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Update

Voyage charterparties: London arbitration clause held unenforceable in Australia

Summary

A recent decision by the Federal Court of Australia has interpreted the Australian *Carriage of Goods by Sea Act 1991* (Cth) 1991 ("COGSA 1991") to mean that choice of law and jurisdiction clauses in voyage charterparties and other sea carriage documents for carriage of goods from Australia have no effect if they purport to limit the jurisdiction of the Australian courts.

The consequence of the decision in *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696 was that a disponent owner under a voyage charterparty, was unable to enforce London arbitration awards in Australia against an Australian charterer, despite the parties having agreed an express English law and London arbitration clause in the charterparty.

Background

Dampskibsselskabet Norden A/S as disponent owners ("DKN") and Beach Building & Civil Group Pty Ltd as charterers ("Beach Civil") entered into an AMWELSH 93 Form charterparty for the carriage of coal from Australia to China (the "Charterparty"). Clause 32 of the Charterparty provided that all disputes arising out of the Charterparty should be determined by arbitration in London.

DKN commenced London arbitration proceedings in respect of a substantial demurrage dispute. Beach Civil contested the tribunal's jurisdiction on a number of grounds, including that the arbitration clause was invalid and unenforceable by reason of the operation of section 11 of COGSA 1991. Beach Civil appear to have accepted that the Arbitrator had jurisdiction or power to determine this issue.

This preliminary issue was determined in DKN's favour, with the Arbitrator holding that the Charterparty arbitration clause was not rendered invalid by that section, and the Arbitrator had jurisdiction to determine the dispute.

Beach Civil took no part in the substantive arbitration and a final award was issued in DKN's favour.

DKN then applied to the Federal Court of Australia for orders recognising and enforcing both the preliminary award and the final award under the *Australian International Arbitration Act 1974* ("1974 Act") which gives effect to the provisions of the 1958 New York Convention, to which Australia has acceded.

Beach Civil contested the application on identical grounds to those submitted to the London arbitration tribunal by way of preliminary issues, arguing that the arbitration clause precluded or limited the jurisdiction of the Australian courts and therefore had no effect by reason of the operation of section 11 of COGSA 1991.

The decision

Beach Civil submitted, amongst other things, that a voyage charterparty is a "sea carriage document" pursuant to section 11(1)(a) of COGSA 1991, and the arbitration clause had no effect pursuant to section 11(2)(b).

COGSA 1991 incorporates an amended version of the Hague-Visby Rules. Section 11 (1) and (2) states:

> ***"11 Construction and jurisdiction***
>
> *(1) All parties to:*
>
> *(a) a sea carriage document relating to the carriage of goods from any place in Australia to any place outside Australia;…*
>
> *are taken to have intended to contract according to the laws in force at the place of shipment.*
>
> *(2) An agreement (whether made in Australia or elsewhere) has no effect so far as it purports to:…*
>
> *(b) preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of a bill of lading or a document mentioned in subsection (1);…."*

This clause does not fall foul of the 1974 Act because section 2C expressly provides that nothing in the 1974 Act affects the operation of section 11 of COGSA 1991.

The question of whether section 11 of COGSA 1991 rendered the London arbitration clause invalid therefore depended upon whether the Charterparty was a *"sea carriage document"* within the meaning of section 11(1)(a) of COGSA 1991.

There is no definition of *"sea carriage document"* in COGSA 1991. DKN argued that a purposive approach should be taken to the interpretation of section 11, submitting that the section should be interpreted narrowly to cover only bills of lading and other documents normally covered by the Hague Visby Rules.

However, the court preferred a literal interpretation of the meaning of section 11, holding that:

> *"the expression "… document relating to the carriage of goods from any place in Australia …" as a matter of ordinary English is apt to encompass a voyage charterparty".*

In reaching this decision, Justice Foster took into consideration that the present section 11(1)(a) of COGSA 1991 is in an amended form. As originally enacted, it referred to:

> *"… a bill of lading, or a similar document of title, relating to the carriage of goods from any place in Australia …,"*

The court held that the amendment to the present wording indicates that the legislature intended to broaden the class of documents covered by 11(1)(a) and 11(2)(b), which would include relevant voyage charterparties.

The court also considered that this conclusion was supported by the decisions in *BHP Trading Asia Ltd v Oceaname Shipping Ltd* (1996) 67 FCR 211 at 235 and *Sonmez Denizcilik ve Ticaret Anonim Sirketi v MV "Blooming Orchard"* (No 2) (1990) 22 NSWLR 273 which related to section 9(2) of the Sea-Carriage of Goods Act 1924 (Cth), the predecessor to s 11(1) of COGSA 1991. That section contained similar wording to the present section 11(1), and those decisions held that a voyage charterparty was for relevant purposes a document relating to the carriage of goods and that a requirement to submit to arbitration abroad in such a contract was void.

The court's decision was contrary to a recent decision by the Supreme Court of South Australia *(Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* [2012] SASC 50), in which the court concluded that the voyage charterparty in question was not a "sea carriage document" within the meaning of section 11. Justice Foster respectfully disagreed with this conclusion.

Implications

The current position is that forum clauses in voyage charterparties and other sea carriage documents for carriage of goods from Australia will not be valid. In theory, an exception to the general position is found in section 11(3) of COGSA 1991, which provides that clauses providing for arbitration in Australia are not made ineffective by section 11(2).

Shipowners and time charterers entering into voyage charters for a voyage from Australia need to bear in mind this development. If they wish to make a claim against the voyage charterer, which will ultimately be enforced in Australia, they will need to consider whether to commence proceedings in Australia. The risk is that any judgment or award obtained outside Australia is likely to be unenforceable.

The decision appears to be contrary to the principal aim of the 1958 New York Convention, being that foreign arbitral awards will not be discriminated against, and such awards are to be recognized and generally capable of enforcement in the same way as domestic awards.

Further information

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