Claim No: HT-2019-000460

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2021] EWHC 1730 (TCC)

Rolls Building
London, EC4A 1NL

Date: 24/06/2021

Before:

MRS JUSTICE O'FARRELL DBE

- - - - - - - - - - - - - - - - - - - -

Between:

SCHENKER (THAI) LIMITED	**Claimant**
- and -	
THE SHELL COMPANY OF THAILAND LIMITED	**Defendant**

- - - - - - - - - - - - - - - - - - - -
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Serena Cheng QC (instructed by Watson Farley & Williams LLP) for the **Claimant**
Anna Boase QC (instructed by DLA Piper LLP) for the **Defendant**

Hearing dates: 2nd and 3rd February 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Thursday 24 June 2021 at 2pm"

....

MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. This is the hearing of an arbitration claim by which, pursuant to s.67 Arbitration Act 1996, the Claimant ("Schenker") challenges the decision dated 18 November 2019 of an arbitral tribunal (the "Tribunal") that it has substantive jurisdiction to determine a claim made by the Defendant ("Shell") in LCIA Arbitration No. 194263.

2. Schenker is an integrated logistics service provider and an affiliate of Schenker AG. Shell is a producer, supplier and seller of petroleum and other oils and an affiliate of Shell Global Solutions International BV ("Shell Global").

3. The underlying dispute arises out of customs services provided by Schenker for Shell. In July 2017 Shell paid Thai import taxes and duties in the sum of THB 346,907,468 (approximately US$ 11 million) on a shipment of gasoline which was imported into Thailand on board "the Silver Millie". The gasoline was found to be out of specification and re-exported, giving rise to a right to a refund. Shell claims that Schenker was engaged by Shell to perform customs services in respect of the Silver Millie shipment, including making the refund claim. Shell claims that Schenker failed to do so properly and promptly and, as a result, Shell has not received its refund, thereby suffering loss.

4. On 20 March 2019 Shell commenced LCIA arbitration proceedings against Schenker, claiming damages in respect of the failed refund claim. Schenker disputed the jurisdiction of the Tribunal. The jurisdiction challenge was determined as a preliminary issue. On 18 November 2019 the Tribunal issued its decision that it has jurisdiction, on the basis of an arbitration clause incorporated into the purchase contract which covered the relevant services.

5. On 16 December 2019 Schenker issued an arbitration claim form, seeking to set aside the Tribunal's decision dated 18 November 2019 that it has substantive jurisdiction to determine the referred dispute.

6. It is common ground that Schenker was engaged to perform the relevant customs services in respect of the Silver Millie shipment. The issue is whether there is a valid arbitration agreement in respect of the dispute between the parties arising out of those services that has been referred to arbitration.

7. Schenker's case is that the parties entered into a separate, ad hoc contract for the customs services in respect of the Silver Millie shipment, as set out in a quotation sent by Schenker to Shell on 22 August 2017 ("the Quotation"). The Quotation did not contain an arbitration agreement; it incorporated the standard trading conditions of the Thai International Freight Forwarders Association ("TIFFA"), including a provision that any claims were subject to the exclusive jurisdiction of the Thai Courts.

8. Shell's case is that Schenker was engaged to carry out the customs services in respect of the Silver Millie shipment pursuant to a purchase contract made between the parties on 1 October 2013 ("the Purchase Contract"). The Purchase Contract incorporated general terms, including an arbitration clause, from the Enterprise Framework Agreement dated 21 March 2012 (the "EFA"), an umbrella agreement between Shell Global and Schenker AG.

9. Although Schenker's position is that it is for Shell to demonstrate the existence of a valid arbitration agreement that covers the scope of the referred dispute, and it is open to the court to find that there was no contract, neither party contends for any positive case apart from the alternatives identified above.

10. Thus, the material question for the court is whether the relevant customs services in respect of the Silver Millie were carried out by Schenker pursuant to the terms and conditions set out in the Quotation or the Purchase Contract.

The Enterprise Framework Agreement ("EFA")

11. On 21 March 2012 Shell Global and Schenker AG entered into the EFA (Contract Number: PT 17475:0), providing a framework, pursuant to which Shell companies might purchase services from Schenker companies, and a set of terms and conditions to be incorporated into such contracts.

12. The EFA documents comprise:

    i) Part 1 – the Framework Agreement;

    ii) Part 2 – Terms and Conditions for Purchase Contracts:

        a) Appendix 2A – General Terms; and

        b) Appendix 2B – Commercial Terms: Range of Scope, Specifications and Technical Information.

13. The definitions set out in Article 1 of Part 1, the Framework Agreement, include:

> ""Call-Off Order" means a Shell Company's written order that is issued under the EFA, which once accepted pursuant to the EFA, will together with the Incorporated Terms constitute a Purchase Contract.
>
> …
>
> "Contractor Company" means Contractor Lead Party and/or an Affiliate of Contractor Lead Party, in each case who is capable of providing Scope.
>
> …
>
> "Incorporated Terms" means (i) the General Terms and (ii) the Incorporated Commercial Terms.
>
> "Incorporated Commercial Terms" means the Commercial Terms applicable to Scope of the Purchase Contract.
>
> …

> "Purchase Contract" means the Call-Off Order accepted by the Contractor and duly signed by the Company together with the Incorporated Terms.
>
> "Range of Scope" means the range of Services offered by Contractor Companies under the EFA as set out in Part 2, Section 2B.
>
> "Scope" means the scope, and any and all relevant portions thereof as the context dictates, that Contractor is required to supply in accordance with the Purchase Contract including the delivery of the Cargo and the performance of the Services (as applicable).
>
> …
>
> "Shell Company" means (i) Shell (ii) any Affiliate of Shell, each in its own capacity and/or on behalf of its Co-venturers, and (iii) any Permitted Buyer.
>
> …
>
> "Services" means any of the services described in Part 2, Section 2B.
>
> "Supplier" means the original equipment manufacturer or other vendor that Company may be buying Cargo from."

14. Article 1.2(d) provides that the EFA and any dispute or claim arising out of or in connection with it, its subject matter or formation (including non-contractual disputes or claims) will be exclusively governed by and construed in accordance with the laws of England and Wales, excluding those conflicts of law rules and choice of law principles which would deem otherwise.

15. Article 3.3 sets out the procedure for formation of a Purchase Contract:

> "(a) Issuance of a Call-Off Order. A Shell Company may order Scope from a Contractor Company who supplies Scope in or to the location of the Shell Company by issuing a Call-Off Order to the Contractor Company. A Call-Off Order issued by a Shell Company to a Contractor Company under the EFA will incorporate by reference the Incorporated Terms.
>
> (b) Local Terms. Where Local Terms are required, the Contractor Company and the Shell Company may add the Local Terms to the Call-Off Order and the Local Terms in the Call-Off Order will prevail to the extent of any conflict with the Incorporated Terms. The Contractor Company and Shell Company will not unreasonably withhold or delay agreement on Local Terms.
>
> …

(d) Acceptance of a Call-Off Order. Once a Call-Off Order is accepted by the Contractor Company and signed by the Shell Company, the Call-Off Order together with the Incorporated Terms will constitute a stand-alone "Purchase Contract" between the Contractor Company as "Contractor" and the Shell Company as "Company"."

16. Article 1 of Part 2, Appendix 2A - General Terms and Conditions for Purchase Contracts - includes the following definitions:

"Call-Off Order" means Company's written order issued under the EFA, which, together with the Incorporated Terms, constitutes the Purchase Contract."

"Cargo" means the goods, products, equipment or materials to be transported by the Contractor, including hydrocarbons shipped in a Container (e.g. drummed chemicals, lubricants). For clarity, hydrocarbons shipped in bulk or massive means shall not be in scope of the EFA."

…

"Scope" means the scope, and any and all relevant portions thereof as the context dictates, that Contractor is required to supply in accordance with the Purchase Contract including the delivery of the Cargo and the performance of the Services (as applicable)."

…

"Services" means services to be supplied by Contractor under the Purchase Contract (including pursuant to a Variation Order or Remedial Actions), including all related obligations connected with Services as provided for in the Purchase Contract and including the results of such Services. The term Services will include, where the Services contemplate delivery of a system or works, such system or works."

17. Article 7.1 contains the following provision in respect of "Prices":

"In consideration of the supply and completion of the whole of the scope in accordance with the terms of the Purchase Contract, Company will pay, or cause to be paid, to Contractor the Contract Price. Prices in the Purchase Contract are per the agreed upon rate schedules … Any activity not explicitly quoted for but requested under an individual work order shall be charged either at a documented outlay plus an agreed service fee or be separately quoted for."

18. Article 22 contains provisions for the resolution of disputes. Article 22.1 defines a "Dispute" as:

> "any dispute, disagreement, controversy or claim arising out of or in connection with the Purchase Contract, whether in tort, contract, under statute or otherwise at law, including any question regarding the existence, validity, interpretation, application, implementation, breach or termination of the Purchase Contract."

19. Article 22.2 requires the parties to follow the pre-arbitration protocol ("the Protocol") prior to submitting any Dispute to arbitration.

20. Article 22.3 contains an arbitration agreement:

> "A party may on notice refer a Dispute not resolved in a timely manner in the reasonable opinion of the party pursuant to the Protocol to arbitration under the arbitration rules of the London Court of International Arbitration ("LCIA"), ("the Rules"). The tribunal that conducts the arbitration will consist of three arbitrators, or, if the parties to the dispute agree otherwise, by a sole arbitrator, appointed in accordance with the Rules. The seat of the arbitration will be London, England, unless otherwise agreed… The arbitration will be confidential and will be governed by the laws of England and Wales… "

21. Article 23.1 states:

> "Where the Purchase Contract provides or contemplates a framework for the issuance of PO for Scope under the Purchase Contract:
>
> (a) each accepted PO will together with the terms of the Purchase Contract be a stand-alone contract (a "PO Contract");
>
> (b) reference to "Purchase Contract" hereunder will also be read as reference to each accepted PO under the Purchase Contract such that the parties' respective rights, remedies and obligations with respect to "Purchase Contract" hereunder will also apply, mutatis mutandis, for each PO Contract;
>
> (c) except as otherwise agreed between the parties to the Purchase Contract, only POs issued after the effective date of Purchase Contract amendments will be subject to such amendments.
>
> Within five (5) days of receipt of a PO, Contractor will, subject to capacity limitations to supply the Scope as set out in the PO, accept the PO in writing, or alternatively, Contractor will commence actions required in providing Scope at which point the PO will be deemed to have been accepted. No terms or conditions endorsed upon, delivered with or contained in Contractor's quotation, acknowledgment, acceptance of the PO, invoice, specification or similar document will form part of the

> PO Contract and Contractor waives any right which it otherwise might have to rely on such terms and conditions."

22. Part 2, Appendix 2B sets out the Commercial Terms, including the following:

> "2.0 RANGE OF SCOPE
>
> The Range of Scope from which Company may select for their local Purchase Contracts is broken into four broad sections. The scope shall be amended from time to time to reflect Company's needs."

23. The four categories of scope are (i) main carriage, (ii) in-country logistics, (iii) other value-add services, and (iv) management and administration.

24. Section 3.7 is entitled: "In-Country Logistics - Export Customs Clearance (at Origin)" and provides:

> "3 a) Contractor is responsible for completing export customs clearance for PC's on Cargo ordered from Suppliers under Incoterms rule EXW only.
>
> b) For Cargo ordered under all other Incoterms rules, the Supplier is responsible for the cost and risk of performing exports clearance which is already included in the price of the Cargo. Where a Supplier requests the Contractor to complete the export formalities on their behalf, this shall constitute a separate arrangement between Contractor and Supplier. The service shall not fall within the scope of the Purchase Contract and Company shall not be a party to this arrangement.
>
> c) Contractor is to ensure that any Cargo subject to an export licence have the required licence available before calling forward or arranging collection.
>
> d) Contractor is responsible for providing each export Supplier within two (2) weeks of export, with a certificate of shipment for every shipment made by Contractor in order that Suppliers can issue export invoices in accordance with VAT, TVA, BTW etc."

25. Section 3.8 is entitled: "In-Country Logistics - Import Customs Clearance (at Destination)" and provides:

> "a) Contractor is responsible for all customs clearance formalities related to the Purchase Contract. Company may however nominate a specific customs clearance agent in country, in which case Contractor shall be required to liaise with and work through any such nominated customs agents.
>
> …

> d) Contractor shall ensure all documents are transmitted to the authorities for lodgment within an acceptable time frame prior to arrival of the vessel or accompany the Cargo for Air freight for avoidance of any delays.
>
> e) Contractor shall maintain records of documentation produced and will report status of documentation and log dispatch times of documents including courier airway bill number. Delays in discharge of ships or any other claims that arise due to incorrect or late customs documentation will be borne by Contractor.
>
> f) Where requested to, Contractor shall make duty payments to the authorities on behalf of Company. Upon presentation of an appropriate customs invoice from Contractor, Company shall arrange for prompt reimbursement of the duty paid. …"

The Purchase Contract

26. Pursuant to the EFA, Shell and Schenker entered into the Purchase Contract (Ref: DS 38006) with an effective date of 1 October 2013 and an expiry date of 30 September 2017.

27. Clause 1(a) of the Purchase Contract provides that, unless otherwise stated, defined terms have the same meaning as in the General Terms of the EFA.

28. Clause 1(b) provides:

> "The Purchase Contract is comprised of the following Parts:
>
> Part 1 - CALL-OFF ORDER
>
> Scope Description Schedule A to the Call-Off Order
>
> Call-Off Order Local Terms - Schedule B to Call-Off Order
>
> Part 2 -INCORPORATED TERMS
>
> Section 2A - General Terms
>
> Any reference to General Terms includes both General Terms unless the context dictates otherwise.
>
> Section 2B -Incorporated Commercial Terms/Pricing
>
> The Call-Off Order and Incorporated Terms will be read as one document and form the Purchase Contract and, in the event of conflict or inconsistency between Parts and Sections, will be given precedence as set out in the General Terms, Clause 1.2 (Conflicts and Precedence), unless otherwise set out herein."

29. Clause 2 provides that the terms set out in Schedule B (Local Terms) will be given precedence over the Incorporated Terms to the extent of any conflict or inconsistency.

30. Clause 3 provides:

> "SUPPLY OF SCOPE:
>
> In accordance with the Purchase Contract, Contractor will supply Scope as specified in Schedule A of the Call-Off Order."

31. Schedule A to the Call-Off Order contains under "SCOPE DESCRIPTION":

> "The Range of Scope from which Company may select for their local Purchase Contracts is broken into two broad sections. The scope shall be amended from time to time to reflect Company's needs.
>
> "*1) In-Country Logistics*
>
> a) At Origin country, coordination/collection of Cargo from Suppliers on undelivered Incoterms.
>
> b) At Origin country, Customs Clearance and documentations of export.
>
> c) At Destination country, Customs Clearance including pre-payment of import duties and document archival.
>
> d) At Destination country, safe discharge at port, stevedoring and cargo superintendence and warranty surveyors.
>
> e) At Destination country, transportation of Cargo from port(s) to Worksite(s).
>
> …
>
> *2) Other Value-add Services*
>
> …
>
> *3) Management and Administration*
>
> …
>
> *4) Custom Clearances Services*."

32. Part 1.0 – Operational Requirements describes the customs clearance services expected of Schenker, including:

> "(a) Contractor shall provide to Company or its nominee custom clearance services described herein.
>
> Contractor shall:

i) Prepare, compile and file all documentations required by Customs for all products imported or exported for the account of the Company at all Ports in Thailand.

ii) File any reconciliation entries with Customs in connection with the import or export entries as described above.

…

v) Provide consultation, advice and guidance to Company in connection with customs matters, as requested. Contractor will endeavor to communicate to Company any missing or inaccurate documents and information pertinent to the customs declaration.

vi) Coordinate all activities for custom clearing of goods including but not limited to liaison with Port Authority, Shipping lines, Freight Forwarders, Bank(s), payment of relevant fees etc. from the time an order is placed on the Contractor up till the product is released by Customs.

…

ix) Provide Company with monthly summary of Import/Export entries filed, Invoice amount on Import/Export entries, total Duty/VAT amount payable …"

33. By paragraph 1 of Schedule B - Call-Off Order Local Terms, the parties agreed that the Purchase Contract and any dispute or claim arising out of or in connection with it, its subject matter or formation (including non-contractual disputes or claims) was to be exclusively governed by, and construed in accordance with, the laws of Thailand, excluding conflict of law rules and choice of law principles which would deem otherwise.

34. Part 2 contains the Incorporated Terms of the Purchase Contract. Section 2A of Part 2, General Terms states:

"General terms are the ones agreed within the Enterprise Framework Agreement (EFA)… and are hereby supplemented/ replaced with the following terms and conditions.

Article 1 …

Article 15 …

Article 17 …"

35. Part 2, Section 2B – Incorporated Commercial Terms states:

"7.1 Prices

The rates for the Services shall be as provided in Attachment 1 to this Purchase Contract. The rates in effect at the time a

> Services Request has been accepted by Contractor shall be valid for the Contractor and the Company throughout the duration of the particular Purchase Contract.
>
> 7.2 Invoicing and Payment
>
> (a) Invoicing. As indicated in Standard Operating Procedure.
>
> (b) Payment. Company will pay Contractor within forty-five (45) days of receipt by Company of a properly prepared and adequately supported invoice."

36. The rates are set out in the schedule at Attachment 1 ("the Rate Sheet") and include rates for the following services in respect of various ports:

    i) Import Handling Charge

    ii) Local Charge

    iii) Transportation Charge

    iv) Air Freight Export Thailand Origin Charge

    v) Ocean Freight Export Thailand Origin Charge

    vi) Export Bulk Customs clearance.

The Purchase Orders

37. Shell issued various purchase orders pursuant to the Purchase Contract, including the following:

    i) PO No. 4513430807 issued on 3 October 2014 in respect of "Service Charge for Export Product";

    ii) PO No. 4513430808 issued on 3 October 2014 in respect of "Reimbursement for Import Bulk Product";

    iii) PO No. 4516057167 issued on 6 July 2015 in respect of "Service Charge for Import Bulk Product".

38. There is an issue between the parties as to whether the purchase orders were sent to and/or received by Schenker.

39. Each of the above Purchase Orders made direct reference to the Purchase Contract DS 38006 and stated on its face:

> "Terms and Conditions Agreement Reference: DS38006.
>
> This Purchase Order is governed by and subject to the terms of the agreement between the parties referenced in this Purchase Order …"

The Silver Millie shipment

40. On 20 July 2017, Shell paid import taxes and duties in relation to two consignments of premium base unleaded gasoline supplied from the Republic of Korea and imported to Thailand.

41. On 22 July 2017, the gasoline arrived in Laemchabang port, on board the Silver Millie and was imported into Thailand.

42. At the request of Shell, Schenker handled the import customs process in respect of the Silver Millie shipment. Mr Wuttipong Popa, Account Manager for Shell, explains in his witness statement dated 20 February 2020 the procedure used.

> "The Thai Customs Department requires payment of the customs, duties and taxes of shipments, before the shipment can be discharged. As part of the import customs clearance process, Schenker Thai would assess those customs, duties and taxes based on the proforma invoice in advance. SCOT through Schenker Thai would then make the initial payment to the Thai Customs Department.
>
> Once the actual quantity and price of the Gasoline is determined on arrival in Thailand, Schenker Thai would then reconcile the amount already paid and either apply for a duty refund from the Customs Department in the event of overpayment or advise SCOT to pay additional taxes to cover any shortfall. This is called the duty refund process.
>
> As the customs clearance agent for T&S and as part of the import customs clearance process, Schenker Thai also handled the duty refund process for SCOT.
>
> …
>
> My involvement with Schenker Thai in the Silver Millie Shipment began on 19 July 2017 when I forwarded an email to Ms Savitree Singhaphan attaching the documents for the shipment. The documents included the bill of lading, manifest, proforma invoice, bill of quantity, calculation statement, time sheet, loading documents, among others (email dated 19 July 2017 at 12.38 pm …). This is what I did with every shipment requiring customs clearance services.
>
> …
>
> I recall Schenker Thai lodged the completed documentation with the Thai Customs Department and deposited the cheque for the advanced customs, duties and tax payment."

43. On 23 July 2017, a surveyor appointed by Shell determined that the gasoline was off-specification and Shell decided to re-export it to Singapore. Shell was charged

demurrage whilst the Silver Millie was waiting in port, so there was some urgency to arrange re-exportation.

44. By telephone, on 23 July 2017, Mr Popa of Shell instructed Ms Singhaphan of Schenker to carry out the re-export customs clearance and to conduct the duty refund process in respect of the Silver Millie shipment as set out in Mr Popa's witness statement.

> "On the evening of 23 July 2017, after the survey, I telephoned Ms Singhaphan of Schenker Thai and instructed her to carry out the re-export customs clearance of the Silver Millie Shipment to Singapore. I also instructed her to conduct the duty refund process for the Silver Millie Shipment in respect of the prepaid customs, duties and taxes on its arrival to Thailand. She acknowledged my instructions and informed me that she would check the required documents and revert to me.
>
> On the evening of 24 July 2017, I followed up with Ms Singhaphan by telephone on the status of the re-export request, as I had not heard from her. Ms Singhaphan said she would revert tomorrow.
>
> On 25 July 2017, Ms Singhaphan provided my team with a list of documents Schenker Thai needed from SCOT for the re-export customs clearance …"

45. Following exchanges of emails between Ms Singhaphan of Schenker and Mr Popa and Ms Yakongkho of Shell on 25 and 26 July 2017, the necessary documents to facilitate re-export of the consignment were concluded and the Silver Millie departed Thailand.

46. As a consequence of the re-exportation, Shell was entitled to a refund of the import taxes and duties it had paid.

47. On 22 August 2017, Schenker sent to Shell Quotation number 17-1-05884 (the "Quotation") which identified the prices for "Customs Clearance process for Bulk Shipment at Sriracha Terminal", "Re-Export Customs Clearance" and "Messenger Fee". The Quotation includes the term:

> "All Schenker Thai's operations are governed by the Standard Trading Conditions of the Thai International Freight Forwarders Association."

48. The Standard Trading Conditions of TIFFA include the following provision:

> "Any demand, claim or dispute arising out of or in connection with the services of the "Company" under these "Conditions" shall be subject to Thai law and the exclusive jurisdiction of the Civil Court, Bangkok Metropolis."

49. The Quotation was signed by Schenker and stated:

> "Please return us a signed copy of this quotation or send us the acceptance message via email to indicate your confirmation of both rates and conditions."

50. The Quotation made provision for Shell to indicate its acceptance of the terms against the words: *"We accept the rates & condition offered in this quotation"* but Shell did not place its signature or company stamp on the Quotation or return it as accepted to Schenker.

51. Upon receipt of the Quotation, Mr Popa queried the prices, both internally and with Schenker, because Laemchabang was not on the Rate Sheet and he believed Schenker were proposing too high a price. There was no discussion between the parties as to whether the re-export services instructed by Shell fell outside the scope of the Purchase Contract or whether different contractual terms might apply to this particular service provision.

52. On 27 November 2017, Schenker sent the following invoices to Shell:

    i) Invoice number 1550074031 in the sum of THB 12,000 - import customs clearance fee in respect of the shipment of base gasoline type 2 on the Silver Millie – with reference to: "PO NO 4516057167";

    ii) Invoice number 1550074026 in the sum of THB 12,000 - import customs clearance fee in respect of the shipment of base gasoline type 2 on the Silver Millie – with reference to: "PO NO 4516057167";

    iii) Invoice number 1550074032 in the sum of THB 600 – reimbursement of overtime and customs EDI fees in respect of the shipment of base gasoline type 2 on the Silver Millie – with reference to: "PO NO 4513430808";

    iv) Invoice number 155007409 in the sum of THB 2,690 – reimbursement of customs guard, overtime and customs EDI fees in respect of the shipment of base gasoline type 2 on the Silver Millie – with reference to: "PO NO 4513430808".

53. On 27 November 2017 Schenker issued receipts acknowledging Shell's payments of the above invoices. Each receipt referred to the relevant invoice number and the purchase order number.

54. On 21 March 2018, the Thai Department of Customs and Excise rejected the application for a tax refund in respect of the Silver Millie shipment on the ground that any application was required to be submitted within six months from the re-export date, namely by 26 January 2018, but a completed application with supporting documentation was not filed in time. As a result, Shell had no entitlement to the duty refund. The decision of the Customs Department was upheld by the Thai Tax Court.

Arbitration proceedings

55. On 20 March 2019, Shell filed a Request for Arbitration under the LCIA Rules 2014. Shell's claim in the arbitration is that on 23 July 2017, pursuant to the Purchase Contract, it instructed Schenker to make a claim for a duty refund in respect of the

Silver Millie Shipment. Shell claims that in breach of contract and negligently, Schenker failed to submit the application correctly and in a timely manner, thereby depriving Shell of the right to a refund.

56. On 16 April 2019, Schenker filed a Response to the Request for Arbitration, in which it challenged jurisdiction. In its written application dated 23 July 2019, Schenker challenged the jurisdiction of the Tribunal on the grounds that:

    i) Shell failed to properly comply with and fully exhaust the procedures set out in the Protocol in the Purchase Contract before filing its Request for Arbitration; alternatively,

    ii) the parties agreed that the relevant customs services would be provided in accordance with the terms and conditions of the Quotation, rather than the Purchase Contract, and therefore there was no arbitration agreement in respect of the referred dispute.

57. In a decision dated 18 November 2019, the Tribunal, consisting of Mr Michael Lee, Dr Michael Hwang SC and Professor Gary Bell (as presiding arbitrator), determined the application in Shell's favour:

> "The Tribunal finds that the Quotation was not incorporated or formed part of the EFA and/or the Purchase Contract. The EFA is clear that once an order is accepted by a contractor and signed by the company, the Call-Off Order together with the Incorporated Terms constitute a stand-alone Purchase Contract. This is reinforced by the Entire Agreement provision in the EFA. Accordingly, the Tribunal rejects the Respondent's alternative argument that it is the Quotation and the dispute resolution provisions thereunder that apply to this dispute."

58. The Tribunal also rejected Schenker's contention that non-compliance with the Protocol rendered the reference to arbitration premature and invalid.

59. The arbitration proceedings have been stayed, pending determination of this arbitration claim.

Court proceedings

60. On 16 December 2019 Schenker issued the arbitration claim, seeking the court's determination on the question whether the Tribunal has jurisdiction to decide the dispute referred in LCIA Arbitration No. 194263.

61. It is common ground that the Purchase Contract incorporates a valid arbitration agreement; the question is whether the dispute submitted to arbitration arose out of or in connection with the Purchase Contract, so as to fall within Article 22 of the incorporated General Terms of the EFA.

62. The challenge to jurisdiction is made pursuant to section 67 Arbitration Act 1996, which provides that:

> "(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court –
>
> (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction…
>
> (3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order –
>
> (a) confirm the award,
>
> (b) vary the award, or
>
> (c) set aside the award in whole or in part."

63. The remedy sought is:

    i) an order that the Tribunal's Decision on Preliminary Issue dated 18 November 2019 be set aside in whole, or insofar as it accepts that the Tribunal has jurisdiction to determine the dispute referred to it;

    ii) declarations that the dispute referred to the Arbitration:

        a) did not arise under or in connection with the Purchase Contract;

        b) is not subject to the Dispute Resolution Procedures of Article 22 of the EFA, as incorporated into the Purchase Contract; and

        c) is not a dispute that the Tribunal has jurisdiction to decide.

64. The following witness statements have been adduced by the parties:

    i) Mr Robert Reiter, Cluster CEO, Southeast Asia for DB Schenker - statements dated 16 December 2019 and 7 May 2020;

    ii) Ms Jintana Saksricharoenying, branch manager, Chiangmai, of Schenker - witness statement dated 16 December 2019;

    iii) Mr Thomas Wieting, Senior Corporate Insurance Manager, Global Insurance Solutions of Schenker AG - statement dated 7 May 2020;

    iv) Mr Thomas Sorensen, Chief Commercial Officer of Schenker (Asia Pacific) Pte Ltd - statement dated 7 May 2020;

    v) Mr Daniel Kind, Head of Global Claims Management for Schenker AG - statement dated 7 May 2020;

    vi) Ms Kantima Mongkolkiettiporn, Chief Commercial Officer, Schenker - statement dated 7 May 2020;

    vii) Mr Manon Kunavoranon, customs specialist and consultant of Schenker - statement dated 7 May 2020;

viii) Mr Kritdanai Phetchana, vertical market manager for automotive at Schenker - statement dated 7 May 2020;

ix) Mr Kevin Lai, Head of Procurement for Shell upstream ventures Brunei and Kazakhstan, Shell Eastern Petroleum (Pte) Ltd - statements dated 20 February 2020 and 10 August 2020;

x) Mr Nopporn Wongsatitporn, Supply Operations Team Lead for Shell - statement dated 20 February 2020;

xi) Ms Thitaree Thitiworanon, Procurement Manager for Shell - statements dated 20 February 2020 and 10 August 2020;

xii) Mr Wuttipong Popa, Account Manager for Shell - statement dated 20 February 2020;

xiii) Mr Jerico Munoz, a procurement, goods and services process expert for Shell - statement dated 28 January 2021.

65. By an application dated 19 December 2020, Shell seeks the court's permission to rely upon the second witness statement of Mr Lai dated 10 August 2020. The application is opposed by Schenker, although the parties agreed that the court could hear the arguments, including references to his evidence, on a *de bene esse* basis. Mr Lai's second witness statement is short in length and responds to specific matters raised in Schenker's reply evidence, concerning the parties' understanding as to the scope of the EFA. It was served on Schenker in August 2020, well in advance of the hearing, and no prejudice has been identified by Schenker. Having regard to those matters, the court grants permission to Shell to rely on the statement.

66. Shell also seeks permission to rely upon the statement of Mr Munoz, which was prepared and sent to Schenker's solicitors on 28 January 2021. It is accepted that the statement was provided late, in comparison to the other factual witness evidence. The evidence is limited in scope, providing documentary support for a matter already in evidence in the second statement of Ms Thitiworanon, namely, the dates on which the Purchase Orders were faxed to Schenker. It is open to Schenker to challenge the reliability and substance of this additional documentary evidence through submissions. The court is satisfied that the evidence is admissible and relevant to the issues that have arisen during the course of these proceedings. Schenker has sufficient opportunity to consider and make submissions on the new documents. Therefore, the court grants permission to Shell to rely on Mr Munoz's statement.

Parties' submissions

67. Ms Cheng QC, leading counsel for Schenker, submits that the parties' agreement for the re-export customs services in respect of the Silver Millie shipment did not incorporate the terms of the Purchase Contract or the EFA and therefore, does not contain an arbitration agreement:

i) The re-export refund services instructed by Shell were not, as a matter of construction, within the scope of the Purchase Contract.

a) The consignments in question were comprised of hydrocarbons shipped in bulk, which were excluded from the scope of the EFA.

b) Re-export customs clearance services did not fall within the scope of the Purchase Contract.

ii) The re-export customs services were not, in fact, instructed under the Purchase Contract. Shell failed to send a written purchase order in respect of the re-export customs services to Ms Mongkolkiettiporn of Schenker and Schenker failed to accept the instruction, either in writing or by conduct.

iii) The relevant customs services were outside the scope of the services ordered in the three Purchase Orders relied upon by Shell. Schenker did not accept those purchase orders so as to give rise to PO Contracts incorporating the terms of the Purchase Contract.

iv) The relevant customs services instructed by Shell were governed by the terms of the Quotation, although Schenker's position is that it does not need to prove this alternative case to succeed in its challenge under section 67 of the Act.

v) In the circumstances, the arbitration agreement incorporated into the Purchase Contract did not apply to the re-export refund services performed by Schenker and the Tribunal does not have jurisdiction to decide the dispute referred to the Arbitration.

68. Ms Boase QC, leading counsel for Shell, submits that as a matter of construction, the re-export customs services instructed by Shell fell within the scope of the Purchase Contract:

i) The dispute which Shell has referred to arbitration is a claim in contract and negligence relating to Schenker's failure to perform the re-export customs services requested by Shell on 23 July 2017.

ii) On a proper construction of the EFA and the Purchase Contract, customs clearance services in relation to bulk shipments and in relation to re-export of shipments were within scope.

iii) Transportation of hydrocarbons shipped in bulk are excluded from the scope of the EFA. It is common ground that the Silver Millie consignment was a bulk shipment of hydrocarbons but Schenker was not instructed to provide any transportation services in relation to this shipment. The exclusion does not extend to customs clearance services required in respect of the bulk shipment of hydrocarbons.

iv) The Quotation was submitted by Schenker after the relevant services had been commenced. Even if it amounted to an offer, which is disputed, it was not accepted by Shell. In any event, the standard terms and conditions sought to be relied on were excluded by the EFA.

v) Objection is taken to Schenker's new arguments in respect of the validity of instructions for the re-export customs services because they were not pleaded in

the arbitration claim and raise new issues of fact which Shell has not had an opportunity to address.

Expert evidence on Thai Law

69. Both the Purchase Contract relied on by Shell and the Quotation relied on by Schenker are subject to Thai law. It is common ground that the issue of formation and construction of the contract fall to be determined by reference to the law of the Kingdom of Thailand. Both parties have produced expert evidence on the material principles of Thai law.

70. Schenker has adduced the following expert evidence:

    i) a short expert report by Rachapol Sirikulchit dated 16 December 2019;

    ii) the expert report of Surasak Vajasit and Mr Sirikulchit dated 7 May 2020;

    iii) the second expert report of Mr Vajasit dated 21 January 2021.

71. Shell has adduced the following expert evidence:

    i) the first expert report of Don Rojanapenkul dated 20 February 2020;

    ii) the second expert report of Mr Rojanapenkul dated 10 August 2020.

72. Schenker's first expert, Mr Sirikulchit, is an associate at Watson Farley & Williams Thailand Ltd, solicitors acting for Schenker in these proceedings and in the underlying arbitration. Likewise, Shell's expert, Mr Rojanapenkul, is a partner at DLA Piper Thailand Ltd, solicitors acting for Shell. Schenker subsequently instructed a second expert, Mr Vajasit, the managing partner at Rajah & Tann, Thailand. The court is satisfied that all three experts have appropriate qualifications and experience to provide expert evidence on the material principles of Thai law. Further, the court is satisfied that all three experts understand that their primary duty is to assist the court and that they have complied with that duty.

73. The experts have addressed the following issues of Thai law:

    i) material aspects of the Thai legal system;

    ii) rules applicable to the formation of a contract and amendments;

    iii) the rules of contractual interpretation.

Thai legal system

74. There is a very large measure of agreement on the issues of principle. The experts agree that Thailand is a civil code system. In civil claims, the main source of law is the Thai Civil and Commercial Code ("CCC"). Decisions of the Supreme Court are persuasive but have no binding authority; there is no doctrine of precedent.

Formation and amendment of contract

75. Section 361 of the CCC provides that:

> "A contract between persons at a distance comes into existence at the time when the notice of acceptance reaches the offeror.
>
> If according to the declared intention of the offeror or the ordinary practice no notice of acceptance is necessary, the contract comes into existence at the time of the occurrence of the fact which is considered as a declaration of intention to accept."

76. Section 366 of the CCC provides that:

> "So long as the parties have not agreed upon all points of a contract upon which, according to the declaration of even one party agreement is essential, in case of doubt it shall be considered that the contract is not yet concluded. An understanding concerning particular points is not binding, even if they have been noted down.
>
> If it is agreed that the contemplated contract shall be made in writing, in case of doubt it shall be considered that the contract is not concluded until it is done in writing."

77. The experts agree the relevant principles applicable to the formation and amendment of a contract:

    i) A contract is formed when a party declares an intention to offer and a counterparty declares an intention to accept the offer.

    ii) There must be agreement on all essential terms.

    iii) The expression of acceptance may be in writing, orally or by conduct, unless the parties have agreed that the contract shall be in writing.

    iv) The parties are free to amend the terms of their contract by mutual agreement but if it has been agreed that any amendment shall be in writing, in case of doubt, the amendment is not considered to have been made until it is set down in writing.

Construction of contracts

78. Section 368 of the CCC provides that:

> "Contracts shall be interpreted according to the intention in accordance with the requirements of good faith, ordinary usage being taken into consideration."

79. Section 171 of the CCC provides that:

> "In the interpretation of a declaration of intention, the true intention is to be sought rather than the literal meaning of the words or expression."

80. The experts agree that, in construing the terms of a contract, the Thai court seeks to establish the true intention of the parties rather than the literal meaning of the words. The experts agree that the following construction elements are taken into account:

    i) The starting point is the plain and ordinary meaning of the words used in the contract to ascertain the true common intention of the parties. The entirety of the contract must be considered and not just the particular clause in question. Section 368 of the CCC cannot be used to interpret the contract in a manner which deviates from the clear wording of the contract.

    ii) The parties' conduct at the time of entering into the contract may be considered. Also, the parties' conduct after the execution of the contract may assist in ascertaining what their common intention must have been at the time of the contract.

    iii) The court may have recourse to the established commercial practices or past conduct between the parties; how dealings of a similar commercial nature are generally carried out and whether the outcome of the interpretation is commercially sensible.

    iv) Good faith requirements are considered. The contract is not to be interpreted in such a way that one party would have an unfair advantage to the detriment of the other.

81. Section 10 of the CCC provides that:

> "When a clause in a document can be interpreted in two senses, that sense is to be preferred which gives some effect rather than that which would give no effect."

82. Section 11 of the CCC provides that:

> "In case of doubt, the interpretation shall be in favour of the party who incurs the obligation."

83. There is some disagreement between the experts as to the meaning of *"the party who incurs the obligation"* in section 11 of the CCC.

84. Mr Rojanapenkul's opinion on this issue is set out in his second report:

> "I refer to paragraph 46 of Mr Vajasit's Expert Opinion where he quotes Section 11 of the CCC. Whilst I note Mr Vajasit's restatement of the law is correct, I wish to add that whilst not captured in the English translation of the provision, it is apparent in the original Thai language statute that Section 11 requires that the obligation incurred has to be related to the source of the dispute. The test for the applicability of Section 11 of the CCC requires the following three elements:
>
> First Element - There must still be a doubt even after the application of all construction elements;

> Second Element - The party entitled to rely on Section 11 has to be 'the party who incurs the obligation'. The test for that is an effect-based test. That is, if in adopting a certain interpretation of a contract, the party in question will be immediately liable, such party is said to be 'the party who incurs the obligation'; and
>
> Third Element - The source of the liability has to be related to the disputed issues."

85. Mr Vajasit's response on this issue is set out in his second report:

> "I do not agree with K. Don's proposition on the application of Section 11 of the CCC. In particular, I have never come across the second and third elements referred to in paragraphs 6.2 and 6.3 of his Second Expert Report in any academic writings, textbooks, or Supreme Court judgments. Section 11 of the CCC says nothing more than that "In case of doubt, the interpretation shall be in favour of the party who incurs the obligation". The original Thai-language version does not expand upon or express any meaning which is different to this English translation. As is demonstrated by Supreme Court judgments outlined in the following paragraphs, there is no basis for K. Don's proposed additional 'elements' nor his suggestion that Section 11 would only be capable of being applied in the context where the issue to be decided upon concerns determining a party's liability.
>
> …
>
> While there is no clear guidance as to who 'the party who incurs the obligation' is in a given scenario, the available Supreme Court authority on this issue would suggest that such party is the party who is more exposed or in a weaker position vis-à-vis any ambiguity or multiple possible interpretations of a certain provision/obligation, and would take on a burden or suffer a detriment if a certain interpretation were adopted: this may include a person who would be a debtor, a person who would be held liable under the contract in question, or a person who would otherwise suffer some detriment or exposure…
>
> It is … my opinion that if the court finds that there remains to be 'doubt' after having applied the construction elements, Section 11 of the CCC is to be applied and it is Schenker Thailand who is the party that is considered to be 'the party who incurs the obligation' within the meaning of Section 11 of the CCC. Specifically, in this case Schenker Thailand incurred the obligation to supply scope whereby, inter alia, section 1.3 of the EFA/Part 2/Section 2B entitles Shell Thailand "to make use of the Scope in its business, at any time as it may desire and without needing approval from Contractor unless specifically provided for in the Purchase Contract and it is Schenker Thailand that would suffer detriment if such obligation were extended beyond

> the boundaries of scope it understood to be demarcated by the Cargo definition and the Purchase Contract terms."

86. I consider whether it is necessary to resolve the issue between the experts below. However, there appears to be consensus that section 11 only applies if, after considering the four construction elements above, there remains uncertainty as to construction of the contract. In such a case, the interpretation will favour the party who incurs the obligation, that is, the party who is more exposed or in a weaker position vis-à-vis any ambiguity or multiple possible interpretations of a certain provision/obligation, and would take on a burden or suffer a detriment if a certain interpretation were adopted.

Construction of the EFA

87. Schenker's primary argument is that the re-export refund services were not covered by the Purchase Contract because they fell outside the range of scope in the EFA and related to hydrocarbons shipped in bulk which were excluded from the EFA. The Purchase Contract was executed pursuant to the EFA and incorporated the terms of the EFA, including any limitations or exclusions as to scope. Therefore, the starting point must be to consider whether, on a proper construction of the EFA, it permitted the parties to enter into a purchase contract in respect of the relevant services under the EFA framework.

88. The General Terms and Conditions of the EFA define "Services" as: *"services to be supplied by Contractor under the Purchase Contract ... including all related obligations connected with Services as provided for in the Purchase Contract and including the results of such Services ..."* This indicates that the EFA anticipated that the scope of services to be provided would be specified in each separately negotiated purchase contract, rather than set out in the EFA. The inclusion of *"all related obligations"* indicates that the scope of services described in the EFA was intended to be general and of wider ambit than any particular referenced activity.

89. Schenker's case is that the EFA Commercial Terms set out the agreed range of services offered by Contractor Companies under the EFA from which Shell Companies could select for their local purchase contracts. That operated as a defined and limited range of services that Schenker was prepared to provide and which Shell could instruct. The defined range did not include any re-export customs clearance services or refund services.

90. In my judgment, the EFA did not impose on the parties a narrow limited range of scope as submitted by Schenker, for the following reasons.

91. Firstly, as set out above, the EFA contemplated that the details of the scope of services would be set out in individual purchase contracts. This is reinforced by the definitions of "Incorporated Terms" and "Incorporated Commercial Terms" which contemplated the selection of Commercial Terms only to the extent that they were applicable to the relevant purchase contract. Article 3.3 of the General Terms expressly permitted the parties to apply local terms to any purchase contract executed under the EFA. Therefore, it was open to the parties to agree the specific scope of any purchase contract and the applicable commercial terms of the same pursuant to the EFA framework.

92. Secondly, the range of scope referred to in the Commercial Terms is not a list of specific services that can be selected or deleted for the purpose of a purchase contract; on the contrary, it is in very broad and inclusive terms. One of the four categories identified is 'in-country logistics', which explicitly refers to customs clearance services at destination. The customs clearance services are not set out in detail but the plain and ordinary meaning of these words would cover all types of custom clearance services, including export, import and re-export services. The fact that the processes of customs clearance for import, export and re-export are governed by separate procedures and legal provisions does not change their characteristics as customs clearance services.

93. Thirdly, the description of scope at section 3.7 is concerned with export customs clearance at the point of origin from suppliers. "Supplier" is defined in the General Terms as: *"the original equipment manufacturer or other vendor that Company may be buying Cargo from"*. It is clear that this is concerned with the division of responsibility between the supplier and the contractor, regarding export clearance services required when the supplier ships the consignment, in this case from Korea. As such, this section is not directly applicable to the services in question.

94. The relevant description is at section 3.8 which is concerned with import customs clearance at destination. This states that *"Contractor is responsible for all customs clearance formalities related to the Purchase Contract"*. The plain and ordinary meaning of these words would cover all types of customs clearance formalities. This would include customs clearance formalities that were characterised as import and/or re-export formalities, as in this case.

95. Schenker's further argument is that any customs clearance services relating to hydrocarbons shipped in bulk were excluded from the EFA. Ms Cheng submits that the range of services set out in the Commercial Terms included export customs clearance services but such services were limited to "Cargo", which was defined as:

> "the goods, products, equipment to be transported by the Contractor, including hydrocarbons shipped in a Container (e.g. drummed chemicals, lubricants). For clarity, hydrocarbons shipped in bulk or massive means shall not be in the scope of the EFA."

96. Further, Ms Cheng submits that section 3.7 of the Commercial Terms limited Schenker's responsibility for providing export customs clearance services to "Cargo" ordered by Shell on Incoterms Ex-Works rules. Such rules would not apply to goods shipped in bulk, such as the Silver Millie shipment. For cargo supplied on other rules, any requirement for Schenker to perform services would be by way of a separate arrangement with the supplier and fall outside the scope of the purchase contract.

97. I reject Schenker's case on the ambit of the bulk hydrocarbons exclusion for the following reasons.

98. Firstly, as submitted by Ms Boase, the opening words in the definition of "Cargo" specify that it includes goods, products, equipment or materials to be transported by the contractor. It is concerned with transportation and not ancillary services. The words that follow clarify that the definition of Cargo applies to hydrocarbons shipped in a container but excludes hydrocarbons shipped in bulk. The last sentence *"For clarity,*

hydrocarbons shipped in bulk or massive means shall not be in scope of the EFA" is not a standalone term, it must be read as part of the definition as a whole which makes clear that it is concerned with materials "to be transported by Schenker". It is not intended to prevent Schenker from performing customs services in relation to bulk shipments.

99. Secondly, this is further clarified by the definition of "Scope" in Article 1 of the Framework Agreement and in the General Terms, both of which clarify that the delivery of Cargo is separate from the performance of Services. Once that is appreciated, it is clear that the bulk hydrocarbons exclusion applies to the delivery of Cargo but not to the supply of Services in respect of such Cargo.

100. Thirdly, the reliance of section 3.7 of the Commercial Terms is misplaced. As set out above, section 3.7 is concerned with the allocation of responsibility between Schenker and the Supplier, and the basis of any alternative commercial arrangement between those parties. It has no application to the services instructed by Shell under a purchase contract executed pursuant to the EFA.

101. It follows that, the plain and ordinary meaning of the words used in the EFA included re-export refund services within the range of scope in the EFA and did not exclude them where those services related to hydrocarbons shipped in bulk.

The Purchase Contract

102. The Purchase Contract was executed by the parties pursuant to the EFA. It identifies the incorporated EFA General Terms and such EFA Commercial Terms/Pricing as were expressly incorporated. The express terms of the Purchase Contract indicate that the parties intended their agreement to cover the full range of customs clearance services that might be required by Shell in respect of the Silver Millie shipment.

103. Firstly, the defined term "Scope", forming part of the incorporated General Terms, includes the performance of the "Services". The defined term "Services" is wide in ambit, including *"all related obligations connected with Services as provided for in the Purchase Contract."*

104. Secondly, as anticipated by the terms of the EFA, the parties set out the range of scope that fell within the Purchase Contract. The above broad interpretation of the indicative services referred to in the EFA is supported by the more detailed description of services set out in the Purchase Contract executed by the parties. The "SCOPE DESCRIPTION" in the Purchase Contract includes at item 4) *"Custom Clearance Services"*. On a plain and ordinary meaning of those words, they cover all types of custom clearance services, whether arising out of export, import or re-export of cargo and whether for clearance, duty refund or other related tasks. There is nothing in this language which suggests that the parties intended export at destination or re-export services to be excluded.

105. Thirdly, the detailed description of the operational requirements supports an inclusive, rather than exclusive, ambit of the customs clearance services covered by the Purchase

Contract. Part 1.0(a)(i) expressly includes the preparation, compilation and filing of: *"all documentations required by Customs for all products imported or exported for the account of the company at all Ports in Thailand"* and, at (ii): *"any reconciliation entries with Customs in connection with the import or export entries"*. On a plain and ordinary meaning of those words, they cover customs services associated with the import and re-export of the consignments on the Silver Millie.

106. Fourthly, the Rate Sheet provides a number of prices for various import and export customs services, suggesting that the reference to custom clearance services in the scope description captures a broad range of services. By way of example, the Rate Sheet specifically included a column of prices for customs services for "Bulk Shipment" and a section for "Export Bulk Customs Clearance".

107. Ms Cheng makes a valid point that the Rate Sheet does not include any explicitly identified rate for re-export or re-export refund services; further, the Rate Sheet does not include any rate for any import service at the Laemchabang Port. However, those potential gaps are addressed by Article 7.1 of the General Terms, which provides that: *"Any activity not explicitly quoted for but requested under an individual work order shall be charged either at a documented outlay plus an agreed service fee or be separately quoted for"*. It is clear from Article 7.1 that the requirement for a separate quotation in respect of any service not referred to in the Rate Sheet arises under the relevant purchase contract; it does not necessitate the formation of a stand-alone contract.

108. Ms Cheng suggests that Article 7.1 of the General Term was replaced by the bespoke provisions of Article 7.1 of Section 2B of the Purchase Contract, which did not contain the above provision. However, this is not borne out by consideration of Part 2 of the Purchase Contract. Section 2A expressly identifies the changes made to the General Terms; it sets out the changes to Articles 1, 15 and 17 but does not include any amendment or deletion of Article 7.1. Section 2B contains the incorporated Commercial Terms, including additional provisions on prices, invoicing and payment at Articles 7.1 and 7.2. They are supplementary to Article 7.1 of the General Terms and do not displace the provision referred to above.

109. It follows that, the plain and ordinary meaning of the words used in the Purchase Contract included import, export, re-export and re-export refund services within its scope, including those services where related to hydrocarbons shipped in bulk.

Common intention

110. Both parties have provided witness statements that purport to set out their intentions in entering into the EFA and the Purchase Contract. However, it must be borne in mind that, as explained by Mr Vajasit in his first expert report, the parties' intentions must be the common intentions of both parties, not just one party; that is, subjective intention is not relevant to the issues of construction.

111. Mr Reiter, Cluster CEO, Southeast Asia for DB Schenker, states in his witness statement that Shell Global and Schenker AG are global partners who have worked together in a longstanding commercial relationship.

112. It is common ground that, when the EFA was entered into, there was no intention that Schenker AG would be Shell Global's exclusive provider of the logistics, freight, customs and related services.

113. The position of Mr Lai, Head of Procurement for Shell upstream ventures Brunei and Kazakhstan, Shell Eastern Petroleum (Pte) Ltd, is that the intended scope was deliberately broad so that it would cover the full scope of services which might be needed from this type of supplier for downstream, upstream and import/ export operations. It was up to the local companies to identify their specific needs and to negotiate the particular scope of work required, through a local Call-Off Order or Purchase Contract.

114. Mr Sorensen, Chief Commercial Officer of Schenker (Asia Pacific) Pte Ltd, and Mr Kind, Head of Global Claims Management for Schenker AG, make the valid point that the range of scope under the EFA was not open-ended; it was important to have an agreed, defined range of scope that would provide parameters for the services that might be the subject of a Call-Off Order or Purchase Contract.

115. There is no dispute between the parties as to the exclusion of transportation of bulk hydrocarbons from the scope of the EFA and the Purchase Contract. Mr Reiter states that Schenker's business focus is on downstream products which can be shipped in containers, rather than hydrocarbons which must be shipped in bulk. Mr Weiting states that Schenker would not assume the risk of transporting bulk hydrocarbons. Mr Lai states that bulk shipment of hydrocarbons requires special handling to prevent accidental oil spills and freight forwarders are not approved parties for such activities but those activities can be distinguished from customs clearance services, a competency in which freight forwarders such as Schenker have expertise.

116. To the extent that the above views gave rise to a common intention, it is reflected in the wording of the EFA, as set out above. Any subjective intention or understanding on the part of the above individuals, contained in their witness statements, would not override the true meaning of the EFA based on a construction of the words used.

Course of dealings and conduct

117. Schenker relies on the fact that historically the parties contracted for customs clearing services for bulk products on a stand-alone and different basis to other services. On 15 February 2012, the parties entered into an agreement for customs clearing services for bulk products ("the Bulk Products Agreement"). Under the Bulk Products Agreement, Shell issued various instructions to Schenker for customs clearing services. However, that agreement expired on 14 February 2013 and was not extended or renewed. Therefore, it does not evidence a continuing course of dealing thereafter which would support an argument that services in relation to bulk products would be dealt with using separate contractual arrangements outside the EFA.

118. Both parties refer to, and rely on, services instructed in relation to bulk shipments at the Laemchabang Port in 2016 and 2017. Schenker relies on the fact that services were carried out in accordance with quotations issued by Schenker on the TIFFA terms. Shell relies on the fact that Schenker provided customs services in relation to bulk shipments and in relation to shipments to the port of Laemchabang in the Sriracha district.

119. Mr Wongsatitporn has analysed the records of customs services provided by Schenker for Shell in 2016 and 2017. During that period, Schenker acted as customs clearance agent for Shell in relation to 185 bulk shipments of gasoline into Thailand:

    i) 167 out of the 185 bulk shipments were to ports listed on the Rate Sheet forming part of the Purchase Contract. Schenker did not raise a quotation in relation to these services and they were invoiced in accordance with the Rate Sheet, by reference to Purchase Order numbers.

    ii) 18 of the 185 bulk shipments were to Laemchabang port (Sriracha), which was not listed on the Rate Sheet. Schenker issued three quotations for services in respect of 9 of the 18 shipments. In the case of all 18 shipments, Schenker charged a rate of THB 12,000 for customs clearance services. In each case, Schenker raised invoices which referred to Purchase Order No. 4516057167, stated to be subject to the terms of the Purchase Contract. All 18 invoices were paid.

120. Ms Saksricharoenying of Schenker suggests in her witness statement that, prior to the Silver Millie shipment, Schenker provided customs clearance services for Shell outside the Purchase Contract. The services related to a shipment of type 2 Base Gasoline, shipped in bulk, carried on the 'Tverskoy Bridge' and delivered to the port of Sriracha. Schenker's services were provided subject to quotation 17-1-03357 dated 16 May 2017. Ms Saksricharoenying's analysis of this transaction is disputed by Mr Wongsatitporn of Shell, who explains in his witness statement that the Tverskoy Bridge shipment services were pursuant to the Purchase Contract:

> "Where a shipment arrives at a port not listed in the Rate Sheet, such as Laemchabang Port, Schenker Thai would issue a quotation for customs clearance services at that port. For all quotations, Schenker Thai would need to issue a corresponding invoice that referenced the applicable PO. The PO would need to have been raised under the Purchase Contract. SCOT's instructions for customs clearance services by Schenker Thai for T&S would always be subject to a PO raised under the Purchase Contract. SCOT would not be able to process any invoice for payment without the applicable PO referenced on the invoice.
>
> I note the invoice and receipt of payment attached to Ms Saksricharoenying's First Witness Statement for the Tverskoy Bridge Shipment referenced PO No. 4516057167 and PO No. 4513430808 issued under the Purchase Contract ... From this, I believe the terms of the Purchase Contract applied to the Tverskoy Bridge Shipment."

121. The parties' course of dealing indicates that since the execution of the EFA and the Purchase Contract, Shell has instructed Schenker to provide customs clearance services in respect of bulk shipments. Most but not all were covered by the Rate Sheet in the Purchase Contract. Some, but not all, of the services that were not identified or separately priced on the Rate Sheet, were the subject of a separate quotation prepared by Schenker. Even where a quotation was prepared, the relevant invoice referred to a Purchase Order issued under the Purchase Contract. All such invoices were paid.

Therefore, the course of dealing supports Shell's case that instructions to provide customs clearance services in respect of bulk shipments were treated by the parties as within the scope of the Purchase Contract.

122. The parties' conduct at the time that the customs clearance services were instructed in respect of the Silver Millie shipment lends support to the interpretation of the words used in the Purchase Contract, as set out above. On 23 July 2017 Mr Popa instructed the re-export services by telephone. This was followed by email exchanges between the parties regarding the services. At no point did Schenker inform Shell that it considered the services to fall outside the scope of the Purchase Contract.

123. Contrary to the argument by Schenker that any services in respect of bulk hydrocarbons were excluded from the EFA, the invoices submitted by Schenker on 27 November 2017 were cross-referred to the Purchase Orders issued under the Purchase Contract and claimed payments for customs clearance services in respect of the Silver Millie shipment.

Conclusions on scope of the Purchase Contract

124. Drawing the threads together, the plain and ordinary meaning of the words used in the EFA included re-export refund services within the range of scope in the EFA and did not exclude them where those services related to hydrocarbons shipped in bulk. Nothing expressed by the parties at the time of entering into the EFA is inconsistent with the plain and ordinary meaning of the words used in the EFA. The plain and ordinary meaning of the words used in the Purchase Contract included import, export, re-export and re-export refund services within its scope, including those services where related to hydrocarbons shipped in bulk. The parties' conduct after the execution of the Purchase Order evidences that Shell instructed, and Schenker performed, customs clearance services in respect of bulk shipments, including bulk shipments to Laemchabang port, whether or not the subject of a stipulated rate in the Rate Sheet, under the terms and conditions of the Purchase Contract.

125. There is no ambiguity or uncertainty as to the proper interpretation of the EFA and the Purchase Contract. Therefore, it is not necessary to consider the application of section 11 of the CCC or resolve any dispute between the legal experts on this issue.

126. For the above reasons, the customs clearance services instructed by Shell in respect of the Silver Millie shipment were within the range of scope of the Purchase Contract.

Purchase Orders

127. Shell's case is that the customs clearance services instructed in respect of the Silver Millie shipment fell within the scope of the following Purchase Orders:

i) PO No. 4513430807 issued on 3 October 2014 in respect of "Service Charge for Export Product";

ii) PO No. 4513430808 issued on 3 October 2014 in respect of "Reimbursement for Import Bulk Product";

iii) PO No. 4516057167 issued on 6 July 2015 in respect of "Service Charge for Import Bulk Product".

128. Schenker's case is that the Purchase Orders were not sent to and/or received by Schenker.

129. Ms Thitiworanon, Procurement Manager for Shell, explained in her first witness statement dated 20 February 2020 that the purchase orders were sent to Schenker:

> "PO No. 4516057167 was automatically generated via the Purchase Contract and sent to Schenker Thai by the contact details it provided. It was intended to cover the scope of import customs clearance and duty refund work performed by Schenker Thai under the Purchase Contract.
>
> I understand PO No. 4516057167 is referenced on every single invoice and receipt issued by Schenker Thai for charges relating to the customs clearance work it performed.
>
> PO No. 4513430807 was also automatically generated via the Purchase Contract and sent to Schenker Thai by the contact details it provided. It was intended to cover the scope of export customs clearance performed by Schenker Thai under the Purchase Contract. I would expect Schenker Thai to reference PO No. 4513430807 on the invoice for export customs clearance work on the Silver Millie Shipment. I understand Schenker Thai have not issued an invoice for the export clearance services work to date.
>
> PO No. 4513430808 was also automatically generated via the Purchase Contract and sent to Schenker Thai by the contact details it provided. It was intended to cover the reimbursement of any charges incurred in connection with the customs clearance work performed by Schenker Thai, such as upfront payment of any government fees or taxes, messenger service fees, power of attorney preparation fees and the like.
>
> I understand PO No. 4513430808 was referenced on every single invoice and receipt issued by Schenker Thai for all reimbursement charges relating to its customs clearance services.
>
> I note that Ms Weena Rattanacharo of Schenker Thai received PO No. 4516057167, PO No. 4513430807 and PO No. 4513430808."

130. Ms Mongkolkiettiporn, the Chief Commercial Officer of Schenker, identified an error in Ms Thitiworanon's statement and set out her evidence that the Purchase Orders were not received by Schenker by post or email:

"Ms Thitiworanon states that: "PO No. 4516057167 was automatically generated via the Purchase Contract and sent to Schenker Thai by the contact details it provided". She says the same thing about POs 4513430807 and 4513430808 in paragraphs 34 and 35. (These POs say, at the bottom, "Terms and Conditions: Agreement Reference DS38006").

When Ms Thitiworanon says that these POs were set to Schenker Thai "by the contact details it provided", I believe she means the contact details provided on the PO, not the contact details provided by Schenker Thai.

I say this for two reasons. First, because the contact details provided by Schenker Thai to SCOT in the Purchase Contract were my contact details.

Second, the contact details provided in the POs were for Ms. Weena Rattanacharo and Ms. Siriporn Yakangkho … I was surprised at Ms Thitiworanon's suggestion that Ms Weena Rattanacharo is a representative of Schenker Thai. To the best of my knowledge and belief, she is not and has never been a Schenker Thai employee, and neither is or was Ms Yankangkho…

All of the email addresses in the POs in question are Shell email addresses. No Schenker contacts are named and no Schenker contact details are provided in the POs referred to by Ms Thitiworanon. In fact, the only reference to Schenker is the inclusion of Schenker Thai's office address in the top left corner of page 1 of 2 of each PO. I have checked my own records and have also asked Mr. Bundit Rungsimanon, Chief Financial Officer for Thailand, Myanmar and Laos, and Ms Ornruedee Wiwatwongcharoen, who works in the Accounting Department at Schenker Thai, to check Schenker Thai's wider records. I confirm, and Mr Rungsimanon and Ms Wiwatwongcharoen confirm to me and I believe, that none of these POs were received by Schenker Thai, either by post or by email.

I cannot therefore agree with Ms Thitiworanon or SCOT that Schenker Thai accepted that the Purchase Order numbers that she refers to were always subject to the Purchase Contract, that we accepted the POs or the terms and conditions of the Purchase Contract which those POs refer to, or that we agreed that the terms of that Contract applied by invoicing against those Purchase Order numbers when told to by SCOT…

…since Schenker Thai did not receive PO Nos. 4516057167 and PO No. 4513430808 at the time, we did not know that those POs referred to the Purchase Contract when we invoiced against them."

131. In her second statement dated 10 August 2020, Ms Thitiworanon accepted that Ms Mongkolkiettiporn was correct that Ms Weena Rattanacharo and Ms Siriporn Yakongkho are employees of Shell and not employees of Schenker. Her evidence is that the Purchase Orders were sent to Schenker by fax:

> "I confirm that SCOT sent the three POs to Schenker via Fax. PO 4516057167 was sent on 30 March 2017. PO 4513430807 and PO 4513430808 were both sent on 03 October 2014. 1 consulted my colleague, Mr Jerico Munoz, a Procurement Goods and Services Process Expert at Shell Shared Services (Asia), B.V., who has access to SCOT'S sent faxes. Mr Munoz confirmed to me that all three POs were sent by fax to a Schenker fax number. SCOT faxed the POs to the following fax number: 6623675020. This is the fax number SCOT sent the POs for lubricants and bitumen to Schenker Thai (see pages 226 to 235 of Exhibit KM1) which Schenker Thai received, as confirmed by Ms Mongkolkiettiporn at paragraph 30 of her First Witness Statement.
>
> Additionally, on 11 June 2020, I checked the DB Schenker website and found that the number SCOT faxed the POs is the same fax number listed for Schenker (Thai) Ltd on its website (page 3 of Exhibit TT2)."

132. Mr Munoz, a procurement, goods and services process expert for Shell, provided a witness statement dated 28 January 2021, exhibiting screen shots from the Shell system used to manage its purchase orders:

> "Shell uses a dedicated system to manage its purchase orders with external vendors. When a purchase order ("PO") is uploaded onto the system, it is automatically routed to 'Easy Link' via the email '@fax.shell.com', which sends a copy of the PO to the vendor via fax. Easy Link is the name for Shell's Group Infrastructure Service used to dispatch POs to vendors.
>
> …
>
> I interrogated the Shell system to identify when PO 4516057167, PO 4513430807 and PO 4513430808 were dispatched to Schenker (Thai) Limited ("Schenker"). …
>
> PO 4516057167 was first created on 6 July 2015 and it was successfully sent to the fax number 6623675020 on the same day. This PO was varied twice. The variation to the PO is indicated by a tick in the column titled "C…", which means change. This PO (as varied) was sent to the same fax number two more times, on 26 January 2017 and 10 March 2017. The successful dispatches of this PO are indicated by the green square symbol in the column titled 'ST…', which means status.

> PO 4513430807 was first created on 3 October 2014 and it was sent to the fax number 6623675020 on the same day. There were no changes to this PO and therefore it was only sent once. The green square symbol in the column 'ST' indicates the fax was successfully dispatched by the system.
>
> PO 4513430808 was first created on 3 October 2014 and it was sent to the fax number 6623675020 on the same day. This PO was varied, as indicated by the ticks in the column "C". It was sent to the same fax number again on 10 March 2017, and twice on 26 January 2017. The green square symbol in the column 'ST' indicates the faxes were successfully dispatched by the system."

133. There is ample evidence establishing that the Purchase Orders were sent to, and received by, Schenker. Ms Thitiworanon provides clear evidence that the Purchase Orders were sent to Schenker by fax. Mr Munoz has produced screen shots of the Shell system, evidencing that the Purchase Orders were sent to, and received by, the fax number used by Schenker. The Purchase Orders were referenced by Schenker in invoices submitted to Shell for payment and paid. Ms Mongkolkiettiporn confirms that the Purchase Orders were not received by Schenker by post or email but does not provide any evidence as to whether they were received by fax.

134. Further, Schenker seeks to rely on new arguments, namely, that (i) Schenker did not accept the Purchase Orders so as to give rise to valid PO contracts; (ii) the Purchase Orders were not sufficiently wide in scope to cover the re-export customs services instructed on 23 July 2017; and (iii) Shell failed to give a written instruction in respect of the re-export services required and therefore it was invalid and of no contractual effect.

135. Ms Boase objects to the new arguments on the grounds that they were not pleaded in the arbitration claim, they raise new issues of fact, and potentially new issues of law, which Shell has not had an opportunity to address.

136. As to the first argument, the procedure for agreeing purchase order contracts is set out in Article 23.1 of the EFA General Terms incorporated into the Purchase Contract. Article 23.1 provides for Schenker to accept a purchase order in writing within five days of receipt; alternatively Schenker may accept a purchase order by conduct. The late introduction of this argument has not afforded Shell with an opportunity to adduce witness or documentary evidence addressing the issue; or to formulate and evidence any points of law such as estoppel. In any event, the course of dealing evidence referred to above establishes that, even if Schenker did not accept the Purchase Orders in writing within the stipulated time, many services were instructed and performed pursuant to the same, which would amount to acceptance by conduct.

137. As to the second argument, the focus of Ms Cheng's submission is on the absence of any reference to *"re-export services"* or *"re-export refund services"* on the face of the Purchase Orders. The description of services in the Purchase Orders is in very brief and general terms. Clearly, it is not intended to be prescriptive as to the ambit of the services required. From the words used, they would be apt to cover customs clearance services in respect of both import and export shipments. Re-export services would fall within that general description and any application for a refund would be in connection with

the re-export entry. There is nothing to indicate that any elements of the necessary customs clearance services were excluded from the scope of the Purchase Orders. Certainly, Schenker did not protest that the services fell outside the scope of the Purchase Orders when Mr Popa instructed them on 23 July 2017.

138. As to the third argument, the Purchase Contract does not stipulate that instructions for services under Purchase Orders must be in writing. Mr Popa instructed Ms Singhaphan by telephone on 23 July 2017 to provide the re-export services required. She agreed to carry out the tasks required. The parties corresponded by email during the following days as to the necessary documentation needed for Schenker to arrange the re-export customs clearance, evidencing the accepted instructions. Schenker did not protest at the time that there was no valid instruction for it to proceed.

139. A brief examination of the new arguments indicates that they do not stand up to scrutiny and have no merit. In any event, the court would not permit the scope of the arbitration claim to be expanded to introduce these points in circumstances where Shell has not had a proper, or fair, opportunity to consider and respond to them.

The Quotation

140. Schenker's case is that the Quotation dated 22 August 2017 was issued because the re-export services instructed in respect of the Silver Millie shipment were outside the scope of the Purchase Contract. The Quotation incorporated the TIFFA standard terms and conditions. Schenker submitted invoices in respect of the import element of the Quotation. Shell paid the sums invoiced. By paying the invoices, Shell indicated its agreement to the rates and conditions set out therein.

141. Reliance is placed on the evidence of Ms Saksricharoenying, branch manager, Chiangmai, of Schenker:

> "When Shell gave an instruction in relation to import customs clearance services, the Schenker operations team would refer to the Rate Sheet to check whether Shell's instruction fell within the range of services set out in the Rate Sheet. If it did, then Schenker's operations team would undertake the services according to Shell's instructions, and would not need to issue a separate contractual document, such as a quotation, because the range of services was covered by the Rate Sheet and it fell within the scope of the EFA. However, if the range of services requested by Shell was not covered within the Rate Sheet, then Schenker's operations team would notify Schenker's sales team to check and confirm whether the instruction was covered by the Rate Sheet under the Purchase Contract. If the range of services was not covered by the Rate Sheet, Schenker would issue a quotation to Shell for the services to be provided in response to Shell's specific instructions and request. In accepting the quotation. Shell would either make the payment or instruct Schenker to proceed to provide the services. Shell would typically confirm the instructions by email.

> When Schenker received the instruction from Shell to provide import customs clearance services for the shipment of base gasoline type 2 ("Gasoline") from Yeosu, South Korea to Sriracha, Thailand on board the Silver Millie (the "Shipment), Schenker checked whether the services that Shell requested were covered by the Rate Sheet. The Rate Sheet provides the scope of services in relation to import customs clearance in item 1: 'Import Handling Charge'. The rates of services for bulk shipment were specifically stipulated in the last column of the Rate Sheet.
>
> The approved and agreed rates for bulk shipment were prescribed in item 1.5 - 1.7 only for certain locations: i.e. the ports of Bangkok, Songkhla, Suratthani and Samutsongkram. As the shipment in question was for delivery at the port of Sriracha, it did not fall within the agreed Range of Scope. It is also important to note that Sriracha is primarily used for non-containerised shipments, including petroleum products shipped in bulk in tankers. Further, the rates prescribed in item 1.5 - 1.7 were significantly lower than the rates under the quotations issued by the Schenker for the shipment of bulk hydrocarbons. This demonstrates that customs clearance services for the Shipment, whether it was for import, re-export or duty refund services, did not fall within the Range of Scope under the Purchase Contract and the EFA and there was no rate that applied to shipments arriving at Sriracha and no rate for shipments that were not shipped in containers. As the services did not fall within the Range of Scope, the charges in the Range of Scope did not apply and our local charges applied. This is reflected in the higher rates for the services we provided in relation to the Shipment.
>
> …
>
> Having satisfied itself that the range of services fell outside of the Rate Sheet, the Purchase Contract and the EFA, Schenker issued quotation No.17-1-05884 (the "Quotation") and sent it to the Shell by email, referring to Shell's instructions in relation to the re-export customs clearance for the Shipment, and requesting Shell to confirm the Quotation so that an invoice could be raised. Shell subsequently confirmed the quotation and paid for the services."

142. The difficulty with Schenker's case is that there is no evidence to support an ad hoc contract based on the Quotation. Firstly, the Quotation was not issued until 22 August 2017, weeks after Schenker had commenced performance of the re-export services.

143. Secondly, the purpose of the Quotation was to provide rates and prices for activities not explicitly identified in the Rate Sheet. Both parties treated it as the basis for discussion and agreement on the fees to be paid. This was expressly provided for in Article 7.1 of the General Terms under the Purchase Contract.

144. Thirdly, the attempt to introduce the TIFFA standard terms and conditions was precluded by Article 23.1 of the General Terms, which provided:

> "No terms or conditions endorsed upon, delivered with or contained in Contractor's quotation, acknowledgment, acceptance of the PO, invoice, specification or similar document will form part of the PO Contract and Contractor waives any right which it otherwise might have to rely on such terms and conditions."

145. Finally, Shell did not accept the quotation. The invoices paid by Shell in respect of the customs services made explicit reference to the Purchase Orders issued under the Purchase Contract. Therefore, payment was consistent with those services falling within the scope of the Purchase Contract rather than under a standalone contract.

Conclusion

146. For the reasons set out above, Schenker was engaged by Shell to carry out customs clearance services in respect of the Silver Millie shipment pursuant to the Purchase Contract. The Purchase Contract contains a valid arbitration agreement in respect of any dispute, disagreement, controversy or claim arising out of or in connection with the Purchase Contract. The services instructed by Shell included the re-export and the re-export refund services the subject of the dispute referred to the Tribunal in LCIA Arbitration No.194263.

147. It follows that the Tribunal's decision dated 18 November 2019 that it has substantive jurisdiction to determine the referred dispute was correct. The court declines to grant the remedy sought by Schenker and dismisses the arbitration claim.

148. Following hand down of this judgment, the hearing will be adjourned to a date to be fixed for the purpose of any consequential matters, including any applications for permission to appeal, and any time limits are extended until such hearing or further order.