SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand

Review of Australian COGSA 1991

This article relates to a presentation given by Peter McQueen, independent arbitrator and mediator, member of ArbDB Chambers London and Singapore, at the MLAANZ NSW Branch Mini Conference held in Sydney on 28 February 2023.

Peter McQueen

In September 2022 the Federal Department of Infrastructure, Transport, Regional Development, Communications and the Arts issued a paper seeking views of stakeholders on whether amending section 11 of the Australian Carriage of Goods by Sea Act 1991 (COGSA) would be of benefit to Australian industries and would increase the use of, and trust in, Australian arbitration.

COGSA regulates certain contracts for the carriage of goods by sea into and out of Australia, as well as between Australian states.

Section 11, which is headed “Construction and Jurisdiction”, contains mandatory provisions relating to both the governing law of such contracts, as well as the effectiveness of jurisdiction and arbitration clauses within such contracts.

Section 11(1) provides that all parties to a “sea carriage document” relating to the carriage of goods from any place in Australia to an place outside of Australia are taken to have intended to contact according to the laws in force at the place of shipment within Australia.

Section 11(2) provides that any clause which purports either to limit the effect of section 11(1) or preclude or limit the jurisdiction of Australian courts to entertain a claim in respect of any contract for the carriage of goods by sea into or out of Australia has no effect.

Section 11(2)(b) and (c) is expressly subject to limited exception provided for by section 11(3), which provides that an agreement for the resolution of a dispute by arbitration is not rendered ineffective by section 11(2) if, under that agreement, the arbitration must be conducted in Australia.

The review refers to the following three concerns which have been raised by what is described in the paper as “a small number of stakeholders” over the current operation of section 11:

1. the lack of clarity and certainty relating to the types of documents to which section 11 applies (Concern 1)
2. the level of protection afforded by section 11 to domestic cargo interests is less than the protection afforded to Australian importers and exporters (Concern 2)
3. the possibility of the seat of arbitration being located in a jurisdiction other than the jurisdiction where the arbitration is to take place (Concern 3)

Concern 1: Definition of a "Sea Carriage Document"

Two court cases have considered whether a voyage charterparty is a "sea carriage document" to which section 11(1) applies for determining whether a foreign arbitration clause is ineffective:

(a) the Supreme Court of South Australia determined that a voyage charterparty did not come within the ambit of section 11 because it was not a sea carriage document as defined in the "amended Hague Rules" set out in Schedule 1A of COGSA – *Jebsens International (Australia) v Interfert Australia* [2012] SASC 50

(b) the Full Federal Court of Australia, in overturning the decision of that Federal Court at first instance, also held that section 11 did not apply to charterparties, explaining that there is a clear distinction to be drawn between the functions of a contract of carriage and a charterparty – *Norden v Beach Building & Civil Group* [2012] FCA 696

Concerns have been raised about the lack of an explicit definition of the term "sea carriage document" in the text of COGSA itself. Two possible solutions have been raised:

(i) define "sea carriage document" in section 4 of COGSA uniquely of by using the definition in the Sea-Carriage Documents Act 1997 – ie, a bill of lading, sea waybill or ship's delivery order

(ii) amend COGSA to clarify that the term used in its body has the definition set out in Article 1(1)(g) of the amended Hague Rules in Schedule 1A

Concern 2: Interstate Voyages

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

It is argued that by not affording the same protections given in section 11 to Australia 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.

This legislative "apparent gap", as described by Full Federal Court of Australia in its recent decision (*Carmichael Rail Network v BBC Chartering Carriers* [2022] FCAFC 171), could be resolved by amendment to section 11 to ensure equal treatment of both international and interstate carriage of goods by sea, including the protection against foreign arbitration clauses.

Concern 3: Seat of Arbitration

Section 11(3) allows for the venue of arbitration proceedings, that is the actual physical hearing, to be in Australia but is silent as to whether the seat of arbitration is to be also located in Australia. The seat of the arbitration is important as it provides the procedural law that governs the arbitration proceedings and the national court providing the supervisory jurisdiction.

It has been suggested that the solution is to amend section 11(3) to ensure that both the seat and the venue of the arbitration proceedings must be in Australia.

Next Steps

Submissions have been received from the Australian Maritime and Transport Arbitration Commission (AMTAC), the Maritime Union of Australia and Professor Nick Gaskell of the University of Queensland.

MLAANZ fully supports the submission provided by AMTAC.

The Department is currently considering these. Should it be decided that amendments to COGSA are needed, additional consultation will occur to ensure that costs and benefits are understood before any amendments are finalised.

The contact party at the Department is Jemma Markowski, Maritime Single Window and Trade Section director, +61 499 759 803, jemma.markowski@infrastructure.gov.au.

Review online – https://www.infrastructure.gov.au/have-your-say/review-section-11-carriage-goods-sea-act-1991.

Peter McQueen
Arbitrator/mediator
Peter McQueen Pty Ltd
PO Box 2193, Bondi Junction, Sydney, NSW, 1355
+61 (0) 408 788 828
peter@petermcqueen.com

March 2023