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Full Federal Court Confirms Validity of International Abritration Agreements in Voyage Charterparties

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

Abstract

The Full Court of the Federal Court has recently held that references to international arbitration in voyage charterparties are enforceable in Australia because such charterparties are not 'sea carriage documents' under the *Carriage of Goods by Sea Act 1991* (Cth) (**COGSA**). The Full Court ruling is particularly significant in affirming the availability of international arbitration to foreign parties entering into charterparties with Australian entities and subsequently seeking to enforce foreign arbitral awards in Australia.

Decision of the Full Court

The principal issue on appeal in *Dampskibsselskabet Nordon A/S v Gladstone Civil Pty Ltd* [2013] FCAFC 107 was the effectiveness of an arbitration clause in a voyage charterparty for the carriage of coal from China to Australia.

The primary judge, Foster J, held that the arbitration clause, which referred disputes to London arbitration, was of no effect because s 11(2)(b) of COGSA rendered ineffective agreements that purported to preclude or limit the jurisdiction of Australian courts with respect to 'sea carriage documents relating to the carriage of goods' within the ambit of s 11(1)(a) of COGSA. As a consequence, Foster J refused recognition and enforcement of an English arbitral award rendered pursuant to the arbitration agreement in the charterparty.

The majority of the Full Court (Rares and Mansfield JJ) determined, however, that a voyage charter party is not a 'sea carriage document relating to the carriage of goods' within the meaning of s 11(1)(a) of COGSA and does not render an international arbitration clause in the charterparty void.

Rares J, delivering the main judgment, examined the legislative scheme and history of COGSA and concluded that its objective is to regulate the relationship relating to the contract for the carriage of cargo by sea rather than the relationship relating to the contractual hire and use of a vessel (being the voyage charterparty). Rares J also observed that the resolution of disputes arising out of charterparties by international commercial arbitration has been a feature of shipping trade for some time. Accordingly, had Parliament intended to effect a substantial change to the operation of arbitration clauses in charterparties, it would have needed to do so in clearer terms than those contained in s 11 of COGSA.

Mansfield J agreed with Rares J and also noted that, since the term 'sea carriage document' is not defined in COGSA, it would be appropriate to look to the definition in the amended Hague Rules, which are contained in Schedule 1A of COGSA. Having considered the definition of the term in the amended Hague Rules, Mansfield J concluded that it did not extend to charterparties. Mansfield J concurred with Rares J that there has traditionally been a clear line drawn between a charterparty and a sea carriage document, as well as 'a clear and longstanding acceptance…that international commercial disputes (including voyage charterparties) may be settled by arbitration'. On that basis, Mansfield J did not construe s 11 of COGSA to limit the effect of arbitration clauses in respect of such disputes.

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Buchanan J, in dissent, concluded that the question of whether a voyage charterparty is a 'sea carriage document' is to be determined on the facts of each particular case. In this regard, Buchanan J disagreed with the decision of Foster J to the effect that all voyage charterparties fall within the ambit of a 'sea carriage document' in s 11 of COGSA. Nevertheless, Buchanan J concluded that, in this case, the terms of the charterparty concerned carriage of freight, rending it a 'sea carriage document'. Accordingly, Buchanan J considered that the ruling of the Court below with respect to the ineffectiveness of the arbitration clause in the charterparty was correct.

Comment

The majority decision of the Full Court provides clarity with respect to the question of whether international arbitration awards issued under voyage charterparties can be enforced in Australia.

From the perspective of accepted practices in shipping trade, the decision is a welcome development because it affirms the long-standing function of commercial arbitration in resolving international disputes arising out of charterparties.

The views of the majority in this case can also be seen as another illustration of the pro-arbitration approach adopted recently in other Australian cases, such as the decision of the High Court in TCL *Air Conditioner (Zhongshan) Co Limited v The Judges of the Federal Court of Australia & Anor* [2013] HCA 5 and the decision of the Full Court in *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109.

This pro-arbitration stance is well-illustrated by the statement of Rares J that the purpose of COGSA '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.'