Survey and the Certificate of Weight shall be borne by the Seller.
>
> 8. QUANTITY DETERMINATION
>
> The quality of the loaded coal shall be determined according to ISO standards by sampling and analysis performed at loading by *PT IOL Indonesia or PT Geoservices or PT Sucofindo as the Independent Surveyor as appointed by the Seller*. The costs of the sampling and analysis will borne by the Seller.
>
> …
>
> [emphasis added]

99 Importantly, when Mr Wei replied on 6 April 2017 with the defendant's first round of proposed amendments to the draft contract, he suggested no change to the three surveyors nominated in cll 7 and 8.[74] The draft contract underwent several rounds of further negotiations until 17 April 2017. On that day, Mr Wei "confirm[ed] the draft good in order".[75] During that period, not once did the defendant comment on or seek to amend the names of the three surveyors nominated in cll 7 and 8 or challenge the plaintiff's option to choose the ultimate surveyor from amongst these three nominees.

100 Bearing that in mind together with the statement of principle in *Statoil* (*supra* [53]), I accept that the parties implicitly agreed upon their choice of surveyor. At the earliest, this further agreement was reached on 6 April 2017 when Mr Wei first replied with no proposed amendments to cll 7 and 8 of the draft contract. At the latest, this agreement was reached by 17 April 2017 when both parties were *ad idem* on the terms of the draft contract.

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74 AEIC of Richard Wei, p 54.

75 AEIC of Richard Wei, p 132.

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101 As a final point, I note that the defendant has argued that the plaintiff cannot rely on cll 7 and 8 in the draft contract as evidence of parties' agreement on the choice of surveyor, without also accepting that the draft contract contains cl 26, *ie* the subject to contract clause earlier discussed. The defendant submits therefore that any agreement in cll 7 and 8 "will not take effect until the [draft contract] is executed by both parties".[76]

102 In my view, this objection obscures the real question. This inquiry is not whether the plaintiff can "cherry-pick the portion of the [draft contract] that is favourable for its purposes" to have contractual effect and ignore the rest of the draft.[77] Whether the parties agreed on the identity of the load port surveyor is a factual question and not a contractual question. Finding that they reached a factual agreement on the load port surveyor does not depend on giving cll 7 and 8 contractual effect. Put another way, it does not matter if cll 7 and 8 are not part of an enforceable contract. It is the content of cll 7 and 8, which the plaintiff proposed and which the defendant did not object to despite being asked for objections, which manifest the parties' factual agreement on the choice of surveyor. This is sufficient to supplement the parties' contract reached on 29 March 2017.

103 Accordingly, I find that there was a contract between the parties that was complete and therefore enforceable.

Quantum

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[76] DCS, para 48.

[77] DCS, para 47.

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104 Having found in favour of the plaintiff on liability, I now turn to consider the quantum of damages payable to the plaintiff.

105 The plaintiff submits that its damages fall to be assessed under the general rule set out in s 50(3) of the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("the Act").[78] The defendant implicitly accepts this to be correct but argues that the conditions precedent for applying s 50(3) are not met.[79]

106 Section 50 of the Act provides as follows:

> **Damages for non-acceptance**
>
> 50.—(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
>
> (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
>
> (3) Where there is an *available market* for the goods in question, *the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been accepted* or (if no time was fixed for acceptance) at the time of the refusal to accept.
>
> [emphasis added]

107 The parties' cases and their experts' evidence therefore focused on the two questions raised by s 50(3):

(a) Was there was an available market for 3400 NAR coal at the load port at the relevant time?

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78 PCS, para 67.

79 DCS, para 69.

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(b) If so, what was the market price of 3400 NAR coal at the load port at the relevant time?

108 I will briefly summarise the parties' respective cases, including the evidence of each of their experts, before setting out my decision and reasons.

The plaintiff's case

109 The plaintiff submits that, in law, there is an "available market" within the meaning of s 50(3) of the Act even if there are no concluded contracts for the specified goods at the specified place at the specified time.[80]

110 The plaintiff's expert witness, Mr Peter Ball, relied for this aspect of his evidence on publications by an organisation known as IHS McCloskey. IHS McCloskey is a well-established source in the coal industry for market data. The weekly IHS McCloskey Fax publications do not indicate any concluded contracts for 3400 NAR steam coal at the load port in May and June 2017.[81] But Mr Ball's evidence is that the Chinese and Indian markets will buy 3400 NAR coal as an alternative to 3800 NAR coal if the price of the 3400 NAR coal is sufficiently attractive.[82] Mr Ball points out that IHS McCloskey records buying interest from China and India for 3800 NAR coal as well as actual contracts concluded for 3800 NAR coal at the load part in May and June 2017.[83] Relying on this, Mr Ball concludes there was indeed an available market for 3400 NAR

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80 PCS, para 69.

81 See in particular AEIC of Peter Ball, pp 146 (IHS McCloskey Fax dated 19 May 2017) and 157 (IHS McCloskey Fax dated 26 May 2017).

82 AEIC of Peter Ball, p 9, para 14.

83 AEIC of Peter Ball, pp 146, 157.

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Indonesian steam coal at the load port in May and June 2017 even though no contracts for that coal with that calorific value were concluded at that time.[84]

111 Having established that there was an available market for 3400 NAR coal at the load port in May and June 2017, Mr Ball then turns to ascertain the market price of 3400 NAR coal in that market. For this, Mr Ball relies on the prices of coal of three different calorific values. This aspect of Mr Ball's methodology is not challenged by the defendant's expert, Mr Benjamin Lawson. The calorific value of coal can be measured either on a Net as Received (NAR) basis or on a Gross as Received (GAR) basis.[85] Both experts appear to agree that in the Indonesian coal market, coal with a calorific value of 3400 NAR is treated as the commercial equivalent of coal with a calorific value of 3800 GAR. Thus, the market price for 3800 GAR coal is the closest and most direct evidence of the market price of 3400 NAR coal.

112 The first index that Mr Ball relies on is the IHS Markit – Weekly Indonesian FOB marker for 3800 GAR coal ("the IHS 3800 GAR index"). IHS Markit produces physical price assessments, which it calls "markers", for major global coal hubs.[86] It relies on market data to compile its markers. This data includes actual transactions as well as unmatched bids and offers and other market information.[87] This index is published weekly and tracks the export price

84 AEIC of Peter Ball, p 8.

85 AEIC of Peter Ball, p 9, para 15.

86 2ABOD 1012.

87 2ABOD 1013.

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of coal shipped out of East and South Kalimantan in geared vessels of minimum 50,000 tonnes and with a calorific value of 3800 GAR.[88]

113 Mr Ball also relies on the Argus/Coalindo ICI 4 index (the "ICI 4 index") and the Argus/Coalindo ICI 5 index (the "ICI 5 index").[89] These two indices are compiled using deals done, bids, offers, tenders and fundamental demand and supply information.[90] Both indices are published weekly.

114 The application of these two indices to ascertain the market price of 3400 NAR coal is less direct. The ICI 4 index tracks the market price for Indonesian coal with calorific value of 4200 GAR (*ie*, equivalent to 3800 NAR). The ICI 5 index tracks the market price for Indonesian coal with calorific value of 3400 GAR (*ie*, equivalent to 3000 NAR). Mr Ball submits that since the average calorific value of the coal covered by the two ICI indices is 3800 GAR (*ie*, equivalent to 3400 NAR), averaging the prices from the ICI 4 index and the ICI 5 index will yield an indication of the market price for 3400 NAR coal.[91]

115 Mr Ball puts the information from the three indices together to arrive at an indicative market price for 3400 NAR coal (equivalent to 3800 GAR coal) by taking the average of: (i) the IHS 3800 GAR index; and (ii) the average of the ICI 4 and ICI 5 indices.[92]

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88 AEIC of Peter Ball, p 9, para 17.

89 AEIC of Peter Ball, p 10, para 18.

90 2ABOD 1029.

91 AEIC of Peter Ball, p 10, para 18; p 11, para 22.

92 AEIC of Peter Ball, p 11.

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116 I pause to clarify that all of the foregoing indices are based on shipments on *geared and grabbed* vessels. The parties and their experts have agreed that a price premium of US$1.175/MT can be added to the market price for shipment on a geared and grabbed vessel in order to obtain the market price for shipment on a gearless vessel (*eg*, the third cargo in the present case).[93]

117 Mr Ball thus arrives at the following market prices for 3400 NAR coal at the load port from 29 April 2017 to 9 June 2017:[94]

Effective date range	**Market price for geared and grabbed vessels (US$)**	**Market price for gearless vessels (US$)**
29/4/2017 – 5/5/2017	33.14	34.315
6/5/2017 – 12/5/2017	32.18	33.355
13/5/2017 – 19/5/2017	31.16	32.335
20/5/2017 – 26/5/2017	30.76	31.935
27/5/2017 – 2/6/2017	31.19	32.365
3/6/2017 – 9/6/2017	33.44	34.615

I should clarify that the third column in this table is not extracted directly from Mr Ball's evidence.[95] Mr Ball derived the market price for shipment on gearless vessels by applying his own premium which he calculated as US$1.10/MT. I have recomputed the figures in the third column by adding the agreed premium

93 NE, 30 October 2018, p 12 line 16 to p 13 line 14.

94 AEIC of Peter Ball, p 13.

95 AEIC of Peter Ball, p 13, Table 3.

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of US$1.175/MT to Mr Ball's market price for shipment on geared and grabbed vessels appearing in the first column.

The defendant's case

118 The evidence of Mr Lawson, on the other hand, is that there was no available market for 3400 NAR coal at the load port at the relevant time.[96] Even if there were an available market, Mr Lawson's opinion is that it is not possible to derive the market price for 3400 NAR coal from the index prices alone. Instead, he takes the index prices as his starting point and then factors in further premiums or deductions to arrive at the market price for 3400 NAR coal.[97]

119 Mr Lawson's premise is that there is no available market for coal at a particular place and time unless there are actual concluded contracts for coal of that specification and shipped from that specific port at that place and time.[98] On the facts of the present case, his evidence was that there was insufficient supply of coal at the load port to meet demand at the relevant time. Sellers were withholding supply[99] because coal prices were rising rapidly and sharply.[100] Mr Lawson initially testified that these conditions prevailed from 23 May 2017 to 1 June 2017.[101] In examination in chief, however, he corrected his earlier

96 AEIC of Benjamin Lawson, p 20, para 33.

97 AEIC of Benjamin Lawson, p 27, para 56.

98 AEIC of Benjamin Lawson, p 20, para 33.

99 AEIC of Benjamin Lawson, p 25, para 47.

100 AEIC of Benjamin Lawson, p 24, para 42.

101 AEIC of Benjamin Lawson, p 25, para 47.

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evidence and testified that these conditions prevailed instead from 18 May 2017 to 27 May 2017.[102]

120 Mr Lawson's justification for opining that there were no concluded contracts is as follows. Between 8 and 15 June 2017, data from the IHS Market Intelligence Network ("the MINT data") shows that no loaded vessels departed from the load port.[103] It usually takes 15 to 20 days from the time of a contract to the time the nominated vessel arrives at the load port and tenders notice of readiness ("NOR").[104] Working backwards, this means that no contracts were concluded between 18 May 2017 and 27 May 2017 for 3400 NAR coal to be traded or shipped from the load port.[105]

121 Mr Lawson also refers to a number of Indonesian market reviews from IHS McCloskey ("the IHS McCloskey Market Reviews") in support of its submission that there was no available market for 3400 NAR coal. For example, one review dated 28 April 2017 states that "[o]ffers emerged at $35.00-$36.00/t FOB, basis 3,400 kc NAR, for geared vessels loading in May, but failed to attract [bids] as well".[106]

122 Alternatively, even if there were an available market, the defendant makes two preliminary points on the market price.

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102 NE, 30 October 2018, p 93, lines 23 to 25.

103 AEIC of Benjamin Lawson, pp 24 to 25, paras 45 to 46.

104 AEIC of Benjamin Lawson, p 25, para 49.

105 AEIC of Benjamin Lawson, pp 25 to 26, paras 50 to 52.

106 2ABOD 806.

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123 First, the defendant takes the point that the plaintiff pleaded only that the market price was to be assessed between 8 May 2017 and 15 May 2017. Thus, it cannot now shift the dates to the end of the laycan for each cargo (*ie*, 22 May 2017, 24 May 2017 and 27 May 2017).[107]

124 Second, the defendant submits that the relevant date for assessing the market price is a reasonable period *after* the termination of the contract by the plaintiff on 29 May 2017 and not the end of the laycan specified for each cargo.[108] The defendant relies on the decision of the House of Lords in *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The "Golden Victory")* [2007] 2 AC 353 ("*The Golden Victory*") for the proposition that where there has been a breach of contract for the sale of goods, some period must usually be allowed to enable the necessary arrangements for the substitute sale or purchase to be made. The relevant market price for assessing damages is the market price at the end of that period. The defendant's case, on the basis of Mr Lawson's evidence, is that the reasonable period to be allowed here is 20 days after 29 May 2017, *ie*, 18 June 2017.[109]

125 Turning to the issue of the market price itself, the starting point of Mr Lawson's methodology is in essence the same as Mr Ball's – namely, averaging index prices. These are the IHS 3800 GAR index, an average of the ICI 4 and ICI 5 indices and the S&P Global Platts 3800 GAR index.[110] The first three

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107 DCS, para 64.

108 DCS, paras 76 to 79.

109 DCS, para 78.

110 AEIC of Benjamin Lawson, p 27, para 57.

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indices are the same indices that Mr Ball relied on. The fourth is one that Mr Lawson alone relies on.

126 Mr Lawson substantially diverges from Mr Ball's approach in that he goes beyond simply averaging prices. Mr Lawson's evidence is that, after obtaining the average index price, it is necessary to "add a premium or subtract a discount depending on each of the price variables at play".[111] Mr Lawson's therefore applies the following premiums and discounts:[112]

(a) A discount of US$1.50/MT due to falling prices in the market for the first half of May 2017,[113] but a premium of at least US$2.00/MT from 16 May until mid-June 2017 given increased demand;[114]

(b) A discount of approximately US$0.50 to US$1.00/MT due to the poor reputation of the mines surrounding the load port;[115]

(c) A premium of at least US$1.00/MT because of the plaintiff's reliable reputation in the industry;[116] and

(d) A premium of US$1.00/MT because of the premium quality of 3400 NAR coal.[117]

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111 AEIC of Benjamin Lawson, p 27, para 56.

112 DCS, para 80; AEIC of Benjamin Lawson, pp 26 to 31.

113 AEIC of Benjamin Lawson, p 28, para 62.

114 AEIC of Benjamin Lawson, p 29, para 63.

115 AEIC of Benjamin Lawson, p 29, para 65.

116 AEIC of Benjamin Lawson, p 30, para 67.

117 AEIC of Benjamin Lawson, p 31, para 71.

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127 As mentioned earlier, the parties also agree that a premium of US$1.175/MT should be added to the market price for shipment on grabbed and geared vessels in order to obtain the market price for shipment on gearless vessels.

My findings

128 Having considered the evidence and methodology of each expert, I prefer the evidence and methodology of the plaintiff's expert, Mr Ball. In my view, there was an available market for the three cargoes at the relevant time. I also accept Mr Ball's assessment of the market prices for the three cargoes.

129 As I have mentioned, the main issues on quantum are whether there was an available market for the coal and, if so, determining the market price for the coal. But it is apparent from my summary of the evidence and the arguments that the parties and their experts have raised a number of subsidiary issues. I will deal with those issues in the course of setting out my reasons for accepting Mr Ball's evidence.

The relevant time for assessment of damages

130 The parties first disagree on the relevant date for assessing damages. The general rule in contract is that damages should be assessed as at the date of the breach or the date on which the plaintiff could reasonably be aware of the breach, save where justice requires a departure from that date: *Johnson and Another v Agnew* [1980] AC 367 at 400H. This is sometimes referred to as the date of breach rule.

131 Section 50(3) of the Act incorporates the date of breach rule. It provides that damages for non-acceptance of goods are to be ascertained "*at the time or*

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times when [the goods] ought to have been accepted" (see [106] above). Determining when the three cargoes in this action "ought to have been accepted" is critical in assessing the plaintiff's loss. That date is relevant to determining *both* whether there was an available market *and* in calculating the market price of the coal.

132 The plaintiff submits that the relevant date at which damages should be assessed is the end of the laycan for each cargo, because the defendant failed to give shipping instructions so as to take delivery of the coal by the end of laycan.[118] This would be the day after the last day of each of the three laycans (see [10] above).

133 The defendant on the other hand argues that the plaintiff kept the contract alive even after the expiry of each laycan and points out that the plaintiff terminated the contract only on 29 May 2017. The defendant submits further that the relevant date is a "reasonable period" of time after 29 May 2017, to allow for the plaintiff to make the arrangements for a notional substitute sale of the three cargoes.

134 The defendant relies on a statement by Lord Bingham in *The Golden Victory* (at 382) that although the general rule is to assess damages at the date of breach, "some period must usually be allowed to enable the necessary arrangements for the substitute sale or purchase to be made", citing the English Court of Appeal in *Kaines (UK) Ltd v Österreichische Warrenhandelsgesellschaft* [1993] 2 Lloyd's Rep 1 ("*Kaines*"). On that basis, the defendant suggests that the relevant time for assessing damages in this case

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118 PCS, para 68.

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is 20 days after 29 May 2017, *ie*, about 18 June 2017, being the time by which it would be reasonable to expect the plaintiff to have found a substitute buyer for the three cargoes.

135 I accept the plaintiff's submissions and reject the defendant's. In *Kaines*, the only reason that the court did not apply the date of breach rule was because the innocent party had waited too long to enter into a substitute contract to buy the goods. By that time, the price of the goods had substantially increased. In other words, the innocent party in that case failed reasonably to mitigate its loss. Although the defendant has raised the issue of mitigation as a defence in the present case,[119] the defendant's only allegation is that the plaintiff failed to mitigate its loss by not accepting the defendant's proposal on 4 May 2017 that the plaintiff sell the first cargo to the defendant.

136 There is accordingly no reason for me not to apply the breach of date rule. I accept that the date of breach is the end of the laycan for each cargo. The plaintiff's damages should accordingly be assessed as at:

(a) 22 May 2017 for the first cargo;

(b) 24 May 2017 for the second cargo; and

(c) 27 May 2017 for the third cargo.

Available market

[119] Defence, para 14(b).

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137 Taking these three dates as the relevant date for assessing damages, I find that there was an available market for the coal at the load port on those dates.

138 First, I do not accept Mr Lawson's evidence that there is an "available market" only if there are concluded contracts, *ie* other buyers and sellers in the market who are "actually contracting with each other for coal shipped from" the load port.[120] The definition of an "available market" for the purposes of s 50(3) of the Act is a question of law. I refer to the helpful observations in *Benjamin's Sale of Goods* (Michael G Bridge gen ed) (Sweet & Maxwell, 10th ed, 2017) at para 16-068:

> … The availability of buyers and sellers, and their ready capacity to supply or to absorb the relevant goods is the basic concept of an "available market" … A fluctuating market price indicates the existence of an available market, but it should not be a necessary test: "there must be sufficient traders, who are in touch with each other".

The Court of Appeal in *Marco Polo Shipping Co Pte Ltd v Fairmacs Shipping & Transport Services Pte Ltd* [2015] 5 SLR 541 at [30(b)] applied and accepted this observation, appearing in the then-current version of *Benjamin's Sale of Goods*.

139 On the strength of these authorities, I accept that all that the plaintiff needs to show is that there was a pool of potential buyers and sellers with the "ready capacity" to supply or absorb the coal on the relevant dates. Evidence of concluded contracts for coal on those dates certainly establishes that there was an available market. But that is not the only method of establishing an available

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120 AEIC of Benjamin Lawson, p 20, para 33.

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market. The presence of bids and offers, even if unmatched, indicates that there were willing seller and willing buyers in the market, albeit at a price which attracted no acceptance.

140 Second, even if I were to accept the defendant's submission that there can be no available market without concluded contracts, I do not accept Mr Lawson's evidence that there were no concluded contracts at the relevant time. As detailed above (at [120]), Mr Lawson's methodology involved observing that there were no loaded vessels departing from the load port between 8 and 15 June 2017 and working backwards 15 to 20 days to arrive at the conclusion that there were no concluded contracts for coal from the load port between 18 May 2017 and 27 May 2017. In my view, this methodology is flawed because of the incorrect assumptions and incomplete data on which it is premised.

141 First, I do not accept Mr Lawson's method of working 15 to 20 days backwards. The estimate of 15 to 20 days is to allow for the time taken between the parties concluding a contract and the nominated vessel arriving at the load port (or tendering NOR).[121] This estimate may be industry practice but is not an invariable rule. Mr Lawson himself acknowledged under cross-examination that, even though this is "normal market practice", it does not happen with every contract.[122]

142 This is demonstrated by the parties' own previous contract dated 15 March 2017. It was conceded that delivery under that contract took place only

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121 AEIC of Benjamin Lawson, p 25, para 49.

122 NE, 31 October 2018, p 135 lines 3 to 13.

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in early May 2017,[123] far beyond the supposed "normal market practice" of 15 to 20 days. Further, Mr Lawson in his own report recognises that parties may enter into term contracts rather than spot contracts. A spot contract is for delivery soon after the date of contracting. It thereby minimises both parties' risk of adverse price movements between contract and delivery. In a term contract, parties may stipulate specific times for delivery which can range from days to years after the date of contracting.[124] All of this further diminishes the utility of the period of 15 to 20 days which Mr Lawson used in his calculations.

143 Next, although Mr Lawson asserts that the range of 15 to 20 days is between the date of contracting "to the time the nominated vessel *arrives* at the load port and tenders NOR",[125] the MINT data that Mr Lawson relies on to work backwards provides only the *departure* dates of vessels already laden with cargo. Mr Lawson accepted in cross-examination that he did not ask for data showing the *arrival* dates of vessels,[126] even though his methodology hinged on arrival rather than departure dates.

144 Flowing from Mr Lawson's omission to ask for the arrival dates, his methodology of working backwards by 15 to 20 days from the vessels' *departure* dates (based on the MINT data) becomes wholly inaccurate. The estimate of 15 to 20 days simply fails to factor in other critical periods of time in any shipping transaction: the full laycan, the time taken to load the vessel

123 NE, 31 October 2018, p 139, lines 13 to 25.

124 AEIC of Benjamin Lawson, p 14, para 16.

125 AEIC of Benjamin Lawson, p 25, para 49.

126 NE, 31 October 2018, p 5 line 1 to p 7 line 1.

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after tender of NOR and the additional time needed to complete cargo documentation.[127]

145 Mr Lawson acknowledged in cross-examination that the laycan was not factored into his methodology.[128] His own report also opines that it would take on average six days to load a cargo of 55,000 MT.[129] A further one day is also typically needed to complete cargo documentation before departure.[130] Curiously, although Mr Lawson's own report sets out these additional periods of time which must elapse between arrival and departure,[131] and despite knowing that the MINT data provides only departure dates, Mr Lawson simply fails to account for these periods in his opinion.

146 Because of the flawed assumptions underlying Mr Lawson's methodology, I cannot accept his evidence that there were no concluded contracts for the sale of coal at the load port at the relevant time.

147 In any event, I have already found that an available market within the meaning of s 50(3) of the Act does not require concluded contracts in the relevant period. I accept Mr Ball's evidence that, based on his review of weekly data from IHS McCloskey, there is a strong basis for concluding that there was "buying interest from China and India" for 3800 NAR Indonesian steam coal at

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127 PCS, para 77.

128 NE, 31 October 2018, p 21, lines 4 to 8.

129 AEIC of Benjamin Lawson, p 25, para 48.

130 NE, 30 October 2018, p 127, lines 10 to 15.

131 AEIC of Benjamin Lawson, p 25, para 48.

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the load port.[132] Mr Ball's opinion is, in my view, corroborated by the IHS McCloskey Fax articles between May and June 2017 that report on the factors affecting demand for Indonesian steam coal from buyers in the different regions.[133] I also find no reason to disagree with his opinion that these buyers consider 3400 NAR steam coal to be a commercial alternative.

148 I therefore accept that at the date of breach, there was an available market for the three cargoes of 3400 NAR steam coal. I now turn to consider the market price on the relevant dates.

Market price

149 The defendant takes a preliminary objection to the plaintiff's case on the market price: that the plaintiff has departed from its pleaded case on this issue. In its further and better particulars, the plaintiff pleaded that it incurred its loss "[a]round 8 to 15 May 2017".[134] In its evidence and closing submissions however, the plaintiff submits it incurred its loss between 22 May 2017 and 27 May 2017 (see [123] above).

150 A party is no doubt bound by its pleaded case. That rule ensures that its opponent knows the case it has to meet at trial and is not taken by surprise. In this case, however, the plaintiff's departure from its pleaded case is not material. The new dates that the plaintiff relies on are not far off from the original pleaded dates. Because of this, the defendant did not suffer any prejudice as a result of

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132 AEIC of Peter Ball, pp 8 to 9, para 13.

133 AEIC of Peter Ball, p 125; p 168.

134 Further and Better Particulars served pursuant to the Defendant's request dated 27 September 2017, p 34.

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the departure. The agreed list of issues that both parties' experts were asked to opine on included ascertaining market availability and market price "in the period of *May to June 2017*".[135] The defendant's expert, Mr Lawson, therefore obtained market data from various sources covering the entire period from May to June 2017 and was therefore prepared to and did give evidence for the entire period.[136] I therefore reject the defendant's pleading point.

151 I turn now to the substance of the market price issue. Having considered the evidence of both experts, I prefer Mr Ball's evidence on market price. As I have noted, there is broad agreement between the experts on the sources of market data on coal prices (see [115] and [125] above). Both experts also agree that an upward adjustment of US$1.175/MT is appropriate to obtain the market price for coal loaded onto gearless vessels.[137]

152 What I reject is Mr Lawson's suggestion to go one step further after averaging the index prices and incorporate premiums and deductions to account for a list of factors (see [126] above). In my view, most, if not all these factors are already priced into the index. To account for them separately would amount to double-counting.

153 Moreover, Mr Lawson accepted in cross-examination that the quantum of premium or deduction which he proposed is not premised on any rigorous methodology but purely on "gut instinct".[138] In fact, the very composition of the

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135 AEIC of Benjamin Lawson, p 12, para 11; AEIC of Peter Ball, p 2, para 3.

136 AEIC of Benjamin Lawson, p 24, para 45 and Annex B; p 27, para 59.

137 NE, 30 October 2018, p 13, lines 4 to 12.

138 NE, 31 October 2018, p 92 lines 13 to 19.

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array of factors for which Mr Lawson opined adjustment was needed also appears arbitrary and unsupported by evidence.

154 In addition to the general points I have made above, I now deal briefly with each of the recommended premiums and discounts and explain my specific reasons for rejecting them:

(a) I do not accept that a discount of US$1.50/MT should be given for the falling market in the first half of May 2017. Mr Lawson acknowledged that market indices factor in market sentiment.[139] A simple survey of the industry publications also confirms this. For example, the IHS McCloskey Fax on 12 May 2017 said that "Asian thermal markets softened further this week … an annual industry event in Bali also dampened enthusiasm for doing deals, with participants preferring to 'wait and see'".[140] The IHS McCloskey Fax on 19 May 2017 said that "Asian thermal markets pared some of their recent falls this week despite bearish sentiment emanating from the annual Coaltrans event in Bali".[141] It is therefore unnecessary to apply a separate discount to the index prices to factor in market sentiment.

(b) For the same reason, I do not accept Mr Lawson's second adjustment: a premium of at least US$2.00/MT in the light of the rising market in the second half of May 2017.

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139 NE, 31 October 2018, p 66, lines 1 to 18; p 67, lines 11 to 16.

140 AEIC of Peter Ball, p 136.

141 AEIC of Peter Ball, p 146.

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(c) I do not accept a discount of US$0.50 to US$1.00/MT for the "generally bad reputation" of the mines shipping through the load port. Mr Lawson's basis for applying this discount is entirely anecdotal. At trial, he could do no more than make general allusions to the high incidence of theft and criminal activity in the area.[142] He again conceded that his recommended discount for the port's poor reputation was based on instinct.[143] In my view, this discount is too speculative.

(d) I do not accept a premium of US$1.00/MT due to the plaintiff's reliable reputation in the industry. The personal good reputation or otherwise of the plaintiff is irrelevant when the court is ascertaining the market price for coal of a similar grade. The court is trying to ascertain an objective price which would be agreed between market participants generally. It is not trying to ascertain the subjective price which could be agreed by any particular market participant.

(e) I do not accept that a premium of US$1.00/MT is warranted because of the above average specifications of the three cargoes.[144] I accept Mr Ball's evidence that the differences in quality between the coal in the three cargoes and the coal covered by the market indices are not significant[145] and also do not engage the rejection levels.[146] Indeed,

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142 NE, 31 October 2018, p 81 to 82.

143 NE, 31 October 2018, p 106, lines 15 to 17.

144 AEIC of Benjamin Lawson, p 31, para 71.

145 NE, 30 October 2018, p 11 line 14 to p 12 line 15; AEIC of Peter Ball, pp 11 to 12, para 20.

146 NE, 30 October 2018, p 75, lines 3 to 15.

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in the course of the trial, Mr Lawson conceded that this premium should be removed.[147]

155 I therefore accept the methodology and the market price advanced by Mr Ball. Mr Lawson is no doubt correct when he says that the index price is "at best … a guide to the market trend" and "[does] not necessarily reflect the actual market price on any given day".[148] But a margin of error is unavoidable when one speaks of ascertaining *any* market price. The exercise is necessarily dependent on being able to obtain reliable market data, and on being able to draw the relevant market price out of the empirical data in the best way possible. The indices that parties rely on are unavoidably theoretical constructs. It is impossible to *prove* a theoretical "actual market price" as a question of fact. I am satisfied to the requisite degree of certainty and within an acceptable margin of error with the reliability of the three indices and the way in which Mr Ball has extracted a market price from the data.

156 Using figures from Mr Ball's table (at [117] above), I therefore find:

(a) a market price of US$30.76/MT for the first cargo as at 22 May 2017;

(b) a market price of US$30.76/MT for the second cargo as at 24 May 2017; and

(c) a market price of US$32.365 for the third cargo as at 27 May 2017, applying the premium for a gearless vessel.

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147 NE, 31 October 2018, p 117, lines 19 to 24.

148 AEIC of Benjamin Lawson, p 17, para 24.

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Quantity

157 The plaintiff also submits that its damages should be assessed on the basis that it shipped the maximum permissible contractual tonnage for each cargo, *ie* 10% more than the nominal contracted quantity.[149] The basis for this submission is that the vessel would have loaded the maximum quantity permissible in order to earn the maximum freight.

158 I reject this submission.

159 First, the plaintiff adduced no invoices or other documentary evidence to establish that shipping 110% of the nominal contracted quantity was a common or market practice in general. As for the specific resale transactions which the plaintiff entered into for these three cargoes, the evidence before me is that the resale quantities for the first and second cargoes were substantially the same as the nominal contracted amount, *ie*, 55,000 MT each.[150] In fact, the amount loaded onto the vessel for the second cargo was slightly *less* than 55,000 MT.[151] I note that the resale quantity for the third cargo was 78,000 MT.[152] However, it appears to me that this is not the result of a variance from the nominal contracted quantity but the result of a specific agreement between the plaintiff and the buyer on the resale.[153]

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149 PCS, para 91.

150 AEIC of Benjamin Lawson, p 34, para 80; 1ABOD 621 and 702.

151 1ABOD 702.

152 1ABOD 673.

153 1ABOD 624.

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160 Second, I note that neither expert suggested that a variance – whether downward or upward – was warranted to the quantities of the cargoes.

161 Finally, I note that Mr Burgess accepts for the plaintiff that in an FOB contract, the actual quantity of the cargo is likely to be determined by the buyer and not the seller. That is because it is the buyer who contracts with the shipowner to charter the vessel.[154]

162 There is ultimately no evidence to support assessing the plaintiff's damages at 110% of the nominal contracted quantity of the cargo. I therefore decline to do so.

Reasonable period

163 In view of my finding that the reference point for the assessment of damages in accordance with the Act is the end of the laycan, it is strictly not necessary for me to make a finding on the issue of whether the plaintiff resold within a reasonable period. In any case, I am inclined to accept that the plaintiff did resell the three cargoes within a reasonable period.

164 I accept the evidence of Mr Ball that what amounts to a reasonable period is contingent on a number of factors, and in particular "depends on the seller's situation".[155]

165 The plaintiff terminated its contract with the defendant on 29 May 2017. The plaintiff resold the three cargoes to three different buyers on 16 June 2017,

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154 NE, 23 October 2018, p 49 lines 7 to p 50 line 13.

155 AEIC of Peter Ball, p 14, para 29; NE, 30 October 2018, p 82, lines 8 to 9.

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20 July 2017 and 21 July 2017.[156] This is within two months of termination. In my view, that is a reasonable period. I do not consider this to be a case where the plaintiff was attempting to sell "distressed cargoes", *ie* cargoes which had to be sold urgently at the earliest achievable price. Although both experts agreed that 3400 NAR coal is considered low-rank coal with a short shelf life,[157] I accept the plaintiff's point that it is capable of mining to demand. This means that the coal that was initially to be sold to the defendant would not have been mined until such time as the plaintiff had found an alternative buyer, thus largely obviating any risk of the cargo deteriorating while in storage.[158]

Calculation of damages

166 For these reasons, the plaintiff is entitled to damages as follows:

Cargo	**Contract price less market price (US$/MT)**	**Quantity (MT)**	**Damages (US$)**
First	39.10 - 30.76 = 8.34	55,000	458,700
Second	39.10 - 30.76 = 8.34	55,000	458,700
Third	40.20 - 32.365 = 7.835	70,000	548,450
Total			1,465,850

156 AEIC of Benjamin Burgess, p 20, para 52.

157 AEIC of Benjamin Lawson, p 33, para 77; NE, 30 October 2018, p 14, lines 2 to 5.

158 NE, 30 October 2018, p 14, lines 6 to 18.

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Conclusion

167 In summary, I find as follows. The parties entered into a contract for the sale to the defendant of three cargoes of coal. The contract arose on 29 March 2017 from the business confirmation emails which the parties exchanged that day. There being no dispute as to breach, the defendant is liable to pay the plaintiff damages for breach of contract in the amount of US$1,465,850.

168 Judgment will therefore be entered for the plaintiff against the defendant for the sum of US$1,465,850 and interest on that sum under s 12 of the Civil Law Act (Cap 43, Rev Ed 1999). Interest under the Civil Law Act will run on the US$1,465,850 from 7 August 2017, the date on which the plaintiff issued the writ in this action, to 29 March 2019, the date of this judgment at the usual rate of 5.33% per annum.

169 That judgment will also include the plaintiff's costs of and incidental to this action. Having heard the parties on costs, and having considered their costs schedules as well as the costs guidelines in Appendix G of the Practice Directions, I have fixed the plaintiff's costs at S$129,000 including disbursements.

Vinodh Coomaraswamy
Judge

Thomas Tan and Tan Xue Ting (Haridass Ho & Partners)
for the plaintiff;
Joseph Tan and Joanna Poh (Legal Solutions LLC)

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for the defendant.

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