FEDERAL COURT OF AUSTRALIA

Dampskibsselskabet Norden A/S v Gladstone Civil Pty Ltd [2013] FCAFC 107

Citation:	Dampskibsselskabet Norden A/S v Gladstone Civil Pty Ltd [2013] FCAFC 107
Appeal from:	Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd [2012] FCA 696
Parties:	**DAMPSKIBSSELSKABET NORDEN A/S v GLADSTONE CIVIL PTY LTD (FORMERLY BEACH BUILDING & CIVIL GROUP PTY LTD) (ACN 081 893 414) (ADMINISTRATOR APPOINTED) (SUBJECT TO DEED OF COMPANY ARRANGEMENT)**
File number:	NSD 1019 of 2012
Judges:	**MANSFIELD, RARES AND BUCHANAN JJ**
Date of judgment:	18 September 2013
Corrigendum:	23 October 2013
Catchwords:	**ADMIRALTY** – statutory interpretation – whether voyage charterparty is a "sea carriage document" for the purposes of s 11 of the *Carriage of Goods by Sea Act 1991* (Cth) – whether arbitration clause in voyage charterparty for voyage from Australia of no effect by force of s 11(2)(b) of the *Carriage of Goods Sea Act 1991* (Cth) – where parties agreed under Americanized Welsh Coal Charter (AMWELSH93) to arbitrate any disputes in London – where owners referred disputes regarding demurrage to arbitration in London – where two arbitral awards made in London – whether foreign arbitral award enforceable under the *International Arbitration Act 1973* (Cth) or of no effect by reasons of s 11(2)(b) of the *Carriage of Goods by Sea Act 1991* (Cth) Held: Appeal allowed; voyage charterparty not a sea carriage document; London arbitral awards enforceable in Australia
Legislation:	*Bills of Lading Act 1855* (UK) *Carriage of Goods by Sea Act 1991* (Cth) ss 2, 3(1), 7, 10(1)(b)(ii), 11(2)(b), Sch 1A, Sch2 *Carriage of Goods by Sea Amendment Bill 1997* (Cth) *Carriage of Goods by Sea (Amendment Act) 1997* (Cth) *Carriage of Goods by Sea Regulations 1998* (Cth)

Carriage of Goods by Sea Regulations 1998 (No 2) (Cth)
Corporations Act 2001 (Cth)s 443E
Goods Act 1958 (Vic) s 89
Harter Act 1893 (US)
International Arbitration Act 1974 (Cth)s 7
Sea-Carriage Documents Act 1996 (QLD) s 3
Sea-Carriage Documents Act 1996 (NSW) s 5
Sea-Carriage Documents Act 1996 (Tas) s 4
Sea-Carriage Documents Act 1996 (WA) s 5
Sea-Carriage Documents Act 1996 (NT) s 5
Sea-Carriage Documents Act 1996 (SA) s 3
Sea-Carriage Documents Act 1996 Vic) s 5
Sea-Carriage Documents Act 1924 (Cth) s 9(1)

Cases cited:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27 applied
BHP Trading Asia Ltd v Oceaname Shipping Ltd (1996) 67 FCR 211 referred to
Campagnie des Messageries Maritimes v Wilson (1954) 94 CLR 577 referred to
Canada Moon Shipping Co Ltd v Companhia Siderurgica Paulista-Cosipa (The Federal Ems) (2012) 223 ACWS (3d) 12; 2012 FCA 284; 2013 AMC 319 applied
Comandate Marine Corp v Pan Australia Shipping Pty Ltd (2006)157 FCR 45 applied
El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA (2004) 140 FCR 296 distinguished
FCT v Consolidated Media Holdings Ltd (2012) 293 ALR 257 applied
Hi-Fert Pty Ltd v United Shipping Adriatic Inc (1998) 89 FCR 166 referred to
Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5) (1998) 90 FCR 1 referred to
McNamara v Consumer Trader and Tenancy Tribunal (2005) 221 CLR 646 applied
Sonmez Denizcilik ve Ticaret Anonim Sirketi v The MV "Blooming Orchard" (The "Blooming Orchard" [No 2]) (1990) 22 NSWLR 273 not followed
TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of Federal Court of Australia (2013) 295 ALR 596 applied
The "Tychy" [1999] 2 Lloyd's Rep 11 referred to
Webb Distributors (Aust) Pty Ltd v Victoria (1993) 179 CLR 15 referred to

Date of hearing: 19 February 2013

Place: Sydney

Division: GENERAL DIVISION

Category:	Catchwords
Number of paragraphs:	134
Counsel for the Appellant:	GJ Nell SC and JA Soars
Solicitor for the Appellant:	James Neill Solicitors
Counsel for the Respondent:	LA Jurth
Solicitor for the Respondent:	Worcester & Co Solicitors

FEDERAL COURT OF AUSTRALIA

Dampskibsselskabet Norden A/S v Gladstone Civil Pty Ltd [2013] FCAFC 107

CORRIGENDUM

1. The name of the appellant has been amended in the MNC and in the Citation from Nordon to Norden.

2. In paragraph 6, line 1, amend “Ocean Beach” to “Ocean Baron”.

I certify that the preceding (2) two numbered paragraphs are a true copy of the Corrigendum to the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:

Dated: 23 October 2013

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1019 of 2012**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**DAMPSKIBSSELSKABET NORDEN A/S** **Appellant**
AND:	**GLADSTONE CIVIL PTY LTD (FORMERLY BEACH BUILDING & CIVIL GROUP PTY LTD) (ACN 081 893 414) (ADMINISTRATOR APPOINTED) (SUBJECT TO DEED OF COMPANY ARRANGEMENT)** **Respondent**

JUDGES:	**MANSFIELD, RARES AND BUCHANAN JJ**
DATE OF ORDER:	**18 SEPTEMBER 2013**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. On or before 24 September 2013, the parties file agreed short minutes of orders to give effect to the reasons of Mansfield and Rares JJ and in default of agreement file and serve their respective proposed short minutes of orders together with written submissions of no more than two pages in relation to any disagreement.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1019 of 2012**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**DAMPSKIBSSELSKABET NORDEN A/S** **Appellant**
AND:	**GLADSTONE CIVIL PTY LTD (FORMERLY BEACH BUILDING & CIVIL GROUP PTY LTD) (ACN 081 893 414) (ADMINISTRATOR APPOINTED) (SUBJECT TO DEED OF COMPANY ARRANGEMENT)** **Respondent**
JUDGES:	**MANSFIELD, RARES AND BUCHANAN JJ**
DATE:	**18 SEPTEMBER 2013**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

MANSFIELD J

1 I have had the benefit of seeing the judgments of Rares J and of Buchanan J.

2 I agree that leave should be given under s 444E(3) of the *Corporations Act 2001* (Cth) nunc pro tunc to begin the appeal and proceed with it until judgment. That leave is necessary because the respondent was placed into voluntary administration on 6 December 2011 and subsequently executed a Deed of Company Arrangement on 16 January 2012. That leave was not opposed.

3 The principal issue is the effectiveness of an arbitration clause in a voyage charterparty for the carriage of coal from Australia to China. The primary judge decided that it is of no effect by reason of s 11(2)(b) of the *Carriage of Goods by Sea Act 1991* (Cth) (COGSA) as it is a "sea carriage document relating to the carriage of goods" within the meaning of s 11(1)(a) of COGSA. Section 11(2)(b) applied because the arbitration clause precluded or limited the jurisdiction of Australian courts.

4 For the reasons which appear below, I agree with Rares J that the charterparty was not a sea carriage document relating to the carriage of goods, and so was not made ineffective by s

11(2)(b) of COGSA. I generally agree with his Honour's reasons for that conclusion. I would therefore allow the appeal and set aside the orders made by the primary judge. In my view, appropriate further orders should be made on the application of the appellant enforcing the final award referred to in the application. As Rares J has suggested, the parties should present minutes of order to give effect to the reasons of Rares J and these reasons. The respondent should pay the costs of the application at first instance and of this appeal.

THE FACTS

5 There is little or no dispute about the facts. I shall not repeat them in detail as they are set out in the judgments of Rares J and Buchanan J, as well as in the judgment at first instance. It is necessary to refer briefly to them to explain my reasons for my conclusion. In doing so, I note – but do not need to refer to – the now resolved dispute about whether the respondent was the relevant charterer of the vessel. That matter was resolved adversely to the respondent by the primary judge and is not the subject of this appeal.

6 The vessel "Ocean Beach" was loaded in Australia in December 2009 and proceeded to China where she discharged the cargo. There was a dispute between the appellant as owner and the respondent as charterer in relation to demurrage payable under the charterparty in respect of delays to the vessel both at the loading port and at the discharge port. That dispute was referred by the appellant to arbitration in London pursuant to cl 32 of the charterparty. It relevantly provided:

> 32. Arbitration
>
> (a) [deleted]
>
> (b) *LONDON
> All disputes arising out of this contract shall be arbitrated at London and, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business sin London who shall be members of the Baltic Mercantile & Shipping Exchange and engaged in Shipping, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his action be taken before the award is made. Any dispute arising hereunder shall be governed by English Law.
>
> For disputes where the total amount claimed by either party does not exceed US $
>
> ** the arbitration shall be conducted in accordance with the Small Claims Procedure of the London Maritime Arbitrators Association.

* *Delete (a) or (b) as appropriate*
** *Where no figure is supplied in the blank space this provision only shall be void but the other provisions of this clause shall have full force and remain in effect.*

7 By a preliminary award of 22 November 2010, the Arbitrator decided that there was jurisdiction to hear in London the dispute under the arbitration clause, thereby deciding that it was not invalid and unenforceable by reason of the operation of s 11 of COGSA because the Charterparty was not a "sea carriage document" within the meaning of that provision. The Arbitrator then made a final Award on 14 January 2011 in favour of the appellant owner in the sum of $US824,663 plus interest and costs (the Award).

8 The proceeding at first instance in this Court was an application for orders to recognise and enforce the Award pursuant to s 8 of the *International Arbitration Act 1974* (Cth) (IAA).

THE DECISION AT FIRST INSTANCE

9 The respondent successfully contended at first instance that the Award should not be enforced because the arbitration clause was of no effect.

10 Section 11 of COGSA provides that:

> 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.

11 The primary judge decided that cl 32 of the charterparty is a "sea carriage document" referred to in s 11(1)(a), so that it fell within the ambit of s 11(2)(b) and was therefore ineffective.

12 The process of reasoning was that:

(1) there is no definition of "sea carriage document" in COGSA;

(2) the amended Hague Rules set out in Sch 1A to COGSA contain a definition of "sea carriage document" and relevantly in Art 1(1)(g)(iv) that it is a non-negotiable instrument (including a consignment note and a document of the kind known as a sea way bill or the kind known as a ship's delivery order) that either contains or evidences a contract of carriage of goods by sea;

(3) the amended Hague Rules apply, strictly speaking, only to those Rules and not to COGSA itself, but assist in deciding the meaning of the term "sea carriage document" in s 11(1)(a) of COGSA;

(4) the parenthesised words in the definition in Art 1(1)(g)(iv) should not cause the wide words of the definition to be read down;

(5) under s 9 of the *Sea-Carriage of Goods Act 1924* (Cth) the expression "… document relating to the carriage of goods from any place in Australia …" had been held to encompass a voyage charterparty: *Sonmez Denizcilik Ve Ticaret Anonim Sirketi v MV "Blooming Orchard" (No 2)* (1990) 22 NSWLR 273 (Carruthers J), followed by Hill J in *BHP Trading Asia Ltd v Oceaname Shipping Ltd* (1996) 67 FCR 211 at 235. The latter decision concerned s 11(1)(a) of COGSA in which the relevant wording then was "… a bill of lading, or a similar document of title, relating to the carriage of goods from any place in Australia …";

(6) subsequent legislative changes to the relevant wording in s 11(1)(a) by the *Carriage of Goods by Sea Regulations 1998* (Cth), and then by the *Carriage of Goods by Sea Regulations 1998 (No 2)* (Cth) to the present form of words in s 11(1)(a) of COGSA indicate an intention to broaden the class of documents covered by s 11(1)(a);

(7) those words should be given their ordinary English meaning; and

(8) the voyage charterparty fell within those words as a contract of carriage of goods by sea as it contains or evidences such a contract.

13 Consequently, the application to enforce the Award was dismissed.

CONSIDERATION

14 I generally agree with the reasons given by Rares J for concluding that the charterparty is not a "sea carriage document" upon which s 11(2)(b) of the COGSA 1991 operates. I can state my complementary observations quite briefly. I also adopt with respect his Honour's statement of the relevant legislative history and of the legislative scheme. I will not repeat it.

15 In my view, whilst there is obviously an available constructional choice as selected by the primary judge, the better approach is to adopt the alternative constructional choice of the term "sea carriage document" in s 11(1)(a) of COGSA for the following reasons:

(1) There has traditionally been a clear line drawn between a charterparty, including a voyage charterparty involving a contract for the hire of a ship, and a sea carriage document.

(2) Equally, there has been a clear and longstanding acceptance under various international instruments, supported by national legislation, that international commercial disputes including under charterparties (including voyage charterparties) may be settled by arbitration: that policy is reflected in the IAA, and has been referred to by the High Court in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 295 ALR 596 at [10] and [45].

(3) Consequently, the Court should not too readily construe s 11(1) of COGSA to limit the effect of arbitration clauses in respect of such disputes. The same approach underlies 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 (*Canada Moon*).

(4) The undefined term "sea carriage document" was introduced into COGSA at the same time as the defined term "Sea carriage document" in Art 1(g) of the amended Hague Rules was added to those Rules, so it would be appropriate to construe the undefined term consistently with that term as defined in the amended Hague Rules. That definition is as follows:

> "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.

(5) The definition in Art 1(g) does not refer to a charterparty in terms, and it is clear that subparas (i), (ii) and (iii) of that definition do not in their terms encompass a charterparty. Furthermore, para (iv) of Art 1(g) should be construed according to its terms, including the parenthesised words. Those words indicate that the focus is upon documents having characteristics similar to a bill of lading. They do not indicate a clear intention to encompass a voyage charterparty.

(6) Paragraph (iv) of Art 1(g) should also be construed in the context of other relevant provisions of the amended Hague Rules, relevantly including Art 1(1)(b) which, when defining a contract of carriage, states that it includes a negotiable sea carriage document issued under a charterparty; Art 10(6) which excludes the application of

those Rules to the carriage of goods by sea under a charterparty unless a sea carriage document is issued for their carriage; and Art 10(7) which recognises that a sea carriage document issued under a charterparty will attract the application of the Rules. Those provisions suggest that a charterparty is being treated as distinct from a contract for the carriage of goods by sea.

(7) The Sea Carriage Documents Acts of the States and Territories such as the *Sea-Carriage Documents Act 1997* (NSW), comprise cognate legislation dealing with the transfer of rights under (among other things) sea carriage documents to which the amended Hague Rules apply, and they also reflect the distinction between a voyage charterparty and a sea carriage document.

(8) The legislative ancestry of the present s 11 of COGSA shows that the concept of a sea carriage document when introduced into COGSA was narrower than the scope of the *Sea-Carriage of Goods Act 1924* (Cth), as remarked upon by Hill J in *BHP Trading Asia Ltd v Oceaname Shipping Ltd* (1996) 67 FCR 211 at 235.

16 Those matters indicate that the amended Hague Rules preserve the distinction between a charterparty including a voyage charterparty, and a sea carriage document. The point of distinction would be lost if, as the primary judge concluded, voyage charterparties were (other than as qualified by Art 10(6) and Art 10(7)) absorbed into the concept of a sea carriage document.

17 In my view, that distinction is also preserved by COGSA. The object of COGSA is to introduce a regime of marine cargo liability with certain aims.

18 One of those aims by s 3(1)(b) is to preserve compatibility with arrangements existing in countries that are major trading partners of Australia. It is consistent with, and would serve, that aim if the capacity of ship owners and ship charterers should continue to be entitled to agree to submit their disputes to arbitration in terms they choose. That has been a traditional practice. It reflects commercial practice where charterparties are negotiated between experienced commercial entities dealing with each other.

19 Another of the aims of COGSA is to have a regime of marine cargo liability which is up-to-date, equitable and efficient. In that context, the contractual arrangements between shippers to or from Australia and the carriers (whether owners or charterers) is not so evidently a matter of equal arms-length bargaining. That may or may not be so. It will depend on the size

of the shipper (exporter or importer) and of the shipment. In that context, where the traditional contract is found in the bill of lading, the interests of the shippers are more evidently appropriate for statutory protection. That is evident from The Report of the Marine Cargo Liability Working Group to the Minister for Transport, September 1995. That Report represented a review of the protection which had been provided to shippers in Australia since at least the 1924 Act (described in *Canada Moon* at [47] as one instance of the first consumer protection legislation regulating the rights and obligations of ocean carriers under bills of lading). Its focus was not upon the relationship between ship owner and ship charterer. There is nothing to suggest that that relationship, as determined by a charterparty, was intended to be caught within the definition of a "sea carriage document". Indeed, clearly as a non-binding observation, Gauthier J in *Canada Moon* at [57] said:

> It is important to note that none of the international regimes discussed above regulate the rights and obligations of parties to a charter-party. They all specifically mention that the rules will essentially only come into play when a distinct contract for the carriage of goods exists or "springs to life", for example through the endorsement of a bill of lading between a carrier and a person who is not a party to a charter-party.

20 In my view, those considerations lend weight to the view I have reached based more directly upon the text and context of s 11(1)(a) of COGSA.

21 I observe that the decision in *Canada Moon* reaches the same conclusion as that of Rares J and myself on an issue almost identical to that raised on this appeal but where the charterer sought to prevent the proposed arbitration, although of course the precise statutory expressions were not identical.

22 Accordingly, I agree with the conclusions of Rares J and the orders he proposes.

I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:

Dated: 18 September 2013

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1019 of 2012**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**DAMPSKIBSSELSKABET NORDEN A/S** **Appellant**
AND:	**GLADSTONE CIVIL PTY LTD (FORMERLY BEACH BUILDING & CIVIL GROUP PTY LTD) (ACN 081 893 414) (ADMINISTRATOR APPOINTED) (SUBJECT TO DEED OF COMPANY ARRANGEMENT)** **Respondent**
JUDGES:	**MANSFIELD, RARES AND BUCHANAN JJ**
DATE:	**18 SEPTEMBER 2013**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

RARES J

23 The substantial issue in this appeal is whether a clause providing for the arbitration in London of disputes arising under a voyage charterparty for the carriage of coal from Australia to China is of no effect because the charterparty is "a sea carriage document relating to the carriage of goods". The primary judge held that the arbitration clause was such a sea carriage document and that accordingly it was of no effect by force of s 11(2)(b) of the *Carriage of Goods by Sea Act 1991* (Cth) (**COGSA**). That was because, contrary to s 11(2)(b), the arbitration clause precluded or limited the jurisdiction of Australian courts in respect of the charterparty.

24 On 6 October 2009, the appellant (**the owners**) entered into a voyage charter on the Americanized Welsh Coal Charter (AMWELSH 93) form with, as the primary judge found, a charterer called Beach Building & Civil Group Pty Ltd (**the charterers**). The respondent charterers are now known as Gladstone Civil Pty Ltd (administrator appointed) (subject to deed of company arrangement). The owners were to nominate a ship to lift a cargo of 68,000 tonnes of coal, 10% more or less in the owners' option, for a voyage from Dalrymple Bay in Queensland to Ningbo and Jiangyin in the People's Republic of China. Freight was payable

at USD17.00 per ton (cl 1). Demurrage was payable at the rate of USD18,500.00 per day or pro rata (cl 10). The charterparty provided that it was governed by English law and that all disputes arising out of it would be arbitrated in London (cl 32).

25 In the event, disputes arose as to the identity of who charterer was and as to owners' entitlement to demurrage of USD824,663 with interest and costs. The owners referred the disputes to arbitration in London. The arbitrator made two awards. The first award found that the arbitrator had jurisdiction despite s11 of COGSA and the charterers were the party that had been incompletely identified as the charterer in the recap telex concluding the charterparty. The second award found that the owners had established their demurrage claim in full and also awarded them interest and costs.

26 In the proceedings below the primary judge held that the charterparty was a sea carriage document within the meaning of s 11(1)(a) of COGSA. His Honour concluded that the arbitration agreement in cl 32 was of no effect by reason of s 11(2)(b) of COGSA and refused to enforce it under the *International Arbitration Act 1974* (Cth) (**IAA**).

27 The owners advanced an alternative argument below and on this appeal that even if the arbitration clause was of no effect under Australian law, nevertheless the award was made under English law and was valid and enforceable under s 7 of the IAA. It is not necessary to explore that argument.

28 For the reasons which follow, the owners' appeal should be allowed because the charterparty was not a sea carriage document within the meaning of s 11 of COGSA.

THE LEGISLATIVE HISTORY

29 The Parliament envisaged that, when COGSA was first enacted, it would achieve the objects set out in s 3(1) in two stages, *first*, by replacing the *Sea-Carriage of Goods Act 1924* (Cth) (**the 1924 Act**) that gave the force of law in Australia to the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* done at Brussels on 25 August 1924 (**the Hague Rules**) with the **Hague/Visby Rules** (being the Hague Rules as amended by the Protocol amending them done at Brussels on 23 February 1968) and, *secondly*, replacing the Hague/Visby Rules with the provisions of Annexes I and II of the *Final Act of the United Nations Conference on the Carriage of Goods by Sea* done at Hamburg on 31 March 1978 known as **the Hamburg Rules** (s 12 and Sch 2).

30 The Act provided for the Hamburg Rules to come into effect on a date fixed by proclamation or automatically three years after the Act had received the Royal Assent (31 October 1994) unless both Houses of the Parliament resolved either to repeal Part 3 and Schedule 2 of COGSA (that gave effect to the Hamburg Rules) or to reconsider that repeal in three years more time if, by then, a proclamation had not been made (s 2).

31 In October 1994, after extensive consultation with the shipping industry, the Federal Minister for Transport announced that the Government would defer the application of the Hamburg Rules. In January 1995, an industry working group was formed under the chairmanship of the Assistant Secretary of the Department of Transport. The group prepared the *Report of the Marine Liability Working Group* in September 1995 (**the Report**). The Report is a convenient source of the then contemporary context for 1997 legislative changes by all Australian Parliaments dealing with documents used in connection with the carriage of marine cargoes. The Report identified and sought to reconcile issues of importance to the various interest groups within the shipping industry in order to achieve amendments to COGSA that would reflect a broadly acceptable marine cargo liability regime which could apply until greater international consensus could be reached. The Report made three key recommendations. *First*, it suggested that COGSA be amended in the following respects, relevantly:

> "*Non-negotiable documents:*
> All relevant shipping documents should be covered, including electronic documents.
> …
> *Arbitration:*
> There should be explicit provision for arbitration in the Act. A reference to arbitration in Australia should not constitute an ouster of jurisdiction of offending Section 11.
>
> *Coverage of Importers:*
> The *Carriage of Goods by Sea Act* should specify that, where the contract of carriage does not incorporate one of the international conventions, importers' contracts of carriage are covered by the international convention in force in the Act.
>
> *Delays:*
> Carriers be made liable for loss due to delay, to the Hamburg Rules limit of 2.5 times the freight payable on the goods delayed, except where the delay is an "inexcusable delay".
> …"

32 *Secondly*, the Report recommended repeal of the provisions in s 2 of COGSA for further reconsideration or automatic implementation of the Hamburg Rules. *Thirdly*, the Report said,

in respect of the treatment of non-negotiable documents, that "[r]eferences to documents should be framed broadly and generally, so as to cover various types of non-negotiable documents, such as sea waybills, as well as Bills of Lading".

33 In footnote to a section headed "Note on Cargo Liability Regimes", the Report referred to the difference between a contract of carriage "[a]s opposed to a charterparty. However, charterparties almost invariably incorporate the provisions of the Hague or Hague-Visby regimes. These regimes then apply as contract terms rather than by statute".

34 The balance of the Report contained no suggestion that its proposals were intended to bring charterparties under statutory regulation by COGSA or to interfere in any way with the firmly established international practice of providing for arbitration of disputes arising under them, in what were then the two major centres of London and New York. The only discussion about arbitration centred on providing the exception that is now found in s 11(3) of COGSA, namely that arbitration should be permitted in Australia of a dispute of the subject matter with which the Report dealt, namely marine cargo liability.

35 Importantly, the Report stated that by November 1994, the Attorneys-General of the States and Territories had agreed in principle to uniform legislation to amend their existing legislation dealing with bills of lading that were modelled on the *Bills of Lading Act 1855* (UK). The Report noted the current legislation in all Australian jurisdictions treated contracts of carriage as being bills of lading or similar documents of title. The agreed amendments were proposed to allow transfer of contractual rights to the lawful holder of a bill of lading or waybill irrespective of whether property in the goods had passed to the holder. In addition, the Report envisaged that the Standing Committee of Attorneys-General (**SCAG**), of the Federal, State and Territory law officers, was to continue its work on a draft bill as a model for uniform State and Territory laws dealing with electronic bills of lading. The Report noted the potential that different rights might eventuate from those reforms and reforms to COGSA.

36 The Explanatory Memorandum for the *Carriage of Goods by Sea Amendment Bill 1997* (Cth) (**the 1997 Amendments**) and Second Reading Speech of the Parliamentary Secretary to the Minister for Transport and Regional Development (Hansard, House of Representatives, 18 June 1997 at 5554) referred to the influence that the recommendations in the Report had had in the formulation of the amendments that the Bill, when passed (as it was), would make to

COGSA. The *Sea-Carriage Documents Act 1997* (NSW) commenced on 1 January 1998. The legislation contained the following definitions in s 5:

> "**contract of carriage**, in relation to a sea-carriage document, means:
>
> (a) in the case of a bill of lading or a sea waybill—the contract of carriage contained in, or evidenced by, the document, or
>
> (b) in the case of a ship's delivery order—the contract of carriage in association with which the order is given.
>
> **sea-carriage document** means a bill of lading, a sea waybill or a ship's delivery order."

37 That Act also provided that its provisions applied to data message or electronic versions of sea carriage documents (s 6). This innovation recognised the then increasing role of electronic communications in commercial dealings that today, only 15 years later, seems almost an unremarkable commonplace. The complimentary legislation was the *Sea-Carriage Documents Act 1998* (NT) s 5, *Sea-Carriage Documents Act 1996* (QLD) s 3, *Sea-Carriage Documents Act 1998* (SA) s 3, *Sea-Carriage Documents Act 1997* (Tas) s 4, *Sea-Carriage Documents Act 1997* (WA) s 5 and *Sea-Carriage Documents Act 1998* (Vic) s 5 (the last Act was repealed on 1 November 2010 and its provisions substituted into Pt IVA of the *Goods Act 1958* (Vic) s 89).

38 This background enables a better understanding of the context and impetus for the 1997 Amendments to COGSA and the subsequent use of the regulation making power in that legislation to effect amendments to COGSA under a "Henry VIII clause" granting the Minister power to make regulations that would amend COGSA itself, as in fact occurred. Francis Bennion in *Statutory Interpretation* (Butterworths, 4th ed, 2002) at 200 said that this description arose because "it was supposed to reflect that monarch's autocratic tendencies": see too D Pearce & S Argument, *Delegated Legislation in Australia* (LexisNexis, 4th ed, 2012) at [1.8], [1.23].

THE LEGISLATIVE SCHEME

39 The object of COGSA was stated in s 3(1):

> "**3 Object of Act**
>
> (1) The object of this Act is to introduce a regime of marine cargo liability that:

(a) is up-to-date, equitable and efficient; and

(b) **is compatible with arrangements existing in countries that are major trading partners of Australia; and**

(c) **takes into account developments within the United Nations in relation to marine cargo liability arrangements.**" (emphasis added)

40 In 1997, s 7 was amended by adding, relevantly, subs (2), (3) and (4), so as to enable regulations to be made that would insert what became the **modified Hague Rules** as Sch 1A to the Act. Those amendments were:

"(2) The regulations may amend this Act to add a Schedule (the ***Schedule of modifications***) that modifies the text set out in Schedule 1 for the following purposes:

(a) to provide for the coverage of a wider range of sea carriage documents (including documents in electronic form);

(b) to provide for the coverage of contracts for the carriage of goods by sea from places in countries outside Australia to places in Australia in situations where the contracts do not incorporate, or do not otherwise have effect subject to, a relevant international convention (see subsection (6));

(c) to provide for increased coverage of deck cargo;

(d) to extend the period during which carriers may incur liability;

(e) to provide for carriers to be liable for loss due to delay in circumstances identified as being inexcusable.

The modifications do not actually amend the text set out in Schedule 1, however **the text has effect for the purposes of this Act as if it were modified in accordance with the Schedule of modifications**.

(3) The regulations may:

(a) amend the Schedule of modifications, but only in connection with the purposes set out in subsection (2); and

(b) amend the provisions of this Part to the extent necessary or appropriate, having regard to the modifications set out in the Schedule of modifications as in force from time to time.

Note: For example, regulations extending the range of sea carriage documents to be covered by the text in Schedule 1 may create a need for associated amendments of sections 10 and 11.

(4) Before regulations are made for the purposes of this section, the Minister

> must consult with representatives of shippers, ship owners, carriers, cargo owners, marine insurers and maritime law associations about the regulations that are proposed to be made." (non-italic emphasis added)

41 The relevant international conventions referred to in s 7(2)(b) were the Hague Rules, the Hague/Visby Rules and the Special Drawing Rights Protocol (being the *Protocol amending the Hague Rules as amended by the Visby Protocol* done at Brussels on 21 December 1979). The regulation making power in s 7(2) and (3)(b) was, as the second reading speech foreshadowed, a "Henry VIII clause" permitting the Act to be amended by delegated legislation.

42 The 1997 amendments added s 11(3) which provided that an agreement or provision of an agreement that provided for disputes to be resolved by an arbitration conducted in Australia "is not made ineffective by subsection (2) (despite the fact that it may preclude or limit the jurisdiction of a court)". The 1997 amendments operated consistently with s 2C of the IAA that had been inserted in 1991 when the original form of COGSA had been enacted. Section 2C of the IAA provided that nothing in the IAA affected the operation of s 11 of COGSA.

43 The *Carriage of Goods by Sea Regulations 1998* (Cth) and the *Carriage of Goods by Sea Regulations 1998 (No 2)* (Cth) were made under s 7(2)(a) of COGSA and amended, *inter alia*, ss 10 and 11 of that Act so that those sections now read as follows:

> "**10 Application of the amended Hague Rules**
>
> (1) 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:
>
> (i) to which, under Article 10 of the amended Hague Rules, those Rules apply; or
>
> (ii) subject to subsections (1A) and (2) – for the carriage of goods by sea from a port in Australia to another port in Australia; or
>
> (iii) contained in or evidenced by a non-negotiable document (other than a bill of lading or similar document of title), being a contract that contains express provision to the effect that the amended Hague Rules are to govern the contract as if the

document were a bill of lading.

Note: The amended Hague Rules are set out in Schedule 1A – see ss 4(1) and 7(1).

(1A) If a contract for the carriage of goods by sea referred to in subparagraph 10(1)(b)(ii) is contained only in, or evidenced only by, a consignment note, the amended Hague Rules apply to the contract only if paragraph 5 of Article 10 of those Rules so requires.

(2) The amended Hague Rules do not apply in relation to the carriage of goods by sea from a port in any State or Territory in Australia to any other port in that State or Territory.

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." (emphasis added)

44 In each of the newly substituted s 11(1)(a) and (2)(c)(i), the expression "a sea carriage document relating to the carriage of goods" replaced "a bill of lading or similar document of title" as the instrument to which the provision was directed. The current wording of those two subsections was inserted by the second set of regulations, the *Carriage of Goods by Sea Regulations 1998 (No 2)*, to overcome unintended drafting errors in the first set. Emmett J had found in *Hi-Fert Pty Ltd v United Shipping Adriatic Inc* (1998) 89 FCR 166 at 181F-182B that the earlier version had confined the jurisdiction of Australian courts under COGSA relevantly only to sea carriage documents to which the amended Hague Rules applied.

45 The modified Hague Rules inserted into Sch 1A of the Act by the 1998 Regulations included several defined terms in Art 1(1) that replaced those in the amended Hague Rules set out in Sch 1, including new definitions of "contract of carriage" and "carriage of goods by sea". Those changes in terminology were denoted by italics to contrast them with the original plain type or words struck through which had been deleted. The amended Hague Rules had used the expression "bill of lading or any similar document of title", while the new modified Hague Rules in Sch 1A used "sea carriage document" instead.

46 The following relevant definitions were set out in Art 1(1) of Sch 1A (incorporating, as the text of the Act did, both what was deleted and added):

> "**ARTICLE 1**
>
> ***1***. In ~~this convention~~ *these Rules*, the following words are employed, with the meanings set out below:–
>
> (a) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.
>
> *(aa) "Consignment note" means a non-negotiable document that:*
>
> *(i) contains or evidences a contract of carriage by sea in connection with which no bill of lading or similar document of title has been issued; and*
>
> *(ii) clearly states that no liability for any loss of, damage to or delay of the goods will be accepted by the carrier of the goods; and*
>
> *(iii) is clearly marked as being non-negotiable.*
>
> ~~(b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a~~

~~carrier and a holder of the same.~~

(b) *"Contract of carriage" means a contract of carriage covered by a sea carriage document (to the extent that the document relates to the carriage of goods by sea),* ***and includes a negotiable sea carriage document issued under a charterparty*** *from the moment at which that document regulates the relations between its holder and the carrier concerned*

….

(e) "Carriage of goods *by sea"* covers the period *during which a carrier is in charge of the goods, according to paragraph 2 of this Article*.

(f) *"Negotiable sea carriage document" means:*

(i) *a bill of lading (other than a bill of lading that, by law, is not negotiable); or*

(ii) *a negotiable document of title that is similar to a negotiable bill of lading and that contains or evidences a contract of carriage of goods by sea.*

(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.*

[NOTE: These Rules do not apply to all sea carriage documents—see Article 10.]

…" (bold emphasis added)

47 A new Art 1A made provision for the use of a sea carriage document in the form of a data message. Art 3(3) required the carrier, master or agent of the carrier, after receiving the goods into his charge, to issue to the shipper, on demand, a sea carriage document (in lieu of the bill of lading required in the amended Hague Rules) that showed, among other things, the apparent order and condition of the goods, as well as including what was furnished in writing by the shipper, about the leading marks necessary to identify the goods, the number of packages or pieces or quantity or weight, as the case required. Moreover, Art 3(4) provided that, *first*, such a sea carriage document would be *prima facie* evidence of the receipt by the carrier of the goods described in it, in accordance with Art 3(3), but, *secondly*, the carrier could not deny that evidence if a negotiable sea carriage document had been transferred to a third party acting in good faith. And, Art 3(7) required the carrier, master or agent of the carrier to issue the shipper, on demand, with a "shipped" negotiable sea carriage document. However, if the shipper had previously received a sea carriage document for the goods, it had to surrender that document if it wanted the other.

48 Importantly, Art 5 of Sch 1A was as follows:

> "**ARTICLE 5**
> A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under ~~this convention~~ *these Rules*, provided such surrender or increase shall be embodied in the ~~Bill of Lading~~ *sea carriage document* issued to the shipper. The provisions of ~~this convention~~ *these Rules* shall not be applicable to charter parties, but if *negotiable sea carriage documents* ~~bills of lading~~ are issued in the case of a ship under a charter party they shall comply with the terms of ~~this convention~~ *these Rules*. Nothing in these rules shall be held to prevent the insertion in a ~~Bill of Lading~~ *sea carriage document* of any lawful provision regarding general average."

Finally, Art 10 relevantly provided:

> **"ARTICLE 10**
> **1.** ~~The provisions of this Convention shall~~ *Subject to paragraph 6, these Rules* apply to ~~every~~ *sea carriage documents*~~Bill of Lading~~ relating to the carriage of goods *from ports in Australia to ports outside Australia*~~two different States~~, *regardless of the form in which the sea carriage document is issued*~~if~~.
>
> ~~(a) the Bill of Lading is issued in a ContractingState, or~~
> ~~(b) the carriage is from a port in a Contracting State., or~~
> ~~(c) the contract contained in or evidenced by the Bill of Lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract;~~
> ~~whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.~~
>
> [*NOTE: For the meaning of "sea carriage document", see paragraph 1(g) of Article 1.*]
>
> ...
> ***6.*** *These Rules do not apply to the carriage of goods by sea under a charterparty unless a sea carriage document is issued for the carriage.*
> ***7.*** *These Rules apply to a sea carriage document issued under a charterparty only if the sea carriage document is a negotiable sea carriage document, and only while the document regulates the relationship between the holder of it and the carrier of the relevant goods.*
>
> ~~Each Contracting State shall apply the provisions of this Convention to the Bills of Lading mentioned above.~~
>
> ~~This Article shall not prevent a ContractingState from applying the rules of this Convention to Bills of Lading not included in the preceding paragraphs.~~"

THE PRIMARY JUDGE'S REASONS

49 The primary judge identified the critical question as being whether s 11(2)(b) of COGSA operated so as to make the arbitration agreement in cl 32 of the charterparty of no effect because it precluded or limited the jurisdiction of Australian courts in respect of a sea

carriage document, being the charterparty, relating to the carriage of goods from a place Australia to any place outside Australia. He held that the charterparty related to the carriage of goods from Australia to China and that cl 32 precluded or limited the jurisdiction of Australian courts based on *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1 and *Campagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577 at 583 per Dixon CJ with whom McTiernan and Kitto JJ agreed.

50 The primary judge construed the expression "sea carriage document" to include a charterparty. His Honour said that COGSA did not contain a definition of "sea carriage document". However, while he considered that Art 1(1)(g)(iv) was of some assistance in arriving at the construction of "sea carriage document" in s 11, none of the other parts of the amended Hague Rules or Sch 1A could be used in the process of construction. His Honour referred to the provisions of s 9 of the 1924 Act which was the statutory predecessor of s 11 of COGSA. He found that the 1924 Act had used the expression in s 9 "bill of lading or document relating to the carriage of goods from any place in Australia …" in the way that s 11 of COGSA used the expression "sea carriage document relating to the carriage of goods from any place in Australia …" to render of no effect any provision that such a document contained that precluded or limited the jurisdiction of Australian courts. His Honour said that a voyage charterparty was, in ordinary English, a "document relating to the carriage of goods from any place in Australia …", as had been held in relation to s 9 of the 1924 Act by Carruthers J in *Sonmez Denizcilik ve Ticaret Anonim Sirketi v The MV "Blooming Orchard" (The "Blooming Orchard" [No 2])* (1990) 22 NSWLR 273 at 282A-B and Hill J, who followed Carruthers J, in *BHP Trading Asia Ltd v Oceaname Shipping Ltd* (1996) 67 FCR 211 at 235C-G.

51 The primary judge rejected the charterers' alternative argument that s 11(1)(b) applied in the circumstances. He held that nothing in the charterparty amounted to an express provision to the effect that the amended Hague Rules were to govern it as if it were a bill of lading within the meaning of s 10(1)(b)(ii). That finding has not been challenged on this appeal and was clearly correct.

52 His Honour considered that the intention of the amendments to COGSA made in 1997 and 1998 was to broaden the class of documents covered by s 11(1)(a) and 2(b). His Honour reasoned that the definition in Art 1(1)(g)(iv) of Sch 1A, in its ordinary English meaning,

included the charterparty. That was because it was a contract for the carriage of goods by sea and so it "contains or evidences" such a contract.

THE CHARTERERS' ARGUMENTS

53 The charterers submitted that his Honour was correct for the reasons he gave. They argued that the expression "sea carriage document", as used in s 11 of COGSA, should be given its natural and ordinary English meaning in the absence of any ambiguity or obscurity. That expression was not defined in COGSA itself and, the charterers contended, it encompassed a voyage charterparty. That was because, they argued, it was a contract for the hire of a ship for the purpose of carrying goods by sea on defined voyage in consideration of freight, relying on the *"Blooming Orchard" [No 2]* 22 NSWLR at 278-279 and the views of Martin Davies & Anthony Dickey: *Shipping Law* (Lawbook Co, 3rd ed, 2004) at p 178.

54 The charterers argued that the construction of "sea carriage document" in reliance on Arts 5 and 10(6) and (7) of Sch 1A to COGSA, contended for by the owners, was not consistent with a broad and liberal interpretation required for domestic legislation that gives effect to international conventions, relying on *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* (2004) 140 FCR 296 at 326-327 [142]-[144].

CONSIDERATION

55 The task of statutory construction commences with a consideration of the text itself: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ. Their Honours held that historical considerations and extrinsic materials could not be used to displace the clear meaning of the text and that the actual language used by the legislature was the surest guide to its intention. Importantly, they said that the meaning of the text may require the consideration of the context, including the general purpose and policy of a provision, in particular the mischief it sought to remedy. The context includes the legislative history and extrinsic materials: *FCT v Consolidated Media Holdings Ltd* (2012) 293 ALR 257 at 268 [39] per French CJ, Hayne, Crennan, Bell and Gageler JJ. Moreover, as McHugh, Gummow and Heydon JJ said in *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646 at 661 [40], what a court says or decides in construing one statute does not necessarily control the construction of another, even where the identical language is used in the section being considered.

56 The objects of COGSA, identified in s 3(1), related to providing a regime for marine cargo liability. That involved regulating the relationship between persons who contract to carry cargo by sea, being, on the one hand, the person who provides, or undertakes to provide the ship, and on the other hand, the person who desires goods to be carried on a ship from one place to another. The objects in s 3(1) were not concerned directly with regulating the relationship between persons who were contracting for the hire of ships. The subject matter of COGSA was a regime for marine cargo liability including the implementation of the Hague Visby Rules and, as was envisaged too hopefully, as events have turned out, the Hamburg Rules. Each set of rules explicitly negated its application to charterparties (Art 5 of the Hague Visby Rules in Sch 1 of COGSA and Art 2(3) of the Hamburg Rules, in Sch 2 of COGSA). Indeed, ever since the 1924 Act gave effect to the Hague Rules, Art 5 had the force of law in Australia so that the regime for marine cargo liability that those Rules prescribed did not apply to charterparties.

57 The meaning of the expression "sea carriage documents" as used in COGSA must be ascertained from that Act as a whole, including the modified Hague Rules in Sch 1A. The expression was introduced into the legislation by the 1998 regulations made under the "Henry VIII clause" in s 7(2)(a). Significantly, Art 3(3) of Sch 1A required the carrier, master or agent of the carrier, to issue the shipper, on its request, with a sea carriage document after the goods had been delivered. Generally, a charterparty is highly unlikely to meet the requirements of Art 3(3), not least because it deals with the hire of the ship as opposed to evidencing the receipt of goods on board by the ship (or into the charge of the carrier, master or agent of the carrier).

58 The purpose for which Art 3(3) requires a sea carriage document to be issued is similar to that of a bill of lading, although now it need not be negotiable. It evidences that the carrier or ship has possession of the goods for the purpose of carrying them by sea and providing a means for a consignee to demonstrate its entitlement to receive delivery of the goods at the port of destination.

59 The use of the words "relating to the carriage of goods from any place in Australia to any place outside Australia" in s 11(1)(a) of COGSA, was to identify the port of loading and a destination as features of a sea carriage document to which s 11 applied. However, those words did not change the intended function of a sea carriage document as a means of enabling a consignee or holder to use it as evidence of its contractual or legal right to receive

the goods at the port of destination. The definitions of "contract of carriage", "carriage of goods by sea" and "sea carriage document" in Art 1(b), (e) and (g) of Sch 1A are predicated on the distinction drawn by Arts 1(c), 5, 10(6) and (7) between the functions of a contract of carriage and a charterparty for the purposes of the modified Hague Rules and COGSA.

60 Ordinarily, a voyage charter, like most charterparties, is a contract for the hire of a ship. Slot charters for space on a container ship are exceptions, and there may be others. In a voyage charter, the owners agrees to perform one or more designated voyages in return for the payment of freight and, when appropriate, demurrage. The parties to a voyage charter will make their own agreement as to how the costs of and responsibility for cargo handling will be allocated: Julian Cooke et al, *Voyage Charters* (Informa, 3rd ed, 2007) at 3-4 [1.1]-[1.2]. After discussing the evolution of international conventions relating to the carriage of goods by sea from the Hague Rules through to the *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (done at New York on 11 December 2008 and known as the **Rotterdam Rules**), Gauthier JA, with whom Pelletier and Manville JJA concurred, said in *Canada Moon Shipping Co Ltd v Companhia Siderurgica Paulista-Cosipa (The Federal Ems)* (2012) 223 ACWS (3d) 12; 2012 FCA 284; 2013 AMC 319 (Federal Court of Appeal, Canada, 8 November 2012) at [59]-[61]:

> "[59] Charter-parties are normally described as contracts of hire of a ship. In French they are referred to as "contrats d'affrètement" (See William Tetley, *Marine Cargo Claims* 4th edition (Cowansville, Quebec: Editions Yvon Blais, 2008) at page 350, note 24). There are three main types of charter-parties.
>
> (i) the bareboat or demise charter, which provides for the hire of an unmanned ship;
>
> (ii) the time charter-parties, which are contracts for the hire of a fully manned ship for a specific duration. These include the more recent type of time charter, referred to as a slot-charter, where for example a carrier will hire from a competitor specific space or a slot (containership) for a specific time period;
>
> (iii) the voyage charter-parties, which are used to hire a specific ship or type of ships for one or more voyages.
>
> [60] As pointed out by John Wilson in *Carriage of Good by Sea* 6th edition (Essex: Pearson Education Limited, 2008) at page 3, it is common knowledge that:
>
> A charter-party is a contract which is negotiated in a free market, subject only to the laws of supply and demand. While the relative

> bargaining strengths of the parties will depend on the current state of the market, shipowner and charterer are otherwise able to negotiate their own terms free from any statutory interference. In practice, however, they will invariably select a standard form of charter-party as the basis of their agreement, to which they will probably attach additional clauses to suit their own requirements. These standard forms have a variety of origins. Some have developed over a number of years in association with a particular trade, such as grain, coal or ore, while others have been designed by individual firms with a monopoly in a particular field, such as the transport of oil. A considerable number which have appeared during the past century, however, are the products of the documentary committees of such bodies as the United Kingdom Chamber of Shipping, the Baltic and International Maritime Conference and the Japanese Shipping Exchange, on many of which both shipowner and charterer interests are represented.
>
> The existence of these standard forms is of considerable advantage in international trade where the parties may be domiciled in different countries and their negotiations hampered by language problems. In such circumstances, parties conversant with the terms of a standard form are unlikely to be caught by an unusual or unexpectedly onerous clause, and accordingly can concentrate their attention on the essential terms covering such matters as freight, laytime and demurrage rates.
>
> [61] **One can readily see that the imbalance in the bargaining power that is the mischief that led to the development of the various international regimes discussed above did not exist in relation to charter-parties.** The liner trade (common carriers operating regular services in certain areas, using the sea carriage documents covered by the various international regimes) is simply quite different from the tramp trade (chartered vessels). There was thus no policy to restrict the freedom to contract of parties to such agreements." (emphasis added)

61 Voyage charters are commonly called "contracts of affreightment", no doubt because of the more direct connection they make between the carriage of specific cargo by the owner for the charterer and the earning of freight as the hire for the voyage: *Voyage Charters* (3rd ed) at [1.2]; see too D. Rhidian Thomas, *The Evolving Law and Practice of Voyage Charterparties* (Informa, 2009) at vii.

62 As Prof Thomas stated, the laytime and demurrage provisions of a voyage charter are two of its most distinctive provisions. But, as each of the text writers explained, the co-existence of a bill of lading, usually issued by the master in favour of the charterer as shipper, in respect of the very cargo that the voyage charter contemplates will be carried, can produce confusion: see e.g. Thomas *op cit* at viii and in Ch 10: *Bills of Lading and Voyage Charters* by Prof Francis Reynolds QC at 201-202 [10.4]-[10.6]; cf *The "Tychy"* [1999] 2 Lloyd's Rep 11 at

18 per Clarke LJ with whom Otton and Walker LJJ agreed; see too: *Scrutton on Charterparties* (Sweet & Maxwell, 22nd ed, 2011) Art 3 at [1-012], [1-014]. Nicholas Gaskell, R Asariotis and Y Baatz in *Bills of Lading: Law and Contracts* (Informa, 2000) at 28 [1.63] said, generally, of all forms of charterparty:

> "The charterparty relates to the use of a ship: the bill of lading relates to a particular cargo to be carried on a ship. **The charterparty does not have the receipt or document of title functions of a bill of lading**, but the two documents do share the function of being evidence of the contracts between the respective parties." (emphasis added)

63 In addition s 3(1)(b) of COGSA contemplated that the statutory regime would be compatible with arrangements existing in Australia's major trading partners. The ready availability of international arbitration to resolve disputes between owners or disponent owners and charters arising under charterparties is a fundamental feature of the shipping trade that has been entrenched for decades. It is underpinned by the 1958 *Convention on Recognition and Enforcement of Foreign Arbitral Awards*, known as the **New York Convention** and the UNCITRAL ***Model Law*** *on International Commercial Arbitration*, each of which, largely, has been given force of law in Australia by the IAA and one or both of which is or are in force in most nations with which Australia trades.

64 The objects of the IAA recognise and encourage the widely shared modern policy of recognising and encouraging private arbitration as a valuable method of settling disputes arising in international commercial relations: *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of Federal Court of Australia* (2013) 295 ALR 596 at 609-610 [45] per Hayne, Crennan, Kiefel and Bell JJ. There, French CJ and Gageler J approved the following observations of Allsop J in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 94-95 [192]-[193] as explaining the international commercial significance of an arbitral award (295 ALR at 600 [10]):

> "The New York Convention and the [UNCITRAL] Model Law deal with one of the most important aspects of international commerce – the resolution of disputes between commercial parties in an international or multinational context, where those parties, in the formation of their contract or legal relationship, have, by their own bargain, chosen arbitration as their agreed method of dispute resolution. The chosen arbitral method or forum may or may not be the optimally preferred method or forum for each party; but it is the contractually bargained method or forum, often between parties who come from very different legal systems. An ordered efficient dispute resolution mechanism leading to an enforceable award or judgment by the adjudicator, is an essential underpinning of commerce …

> The recognition of the importance of international commercial arbitration to the smooth working of international commerce and of the importance of enforcement of the bilateral bargain of commercial parties in their agreement to submit their disputes to arbitration was reflected in both the New York Convention and the [UNCITRAL] Model Law."

65 It is unlikely that, when it enacted ss 7(2)(a) and 11(3) of COGSA, 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 s 11(3) was to allow arbitration in Australia of marine cargo liability claims, not disputes arising under charterparties. Had the Parliament intended COGSA to make a sweeping change to the ways in which arbitration agreements in charterparties operated it would have needed to say so in clear terms. Section 11 cannot be read as depriving international arbitration clauses in charterparties made anywhere in the world of force or effect, just because the charter relates to the carriage of goods from overseas to Australia.

66 Over 10% of the world's trade by volume comes into or leaves Australia by sea. Much of that trade is carried by ships under charters that, as an ordinary incident of the shipping industry, will contain international arbitration clauses that were freely negotiated by sophisticated, professional parties. Those parties could bargain at arms length for the terms of their charterparties, including for resolution of disputes arising under them: cf *TCL* [2013] HCA 5 at [10], [45]; *Canada Moon* 2012 FCA 284 at [61]. They would not have anticipated that their agreement for international arbitration had been eliminated "by a sidewind" involving the combination of the ship carrying cargo from Australia overseas and s 11 of COGSA: cf *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 37 per Mason CJ, Deane, Dawson and Toohey JJ.

67 The purpose of s 7(2)(a) was to allow for more recent innovations in documentation used to arrange carriage of goods by sea to be covered under a regime close to the Hague Visby Rules. At the time that s 7(2)(a) was enacted, all the Australian Governments and Parliaments were concerned to facilitate developments in the marine cargo trade that had moved away from the carrier (be it the ship owner or charterer) providing the shipper of goods with the traditional bill of lading or other document of title. Charterparties have never been used for the purposes of bills of lading or the documents described as "sea carriage documents" in Art 1(1)(g) of Sch 1A of COGSA or s 5 of the *Sea-Carriage Documents Act 1997* (NSW) or its analogues. Indeed, so much is plain from the exclusion of charterparties from the

operation of the Hague Rules, the Hague-Visby Rules and the modified Hague Rules in Art 5 of each of them.

68 The insertion of the new expression "a sea carriage document relating to the carriage of goods by sea" in s 11 and the amendments to ss 7, 10 and 11 effected in 1997 and 1998 must be considered in the context that at no point were charterparties discussed in the extrinsic materials as documents that the amendments were intended to affect by the operation of s 11 of COGSA. Moreover, the terms of Arts 5, 10(6) and (7) reinforced the clear understanding of the drafters of the 1998 Regulations that charterparties were, in general, outside the new marine cargo liability regime that the 1997 and 1998 legislative changes affected. Article 10(6) and (7) provided for a negotiable sea carriage document – i.e. a document having the effect of a bill of lading – issued under a charterparty to be governed by the modified Hague Rules in Sch 1A, but only while, and so far as, it regulated the relationship between its holder and the carrier of the goods. This was also consistent with the definition of "contract of carriage" in Art 1(6). These Articles read with Art 5 recognised that unless such a negotiable bill of lading had been issued, the charterparty alone would govern the relationship between a carrier and a charterer, including in respect of the carriage of the charterer's goods and that, as a consequence, COGSA would have no application to the relationship. As explained above, voyage charterparties involve the parties to them in a relationship covering the hire of the ship and the carriage of the charterer's cargo.

69 In *The Blooming Orchard [No 2]* 22 NSWLR 273, Carruthers J held that a clause providing for London arbitration in an earlier form of the Americanized Welsh Coal Charter for a voyage from Australia to Turkey was of no effect by force of s 9 of the 1924 Act, being the predecessor of s 11 of COGSA. In my opinion, that decision was wrong and contrary to principle. His Honour recognised that the second reading speech for the Bill that became the 1924 Act did not refer to charterparties and only referred to bills of lading (22 NSWLR at 278F-G). However, he considered that the words "a document relating to the carriage of goods by sea from any place in Australia to any place outside Australia" could not be read down. Of course, the charterers rely on a similar, but different, expression (with the interpolation of "sea carriage" before "document") being used in s 11(1)(a) of COGSA.

70 Carruthers J held that the expressions used in s 9(1) of the 1924 Act were plain words, that "make complete sense of the subsection and accord with commonsense and the realities of commercial life". However, the realities of commercial life and the evident purpose of s 9(1)

of the 1924 Act, as well as that of s 11 of COGSA, respect the free negotiation of charters by commercial parties in the international shipping trade. Those statutory provisions sought to protect shippers and consignees of cargoes carried by sea to or from Australia from being forced to litigate or arbitrate, away from Australia, claims against the contractual or actual carrier of their goods. 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 and conditions in such a document. The Commonwealth statutory analogues enacted at the turn of the twentieth century, and later the Hague Rules and their successors evolved from the *Harter Act 1893* (US). Those statutes and international conventions sought to protect the owners of cargoes from the harsh consequences of the actions of shipowners and carriers of goods creating virtual contracts of adhesion in bills of lading, and now sea carriage documents.

71 The purpose of s 11 of COGSA 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.

72 There is no substance to the charterers' reliance on *El Greco* 140 FCR at 326-327 [142]-[144]. The terms of s 11 do not give effect to an international convention; indeed the construction advanced by the charterers would subvert the purposes of the 1958 *New York Convention*, the *Model Law* and the IAA.

CONCLUSION

73 For these reasons the appeal must be allowed, and an order enforcing the award must be made. The owners should be granted leave to bring and proceed with the appeal until judgment *nunc pro tunc* pursuant to s 444E(3) of the *Corporations Act 2001* (Cth). The owners should have their costs of the proceedings below. The owners and the charterers agreed between themselves in relation to the costs of the appeal and it is not necessary to make any orders about those costs. The parties should bring in short minutes of order to give effect to these reasons.

I certify that the preceding fifty-one (51) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 18 September 2013

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1019 of 2012**

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**DAMPSKIBSSELSKABET NORDEN A/S** **Appellant**
AND:	**GLADSTONE CIVIL PTY LTD (FORMERLY BEACH BUILDING & CIVIL GROUP PTY LTD) (ADMINISTRATOR APPOINTED) (SUBJECT TO DEED OF COMPANY ARRANGEMENT)** **Respondent**
JUDGES:	**MANSFIELD, RARES AND BUCHANAN JJ**
DATE:	**18 SEPTEMBER 2013**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

BUCHANAN J:

INTRODUCTION

74 This appeal deals with the question of whether an arbitration clause in a voyage charterparty is rendered ineffective by s 11 of the *Carriage of Goods by Sea Act 1991* (Cth) ("COGSA"). It requires consideration of the terms and operation of the "amended Hague Rules" prescribed by Schedule 1A to COGSA, the effect of s 11 of COGSA and the operation of s 8 of the *International Arbitration Act 1974* (Cth) ("the Arbitration Act").

75 On 6 October 2009, the appellant and the respondent entered into a voyage charterparty in an "Americanized Welsh Coal Charter" form for a vessel to transport coal from the Dalrymple Bay Coal Terminal in Queensland, Australia to China. The cargo was to be 68,000 tons of coal (10 percent more or less) on which freight was to be paid at a nominated rate based on bills of lading. The charterparty required bills of lading to be prepared within 24 hours after loading and required that they include particular clauses set out in the charterparty. The charterparty provided for demurrage and dispatch at the rate of US$18,500 per day. The charterparty provided for arbitration at London and that any dispute was governed by English law.

76 Clause 32 of the charterparty provided as follows:

> **32. Arbitration**
>
> (a) *~~NEW YORK~~
>
> ~~All disputes arising out of this contract shall be arbitrated at New York in the following manner, and subject to U.S. Law:~~
>
> ~~One Arbitrator is to be appointed by each of the parties hereto and a third by the two so chosen. Their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of court. The Arbitrators shall be commercial men, conversant with shipping matters. Such Arbitration is to be conducted in accordance with the rules of the Society of Maritime Arbitrators Inc.~~
>
> ~~For disputes where the total amount claimed by either party does not exceed US$_____** the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators Inc.~~
>
> (b) *LONDON
>
> All disputes arising out of this contract shall be arbitrated at London and, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic Mercantile & Shipping Exchange and engaged in Shipping, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his action be taken before the award is made. Any dispute arising hereunder shall be governed by English Law.
>
> For disputes where the total amount claimed by either party does not exceed US $ ** the arbitration shall be conducted in accordance with the Small Claims Procedure of the London Maritime Arbitrators Association
>
> * Delete (a) or (b) as appropriate
>
> ** Where no figure is supplied in the blank space this provision only shall be void but the other provisions of this clause shall have full force and remain in effect.

77 A dispute arose about demurrage. The dispute was submitted to arbitration in London by the appellant. The respondent objected to the competency of the arbitrator on two grounds. First, the respondent claimed not to be identified by its correct name and therefore not to be bound by the charterparty. Secondly, the respondent asserted that the provisions of COGSA rendered the arbitration clause ineffective. In a "Declaratory Arbitration Award", given on 22 November 2010, the arbitrator rejected each of those arguments. The respondent thereafter played no further part in the arbitration. On 14 January 2011, the arbitrator handed

down a "Final Arbitration Award" ("the award"), awarding the appellant US$824,663.18 with interest. Some other relatively minor amounts were also awarded as a result of the arbitration.

78 The respondent did not comply with the award. The appellant then commenced proceedings in this Court seeking leave to enforce the award under s 8(3) of the Arbitration Act. In the proceedings before the primary judge, the respondent relied again upon its earlier two objections to the competence of the arbitrator and submitted that the award was not enforceable.

79 The first of the objections was that the respondent was not bound by the charterparty. Both the arbitrator and the primary judge found that the respondent had been misdescribed in the charterparty but was nevertheless bound by it. The arbitrator rectified the charterparty to state the true name of the respondent. The primary judge also rejected the respondent's reliance on this argument and the point has not been further pursued on the appeal.

80 Upon the construction which he gave to certain parts of COGSA, the primary judge concluded that the charterparty was a "sea carriage document" within the meaning of s 11 of COGSA, and that s 11(2) of COGSA rendered the arbitration clause ineffective. The primary judge concluded that the award was unenforceable and dismissed the appellant's application.

81 The question whether the charterparty was a "sea carriage document" within the meaning of s 11 of COGSA constitutes the principal matter to be dealt with on this appeal. However, a subsidiary issue also arises. That issue concerns a contention by the appellant that even if COGSA did render the arbitration clause in the charterparty ineffective, nevertheless, the award made by the arbitrator was enforceable in this Court because no ground existed upon which this Court may refuse to enforce it under s 8(5) or (7) of the Arbitration Act.

82 One further introductory matter should be mentioned. After the hearing before the primary judge had concluded, but before judgment was delivered, the respondent was placed into voluntary administration. A deed of company arrangement was subsequently made. Section 444E(3) of the *Corporations Act 2001* (Cth) requires that leave be granted to the appellant to maintain the present appeal. Agreement was reached amongst the appellant, the respondent and the deed administrator that leave should be granted upon certain conditions which were also agreed amongst them. At the commencement of the hearing of the appeal, an order was sought, and not opposed, that the appellant had leave to prosecute the appeal.

IS THE ARBITRATION CLAUSE INEFFECTIVE?

83 COGSA contains, in Schedule 1A, the "amended Hague Rules". The unmodified Hague Rules, in the form of their English translation, are set out in Schedule 1. Section 7(1) and (2)(a) of COGSA provide:

> **7 The amended Hague Rules**
>
> (1) The ***amended Hague Rules*** consists of the text set out in Schedule 1, as modified in accordance with the Schedule of modifications referred to in subsection (2). The text set out in Schedule 1 (in its unmodified form) is the English translation of Articles 1 to 10 of the Brussels Convention, as amended by Articles 1 to 5 of the Visby Protocol and Article II of the SDR Protocol.
>
> (2) The regulations may amend this Act to add a Schedule (the ***Schedule of modifications***) that modifies the text set out in Schedule 1 for the following purposes:
>
> (a) to provide for the coverage of a wider range of sea carriage documents (including documents in electronic form); …

84 The modifications made by Schedule 1A were ones authorised by s 7(2) of COGSA. The mechanism by which they were effected will be discussed a little later.

85 Sections 8, 10 and 11 of COGSA provide as follows:

> **8 The amended Hague Rules to have the force of law**
>
> Subject to section 10, the amended Hague Rules have the force of law in Australia.
>
> …
>
> **10 Application of the amended Hague Rules**
>
> (1) 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:
>
> (i) to which, under Article 10 of the amended Hague Rules, those Rules apply; or
>
> (ii) subject to subsections (1A) and (2) – for the carriage of goods by sea from a port in Australia to another port in Australia; or
>
> (iii) contained in or evidenced by a non-negotiable document (other than a bill of lading or similar document of title),

being a contract that contains express provision to the effect that the amended Hague Rules are to govern the contract as if the document were a bill of lading.

Note: The amended Hague Rules are set out in Schedule 1A – see ss 4(1) and 7(1).

(1A) If a contract for the carriage of goods by sea referred to in subparagraph 10(1)(b)(ii) is contained only in, or evidenced only by, a consignment note, the amended Hague Rules apply to the contract only if paragraph 5 of Article 10 of those Rules so requires.

(2) The amended Hague Rules do not apply in relation to the carriage of goods by sea from a port in any State or Territory in Australia to any other port in that State or Territory.

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.

86 The effect of s 11(2)(b) in the present case is that if the charterparty was a document of the kind mentioned in s 11(1)(a) or (b), the arbitration clause in the charterparty was ineffective because it purported to preclude or limit the jurisdiction of Australian courts.

87 The primary judge found that the charterparty was not a document within the meaning of s 11(1)(b) because it was not a document of a kind mentioned in s 10(1)(b)(iii). In turn that conclusion depended upon the finding that, whatever the true character of the charterparty, it was not a contract that contained any express provision to the effect that the amended Hague Rules were to govern it as if it were a bill of lading. Having regard to the terms of the charterparty, that conclusion is unassailable and no party has put it in issue in the present proceedings. The result is that if s 11(2)(b) of COGSA applies to the arbitration clause in the charterparty it is because the charterparty is "a sea carriage document" within the meaning of s 11(1)(a).

88 The term "sea carriage document" is not defined in the body of COGSA. It is, however, defined in the amended Hague Rules which are contained in Schedule 1A.

89 The appellant has argued that the charterparty was not a sea carriage document. It contends that it is a document of a different kind and that under neither the ordinary meaning of the term sea carriage document, nor the defined meaning it is given by the amended Hague Rules, is the charterparty such a document.

90 In my view, the first element of this proposition should not be accepted. The voyage charterparty in the present case is clearly enough a document which set out contractual rights and obligations stating the terms on which coal was to be loaded, carried from Australia to China and discharged. It obviously was, in part therefore, a contract for carriage by sea. In my view, in that sense it was a sea carriage document. However, that does not in my view suffice to resolve the present controversy because, on the view I take of the proper construction of s 11 of COGSA, and the amended Hague Rules in Schedule 1A, the term sea carriage document where used in s 11 of COGSA must be given the defined meaning supplied by the amended Hague Rules.

91 The critical questions on this aspect of the appeal, and the answers I would give them (for reasons which will require some explanation), are as follows:

1. Does the term "sea carriage document" where it is used in s 11 of COGSA (s 11(1)(a) and s 11(2)(c)(i)) have the meaning given by the definition of that term in Article 1(1)(g) of the amended Hague Rules? – Yes.
2. Are documents which fall within the definition of Article 1(1)(g) necessarily ones to which the amended Hague Rules apply? – No.
3. Is the charterparty a document to which the amended Hague Rules apply? – No.
4. Is the charterparty a document within the definition of "sea carriage document" in Article 1(1)(g) of the amended Hague Rules? – Yes.

1. Does the term "sea carriage document" where it is used in s 11 of COGSA have the meaning given by the definition of that term in Article 1(1)(g) of the amended Hague Rules?

92 In my view, there are good reasons why the term "sea carriage document" where it is used in s 11(1)(a) (and s 11(2)(c)) of COGSA should be given the same meaning as is given by the definition of that term in the amended Hague Rules in Schedule 1A to COGSA. However, that is not the same question as whether a sea carriage document is necessarily one to which the amended Hague Rules apply – i.e. a document which is identified by s 10 of COGSA.

93 The provisions of the amended Hague Rules which appear to me to require consideration in the discussion which follows are the following:

> **ARTICLE 1**
>
> 1. In these Rules, the following words are employed, with the meanings set out below:-
>
> (a) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.
>
> (aa) …
>
> (b) "Contract of carriage" means a contract of carriage covered by a sea carriage document (to the extent that the document relates to the carriage of goods by sea), and includes a negotiable sea carriage document issued under a charterparty from the moment at which that document regulates the relations between its holder and the carrier concerned.
>
> (ba) …
>
> (c) "Goods" includes goods, wares, merchandise, and articles of every kind whatsoever except live animals.

(d) "Ship" means any vessel used for the carriage of goods by sea.

(e) ...

(f) "Negotiable sea carriage document" means:
(i) a bill of lading (other than a bill of lading that, by law, is not negotiable); or
(ii) a negotiable document of title that is similar to a negotiable bill of lading and that contains or evidences a contract of carriage of goods by sea.

(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.
[NOTE: These Rules do not apply to all sea carriage documents – see Article 10.]

…

ARTICLE 5

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under these Rules, provided such surrender or increase shall be embodied in the sea carriage document issued to the shipper. The provisions of these Rules shall not be applicable to charter parties, but if negotiable sea carriage documents are issued in the case of a ship under a charter party they shall comply with the terms of these Rules. Nothing in these rules shall be held to prevent the insertion in a sea carriage document of any lawful provision regarding general average.

…

ARTICLE 10

1. Subject to paragraph 6, these Rules apply to sea carriage documents relating to the carriage of goods from ports in Australia to ports outside Australia regardless of the form in which the sea carriage document is issued.
[NOTE: For the meaning of "sea carriage document", see paragraph 1(g) of Article 1.]

2. Subject to paragraph 6, these Rules apply to the carriage of goods by sea from ports outside Australia to ports in Australia, unless one of the Conventions mentioned in paragraph 3 (or a modification of such a Convention by the law of a contracting State) applies, by agreement or by law, to the carriage, or otherwise has effect in relation to the carriage.

3. The Conventions are:

(a) the Brussels Convention;
(b) the Brussels Convention as amended by either the Visby Protocol or the SDR Protocol or both;
(c) the Hamburg Convention.

4. Subject to paragraphs 5 and 6, these Rules apply to a sea carriage document that contains or evidences a contract for the carriage of goods by sea from a port in a State or Territory in Australia to a port in another State or Territory in Australia.

5. If a contract for the carriage of goods by sea from a port in a State or Territory in Australia to a port in another State or Territory in Australia is contained only in or evidenced only by a consignment note, these Rules apply only if the goods:

(a) are to be carried onwards by sea to, or are being carried onwards by sea from, a port outside Australia; and
(b) have been declared to the carrier in writing to be international cargo.

6. These Rules do not apply to the carriage of goods by sea under a charterparty unless a sea carriage document is issued for the carriage.

7. These Rules apply to a sea carriage document issued under a charterparty only if the sea carriage document is a negotiable sea carriage document, and only while the document regulates the relationship between the holder of it and the carrier of the relevant goods.

94 Before the precise terms of the definition in Article 1(1)(g) (and the other provisions of the amended Hague Rules) are considered, the history of COGSA in its present form should be mentioned.

95 The term "sea carriage document" first appeared in COGSA when s 7(2) (set out earlier) was inserted by the *Carriage of Goods by Sea (Amendment) Act 1997* (Cth). It was not defined. The term "sea carriage document" was later inserted in s 11 at the same time as Schedule 1A (the amended Hague Rules containing the new definition of "sea carriage document") was prescribed. That was accomplished by the *Carriage of Goods by Sea Regulations 1998* (Cth) which in turn was authorised by s 7(2) of COGSA.

96 Immediately before that time, the amended Hague Rules were the modified Hague Rules in Schedule 1. When COGSA was enacted in 1991, the amended Hague Rules were defined by s 7 as follows:

7. A reference in this Act to the amended Hague Rules is a reference to the English translation of Articles 1 to 10 (inclusive) of the Brussels Convention, incorporating the English text of the amendments made to that Convention by Articles 1 to 5 (inclusive) of the Visby Protocol and Article II of the SDR Protocol, as set out in Schedule 1.

97 At that time, ss 10 and 11 of COGSA provided:

Application of the amended Hague Rules

10.(1) 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 this Part and before the commencement of Part 3; and
(b) is a contract:
(i) of a kind referred to in Article 10 of the amended Hague Rules; or
(ii) subject to subsection (2), for the carriage of goods by sea from a port in Australia to another port in Australia, being a contract that is contained in or evidenced by a bill of lading or similar document of title; or
(iii) contained in or evidenced by a non-negotiable document (other than a bill of lading or similar document of title), being a contract that contains express provision to the effect that the amended Hague Rules are to govern the contract as if the document were a bill of lading.

(2) The amended Hague Rules do not apply in relation to the carriage of goods by sea from a port in any State or Territory in Australia to any other port in that State or Territory.

Construction and jurisdiction

11.(1) All parties to:

(a) a bill of lading, or a similar document of title, 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 bill of lading, or a similar document of title, 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.

98 The protection given by s 11 (preserving the jurisdiction of Australian courts) thus applied at that time to bills of lading and similar documents of title for carriage of goods to and from Australia and non-negotiable documents of other kinds which were expressed to be governed by the amended Hague Rules (then the Hague-Visby Rules).

99 In January 1995, a Cargo Liability Working Group was formed, consisting of representatives of shipper, carrier and insurer interests, to make proposals to the federal Department of Transport for consideration by the Minister for Transport. In its Report of September 1995, the Working Group proposed that the provisions of COGSA should be extended to cover "all contracts of carriage". In particular, it was suggested that "[r]eferences to documents should be framed broadly and generally, so as to cover various types of non-negotiable instruments…as well as Bills of Lading". It was recommended that "[a]ll relevant shipping documents should be covered, including electronic documents".

100 In response, COGSA was amended in 1997 to permit a further schedule to be added to COGSA by regulation. Section 7(2) (set out above) was inserted to permit "coverage of a wider range of sea carriage documents". This was the first use of the term "sea carriage document" in COGSA.

101 In 1998, as earlier indicated, the *Carriage of Goods by Sea Regulations 1998*(Cth) were made. They inserted Schedule 1A (the present amended Hague Rules) in substantially its present form. "Sea carriage document" was defined. The term "sea carriage document to which, or relating to a contract of carriage to which, the amended Hague Rules apply" was (by reg 6) substituted in s 11(1)(a) and s 11(2)(c)(i) for the term "a bill of lading, or a similar document of title". This change had an apparently unintended effect. It excluded, from the protection of s 11, any document to which the new amended Hague Rules did not apply. The difficulty soon became evident and was exposed by Emmett J in *Hi-Fert Pty Ltd v United Shipping Adriatic Inc* (1998) 89 FCR 166 ("*Hi-Fert*"). Emmett J said (at 181):

> Hi-Fert contended that the rule-making power conferred by s 7(3) of the Amendment Act did not include a power to amend s 11(2)(c) of COGSA in the manner for which United contended. Hi-Fert contended that no amendment to s 11(2)(c) was necessary to give effect to the modifications made to the Hague-Visby Rules. Section 11(2)(c) and its predecessors have, since 1904, operated irrespective of the terms of any

overseas Bill of Lading, whatever its content and irrespective of various conventions.

A general rule-making power of the type conferred by s 7(3)(b) does not enable the rule-maker, by regulation, to extend the scope or operation of the enactment. It should be treated as strictly ancillary: see *Shanahan v Scott* (1957) 96 CLR 245 at 250. The purpose of s 11 is to ensure that a foreign jurisdiction clause in respect of a bill of lading relating to inward shipments cannot affect Australia as a proper dispute resolution forum. As I have said earlier, s 11 of COGSA is not directly concerned with the adoption of the Hague-Visby Rules in s 8; nor is it concerned with any modification to the Hague-Visby Rules.

There is nothing in the Second Reading Speech which introduced the Amendment Act nor in the Explanatory Memorandum relating to it to indicate that it was contemplated that changes to be made to COGSA by the regulations authorised by the Amendment Act would impact in any significant way on the protection afforded to importers by s 11(2)(c). However, if United's contention is correct, reg 6.2 has a very significant impact. The effect of the contention is that s 11(2)(c)(i) will not apply to sea carriage documents relating to the carriage of goods from any place outside of Australia to any place in Australia if one of the conventions mentioned in par 3 of Art 10 of the modified Hague-Visby Rules applies, by agreement or by law, to the carriage or otherwise has effect in relation to that carriage.

Prior to the commencement of reg 6.2, s 11(2)(c)(i) applied to any bill of lading or similar document of title relating to the carriage of goods from any place outside Australia to any place in Australia irrespective of whether any of the conventions referred to in par 3 applied to the carriage or not. The effect, therefore, is a very significant restriction of the circumstances in which s 11(2)(c) has application. There was no express authority for such a change to be effected by the regulations in the terms of s 7(3)(b) of the Amendment Act. Power to amend the Act was given only to the extent "necessary or appropriate, having regard to the modifications set out in the Schedule of modifications". The modifications do not require any restriction in the operation of s 11.

102 Emmett J went on to say (at 182):

Paragraph 1 of Art 1 of the modified Rules provides that certain words specified are employed in the rules with the meaning there set out. In particular, there is a definition of the expression "sea carriage document" that is wider than the expression "a bill of lading or similar document of title" as used in the original s 11. There would be a rationale for extending the operation of s 11(2)(c)(i) to cover not only bills of lading or similar documents of title as that expression was used but any sea carriage documents within the meaning of that expression as defined in par 1 of Art 1. That may have been the intention of the drafter. However, the amendment appears to go further than that.

The expression "contract of carriage" is also defined in the modified Rules as meaning "a contract of carriage covered by a sea carriage document (to the extent that the document relates to the carriage of goods by sea)". The definition of sea carriage document is as follows:

> "(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 … that either contains or evidences a contract of carriage of goods by sea."
>
> It would be consistent with the power conferred by s 7(3)(b) of the Amendment Act to provide that the documents to which s 11 applies be expanded to be consistent with the definition of "sea carriage document" as that expression is used in the modified Rules. However, if the amendment is to be given the wider meaning than appears to follow literally, I consider that it would be invalid.
>
> I consider, therefore, that the amendment should be read down so as to be within the power. I would read it down so that s 11(2)(c)(i) applies to a sea carriage document as that term is defined in the modified Hague-Visby Rules or a sea carriage document relating to a contract of carriage as that term is defined in the modified Hague-Visby Rules.

103 The significance of this judgment for the present appeal is twofold. First, it draws attention to the fact that the protection given by s 11 (and its earlier counterparts) was not earlier confined to documents to which the Hague-Visby Rules (those in Schedule 1) applied. Secondly, Emmett J applied the new definition in Article 1(1)(g) of the amended Hague Rules in Schedule 1A as a test of validity. He did so in circumstances where it was clear that the definition, and therefore the operation of s 11, was not confined by the application of those new amended Hague Rules. Each of these two elements appears to me to have been essential to the judgment. The analysis did not embrace any suggestion that s 11 should be construed to refer only to documents to which the amended Hague Rules themselves applied. Indeed, that unjustified limitation was the vice being addressed. Emmett J's judgment in *Hi-Fert* had the direct consequence that s 11 was not confined in its valid operation to documents to which the amended Hague Rules applied.

104 Seven days after *Hi-Fert* was decided, the *Carriage of Goods by Sea Regulations 1998 (No 2)* (Cth) commenced. That put s 11(1)(a) and s 11(2)(c)(i) of COGSA into their present form. It removed the difficulty identified by Emmett J. These events in December 2008, in my view, make it plain that it was expressly intended by the most recent amendment that the term "sea carriage document" in s 11 of COGSA should have the defined meaning given by the amended Hague Rules as suggested by Emmett J. It was also clear that, defined in that way, s 11 might apply to sea carriage documents to which the amended Hague Rules did not themselves apply. I return to that issue shortly.

105 Another reason why the term "sea carriage document" in s 11 should be regarded as bearing its defined meaning is that the amended Hague Rules (and the definition of "sea carriage

document" which they provide) should be regarded as part of COGSA. They have the force of law in Australia, subject to the operation of s 10 of COGSA itself. Ordinary principles of construction suggest that, unless there is a good reason to think otherwise, the terms used in COGSA would be regarded as used consistently. The application of this principle does not only concern the term "sea carriage document". It is apparent, in my respectful view, that other terms which are not defined in the body of COGSA are also intended to be ones which also take their meaning from the context supplied by the amended Hague Rules. Those terms are: "carrier"; "consignment note"; "contract of carriage"; "goods"; "ship" and "carriage of goods by sea", as well as "sea carriage document". They each have a meaning supplied by Article 1 of the amended Hague Rules. In my view, it is plain that the terms are used in a uniform way with the same meaning in COGSA as the meaning given for the purpose in the amended Hague Rules.

106 In my respectful view, therefore, the term "sea carriage document" in s 11(1)(a) and s 11(2)(c)(i) has the defined meaning given by Article 1(1)(g) of the amended Hague Rules.

2. Are documents which fall within the definition of Article 1(1)(g) necessarily ones to which the amended Hague Rules apply?

107 There are, in my view, several reasons why a sea carriage document referred to in Article 1(1)(g) need not be necessarily one to which the amended Hague Rules apply. I have already mentioned the history which makes it apparent that in response to the judgment in *Hi-Fert*, s 11 was put once again into a form which was not intended to be confined to documents to which the new amended Hague Rules applied. There are further reasons for this conclusion.

108 Whether the amended Hague Rules apply to a particular document is governed by s 10 of COGSA. The amended Hague Rules do not apply to contracts of carriage of goods by sea made before 1997, but s 11 of COGSA is not limited in that way. It is also clear from s 10 that not all documents of a particular class referred to in s 10(1)(b)(ii) or (iii) are intended to be ones to which the amended Hague Rules apply. In those cases, further specific conditions must be met. Thus, in the case of a contract referred to in s 10(1)(b)(ii) (i.e. for carriage between Australian ports) which is contained in, or evidenced by, a consignment note (a document which is stipulated by the amended Hague Rules to be a sea carriage document), the amended Hague Rules only apply if Article 10(5) requires it. Further, a non-negotiable document of the kind referred to in s 10(1)(b)(iii) is thereby subject to the amended Hague

Rules if it meets the condition that it contains an express provision that the amended Hague Rules are to govern it as if it was a bill of lading.

109 Section 10(1)(b)(i) applies the amended Hague Rules to all documents to which Article 10 applies, but there are also exceptions made by Article 10 which indicate that the meaning of sea carriage document as defined is not co-extensive with the application of Article 10, and therefore s 10(1)(b)(i) of COGSA.

110 Particular attention must be given, in this connection, to the note which follows Article 1(1)(g)(iv). It is apparent from the note also that there are sea carriage documents intended to be embraced within the definition to which the amended Hague Rules do not apply. Article 10 provides some ready examples. One obvious example is that sea carriage documents relating to the carriage of goods to Australia (the circumstance to which s 11(2)(c)(i) is addressed) are only covered by the amended Hague Rules in the circumstances referred to in Article 10(2) – i.e. where a Convention nominated by 10(3) does not apply. That is the circumstance on which the decision in *Hi-Fert* turned. It is not a limitation imported into s 11, even in the undisputed case of a bill of lading. There are further limitations stated by 10(5), but there is no doubt, for example, that a consignment note is a sea carriage document within the meaning of Article 1(1)(g)(iv) whether or not the amended Hague Rules apply to it in a particular case.

111 The consequence of these matters is that the scope of the definition of sea carriage document is not confined to documents to which the amended Hague Rules apply. Nor, therefore, is s 11 of COGSA.

3. Is the charterparty a document to which the amended Hague Rules apply?

112 It is plain, in my view, that Article 10 of the amended Hague Rules does not apply to the charterparty in the present case. There are a number of clear indicators that this is so.

113 First, Article 5 is clear in its terms that the amended Hague Rules do not apply to charterparties. There is no doubt that the voyage charterparty in the present case is such a document. No argument is available that any of its terms are "issued…under [the] charter party" as contemplated by Article 5 because neither the charterparty or any individual terms are negotiable.

114 Secondly, under the combination of Articles 10(1), (6) and (7), it would be necessary (conformably also with Article 5) to identify a negotiable sea carriage document which had been issued under a charterparty in order for the amended Hague Rules to apply to the carriage of goods under that charterparty. The charterparty in the present case does provide for such circumstances. It provides that bills of lading will be issued. Those bills of lading will come within the operation of Article 10 of the amended Hague Rules. The charterparty itself does not.

115 The result is that the charterparty does not come within s 10(1)(b)(i) of COGSA. Neither does it come within s 10(1)(b)(iii) for the reasons given by the primary judge referred to earlier. Therefore, the charterparty is not a document to which the amended Hague Rules apply.

4. Is the charterparty a document within the definition of "sea carriage document" in Article 1(1)(g) of the amended Hague Rules?

116 In my view, the answer to this question is: Yes. Of the various elements contained in the definition of "sea carriage document" in Article 1 of the amended Hague Rules, the only possibility that the charterparty in the present case was a sea carriage document as there defined lies in Article (1)(g)(iv). In my view, the charterparty in the present case contains or evidences a contract of carriage of goods by sea. The provisions which deal with the arrangements for carriage of, and payment for, freight seem to me to be provisions of that character.

117 The conclusions of the primary judge about this issue appear to me to be captured in the following paragraphs of his Honour's judgment:

> 130 There is no definition of "*sea carriage document*" in COGSA 1991. That expression is, however, defined in Art 1(1)(g)(iv) of the amended Hague Rules which are set out in Schedule 1A to the Act. Strictly speaking, that definition applies only to those Rules, not to COGSA 1991 itself. However, those Rules have the force of law and assume some significance in COGSA 1991. I agree with Senior Counsel for DKN that the types of documents covered by subpars (i), (ii) and (iii) of Art 1(1)(g) are not relevant in the present case. Those documents comprise bills of lading and their analogues.
>
> …
>
> 142 I see no warrant for doing other than giving the words of the definition in Art 1(1)(g)(iv) a meaning reflective of ordinary English usage. Taking that approach, because the Charterparty is a contract of carriage of goods by sea it *"contains or evidences"* such a contract. It is, therefore, a *"sea carriage*

> *document"* within the meaning of s 11(1)(a). The same result would be arrived at by simply construing the phrase *"sea carriage document"* in s 11(1)(a) without recourse to Art 1(1)(g)(iv) of the amended Hague Rules.

118 My analysis of the position has led me to the same result. It does not have the consequence that charterparties generally would be exposed to the operation of s 11 of COGSA, or that the arbitration clauses they contain would be rendered ineffective under Australian law. The present case (on the view I favour) turns on the particular provisions and character of the charterparty and the fact that it deals directly with the terms on which freight is to be carried.

119 Clauses 1 and 2 of the charterparty provide:

> **1. Loading Port(s) / Discharging Port(s)**
>
> That the said Vessel being tight, staunch and strong, and in every way fit for the voyage, shall, with all convenient speed, proceed to
>
> **…Dalrymple Bay Coal Terminal, Australia**
> and there load, always afloat, and in the customary manner from the Charterers, in such safe berth as they shall direct, a full and complete cargo Of [sic] coal **68,000** tons of ~~2240 lbs/~~1000 kilos **10** % more or less in the Owners' option; and being so loaded, shall therefrom proceed, with all convenient speed, to [China].
> …and there deliver her cargo, as ordered by the Charterers, where she can safely deliver it, always afloat, on having been paid freight at the rate of 17.00 US $ per ton of ~~2240 lbs/~~1000 kilos, **free in and out spout trimmed, basis 1 port load, 2 port discharge**, on bill of lading quantity.
>
> **2. Freight Payment**
>
> The FREIGHT shall be paid in **Denmark in free transferable US currency into the following account designated by carriers. Payment to be effected within 3 New York banking days after signing/releasing Bills of Lading, marked FREIGHT PAYABLE AS PER C/P** …

120 In my respectful opinion, these provisions constituted an enforceable contract for the carriage of freight, whatever might be the additional legal effect of any bill of lading. The charterparty itself in the present case, therefore, is a sea carriage document as defined, even though any bill of lading issued under the charterparty would also be a sea carriage document.

121 In *The Blooming Orchard [No 2]* (1990) 22 NSWLR 273, Carruthers J came to a similar conclusion concerning the operation of s 9 of the *Sea Carriage of Goods Act 1924* (Cth). He took the view that the term "a document" should be given a meaning consistent with general usage, not confined in a way similar to the way argued in the present case. *The Blooming*

Orchard [No 2] does not seem to me to have been wrongly decided, either by reference to the legislative provisions it considered or by reference to any general point of principle. That case, like the present, considered a circumstance where a voyage charterparty in the form used in the present case also represented a contract for the carriage of goods by sea.

122 The decision of Carruthers J in *The Blooming Orchard [No 2]* was endorsed by Hill J in this Court in *BHP Trading Asia Ltd v Oceaname Shipping Ltd* (1996) 67 FCR 211. This decision was given before the insertion of Schedule 1A, and directly concerned s 9 of the earlier *Sea Carriage of Goods Act 1924* (Cth). However, the following observation is apposite (at 235):

> I would but say that I should have thought there was little doubt that a voyage charter of the kind here was a document relating to the carriage of goods.

123 When COGSA was enacted in 1991, the construction favoured by Carruthers J and Hill J was avoided because the operation of s 11(1)(a) and s 11(2)(c)(i) of COGSA initially turned on the existence of "a bill of lading, or similar document of title". When s 11 was first amended by regulation in 1998, no specific difficulty about whether charterparties might be touched by s 11 arose because the operation of s 11(1)(a) and s 11(2)(c)(i) was limited to "a sea carriage document to which…the amended Hague Rules apply". The alteration was curious, nevertheless, because the amended Hague Rules do not apply to charterparties at all, but that curiosity may be put to one side.

124 The more important observation is that those restrictions were removed in December 1998 with the making of the regulation which put s 11(1)(a) and s 11(2)(c)(i) into their present form. The language now employed once again turns on the term "document". It is, if anything, clearer because the document must be one "that either contains or evidences a contract of carriage of goods by sea". The charterparty in the present case is such a document.

125 That also, in my respectful view, should be regarded as the intended position arising from the enactment of s 11(1)(a) and s 11(2)(c)(i) in their present form, following the decision in *Hi-Fert*.

126 In my view, therefore, the charterparty was a sea carriage document within the meaning of s 11(1)(a); and thus s 11(2) of COGSA rendered cl 32 of the charterparty ineffective.

IS THE AWARD ENFORCEABLE?

127 The conclusion I have reached, that the arbitration clause was ineffective, makes it necessary to express a view about the alternative submission put by the appellant, namely that if s 11(2)(b) of COGSA applies, nevertheless the award is enforceable in its own right. The argument was based upon the following provisions of the Arbitration Act:

> **8 Recognition of foreign awards**
>
> (1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.
>
> …
>
> (3) Subject to this Part, a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court.
>
> (3A) The court may only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7).
>
> …
>
> (5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:
>
> (a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him or her, under some incapacity at the time when the agreement was made;
> (b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;
> (c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings;
> (d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;
> (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
> (f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.
>
> (6) Where an award to which paragraph (5)(d) applies contains decisions on matters submitted to arbitration and those decisions can be separated from

decisions on matters not so submitted, that part of the award which contains decisions on matters so submitted may be enforced.

(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:

(a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or
(b) to enforce the award would be contrary to public policy.

(7A) To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:

(a) the making of the award was induced or affected by fraud or corruption; or
(b) a breach of the rules of natural justice occurred in connection with the making of the award.

…

128 The argument was that there were no grounds upon which, pursuant to s 8(5) or (7) of the Arbitration Act, the award might not be enforced and so s 8(3A) required the Court to enforce it.

129 Section 2C(b) of the Arbitration Act provides:

2C Carriage of goods by sea

Nothing in this Act affects:

…

(b) the operation of section 11…of the *Carriage of Goods by Sea Act 1991.*

130 I agree with the primary judge that s 2C(b) of the Arbitration Act has the effect that the award cannot be enforced in this case if cl 32 of the charterparty was not available as a source of power for the arbitrator due to the operation of s 11 of COGSA.

131 The award itself was premised on the earlier finding by the arbitrator that s 11(2)(b) of COGSA did not apply to the arbitration clause. In my view, that finding was incorrect. However, a legal error by the arbitrator would not mean, necessarily, that the arbitration award was unenforceable. If the award is unenforceable it must be because the arbitration agreement was not effective to submit the dispute to determination by the arbitrator in the first instance.

132 In *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5, the majority judgment (Hayne, Crennan, Kiefel and Bell JJ) said (at [76]-[79]):

> An agreement to submit disputes to arbitration does not, apart from statute, take from a party the power to invoke the jurisdiction of the courts to enforce that party's rights by instituting an action to determine a dispute of a kind that the parties have agreed should be arbitrated[*Dobbs* (1935) 53 CLR 643 at 652-653, citing *Kill v Hollister* (1746) 1 Wils KB 129 [95 ER 532]; *Thompson v Charnock* (1799) 8 TR 139 [101 ER 1310]; *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478]. The jurisdiction of the courts is not and cannot be ousted by a private agreement.
>
> However, if parties do go to arbitration and the arbitrator makes an award, the making of the award has legal significance in respect of the parties' dispute and their rights and liabilities. As the plurality in *Dobbs* ((1935) 53 CLR 643 at 653) said: "if, before the institution of an action, an award was made, *it* [the award] governed the rights of the parties and precluded them from asserting in the Courts the claims which the award determined" (emphasis added). In such a case, the arbitrator's award governs the rights of the parties because "[b]y submitting the claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them" [*Dobbs* (1935) 53 CLR 643 at 653. See also *Minister for Works (WA) v Civil and Civic Pty Ltd* (1967) 116 CLR 273 at 284; *CFMEU* (2001) 203 CLR 645 at 658 [31]].
>
> This gives rise to the general rule that an award made by an arbitrator pursuant to such authority is final and conclusive. Further, the arbitrator's making of an award in exercise of such authority both extinguishes the original cause of action and imposes new obligations on the parties in substitution for the rights and liabilities which were the subject of the dispute referred to arbitration. The former rights of the parties are discharged by an accord and satisfaction. The accord is the agreement to submit disputes to arbitration; the satisfaction is the making of an award in fulfilment of the agreement to arbitrate [*Dobbs* (1935) 53 CLR 643 at 653. See also *McDermott v Black* (1940) 63 CLR 161 at 183-185; [1940] HCA 4; *Doleman & Sons v Ossett Corporation* [1912] 3 KB 257 at 267].
>
> It follows that when an arbitral award is enforced by curial process, the obligations sought to be enforced are those which are created by the award in substitution for the rights and liabilities which were the subject of the dispute referred to arbitration. A party may sue on an award as a cause of action or, in some cases, as in this case, seek enforcement of the award pursuant to the [Arbitration] Act.

(See also per French CJ and Gageler J at [17].)

133 However, those principles operate in the context of any legislative constraints to which they are subject. In the present case, apart from the inclusion of cl 32 in the charterparty, the respondent did not in any sense submit to the arbitration or accept the arbitrator's jurisdiction. The present is not a case where there might be an independent foundation for accepting the award as enforceable. The award takes its authority solely from cl 32 of the charterparty.

Section 11(2)(b) of COGSA rendered cl 32 ineffective for the purpose of Australian law. As cl 32 is ineffective, the award was not authorised by it for the purpose of Australian law. The award is not enforceable because it would affect the operation of s 11 of COGSA to enforce it, contrary to s 2C(b) of the Arbitration Act. It would, moreover, in my view be contrary to public policy to enforce the award if that would defeat the intended operation of s 11(2)(b) of COGSA (see Arbitration Act s 8(7)(b)).

CONCLUSION

134 In my respectful view, the findings and conclusions of the primary judge were correct and should not be disturbed. The order which I favour is that the appeal be dismissed with costs.

I certify that the preceding sixty-one (61) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan.

Associate:

Dated: 18 September 2013