Neutral Citation Number: [2015] EWHC 194 (Comm)

Case No: 2014-943

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 05/02/2015

Before :

MR JUSTICE HAMBLEN

- -

Between :

Shagang South-Asia (Hong Kong) Trading Co. Ltd	**Claimant**
- and -	
Daewoo Logistics	**Defendant**

- -
- -

Robert Bright QC (instructed by **Reed Smith LLP**) for the **Claimant**
Nigel Jacobs QC (instructed by **Lax & Co. LLP**) for the **Defendant**

Hearing dates: 23 January 2015

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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.

....

MR JUSTICE HAMBLEN

Mr Justice Hamblen:

Introduction

1. The Claimant ("Shagang") applies under s.67 of the Arbitration Act 1996 (1) to set aside the First Final Arbitration Award dated 8 July 2014 ("the Award") made by Mr Timothy Rayment as sole arbitrator and (2) for a declaration that the Tribunal was not properly constituted.

Background

2. By a Fixture Note dated 17 April 2008 the Respondent ("Daewoo") agreed to charter a vessel ("DAEWOO TBN") to Shagang to perform various shipments for the period 1 May – 31 December 2008. The Fixture Note provided (*inter alia*) as follows:

> "23. **ARBITRATION**: ARBITRATION TO BE HELD IN HONGKONG. ENGLISH LAW TO BE APPLIED.
>
> 24. OTHER TERMS/CONDITIONS AND CHARTER PARTY DETAILS BASE ON GENCON 1994 CHARTER PARTY."
>
> 25. THIS CHARTERPARTY TO APPLY ENGLISH VERSION."

3. Part I of the Gencon 1994 Form ("the Gencon form") consists of numbered boxes that are to be filled in. Box 25 of the Gencon form Part I is to be filled in according to the following instructions:

> "Law and Arbitration (state 19(a), 19(b) or 19 (c) of Cl. 19; if 19(c) agreed also state Place of Arbitration) (if not filled in 19(a) shall apply (Cl 19)."

4. Clause 19 of the Gencon form Part II provides as follows:

> "**19. Law and Arbitration**
>
> * (a) This Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force. Unless the parties agree upon a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator; the decision of the three-man tribunal thus constituted or any two of them shall be final. On the receipt by one party of the nomination in writing of the other party's arbitrator, that party shall appoint their arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall be final.
>
> For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25** the arbitration shall be conducted in accordance with the Small Claims Procedure of the London Maritime Arbitrators Association.
>
> * (b) This Charter Party shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and should any dispute arise out of this Charter Party, the matter in dispute shall be referred to three persons at New York, one to be appointed by

> each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for purpose of enforcing any award, this agreement may be made a rule of the Court. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.
> For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25 ** the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc.
>
> * (c) Any dispute arising out of this Charter Party shall be referred to arbitration at the place indicated in Box 25, subject to the procedures applicable there. The laws of the place indicated in Box 25 shall govern this Charter Party.
>
> (d) If Box 25 in Part I is not filled in, sub-clause (a) of this Clause shall apply.
>
> * (a) (b) and (c) are alternatives; indicate alternative agreed in Box 25.
>
> ** Where no figure is supplied in Box 25 in Part I, this provision only shall be void but the other provisions of this Clause shall have full force and remain in effect."

5. The underlying dispute between the parties arises from the carriage (and alleged shortlanding) of a cargo of steel products carried on the "NICOLAOS A" from China to Jebel Ali in May/June 2008. The vessel completed discharge and sailed from Jebel Ali on or about 6 July 2008. However shortly after sailing, it was apparently discovered that cargo destined for Jebel Ali had not been discharged. This led to a claim being brought by the cargo receivers against the Head Owners which was eventually settled for approximately US $1 million. The Head Owners have brought London arbitration proceedings against the Head Charterers (SK Shipping) and that claim has been passed down the charter chain (Probulk - STX Pan Ocean – Daewoo - Shagang).

6. Arbitration proceedings were purportedly commenced by Daewoo against Shagang in February 2014. Daewoo's solicitors purported to give notice of Mr Rayment's appointment by emails of 4 February and 26 February and by a letter of 27 February 2014. Shagang did not respond and Daewoo purportedly appointed Mr Rayment as sole arbitrator. Mr Rayment wrote to Shagang giving notice that he had accepted the appointment as sole arbitrator by a letter of 18 March 2014.

7. Reed Smith were appointed on behalf of Shagang on 7 May 2014, and immediately queried Mr Rayment's appointment as sole arbitrator and thus his jurisdiction. They suggested that the seat of the arbitration was Hong Kong, and that the law applicable to the arbitration was not English law but Hong Kong law, with the result that the arbitration was subject to the Hong Kong Arbitration Ordinance ("the HK Ordinance").

8. There ensued written submissions from both parties on the issue of jurisdiction, followed by the Award. The Award addressed a number of questions but the principal issues upon which it focussed were whether the arbitration was subject to the English Arbitration Act 1996 ("the English Act") or the HK Ordinance, and whether clause 19(a) of the Gencon form applied. Mr Rayment's conclusion was that the arbitration was subject to the English Act (see paragraphs 33 and 34) and that Gencon clause 19(a) was indeed applicable (see paragraphs 40 and 41). In the light of these conclusions, he concluded that he had been properly constituted as sole arbitrator (paragraph 45).

The Issues

9. The dispute between the parties on this application centres on the proper construction of clause 23 and its relationship with clause 19 of Part II of the Gencon form.

10. Shagang's case is that clause 23 provides for arbitration in Hong Kong subject to the procedural or curial law there applicable, being the HK Ordinance. Clause 19 of the Gencon form is inconsistent with clause 23 and is not incorporated or otherwise applicable. It follows that the Arbitrator had no jurisdiction pursuant to either clause 19 or the English Act.

11. Daewoo's case is that clause 23 when read together with clause 19 provides for Hong Kong to be the geographical location for the arbitration but for the arbitration to be subject to the English Act and English curial law. Alternatively the same conclusion follows on the proper construction of clause 23 even if clause 19 is not incorporated or otherwise applicable. It follows that the Award was rightly decided and Mr Rayment had and has jurisdiction.

12. If clause 19 is not incorporated or otherwise applicable but clause 23 does make the arbitration subject to English curial law then Shagang has an alternative case that Mr Rayment's appointment as sole arbitrator was not validly made since it was made on the basis of clause 19 rather than by reference to the applicable requirements of the English Act.

13. The essential issues are therefore:

(1) Whether arbitration under the contract is subject to English or Hong Kong curial law.

(2) If the arbitration is subject to English curial law, whether the appointment of Mr Rayment as sole arbitrator was validly made.

14. In considering these issues, it is necessary to bear in mind a number of separate concepts, all distinct (albeit related in many cases for practical purposes):

(1) The venue/place of the arbitration, i.e. the geographical location where the arbitration hearings are to be held.
(2) The "seat" of the arbitration, i.e. the country which is intended to provide the curial law.

(3) The law governing the arbitration agreement.
(4) The law governing the substantive contract, i.e. the substantive proper law.

Issue (1): Whether arbitration under the contract is subject to English or Hong Kong curial law.

15. I propose to address this issue by first considering (1) the wording of clause 23; (2) the commercial background and (3) the relevant authorities.

(1) The wording of clause 23

16. Whilst I appreciate that clause 23 has to be read in context and that the charterparty was agreed to be based on the Gencon form, it is convenient to start with a consideration of the wording of clause 23 itself.

17. The clause is headed "Arbitration" and has two limbs: (1) where arbitration is "to be held" and (2) what law is "to be applied".

18. It is clearly a dispute resolution clause and I consider that the most natural and obvious meaning of its two limbs is that it is intending to address (1) where and how disputes are to be determined (arbitration in Hong Kong) and (2) the law governing determination of such disputes (English law).

19. It is logical and sensible for a dispute resolution clause to address both the issue of where and how disputes are to be resolved and the law governing such resolution and such clauses commonly do so.

20. Agreeing that an arbitration is "to be held" in a particular country suggests that all aspects of the arbitration process are to take place there. That would include any supervisory court proceedings which might be required in relation to that process.

21. Agreeing that a law is "to be applied" to disputes between parties is a common means of expressing a choice of substantive law, a choice that is frequently made express.

22. By contrast it is far less usual to express a choice of curial law. Often that is simply left to be inferred from the place of arbitration which has been chosen. Where it is made express it is usually done by referring to the governing arbitration statute (e.g. the English Arbitration Acts, as in clause 19(a) of the Gencon form). There does not appear to be any reported case in which that choice has been made by stating that a country's law applies or is "to be applied" or where the parties have stated that the arbitration will be governed by a specified "procedural law" or "curial law".

(2) The commercial background

23. Daewoo stressed that it makes good commercial sense for the same country's law to govern both substance and procedure and that a bifurcation between them is unlikely to be intended. It stressed in particular that where there is such a divergence there may be a need to employ two sets of lawyers and to prove

foreign law as a matter of fact. That is undesirable as a matter of practicality and cost and also means that there can be no appeal on matters of law.

24. However, as has been judicially observed, such a bifurcation is "by no means uncommon" (per Mustill J in *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446 at p453) and happens "often" (per Kerr LJ in *Naviera Amazonica Peruana SA v. Compania Internacionale de Seguros* [1988] 1 Lloyd's Rep 116 at p119). Further, in common law jurisdictions such as Hong Kong English law would often be dealt with by means of submission rather proof of fact. Nor is there anything particularly surprising about having no rights of appeal from an arbitration decision. It is consistent with a desire for finality and it is the prescribed position under some arbitration rules (e.g. those of the LCIA).

25. Far more "uncommon" is a bifurcation between the place of arbitration and the law governing the conduct of the arbitration there. Indeed Daewoo could only identify one case in which an arbitration clause has been so construed - *Braes of Doune Wind Farm v. Alfred McAlpine Business Services* [2008] 1 Lloyd's Rep 608. Such a bifurcation is inviting jurisdictional complications and issues as to the relative roles of the local court and the chosen foreign court in relation to the arbitration. In the present case, for example, there was evidence that if the matter was before the Hong Kong court it would apply the HK Ordinance because it is mandatorily applicable to arbitrations taking place in Hong Kong.

26. In the *Naviera* case Kerr LJ commented as follows at p120-121:

> "E. There is equally no reason in theory which precludes parties to agree that an arbitration shall be held a place or in country X but subject to the procedural laws of Y. The limits and implications of any such agreement have been much discussed in the literature, but apart from the decision in the instant case there appears to be no reported case where this has happened. This is not surprising when one considers the complexities and inconveniences which such an agreement would involve. Thus, at any rate under the principles of English law, which rest upon the territorially limited jurisdiction of our Courts, an agreement to arbitrate in X subject to English procedural law would not empower our Courts to exercise jurisdiction over the arbitration in X…
> …..
>
> One only has to glance through our Arbitration Acts, 1950 and 1979 to see how the conduct of arbitrations and the powers of the Courts in relation to them intermesh. To quote the first sentence of the text of Mustill & Boyd on Commercial Arbitration:
>
> > "The law of private arbitration is concerned with the relationship between the courts and the arbitral process."
>
> This cannot be sub-divided. I do not know what the Courts in Lima would do if the Judge were right in the present case that this was a Lima arbitration to be conducted according to English procedural law. But their task would certainly not be an enviable one.

> ….
> Against this background it is clear that the Judge's conclusion in the present case is unlikely to be right, because it produces a highly complex and possibly unworkable result which the parties could hardly have intended. Or, to put it in another way, his conclusion can only be right if this is indeed an apparently unprecedented instance of parties' having expressly and clearly agreed to arbitrate in X (Lima) subject to the curial law of Y (London)."

27. The passage at "E." from Kerr LJ's judgment was cited by Clarke J in *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24 at p32. Although he noted that under the Arbitration Act 1996 such a bifurcation may be less problematical he nevertheless concluded that it would "undoubtedly give rise to difficulties".

28. The close link which exists between the place of arbitration and the procedure which governs the arbitration is the reason why choice of place generally carries with it an implied choice of governing procedure. As Saville J explained in *Union of India v McDonnell* [1993] 2 Lloyd's Rep 48 at p50:

> "If the parties do not make an express choice of procedural law to govern their arbitration, then the court will consider whether they have made an implicit choice, In this circumstance the fact that the parties have agreed to a place for the arbitration is a very strong pointer that implicitly they must have chosen the laws of that place to govern the procedures of the arbitration. The reason for this is essentially one of common sense. By choosing a country in which to arbitrate the parties have, ex hypothesi, created a close connection between the arbitration and that country and it is reasonable to assume from their choice that they attached some importance to the relevant laws of that country, i.e. those laws which would be relevant to an arbitration conducted in that country…."

(3) The authorities

29. It is no doubt in light of considerations such as these that the authorities indicate that clear words are necessary for the parties to choose a seat of arbitration which differs from the place of arbitration.

30. In *Dicey, Morris and Collins on The Conflict of Laws* (15th ed.) at paragraph 16–035 it is stated that:

> "*Determination of the seat.* Party autonomy in the choice of the law to govern arbitral procedure ((the *lex arbitri)* is expressed in the choice of a seat for the arbitration. This "seat" is in most cases sufficiently indicated by the country chosen as the place of the arbitration. For such a choice of place not to be given effect as a choice of seat, there will need to be clear evidence that the parties (or the arbitrators, if so authorised by the parties) agreed to choose another seat for the arbitration; and that such a choice will be effective to endow the courts of that country with jurisdiction to supervise and support the arbitration. The concept of the "seat" of the arbitration is a juridical concept.

> The legal "seat" must not be confused with the geographically convenient place chosen to conduct particular hearings…"

31. This passage was cited with approval by Cooke J in *Shashoua v Sharma* [2009] 2 Lloyd's Rep. 376. In that case the parties agreed that 'the venue of arbitration shall be London, United Kingdom' whilst providing that the arbitration proceedings should be conducted in English in accordance with ICC Rules and that the governing law of the agreement itself would be the laws of India.

32. Cooke J held that London had been chosen as the seat and English law as the curial law. He stated as follows:

> "26…..The claimants submitted that in the ordinary way, however, if the arbitration agreement provided for a venue, that would constitute the seat. If a venue was named but there was to be a different juridical seat, it would be expected that the seat would also be specifically named. Notwithstanding the authorities cited by the defendant, I consider that there is great force in this. The defendant submits however that as 'venue' is not synonymous with 'seat', there is no designation of the seat of the arbitration by clause 14.4 and, in the absence of any designation, when regard is had to the parties' agreement and all the relevant circumstances, the juridical seat must be in India and the curial law must be Indian law.
>
> 27 In my judgment, in an arbitration clause which provides for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that the venue of the arbitration shall be London, United Kingdom does amount to the designation of a juridical seat. The parties have not simply provided for the location of hearings to be in London for the sake of convenience and there is indeed no suggestion that London would be convenient in itself, in the light of the governing law of the Shareholders Agreement, the nature and terms of that agreement and the nature of the disputes which were likely to arise and which did in fact arise (although the first claimant is resident in the UK).
>
> …..
>
> 34 'London arbitration' is a well known phenomenon which is often chosen by foreign nationals with a different law, such as the law of New York, governing the substantive rights of the parties. This is because of the legislative framework and supervisory powers of the courts here which many parties are keen to adopt. When therefore there is an express designation of the arbitration venue as London and no designation of any alternative place as the seat, combined with a supranational body of rules governing the arbitration and no other significant contrary indicia, the inexorable conclusion is, to my mind, that London is the juridical seat and English law the curial law. In my judgment it is clear that either London has been designated by the parties to the arbitration agreement as the seat of the arbitration or, having regard to the parties' agreement and all the relevant circumstances, it is the seat to be determined in accordance with the final fall back provision of section 3 of the Arbitration Act."

33. Cooke J's approach was agreed with and followed by Blair J in *U & M Mining Zambia Ltd. v. Konkola* [2013] 2 Lloyd's Rep 218 and by Eder J in *Enercon GmbH v. Enercon (India) Ltd.* [2012] 1 Lloyds Rep. 519. The *Enercon* case concerned an arbitration clause which provided that "The venue of the arbitration proceedings shall be London" and that "The provisions of the Indian Arbitration and Conciliation Act, 1996 shall apply." Eder J held the seat to be London. He stated that if it had not been the provision referring to the Indian Act the conclusion that London was the seat would by "beyond any possible doubt". He identified the issue as being whether this provision is to be regarded as "significant contrary indicia" (using the language of Cooke J.) so as to place the "seat" of the arbitration in India" (at [59]). He concluded that it was not.

34. Daewoo sought to distinguish these cases on the grounds that clause 23 does not refer to "venue" or "place" or other word which may be regarded as referring to the "seat". It was also stressed that, unlike London in *Shashoua v Sharma* and the *Enercon* case, Hong Kong is a convenient place for the arbitration given that the parties are based in the Far East. It may well therefore have been chosen simply as a convenient geographical location for hearings.

35. In my judgment there is no meaningful distinction to be drawn between choosing a place as a "venue" or "place" for the arbitration and choosing it as the place where the arbitration "is to be held". In the *Naviera* case Kerr LJ regarded an agreement for "arbitration in London" as being a colloquial choice of seat. As he stated at p119:

> "Before considering the correct construction of this particular contract on the question whether the "seat" (or whatever term one uses) of any arbitration thereunder was agreed to be London or Lima or – to put it colloquially – whether this contract provided for arbitration in London or Lima…."

36. As Clarke J observed in *ABB v Keppel* at p31:

> "It is, I think, of interest to note that Lord Justice Kerr treated the expression "arbitration in London" or "arbitration in New York" as ordinary or colloquial language describing the seat of the arbitration."

37. Nor do I consider that the inconvenience of London was a determining factor in either *Shashoua v Sharma* or the *Enercon* case. It was relevant, but no more than that. Moreover, whilst Hong Kong is no doubt geographically convenient, it is also a well known and respected arbitration forum with a reputation for neutrality, not least because of its supervising courts.

38. In my judgment the approach adopted in *Shashoua v Sharma* and in other cases is appropriate in this case also. An agreement that the arbitration is "to be held in Hong Kong" would ordinarily carry with it an implied choice of Hong Kong as the seat of the arbitration and of the application of Hong Kong law as the curial law. Clear words or "significant contrary indicia" are necessary to establish that some other seat or curial law has been agreed.

39. For reasons already given I do not consider that "English law to be applied" provides clear wording to that effect. Indeed, it is most naturally to be read as referring to the substantive law applicable. Daewoo, however, submitted that are other clear indicia which may be relied upon, in particular the heading of the clause – "Arbitration" and the fact that the charterparty was to be based on the Gencon form and the part incorporation and application of clause 19(a) of that form.

40. I do not consider the heading of clause 23 to be a significant contrary indication. As Shagang submitted:

(1) It is quite common for charterparties to include a clause headed "Arbitration" whose subject-matter is – despite the heading – not confined to the arbitration but extends to the substantive proper law. This includes various standard-form charterparties such as, for example clause 45 of the Norgrain Form 1989 and clause 31 of the Sugar Charter-Party 1999.

(2) The reason for this is that choice of forum and choice of law are closely related. An express choice of a specific forum is normally regarded as an implied choice of substantive governing law. That may be why it evidently seems natural to some draftsmen to give a clause the heading "Arbitration", even though its intended subject-matter in fact includes the substantive governing law.

(3) If clause 23 only had limb (1) this would be enough to be regarded as an implied choice of Hong Kong substantive governing law. However, because the Gencon form is normally subject to English law (or, sometimes, New York law) all the existing learning and understanding of Gencon is predicated on it being subject to English law (or New York law). A fixture based on Gencon but subject to a different governing law would be a charterparty whose meaning would be uncertain. It therefore makes sense that parties to such a fixture would wish to make it clear that, notwithstanding the choice of Hong Kong as the place for the arbitration, the substantive governing law should nevertheless be English law.

(4) It would be unusual for parties to have express choice of forum and an express choice of curial law but no express choice of substantive proper law. It would be bound to give rise to disputes as to what the substantive proper law should be.

41. Daewoo stressed that the heading "Arbitration" in clause 23 is to be contrasted with the heading "Law and Arbitration" in clause 19 of the Gencon form. However, I do not accept that, as Daewoo submitted, this reflects some careful and deliberate decision to omit choice of law from clause 23. The Fixture Note was a short form contract and was expressed in abbreviated terms. Moreover, clause 23 did on any view involve a choice of law, albeit there is a dispute as to whether that was of substantive law, curial law or both.

42. Daewoo's central submission was that the clear contrary agreement is to be found in clause 19(a) of the Gencon form. It submitted that this should be construed as

supplementing clause 23 and when read together the application of the English Arbitration Acts and English curial law is clear.

43. The main difficulty with this submission is how clause 19(a) is made applicable.

44. As Shagang submitted, the Gencon scheme in relation to law and arbitration offers a number of options but is very rigid about the specific options available. In particular, the place of arbitration, the curial law and the substantive proper law are addressed in a number of options, but each option involves a unitary approach with all three of those elements going together – as Daewoo put it, they are "one shop" options. Thus:

(1) If box 25 is filled in "19(a)" then the agreement is for arbitration in London, English law to apply as the curial law of the arbitration and English law also to apply as the substantive proper law of the charterparty.

(2) If box 25 is filled in "19(b)" then the agreement is for arbitration in New York, US law to apply as the curial law of the arbitration and New York law to apply as the substantive proper law of the charterparty.

(3) If box 25 is filled in "19(c)" then it must also be filled in with a single place-name as "the Place of Arbitration". The place thus indicated will be not only the venue for the arbitration but also the place whose system of law will be the curial law of the arbitration and the substantive proper law.

(4) If box 25 is not filled in then clause 19(a) applies, with the result that the arbitration is to be in London with English law to apply as the curial law of the arbitration and as the substantive proper law.

45. Clause 23 does not fit with any of these options or with the scheme of clause 19 as a whole.

(1) It does not fit with clause 19(a) as Hong Kong rather than London is to be the place of the arbitration. This is contrary to the unitary scheme of clause 19 whereby the place of arbitration, the curial law and the substantive proper law are all English. Further there is an express linkage in the clause between London and the applicable curial law ("…shall be referred to arbitration in London in accordance with the Arbitration Acts…"). The arbitrator appointment procedure is also agreed with London in mind, as borne out by, for example, the fact that the clause 19(b) procedure is different and that there is no specified procedure where clause 19(c) applies. That connection is also emphasised by the reference to the LMAA Small Claims Procedure.

(2) It obviously does not fit clause 19(b) and New York law and arbitration.

(3) It does not fit clause 19(c) as that too involves a unitary scheme with the law of the place indicated to be the governing law. On both parties case English law is the governing law; not that of Hong Kong.

(4) It does not fit clause 19(d) as that is a default option which applies where no choice has been made as reflected in the box being left blank. However, in this case express choices have been made as to both the place of arbitration and the law "to be applied".

46. On Daewoo's own case clause 23 is inconsistent with clause 19(c). As it submitted:

> "Clause 23 of the Fixture Note expressly provides for the application of English law. However Clause 19(c) provides that the place or physical venue of the arbitration and its curial and substantive laws will be the same – i.e. a "one shop" clause. Thus, for this reason too, Clause 23 of the Fixture Note cannot have been intended to give rise to the application of Clause 19(c)."

However, the same reasoning and conclusion applies to clause 19(a) and the express provision that Hong Kong shall be the place or physical venue of the arbitration.

47. In my judgment the parties chose to do something which does not fit with the Gencon scheme. The reality is that they agreed to do something different to clause 19. I accordingly agree with Shagang that clause 23 is inconsistent with clause 19 and that clause 24 was not intended to incorporate by reference clause 19 of the Gencon form or otherwise to make it applicable. Clause 19 cannot therefore be a contrary indication or agreement.

48. A similar conclusion was reached in the broadly comparable case of *Swiss Bank Corp v Novorissiysk Shipping Co. (The 'Petr Shmidt')* [1995] 1 Lloyd's Rep 202. In that case, a fixture confirmation incorporated the standard form Vegoilvoy charterparty "with following additions/alterations". The provisions that followed in the fixture confirmation included the term: "General average/arbitration in London – English law to apply". This differed from the Vegoilvoy form, which provided for arbitration in New York with three arbitrators, one chosen by each party. Potter J held that, rather than a *mutatis mutandis* alteration with "London" being substituted for "New York" in the Vegoilvoy arbitration clause, the parties' agreement in relation to arbitration should be understood as being no more or less than "Arbitration in London – English law to apply". He held, on this basis, that they should not be taken to have agreed on three arbitrators, but that under Section 6 of the Arbitration Act 1950 (which was the statutory precursor to Section 15 of the English Act) this should be deemed to be an agreement requiring a sole arbitrator. As Potter J stated at p206-7:

> "....No doubt if a charter-party had been drawn up in this case there would have been a more elaborate clause for arbitration in London than one in the bare terms of the telex. However, I do not infer that the parties necessarily intended, or would necessarily have drafted, a new clause simply by a mutatis mutandis alteration of the form of clause 31 so as to substitute references to London and the English Arbitration Acts for the references to New York and the United States Arbitration Act. Thus, there is simply left an agreement for "Arbitration in London – English law to apply". That is a clause of sufficient

definition to be enforced by the English Courts with the "gap-filling" powers conferred by the Arbitration Acts…"

49. Daewoo placed particular reliance on the decision of Akenhead J in the *Braes of Doune* case. That case involved a dispute under the Engineering, Procurement and Construction ("EPC") Contract. Under clause 1.4.1 the parties agreed that the English courts had "exclusive jurisdiction" to settle disputes "subject to" arbitration. Clause 20.2(c) of the EPC Contract provided:

> "(c) This arbitration agreement is subject to English Law and the seat of the arbitration shall be Glasgow, Scotland. Any such reference to arbitration shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act 1996 or any statutory re-enactment."

50. The claimant employers sought to appeal an arbitration award in the English High Court following a hearing held in Edinburgh. The defendant contractors argued that the (juridical) seat of the arbitration was Scotland and not England and therefore, the English Court had no jurisdiction. Akenhead J. held that the English Court had jurisdiction.

51. Daewoo relied in particular on the following aspects of the judgment:

(1) The observation that the legal or juridical seat of the arbitration should not be confused with the geographically convenient place for holding hearings: at [11]-[14].

(2) The observation that the curial law of the arbitration can be different from its venue is not unusual - "It is not uncommon at least in this current century and some considerable time before for the parties to agree that arbitrations can be physically conducted in one country but be subject to the procedural control of the laws of another country": at [13].

(3) Akenhead J's conclusion at [17(e)] that, reading the EPC Contract as a whole: "the parties' express agreement that the "seat" of arbitration was to be Glasgow, Scotland must relate to the place in which the parties agreed that the hearings should take place. However, by all the other references the parties were agreeing that the curial law or law which governed the arbitral proceedings was that of England and Wales. Although authorities establish that, prima facie and in the absence of agreement otherwise, the selection of a place or seat for an arbitration will determine what the curial law or "lex fori" or "lex arbitri" will be, I consider that, where in substance the parties agree that the laws of one country will govern and control a given arbitration, the place where the arbitration is to be heard will not dictate what the governing or controlling law will be."

52. Akenhead J therefore agreed with the approach that prima facie the selection of the place of arbitration will determine the applicable curial law and that it is necessary to establish an agreement to the contrary. On the particular contract wording in that case he held that there was such an agreement. That, however, was a much stronger case than the present since, notwithstanding the reference to

the "seat" being in Glasgow, the arbitration agreement was expressly subject to English law and it was agreed that the reference to arbitration was one within the English Act.

53. The *Braes of Doune* case remains the only reported example of a clause choosing a curial law different to that of the place of arbitration. Whilst it is correct that arbitration hearings (or parts of them) may often be conducted in countries other than that of the applicable curial law, it is not common, in my experience, for there to be an express contractual choice of such bifurcation. It is to be noted that the *Braes of Doune* case was considered and distinguished in both *Shashoua v Sharma* and the *Enercon* case – see in particular Cooke J's judgment at [31].

54. Daewoo also submitted that the analysis of Eder J in *Enercon* case supported its arguments, even if his conclusion did not. It drew attention in particular to his reliance on the inconvenience of London as a geographical location and to the reference to "arbitration proceedings" being in London. However, I agree with Shagang that the decision does not assist Daewoo. The "contrary indicia" in that case were much stronger than here since the arbitration clause stated that "the provisions of the Indian Arbitration and Conciliation Act 1996 shall apply". However, that even this express reference to the Indian Act did not displace the implied choice of English curial law: essentially because (following *Shashoua v Sharma)* the association between venue and seat/curial law is so close that even an express reference to a different (foreign) arbitration regime may not be enough to break that association.

55. Daewoo also had a fallback case that the "English law to be applied" meant both substantive and curial law. However, the need for clear wording or "significant contrary indicia" for there to be an agreement to a different curial law to that of the place of arbitration applies equally in such a case, and there is none for reasons already stated. Daewoo also submitted that on any view there was ambiguity and that meant that reference could be made to clause 19. However, I do not consider that there is real ambiguity, but even if there was that would not entitle reference to be made to an inapplicable contractual provision.

56. In summary, I do not consider that any of the arguments or cases relied upon by Daewoo show that there is in this case clear wording or other contrary indicia sufficient to displace the prima facie conclusion that the agreement that the arbitration is "to be held in Hong Kong" carries with it an implied choice of Hong Kong as the seat of the arbitration and of the application of Hong Kong law as the curial law. That is in any event the conclusion I would reach as a matter of construction regardless of any prima facie rule or presumption.

57. I accordingly conclude that arbitration under the contract is subject to Hong Kong rather than English curial law.

Issue (2) - If the arbitration is subject to English curial law, whether the appointment of Mr Rayment as sole arbitrator was validly made.

58. If I am wrong in my conclusion on Issue (1) then Shagang's alternative case is that Mr Rayment was still invalidly appointed as sole arbitrator.

59. It was accepted and indeed averred by Daewoo that Mr Rayment's appointment as sole arbitrator was made pursuant to clause 19(a) of the Gencon form.

60. However, if, as I have concluded, that clause is inapplicable then Mr Rayment could not have been validly appointed thereunder.

61. Clause 23 does not involve an agreement as to the number of arbitrators with the consequence that the tribunal is to be a sole arbitrator pursuant to s.15(3) of the English Act. There has been no attempt to follow the procedure for the appointment of a sole arbitrator as set out in s.16(3). Nor has the court's powers to appoint an arbitrator under s.18 been invoked.

62. Mr Rayment has accordingly not been validly appointed as a sole arbitrator under the English Act (if applicable).

Conclusion

For the reasons outlined above I find for Shagang on both Issues. Daewoo has questioned the court's powers in those circumstances and I shall hear the parties further on the appropriate consequential orders.