Shipping

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SIGNIFICANT AUSTRALIAN JUDGMENT IMPACTS VOYAGE CHARTERPARTIES

Jebsens Orient Shipping Services A/S & Anor v Interfert Australia Pty Ltd & Ors

In a decision of international significance, the Supreme Court of South Australia recently determined that a voyage charterparty is not a *'sea carriage document'* for the purposes of the *Carriage of Goods By Sea Act* (Cth) 1991 (COGSA) with the effect that section 11 of COGSA does not operate to automatically render an arbitration clause in a voyage charterparty void and unenforceable[1]. The same issue is the subject of a reserved decision in other Australian court proceedings and it remains to be seen whether a consistent approach is taken on the point[2].

Background

Jebsens Orient Shipping Services (as Owners) (JOSS) and Interfert Australia (as Charterers) (Interfert) were parties to a charterparty on the GENCON 1994 form. The charterparty contained a clause that stipulated that it was to be governed by and construed in accordance with English Law, and that any disputes arising under the fixture be referred to arbitration in London.

In October 2008 JOSS obtained two London arbitration awards against Interfert for the total amount of US$1,494,692.20 in respect of freight that was due under the charterparty in respect of fertilizer shipped to Australia.

Interfert subsequently challenged the validity of the arbitration awards in the Supreme Court of South Australia on the ground that the arbitration clause in the charterparty was rendered void by section 11 of the COGSA and therefore the arbitration awards were invalid and should not be "recognized" under the *International Arbitration Act 1991* (Cth) (being the Federal legislation giving effect to, among other things, the "New York" Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

1 See *Jebsens Orient Shipping Services A/S & Anor v Interfert Australia Pty Ltd & Ors* (Unreported. Supreme Court Proceeding No. SCCIV-10-1589).
2 *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd (Federal Court Proceeding No. NSD 86 of 2011).*

Section 11 COGSA

The issue of whether an arbitration clause in a voyage charterparty for the carriage of Australian export or import cargo is rendered void by section 11 of COGSA has been the subject of discussion for some time, albeit the generally accepted position among legal commentators seems to be that should section 11 apply mandatorily to voyage charterparties this would be an unintended consequence of certain amendments to the legislation[3].

Section 11 of COGSA is a voiding provision which operates to, among other things, render ineffective any clause in a *sea carriage document*, that purports to oust the jurisdiction of the Australian Courts to adjudicate disputes arising out of a *sea carriage document* relating to Australian export or import cargo.

With regard to import cargo, s.11(2)(c)(i) of COGSA (which was the provision specifically under consideration by the Supreme Court of South Australia) states:

An agreement ... has no effect so far as it purports to ... preclude or limit the jurisdiction of a court of the Commonwealth or of a State ... in respect of ... a *sea carriage document* relating to the carriage of goods from any place outside Australia to any place in Australia. (Emphasis added.)

Therefore, the key issue for determination by the Court was whether a voyage charterparty is a *sea carriage document* for the purposes of COGSA thereby attracting the operation of s.11(2)(c)(i) to render the arbitration clause void.

Surprisingly, this is the first judicial ruling directly on the point as it arises under COGSA. The same point under the predecessor provision to section 11, section 9 of the *Sea-Carriage of Goods Act 1924* (Cth), was considered by Supreme Court of New South Wales in the The *"Blooming Orchard."*[4] In that case, Carruthers J found that section 9 (2) did apply to a voyage charter. However, relevantly, in contrast to section 11 of COGSA, section 9(2) referred to "any bill of lading or document relating to the carriage of goods" and His Honour held that a voyage charter was a "document relating to the carriage of goods". As a consequence, the arbitration clause in the charterparty was rendered illegal, null and void.

Supreme Court of South Australia

In the present case Anderson J determined that a voyage charterparty was not a sea carriage document for the purposes of COGSA ruling:

"The COGSA in its current form deals with the rights of persons holding bills of lading or similar instruments. A charterparty is a document of a different genus.

A charter party is not a "sea carriage document" simply because it is a document containing a contract for the carriage of goods by sea."

His Honour proceeded to find that the arbitration awards made in favour of JOSS were valid and enforceable in Australia.

It is to be noted that the expression *"sea carriage document"* is not defined in the sections of COGSA. However, it is defined in the amended Hague Rules, which are set out in Schedule 1A of COGSA.

JOSS successfully argued that the Court should have regard to the definitions contained in the amended Hague Rules when interpreting COGSA itself.

It was also argued for JOSS that a charterparty cannot be a *"sea carriage document"* for the purposes of COGSA because:

1. A charterparty was not included within the definition of *"sea carriage document"* found in the amended Hague Rules notwithstanding the common nature of a charterparty in the maritime industry.

2. The amended Hague Rules in fact draws a distinction between charterparties and *"sea carriage documents"*[5].

The evolution of COGSA (and its predecessors[6]) was also analysed in support of the proposition that the undeniable conclusion is that Parliament never intended for charterparties to be caught by the cargo liability regime set out in COGSA and therefore should not subject to the general operation of s.11.

Conclusion

This is a significant decision for the international chartering operations in relation to Australian import and export cargoes. However, it remains to be seen whether it is followed in the other case that is currently pending.

3 See for example Davies & Dickey, *Shipping Law* (2004 3rd Ed.) p.280-281.

4 (1990) 22 NSWLR 273; see also *Hi-Fert Pty Ltd v United Shipping Adriactic Inc* (1998) 89 FCR 166.

5 See for example Articles 5 and 10 of the amended Hague Rules.

6 *Sea-Carriage of Goods Act (Cth)1924; Carriage of Goods by Sea Amendment Act (Cth) 1997; Carriage of Goods by Sea Regulations (Cth) 1998; Carriage of Goods by Sea Regulations (No 2) (Cth) 1998.*

Even if the decision is followed, any uncertainty that still remains and may cause a party to revisit the point on appeal could, of course, be resolved by amending COGSA to remove the doubt.

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