"A comparative analysis of how courts in different countries deal with Jurisdiction and Arbitration Clauses in Bills of Lading and Other Sea Carriage Documents."

The Australian position

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1. Background and history

1.1 Since Federation, Australia has had in place legislation modelled on the US Harter Act. Its earliest iteration was the Sea-Carriage of Goods Act 1904 (Cth) which provided in s 6:

> All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.

This provision was enacted specifically to ensure that carriers could not avoid liability by using English choice of law and forum clauses (Commonwealth, Parliamentary Debates, Senate 23 November 1904, 7286).

1.2 The adoption of the Hague Rules in 1924 led Australia to revise its legislation and, in 1924, Australia enacted the *Sea-Carriage of Goods Act* 1924 (Cth). The 1924 Act extended the jurisdictional protection that had been provided in relation to the outbound carriage of goods by its predecessor to inward carriage. Section 9 provided:

> (1) All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.
> (2) Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the Courts of the

> Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect.

The purpose of this section was to ensure that cargo claimants had access to Australian courts and, in *Compagnie Des Messageries Maritimes v Wilson* (1954) 94 CLR 577, 538 Dixon CJ observed that s 9 was 'expressed in the strongest words' and rendered 'any stipulation or agreement falling within its terms illegal, null, void and of no effect'.

1.3 The development of yet further international regimes in the form of the Visby Protocol and the Hamburg Rules led to yet another iteration of Australia's carriage of goods by sea liability regime, this time in the form of the *Carriage of Goods of Sea by Act* 1991 (Cth) (COGSA 91) as amended by the *Carriage of Goods of by Sea Amendment Act* 1997 and the *Carriage of Goods by Sea Regulations* 1998 (No 1) and (No 2). The combined effect of those various legislative instruments is s 11 of COGSA 91 as it exists today.

2. Overveiw of current status of the law in Australia

2.1 Section 11 of COGSA 91 provides:

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; or
  (b) a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii), relating to such a carriage of goods;
  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:
  (a) preclude or limit the effect of subsection (1) in respect of a bill of lading or a document mentioned in that subsection; or
  (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); or
  (c) preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of:
    (i) a sea carriage document relating to the carriage of goods from any place outside Australia to any place in Australia; or

(ii) a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii) relating to such a carriage of goods.

(3) An agreement, or a provision of an agreement, that provides for the resolution of a dispute by arbitration is not made ineffective by subsection (2) (despite the fact that it may preclude or limit the jurisdiction of a court) if, under the agreement or provision, the arbitration must be conducted in Australia.

2.2 For present purposes, it is important to understand that "sea carriage document" is defined in Schedule 1A to COGSA 91, the schedule that contains the Amended Hague Rules, to mean:

(i) a bill of lading; or
(ii) a negotiable document of title that is similar to a bill of lading and that contains or evidences a contract of carriage of goods by sea; or
(iii) a bill of lading that, by law, is not negotiable; or
(iv) a non-negotiable document (including a consignment note and a document of the kind known as a sea waybill or the kind known as a ship's delivery order) that either contains or evidences a contract of carriage of goods by sea.

2.3 Recent case law that has considered this provision has centred on whether a voyage charter was a 'sea-carriage document' to which s11 applied for the purpose of determining whether a foreign arbitration clause offended s 11.

2.4 In *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* (2001) 112 SASR 297, the Supreme Court of South Australia determined that a voyage charter did not come within the ambit of s 11 because it was not a 'sea-carriage document' as defined in Art 1 of the Amended Hague Rules. It was held that a voyage charter was "a document of a different genus" from a sea carriage document because it did not deal with "the rights of persons holding bills of lading or similar instruments" [7]. It was held further that a charter party was not a sea carriage document simply because it contained a contract for the carriage of goods by sea [8].

Perhaps unsurprisingly, that reasoning has been criticised.

2.5 The same issue was considered by the Full Federal Court of Australia in *Dampskibbelskabet Norden A/S v Beach Building and Civil Group Pty Ltd* (2013) FCR 469 (Norden) where, by majority, the Court affirmed that a voyage charter was not a sea carriage document for the purpose of s 11, overturning the decision of the judge at first instance.

3. An example of the current case law shows Australia's current position

3.1 In Norden, the shipowners, DKN, brought arbitration proceedings against the charterers in London pursuant to a clause in the voyage charter. DKN claimed that the charterers were liable for demurrage consequent upon delays in loading a cargo of coal at Dalrymple Bay Coal Terminal in Queensland, Australia and in discharging the coal at its port of destination in China.

3.2 The arbitrator found in favour of DKN, who then sought to enforce the award in Australia. Charterers sought to resist enforcement on the basis that the award had been made pursuant to an arbitration agreement rendered ineffective by s11. At first instance, Foster J held that a voyage charter was a sea carriage document for the purposes of s 11. This decision was consistent with an earlier decision of the Supreme Court of New South Wales, *The Blooming Orchard (No 2)* (1990) 2 NSWLR 273, in which Carruthers J had held that a voyage charter was a document relating to the carriage of goods for the purpose of s 9 of the *Sea-Carriage of Goods Act* 1924. Consequently, the London arbitration clause contained therein was invalid.

3.3 In the Full Federal Court, Rares J, with whom Mansfield J concurred [4], held that, "Ordinarily, a voyage charter, like most charterparties, is a contract for the hire of a ship" where owners agree "to perform one or more designated voyages in return for the payment of freight and, when appropriate, demurrage" [60]. He observed further that charterparties "as an ordinary incident of the shipping industry will contain arbitration clauses that were freely negotiated by sophisticated, professional parties" who "could bargain at arms length for the terms of their charterparties" [66]. Rares J observed that, "the realities of commercial life and the evident purpose of … s 11 of COGSA, respect the free negotiation of charters by commercial parties in the international shipping trade" [70]. By contrast "the shipper will have no substantive say, and the consignee, or party to whom a bill of lading or negotiable sea-carriage document is transferred no say at all, in the terms or conditions in such a document" [70]. Section 11 purports to protect those parties from "being forced to litigate or arbitrate, away from Australia". Its purpose, he said, is to:

> protect, as part of a regime of marine cargo liability within the object of s 3, the interests of Australian shippers and consignees from being forced contractually to litigate or arbitrate outside Australia. That purpose does not extend to

protection of charterers or shipowners from the consequences of enforcement of their freely negotiated charterparties subjecting them to the well-recognised and usual mechanism of international arbitration in their chosen venue [71].

3.4 The decision of the Full Federal Court has been welcomed, primarily on the basis that it is encouraging and supportive of international arbitration in shipping law disputes.

4. Future direction of the Australian Courts

4.1 Unless and until there is the opportunity for the High Court to consider the issue that was raised in Norden, it is expected that Australian courts, both State and Federal, will follow that decision; an intermediate court of appeal would have to determine that the decision was "plainly wrong" in order to depart from it (*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89). In any event, with respect, the decision is plainly right and consistent with international jurisprudence: see, for example, the decision of the Federal Court of Appeal of Canada (Gauthier, Pelletier and Mainville JJA) in *Canada Moon Shipping Co Ltd v Companhia Siderurgica Paulista-Cosipa* (2012) 223 ACWS (3d) 12; 2012 FCA 284, cited with approval in Noren.

5. Is there new legislation that will impact on the current position.

5.1 There is remaining disquiet about the scope and effect of s 11 of COGSA 91. The Australian Maritime and Transport Arbitration Commission (AMTAC) is a Commission of the Australian Centre for International Commercial Arbitration (ACICA) and has as its major objective the promotion of the conduct of maritime arbitration in Australia. It has prepared a submission proposing reform of s 11.

5.2 AMTAC considers that it would be in the national interest for s11 of the *Carriage of Goods by Sea Act* 1991 (COGSA) to be amended in order to clarify and provide certainty in relation to the matters described below.

AMTAC considers that:

1. It is desirable that those engaged in the shipping, import and export industry have confidence and certainty as to the scope and application of s11(2) of COGSA. This is especially:

a) in relation to the types of documents to which this section is to apply beyond those expressly listed or mentioned in the section;
b) where the effect of the section is to strike down agreements which the parties to those documents have otherwise concluded and were otherwise free to conclude under Australian law (but for that section); and
c) where the section applies to all shipments in and out of Australia under documents of the type caught by it.

2. In s11 (2)(c) there is no reference to documents relating to the carriage of goods by sea between States or between States and the Northern Territory, thereby allowing for a foreign arbitration clause to be included in those carriage documents. The omission of the application of s11(1) and (2) to contracts for the carriage of goods intra-State can only be due to a drafting oversight. This omission, and the different treatment of intra-State and overseas shipments in this regard, is not supported by any policy considerations. There is no good policy reason why the protection afforded by s11(1) and (2) to Australian importers and exporters should not also be available to those involved in the intra-State carriage of goods by sea. The existing lacuna potentially prejudices Australian shippers and consignees of intra-State carriage, especially where such goods are to be carried on foreign flagged and owned vessels and where the carrier is more likely to insist on terms within its contracts providing for the application of foreign law and for any claims against it to be determined in a foreign jurisdiction.

3. Section 11 (3) allows for arbitration to be conducted in Australia but remains silent as to whether the seat of arbitration is required to be in Australia, noting that in arbitration practice it is possible for the seat of the arbitration to be in a different jurisdiction from that in which the arbitration hearing is being conducted. Further, in providing an exception to s11(2), s11(3) is able to promote and foster arbitration in Australia as a means of resolving disputes falling within the scope of COGSA. An amendment to s11(3) to clarify the arbitrations to which it applies, in particular by emphasising that it is those where the seat of the arbitration is in Australia, and thereby encouraging arbitrations that have their seat in Australia, is both in the public interest and consistent with the Commonwealth and State legislatures' expressed policies of promoting and favouring arbitration as a

means of resolving commercial disputes that would otherwise be compelled to utilise scarce judicial resources.