Australia: Voyage charterparties are not sea carriage documents

The Australian Federal Appeal Court overturned the Federal Court's decision and judged that a voyage charterparty was not a sea carriage document.

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The Australian Federal Appeal Court recently handed down its decision on the long awaited appeal in the *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd*. (Norden) case. The Australian Federal Appeal Court overturned the Federal Court's decision and judged that a voyage charterparty was not a sea carriage document. This is likely to be welcomed by Members and clients favouring law and arbitration clauses other than Australian law and jurisdiction, in their voyage charterparties. We examine below the implications of this decision.

Background

In previous articles we reported on two contradictory cases which affected the validity of foreign arbitration proceedings and the enforcement of foreign arbitration awards in Australia in relation to goods shipped into or out of Australia. The first of these cases was a decision of the Supreme Court of South Australia in the case of Jebsens Orient Shipping Services A/S & Anor v Interert Australia Pty & Ors (Jebsens) . The second case which we reported was the Federal Court case of Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd. (Norden) . At the heart of these cases was whether a voyage charterparty was a "sea carriage document" within the meaning of Section 11 of the Australian Carriage of Goods by Sea Act 1991 (COGSA 91). In the *Jebsens* case the Supreme Court of South Australia deemed that a voyage charterparty was not a sea carriage document thereby overturning a long-running argument in Australian legal and academic circles as to whether such a document was a "sea carriage document". However, the Federal Court in the *Norden* case reverted to earlier thinking and stated that for the purposes of Section 11 of COGSA 91 a voyage charterparty was a sea carriage document.

Sections 11(1) and 11(2) of the Australian Carriage of Goods by Sea Act 1991 (COGSA 91) read as follows:

"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...

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:...

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)."

The ramification of the decision in the *Norden* case was that a foreign arbitration agreement in a voyage charterparty would be rendered null and void. In reaching its decision the Court interpreted the provisions of COGSA 91 and the amendments to it in a very literal fashion.

Amendments to the Australian COGSA

As reported in previous articles, the original text of COGSA 91, Section 11 only applied to a bill of lading or other documents of title. In the mid-1990s, a working group was given the task of improving Australia's marine cargo liability regime and made a number of recommendations. Some of these recommendations found their way into the Carriage of Goods by Sea Regulations 1998 which sought to correct two technical drafting errors in COGSA 91, make a clarificatory amendment plus a further amendment which had apparently been requested by the industry. This latter amendment was to widen the categories of shipping documents in line with the intention that COGSA 91 should apply to all relevant shipping documents. The amendment deleted the reference to *"a bill of lading or a similar document of title"* and replaced it with *"a sea carriage document to which, or relating to a contract of which, the amended Hague Rules apply."*

The consequences of these amendments to Section 11 of COGSA 91 caused fierce academic and legal debate and result, as we have seen, in contradictory judgements. However, it can be hoped that a conclusion to the debate may now have been reached following the Federal Court of Appeal's decision in the *Norden* case which overturned the Federal Court's decision.

The Norden decision

In reaching its decision the Federal Appeal Court analysed the definition of the term "sea carriage document" in cargo conventions such as the Hague-Visby Rules which limits these documents to bills of lading or similar negotiable or non-negotiable documents. They also took into account a statute on the books of New South Wales, namely the Sea Carriage Documents Act of 1997, which also limited this type of document to bills of lading or waybills. In addition, the Federal Appeal Court was conscious of an international commercial understanding that voyage charterparties were fundamentally associated with the hire of a vessel and therefore separate from sea carriage documents which are contracts for the carriage of cargo.

The respondents in the *Norden* case are currently involved in insolvency proceedings and as a consequence it is unlikely that there will be an appeal to the Federal High Court, which is the highest court in Australia. Consequently this decision is, for the time being, unlikely to be challenged. That said, although the decision of the Australian Federal Appeal Court will be binding upon a lower Federal Court it may not be binding upon State or Territory Courts. However, the decision of the Australian Federal Appeal Court will be very persuasive to those courts and it is understood that State and Territory Courts will follow the decisions of Federal Courts unless they are considered to be manifestly wrong. At present the indications are that academics, the legal profession and the judiciary consider the Australian Federal Appeal Courts decision to be good law reflecting the intention of the legislature.

Where does this Federal Appeal Court decision leave Members and clients?

The upshot of the Federal Appeal Court's decision is that Members and clients who have a voyage charterparty for shipment of goods out of or into Australia which includes a law and arbitration or jurisdiction clause agreeing to jurisdictions and forums other than Australia and the Australian courts, will not find themselves falling foul of Section 11 of COGSA 91. Any disputes for which Members and clients obtain an arbitration award may be enforceable in Australia under the International

Arbitration Act 1974.

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