FIXTURE AND GENCON 94: ARE GENCON 94 LAW AND ARBITRATION PROVISIONS BROUGHT INTO THE CHARTER? THE INDIAN VIEW

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It is not every day that one gets an opportunity to reflect on an article written by one's Professor. Professor Simon Baughen recently noted the award in London Arbitration 2/20 involving a Gencon 94 voyage charterparty, where the Tribunal struck down an argument by charterers that there was no arbitration agreement based on the fact that the recap's 'main terms' did not state a law and arbitration clause. Owing to disputes under the charterparty the owners had appointed an arbitrator on the basis of the law and arbitration clause in the standard form.[1] The tribunal held that the concluding words of the fixture recap email 'Otherwise as clean Gencon 94 charterparty incl cls paramount … to be amended/altered as per above main terms agreed' meant that the recap terms should be written into the Gencon 94 form, to the effect that all other terms in the standard form operate where there is no contradictory clause in the recap. Gencon 94, is a standard form voyage charterparty developed by BIMCO and clause 19(a) provides for London arbitration and English law.[2] This note will consider how this issue has been dealt with by decisions of the courts of India.

In the world of commercial maritime transactions, charterparty contracts are possibly one of the most, if not the most, common contracts for hiring of ships. Owing to the international nature of the trade, this contract is often made over invisible radio waves, in the form of telephonic deliberations, email exchanges and now even through mobile applications. In *Shakti Bhog Foods Ltd v Kola Shipping Ltd*,[3] the Supreme Court of India held that email exchanges stating the fixture note/recap validly witnessed the charterparty agreement and the law and arbitration clause in the recap which referred to London was binding on parties.

At least two cases, from different high courts in India, shed some light on this scenario. The Rajasthan High Court in *Django Navigation Ltd v Indo Ferro Metal Private Ltd*,[4] where the proceedings were for enforcement of a foreign award, upheld the fixture recap's law and arbitration clause, reading it in harmony with clause 19(a) of the Gencon 94 form which had an empty Box 25. Both the recap clause and the Gencon clause referred to English law/London arbitration.

Similarly, in the Calcutta High Court in *LMJ International Ltd v Noor Maritime Ltd & Anor*,[5] the charterer plaintiff moved court to challenge (via injunction) the invocation of London arbitration proceedings which had been based on a fixture note clause, which stated as follows: '27. Arbitration/General Average: At London or Hong Kong, English Law to Apply'. The charterer's main argument was that there was no valid arbitration agreement between the parties since there was disparity between the fixture note and Gencon 94 clause 19(a). The main argument on behalf of the defendant owner was that the main terms of the fixture note necessarily incorporated the Gencon 94 and thereby clause 19(a), superseding the fixture note's clause 27 mentioned above. The charterer argued that this line of argument could have held some weight if Box 25 in the Gencon 94 form was empty; however, in this case the words 'See Clause 27 of Main Terms' had been inserted in the box. The sum total of the charterer's argument was that, since he was not allowed to exercise the choice in clause 27 and the arbitration had been invoked unilaterally by the defendant in London, it was not a valid invocation.

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[1] Simon Baughen 'Fixture recap "otherwise as clean Gencon 94 charterparty to be amended/altered as per above main terms agreed". Are Gencon 94 law and arbitration provisions brought into the charter?' (The Institute of International Shipping and Trade Law, Swansea April 2020) https://iistl.blog/tag/fixture-recap-incorporation-of-gencon-94-as-per-above-main-terms-agreed-cl-19a-incorporation-of-law-and-arbitration-provisions/. Also available at London Arbitration 2/20, 9 April 2020, Lloyd's Maritime Law Newsletter.

[2] See https://www.bimco.org/contracts-and-clauses/bimco-contracts/gencon-1994. The clause provides three alternatives for law and arbitration and cl 19(d) provides for English law and arbitration to apply by default in the event that the parties make no specific choice.

[3] (2009) 2 SCC 134.

[4] 2018 SCC OnLine Raj 225.

[5] 2011 SCC OnLine Cal 4729.

The court held that this was indeed a substantial argument. However, the charterer's conduct was noted to be one of 'acquiescence' and hence, the injunction was not granted.

This makes one wonder what consequences would follow if Box 25 were left untouched and the law applicable in the fixture note is not the same as clause 19(a), that is, English law. In order to make the construction of the contract easier, it is advisable that parties fill in Box 25 with an express reference to the clause of the fixture. There is authority to the effect that a court would read a specific law and arbitration clause over the standard print.

In *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics*,[6] where Box 25 was left empty and the fixture note stated 'Arbitration: 23. Arbitration to be Held in Hong Kong. English Law to be Applied. 24. Other Terms/Conditions and Charter Party Details Base on Gencon 1994 Charter Party'. The charterer, Daewoo, initiated arbitration in London, appointed the arbitrator in accordance with clause 19(a) and gave notice to Shagang. Shagang's lawyers contested the appointment of the arbitrator, claimed that the seat of arbitration and, therefore, the law applicable to the arbitration was of Hong Kong. The arbitrator ruled in favour of his appointment and came to the finding that the Gencon 94 clause 19(a) applied. On challenge, the English High Court framed the following issues: '(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'. In holding for Shagang on both issues, it held that clause 23 of the fixture note was specific and inconsistent with clause 19. Therefore, to displace the reliance on clause 23 a high degree of contrary indication that the parties did not wish to be bound by it was required. This was so because, while it was common to only name the seat of arbitration and the law of the contract, it was rather uncommon to mention a seat and a separate curial law. Hence, the parties would be reasonably expected to read it as seat of arbitration and the law of the contract. Daewoo's argument that clause 23 was prefixed with the word 'Arbitration' and not the words 'Law and Arbitration' was novel in its attempt to prove that the latter part of clause 23 meant the application of English law as the curial law; however, it failed to convince the court.

[6] [2015] EWHC 194 (Comm).