



Australian Government

Department of Infrastructure, Transport,
Regional Development, Communications and the Arts

TRANSPORT / SURFACE TRANSPORT POLICY / SUSTAINABLE TRANSPORT & MARITIME SAFETY

Carriage of Goods by Sea Act 1991

Potential amendments to Section 11

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Introduction

The 2021 International Arbitration Survey conducted by Queen Mary University of London found that international arbitration is increasingly becoming the preferred method of resolving cross-border disputes for 90 per cent of respondents, either on a stand-alone basis (31%) or in conjunction with alternative dispute resolution (59%).¹

The findings of the Australian Centre for International Commercial Arbitration's (ACICA) 2020 Australian Arbitration Report (the Report) also reflected this growth. The Report showed the use of arbitration is booming in Australia because of increased domestic and cross-border investment and trade in sectors and industries such as construction, engineering, mining, infrastructure and renewables.²

The Report reviewed 223 arbitration cases in Australia between 2016 and 2019 worth an estimated \$35 billion. Approximately 4 per cent of these arbitrations were transport-related, which included maritime cases. The total value of transport arbitration cases was \$4.6 billion with an average value \$80 million per case.³

For the maritime sector, London continues to be the dominant market for international maritime arbitration. The 2021 International Arbitration Survey found London was one of the five most preferred seats of arbitration, along with Singapore, Hong Kong, Paris and Geneva.⁴ London handled 1,737 maritime arbitrations in 2019—up 14 per cent on the previous year—which equates to around 83 per cent of all international maritime arbitrations in 2019. The London Maritime Arbitrators Association accounted for 96 per cent of all international maritime arbitrations globally in 2019.⁵ The survey found this dominance was due to high levels of credibility and trust in London's arbitration centres and personnel.

In Australia, section 11 (Construction and jurisdiction) of the *Carriage of Goods by Sea Act 1991* (COGSA) contains mandatory provisions relating to the governing law, jurisdiction and arbitration clauses that must be included in contracts of carriage of goods by sea.

A small number of stakeholders have raised concerns over the current operation of section 11 of COGSA, that it lacks clarity and certainty, which may be impeding Australian industries from settling disputes, including through arbitration. A copy of section 11 of COGSA is at [Appendix A](#).

These stakeholders consider that amendments to COGSA should be made to address:

- the lack of clarity and certainty in relation to the types of documents to which the section 11 applies.
- the level of protection afforded by the section 11 to domestic cargo interests is less than the protection afforded to Australian importers and exporters.
- the possibility of the seat of arbitration being located in a jurisdiction other than the jurisdiction where the arbitration is to take place.

The Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department) is seeking stakeholder views on whether amending these aspects of section 11 of COGSA would be of benefit to Australian industries and increase the use of and trust in Australian arbitration processes.

¹ The School of International Arbitration (SIA), Queen Mary University of London and White & Case LLP, 2021 [International Arbitration Survey: Adapting arbitration to a changing world](#), SIA, 2021, accessed 21 April 2022.

² Australian Centre for International Commercial Arbitration (ACICA), [2020 Australian Arbitration Report](#), ACICA, 2020, accessed 18 March 2022.

³ Ibid.

⁴ The School of International Arbitration (SIA), Queen Mary University of London and White & Case LLP, 2021 [International Arbitration Survey: Adapting arbitration to a changing world](#), SIA, 2021, accessed 21 April 2022.

⁵ Insurance Marine News, [London has more than 80% share of global maritime arbitration market](#), 2020, accessed 3 March 2022.

This paper will examine three aspects of section 11 of COGSA:

- providing a clearer definition of ‘sea carriage document’
- providing protection against the operation of foreign arbitration clauses in the context of interstate shipping
- mandating the seat of arbitration be in Australia.

Questions are included throughout the paper to guide responses from industry but all relevant feedback is welcome.

International framework

The *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* (Brussels Convention) contains the Hague Rules, which govern bills of lading and establishes the minimum standard with respect to both international and interstate carriage of goods by sea. These include provisions that provide for certain responsibilities and liabilities attached to the carrier regarding the carriage of goods, as well as rights and immunities for which they are entitled.

The Hague Rules represented the first attempt by the international community to find a workable and uniform way to address the problem of shipowners regularly excluding themselves from all liability for loss or damage to cargo by establishing a minimum mandatory liability of carriers.

Under the Hague Rules the shipper bears the cost of lost/damaged goods if they cannot prove that the vessel was unseaworthy, improperly manned or unable to safely transport and preserve the cargo. These provisions have frequently been the subject of discussion between shipowners and cargo interests on whether they provide an appropriate balance in liability.

The Hague Rules have since been amended by the *Protocol amending the Brussels Convention* (Visby Protocol) and *Protocol amending the Brussels Convention*, as amended by the Visby Protocol (SDR protocol). These protocols made several substantive changes to the original text, including:

- increasing the applicable liability limits
- replacing the gold standard with a modern International Monetary Fund currency unit (Special Drawing Rights)
- clarifying the meaning of ‘package or unit’, enabling liability limits to take into account the increasing containerisation within the shipping industry.

The amended Hague Rules are not unanimously agreed with, or between, Australia’s international trading partners. A number of alternative international treaties on this issue have been under consideration by the international community for many years but no clear or consensus driven option has been identified. Given the inconsistent state of agreement to international treaties on this issue, amendments to COGSA beyond section 11 could have unanticipated effects on the Australian regulatory regime or negotiating position and so will not be considered at this time.

Carriage of Goods by Sea Act

The objective of COGSA is to introduce a regime of marine cargo liability that:

- is up to date, equitable and efficient.
- is compatible with arrangements existing in countries that are major trading partners of Australia.
- takes into account developments within the United Nations in relation to marine cargo liability arrangements.⁶

⁶ Subsection 3(1) *Carriage of Goods by Sea Act 1991*.

COGSA gives effect in Australia to the Brussels Convention, as amended by the Visby Protocol and the SDR protocol. Together these agreements comprise the amended Hague Rules, which entered into force in 1993 upon Australia's accession to the SDR Protocol. The amended Hague Rules are contained in Schedule 1 of COGSA, as modified by Schedule 1A (the Schedule of modifications).

Where section 11 of COGSA applies, a claimant may bring an action in an Australian court or arbitration center, where they would otherwise be prevented from doing so, due to a choice of forum clause in the carriage of goods by sea contract. This operates to allocate responsibility as simply as possible and to reduce the amount and costs of legal disputes.

Concern 1: Definition of a 'sea carriage document'

Subsection 11(1)(a) of COGSA provides that "all parties to 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".⁷ COGSA does not define the phrase 'sea carriage document' in the Act.

Two court cases have recently considered whether a voyage charter was a 'sea-carriage document' to which section 11 of COGSA applies for determining whether a foreign arbitration clause is ineffective.

Jebsens International (Australia) v Interfert Australia⁸

Jebsens and Interfert Australia were parties to a charterparty that contained a clause stipulating the agreement be governed by and construed in accordance with English law, and that any disputes be referred to arbitration in London.

In October 2008, Jebsens obtained two London arbitration awards against Interfert for approximately US\$1.5 million in respect of fertilizer that was due under the charterparty to be shipped to Australia. Interfert 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 recognised by Australian courts.

The Supreme Court of South Australia determined that a voyage charter did not come within the ambit of section 11 of COGSA because it was not a 'sea-carriage document' as defined in the Amended Hague Rules (Schedule 1A COGSA).

Schedule 1A—Schedule of modifications

Article 1(1)(g): "Sea carriage document" means:

- (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.

⁷ Subsection 11(1) *Carriage of Goods by Sea Act 1991*.

⁸ *Jebsens International (Australia) Pty Ltd and Anor v Interfert Australia Pty Ltd and Ors* [2012] SASC 50.

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. It was held further that a charterparty was not a sea carriage document simply because it contained a contract for the carriage of goods by sea.

Dampskibsselskabet Norden v Beach Building & Civil Group⁹

The Full Federal Court of Australia in *Dampskibsselskabet Norden (DKN) v Beach Building and Civil Group (BBCG)* considered the same issue and by a majority affirmed that a voyage charter was not a sea carriage document for the purpose of section 11 of COGSA, overturning the decision of the judge at first instance.

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 and in discharging the coal at its port of destination in China. The arbitrator found in favour of DKN, who then sought to enforce the award in Australia. BBCG sought to resist enforcement on the basis that the award had been made pursuant to an arbitration agreement rendered ineffective by section 11 of COGSA.

At first instance, a single judge of the Federal Court of Australia held that the voyage charterparty is a 'sea carriage document' under the definition in the amended Hague Rules in Schedule 1A of COGSA as it was a non-negotiable document that either contains or evidences a contract of carriage of goods by sea. Consequently, the London arbitration clause contained therein was invalid.

On appeal, the Full Federal Court held that section 11 of COGSA does not apply to charter parties, i.e. agreements for hire of a ship, and enforced the award as:

- there is a clear distinction drawn between the functions of a contract of carriage and a charterparty.
- it was unlikely that the Parliament intended that agreements for international arbitration in voyage, or other, charterparties would be deprived of force or effect unless the arbitration occurred in Australia. The purpose of section 11 of COGSA is to protect the interests of Australian shippers and consignees from being forced contractually to litigate, or arbitrate outside Australia. It does not extend to protection of charterers or shipowners from the consequences of freely negotiated charterparties.

Some stakeholders have raised concerns about the lack of an explicit definition for the term 'sea carriage document' in the text of the Act itself. They argue the court decisions have only increased confusion over what a 'sea carriage document' may encompass, with judges interpreting the definition of the term in the amended Hague Rules differently. They maintain it is desirable for industry to have confidence and certainty as to what documents are considered by section 11 of COGSA.

Stakeholders have raised two possible solutions to address these concerns:

1. the term 'sea carriage documents' is explicitly defined in Section 4 of COGSA either uniquely or by using the definition in the Sea-Carriage Documents Act 1997 (NSW)¹⁰, or
2. the Act is amended to clarify that the term 'sea carriage documents' used in the main body of the Act has the definition set out in Art1(1)(g) of the Amended Hague Rules in Schedule 1A.

⁹ *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696.

¹⁰ 'Sea-carriage document' means a bill of lading, a sea waybill or a ship's delivery order.

Questions

- 1) What concerns do you have with regard to the lack of a definition for the term 'sea carriage document' in COGSA?
- 2) What amendments, if any, do you believe need to be made to provide clarity as to the definition of a 'sea carriage document'?
- 3) What activities should the term 'sea carriage documents' be capturing? Noting that ship chartering and cargo carriage via a bill of lading are quite different activities being used by different clientele.
- 4) If charterparties were to be considered 'sea carriage documents', what impact would this have on your business operations and contractual negotiations? What costs and benefits would be generated?

Concern 2: Interstate voyages

COGSA and the amended Hague Rules regulate not only certain contracts for the carriage of goods by sea into and out of Australia, but also from a port in Australia to a port in another state or territory of Australia (interstate shipments) under Subsection 10(1)(b)(ii).

Section 10—Application of the amended Hague Rules

- (2) The amended Hague Rules only apply to a contract of carriage of goods by sea that:
- (a) is made on or after the commencement of Schedule 1A and before the commencement of Part 3;
- and
- (b) is a contract:
 - (ii) subject to subsections (1A) and (2)—for the carriage of goods by sea from a port in Australia to another port in Australia;

Subsections 11(1) and (2) of COGSA operate to strike down foreign arbitration and exclusive jurisdiction clauses in sea carriage documents covering the carriage of goods into and out of Australia. These provisions do not extend to the interstate carriage of goods by sea around Australia, leaving parties free to agree to foreign legal dispute resolution provisions.

However, an Australian Court may strike down a foreign choice of law clause in a contract for the interstate carriage of goods by sea by the application of Article 3, Rule 8 of the amended Hague Rules where:

- the contract of carriage is subject to the amended Hague Rules by operation of subsection 10(1)(b)(ii) of COGSA.
- the application of that foreign choice of law clause either (a) relieves the carrier or ship from liability for loss of or damage to the goods carried arising from negligence, fault or failure in their duties and obligations under the amended Hague Rules or (b) lessens the carrier's liability from that otherwise provided for by the amended Hague Rules.

Stakeholders argue not affording the same protections in section 11 of COGSA given to Australian importers and exporters to those involved in the interstate carriage of goods by sea is damaging to Australian cargo interests and is unsupported by policy reasoning. Specifically:

- there is a public expectation that where a contract is made in Australia for the interstate carriage of goods by sea, it will be governed by Australian law.

- Australian parties involved in the shipment of goods by sea within Australian borders get lost in a legislative gap and so are not afforded the same protection as those whose transactions involve shipments of cargo:
 - in and out of Australia.
 - wholly within a state who has put in place section 11-style protections for intrastate contracts (e.g. New South Wales¹¹).
- Australia's reliance on foreign-flagged vessels for domestic shipping creates an unequal relationship, as the carriers using these vessels are more likely to insist upon contractual terms that provide for the application of a foreign system of law and the Australian shippers do not have sufficient influence to change this and are not protected by section 11 of COGSA.

Stakeholders have suggested a potential solution is to amend section 11 of COGSA to ensure that international and interstate carriage of goods by sea are treated equally, including the protection against foreign arbitration clauses.

Questions

- 5) Why do you support/not support expanding the scope of section 11 of COGSA to apply to the carriage of goods on interstate voyages?
- 6) What impact would the expanded scope of section 11 of COGSA to include interstate voyages have on your business operations and contractual negotiations?
 - a) What costs and benefits would be generated?
 - b) How much, if any, would an expanded scope of section 11 of COGSA to include interstate voyages affect your decision to undertake domestic shipping operations in Australia?
- 7) Without amending section 11 of COGSA, how else could Australia protect Australian shippers moving goods by sea interstate?

Concern 3: Seat of Arbitration

Subsection 11(2) of COGSA provides that certain contractual clauses seeking to preclude or limit the jurisdiction of Australian courts have no effect. This restriction would encompass foreign arbitration clauses, which provide a form of dispute resolution for relevant parties to enter into.

An exception to this applies through the operation of subsection 11(3) of COGSA, which allows arbitration actions to be physically conducted in Australia but is silent as to whether the seat of arbitration to be located here. The seat of arbitration provides the procedural law that governs the arbitration and affects matters such as the right of appeal and any entitlement to challenge an award.

This results in a potential situation where:

- any claims arising under a contract for the carriage of goods by sea can be determined by foreign arbitration.
- the seat of arbitration could be in a different jurisdiction from that in which the arbitration hearing is being conducted.
- Australian courts would not have supervisory jurisdiction over that arbitration.

Some stakeholders argue the absence of a requirement that the seat of arbitration be in Australia is contrary to the purpose of subsection 11(3) of COGSA, which is designed as an exception to subsection 11(2) that maintains an Australian court's jurisdiction. They also argue it is against the public interest and inconsistent

¹¹ Section 6 *Sea-Carriage of Goods (State) Act 1921* (NSW).

with Australian, state and territory government policies that promote and favour arbitration as a means of resolving commercial disputes that would otherwise go to court.

Stakeholders maintain that Australia offers numerous advantages to parties seeking to resolve disputes.

- Australia has an arbitration-friendly legal framework supported by the Australian courts and their sophisticated consideration of international arbitration issues. Over the past decade, the Australian courts have increasingly provided users with certainty and confidence around the judiciary's support for a robust international arbitration framework.
- The ACICA is at the forefront of arbitral best practice and innovation. The ACICA 2021 Rules reflect developments in international best practice, including with reference to improved online practices developed during the COVID-19 pandemic, and aim to further enhance the arbitration experience for all users.¹²
- Australia is a Party to the New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards 1958, which came into force on 24 June 1975 and has adopted the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 including the 2006 amendments, as its procedural law.¹³

Stakeholders have suggested a potential solution to these concerns is amending Section 11(3) of COGSA to ensure the seat and location of an arbitration must be in Australia.

Questions

- 8) Why does your organisation support/not support requiring the seat and location of arbitration to be in Australia?
- 9) Does your organisation support the current requirement that the location of arbitration be in Australia?
- 10) What about the Australian arbitration system is attractive to your organisation?
- 11) How would fixing the seat and location of arbitration in Australia support and encourage the settlement of contractual disagreements generally?
- 12) What conflicts are you aware of that may be created by requiring the seat and location of an arbitration to be in Australia? For example, conflicts with current arbitration legislation, practices or recommendations.
- 13) What benefits are there in retaining the flexibility for parties to a commercial agreement to choose exclusive jurisdiction agreements?

Next steps

The Department invites interested stakeholders to respond to any or all of the questions in this Discussion Paper through cogsa@infrastructure.gov.au by **5.00pm AEST Friday 14 October 2022**. Any other feedback relevant to the Australian Government's consideration of Section 11 is also welcomed. The Department intends to publish the responses it receives—please let us know if you would prefer to remain anonymous.

Your responses will be considered by the Department before any decision is made on whether amendments are needed to section 11 of COGSA and we may reach out to discuss submissions further with stakeholders on a case by case basis. If the Department decides any amendments are needed to Section 11 of COGSA, additional consultation will occur to ensure all costs and benefits are understood before any amendments are finalised.

¹² <https://acica.org.au/acica-rules-2021/>

¹³ <https://acica.org.au/why-arbitrate-in-australia/>

Appendix A—Carriage of Goods by Sea Act 1991

Section 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; 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.