

A NOTE ON NORDEN: VOYAGE CHARTERPARTIES, THE HAGUE/VISBY RULES AND ENFORCING FOREIGN ARBITRATION AWARDS

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In the late 17th century, Louis XIV's finance minister, Jean-Baptiste Colbert gathered a group of merchants at his house in Paris. He asked them what he could do for commerce, and one of them responded, 'Laissez nous faire' – let us do it.¹ The attitude of the plain-speaking merchant reflects in part the policy in Australian courts of preserving the freedom of commercial parties to transact with limited curial interference, and in particular, the freedom to choose the method by which disputes in respect of their agreement may be resolved.²

Balanced against such a concern is that of protecting weaker parties from being exploited by stronger parties.³ This is achieved in part by equity, but pertinently for the purpose of this note, by statute. On a broader analysis, clarifying the space between the two objectives provides certainty to those who engage in international commerce.

This note considers the recent decision of the Full Court of the Federal Court in *Dampskibsselskabet Norden A/S v Gladstone Civil Pty Ltd (formerly Beach Building & Civil Group Pty Ltd)* (admin apptd, subject to DOCA)⁴ ('**Norden**').

In that decision, the court held by a 2 to 1 majority that a London arbitration clause in a voyage charterparty was *not* an agreement that precluded or limited the jurisdiction of the Australian courts in respect of a sea carriage document relating to the outbound carriage of goods by sea. In order to arrive at that conclusion, the court overturned the first instance decision of Foster J that a voyage charterparty, on a standard Amwelsh 93 form, was a 'sea carriage document' within the meaning of ss 11(1)(a) and 11(2)(b) of the *Carriage of Goods by Sea Act 1991* (Cth) ('**COGSA**').⁵ The Full Court's characterisation of the voyage charterparty aligned with the decision of Anderson J in a 2012 decision of the South Australian Supreme Court.⁶

This note suggests that *Norden* demonstrates the relationship between the two competing concerns by limiting the protective reach of COGSA in respect of dispute resolution agreements in voyage charterparties, thereby allowing parties to such contracts to do as the plain-speaking 17-century French merchant had asked to be allowed to do.

Background

A well-understood system of dispute resolution, particularly where parties have mutually agreed on a particular resolution mechanism (like arbitration for example) is an 'essential underpinning of commerce.'⁷ In that respect, arbitration has long been recognised as an effective dispute resolution process. In fact public and private arbitration were common in Ptolemaic Egypt with the aim to utilise the arbitration process to reach settlement before turning to more formalistic legal process.⁸ Even earlier, there are documentary references from the Bronze Age reign of the Great King Mursili II of the Hittite Empire, to the sanction of an attempt to settle a dispute by arbitration before it is brought

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¹ Joseph Kairys Jr, 'Maximising the Wealth of Nations: A Paradigm for Political Economy' (Working Papers in Economics No 477, University of Gothenburg, December 2010) 18.

² *Comandante Marine Corp v Pan Australian Shipping Pty Ltd* (2006) 157 FCR 45, [192]-[193] (Allsop J).

³ *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 193-4 (Mason and Wilson JJ).

⁴ [2013] FCAFC 107.

⁵ *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696.

⁶ *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* [2012] SASC 50. This case will be discussed later in this note.

⁷ *Comandante Marine Corp v Pan Australian Shipping Pty Ltd* (2006) 157 FCR 45, [192] (Allsop J).

⁸ Derek Roebuck, 'Cleopatra Compromised: Arbitration in Egypt in the First Century BC' (2008) 74(3) *Arbitration* 263, 264. As the title suggests, this article gives a brief yet fascinating account of the sophisticated dispute resolution processes that existed in Ptolemaic Egypt in the 1st century BC.

before the king.⁹ Commercial arbitration in England has been described as a ‘fact of commercial life well before the eighteenth century’.¹⁰

It has long been a common law rule that *pacta sunt servanda* – promises are to be kept.¹¹ However, at least from the 18th century, it was the position in the common law that an arbitration agreement that purports to oust the jurisdiction of the court will not be recognised.¹² Such an agreement could not prevent an action before the courts in law or equity.¹³ The latter proposition is still good law, unless such a right is granted in statute.¹⁴ However, the agreement to utilise a forum other than the court is no longer in itself invalid, unless to make such an agreement would be contrary to statute.¹⁵ This reflects the importance placed on party autonomy and the concern to hold parties to their bargain, particularly in international commerce, unless the legislature has decided that it would be inappropriate to do so.

An example of just such a decision by Parliament is found in s 11(2) of COGSA, which renders ineffective a foreign arbitration agreement that purports to preclude or limit the jurisdiction of the Australian courts.¹⁶ The provision expresses the legislative intent of favouring the protection of parties to certain types of transactions over party autonomy and freedom of contract.

Section 11 of COGSA states:

- (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 sub-section (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 sub-paragraph 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.

(emphases added)

The phrase, ‘sea carriage document’ is not defined in COGSA, but is defined in art 1(1)(g) of the modified amended Hague Rules at Sch 1A of COGSA.¹⁷ This provides:

"Sea carriage document" means:

⁹ Gary Beckman, *Hittite Diplomatic Texts* (2nd ed, Scholars Press, Atlanta) 172.

¹⁰ Mary Bedikian, ‘Triumph of Progress: The Embrace of International Commercial Arbitration’ in Russel Miller and Rebecca Bratspies (eds), *Progress in International Law* (Koninklijke Brill, 2008) 517, 522.

¹¹ *Robinson v Bland* (1760) 1 Black W 234.

¹² *Kill v Hollister* (1746) 1 Wils KB 129; 95 ER 532.

¹³ Scrutton LJ vividly captured this attitude in *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478, declaring at 488: ‘There must be no Alsatia in England where the King’s writ does not run.’

¹⁴ *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5, [76] (Hayne, Crennan, Kiefel and Bell JJ). Pertinently, the *International Arbitration Act 1974* (Cth) is one such statute.

¹⁵ *Felton v Mulligan* (1971) 124 CLR 367, 386-7 (Windeyer J).

¹⁶ Naturally, there are other statutes which contain such legislation. See Kate Lewins, ‘Maritime Law and the TPA as a “Mandatory Statute” in Australia and England: Confusion and Consternation?’ (2008) 36 *Australian Business Law Review* 78, 79.

¹⁷ The amended Hague Rules in Schedule 1A of COGSA are a modification of the Hague/Visby Rules.

- (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.

The language of s 11(2) is directed not as much at the agreement which contains a foreign jurisdiction clause, but specifically at the provision within an agreement which offends s 11. This must be the case as a matter of common sense, and simple statutory interpretation. It also holds true in theory because of the doctrine of separation which effectively renders the arbitration provision as separate from the agreement in which it occurs.¹⁸

Section 11 has its genesis in s 6 of the *Sea-Carriage of Goods Act 1904* (Cth) ('1904 Act'). Section 6 of the 1904 Act extended only so far as to render any foreign choice of law clause ineffective. The 1904 Act came into force following the enactment of the *Harter Act* in 1893 in the US,¹⁹ and the particular provision was drafted with a view, amongst others, to prevent carriers from relying upon English choice of law clauses which would permit them to deploy extensive exclusion clauses and absolve themselves of liability of any kind to shippers.²⁰

The successor to the 1904 Act was the *Sea-Carriage of Goods Act 1924* (Cth) ('1924 Act') which at s 9, contained a similar provision to s 6 of the 1904 Act. In addition, it protected Australian jurisdiction in a 'bill of lading or document relating to the carriage of goods'. That provision is now reincarnated in s 11(2) COGSA.²¹ Section 9 of the 1924 Act also rendered ineffective any foreign jurisdiction clauses for inward carriage. It attracted criticism²² but its effect was clearly intended.²³

COGSA was enacted in 1991 to give force of law to the Hague/Visby Rules. In its original form as passed, s 11(2)(b) and s 11(1)(a) related to 'bills of lading and other documents of title'. Clearly, this was narrower in scope than its predecessor, s 9 of the 1924 Act.

The following critical events then occurred during the 1990s:

- (a) In September 1995, a working group on marine cargo liability released a report calling for legislative changes to, *inter alia*, reflect the broader group of documents that were being used in the industry.²⁴
- (b) In 1997, s 7 of COGSA was amended to enable regulations that would later insert the amended Hague Rules for the purpose of, *inter alia*, providing 'coverage of a wider range of sea carriage documents'.²⁵ This was the first time the phrase 'sea carriage documents' entered the federal legislative vernacular in respect of cargo liability,²⁶ but it was not defined.

¹⁸ *Comandante Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, [229] (Allsop J), following the NSW Court of Appeal decision in *Ferris v Plaster* (1994) 34 NSWLR 474.

¹⁹ Named after US Member of the House of Representatives, Michael Carter.

²⁰ See generally, John Mo, "The Duty to Obey" versus an "Inherent Sense of Justice" (1995) 69 *Australian Law Journal* 276, 290-2. Rares J referred to these sorts of contracts as 'virtual contracts of adhesion': *Norden*, [70]. See also Martin Davies, 'Forum Selection, Choice of Law and Mandatory Rules' [2011] *Lloyd's Maritime and Commercial Law Quarterly* 237, 238-240.

²¹ Section 9 of the 1924 Act struck down offending agreements in much more emphatic terms compared to that used in s 11 COGSA. The latter renders offending agreements of 'no effect' whereas the former unleashed a 'trinity of invalidity' comprising 'illegal, null and void' against such provisions: *Bulk Chartering & Consultants Australia Pty Ltd v T&T Metal Trading Pty Ltd* (1993) 31 NSWLR 18, 23 (Kirby P).

²² For example, in *The Amazonia* [1989] 1 L1 Rep 403, Gatehouse J commented in relation to the 1924 Act 'I find it difficult to believe that Parliament intended to prevent the parties to any bill of lading or charter-party, falling within the description set out in s 9(1) and (2), from voluntarily agreeing to settle a particular dispute other than in the Australian courts': at 410.

²³ See the Second Reading Speech in respect of the *Sea-Carriage of Goods Bill 1924* (Cth) of the then Minister for Trade and Customs, Senator Herbert Pratten: *Hansard*, 20 August 1924, p 3353.

²⁴ *Norden* [31] Rares J, [99] (Buchanan J).

²⁵ *Ibid* [40].

²⁶ *Ibid* [100].

- (c) In 1997, the *Sea Carriage Documents Acts* were enacted in the States and the Northern Territory. These Acts replaced the legislation modelled on the old *Bills of Lading Act 1855* (UK) and essentially expanded the scope of documents to which the legislation applied.²⁷ They operate as cognate federal legislation.²⁸
- (d) In 1998, Schedule 1A of COGSA – the amended Hague Rules – was introduced and s 11 was modified, with both making reference to ‘sea carriage documents’.²⁹ Section 11(1)(a) was modified to apply to a ‘sea carriage document to which, or relating to a contract of carriage to which, the amended Hague Rules apply’.
- (e) In 1998, Emmet J handed down the Federal Court’s decision in *Hi-Fert Pty Ltd v United Shipping Adriatic Inc*³⁰, which identified that the amendment to s 11 had the unintended and impermissible effect of restricting its operation only to documents to which the amended Hague Rules applied.
- (f) Just a week later, s 11 was amended to read as it does today.³¹

Until 2012, there had been no direct authority on whether s 11 applied to voyage charterparties. A number of cases had decided this in the affirmative in respect of s 9(2) of the 1924 Act,³² but these are distinguishable in light of *first*, the different language of used in the 1924 Act, and *second*, the legislative history of s 11 COGSA in present form.

Two cases in 2012 considered the application of the present s 11(2)(b) COGSA to a voyage charterparty, and produced radically different outcomes.

In the first, *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* (‘*Jebsens*’),³³ Anderson J of the South Australian Supreme Court held that a voyage charterparty was not caught by s 11 of COGSA. While the reasons for his Honour’s decision could have benefitted from further amplification, the thrust of them was that a voyage charterparty was, in his Honour’s view, of a ‘different genus’ compared to bills of lading and other similar instruments, to which COGSA and the amended Hague Rules are directed.³⁴

Contrary to *Jebsens*, in the second case, *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (‘*Beach Building*’),³⁵ Foster J of the Federal Court held that a voyage charter was a contract of carriage to which s 11 of COGSA applied, and therefore a London arbitration clause in the voyage charterparty in question was invalid. As a result, an award obtained following determination of a demurrage dispute by an arbitrator in London was held to be unenforceable in Australia.

The effect of *Beach Building* was that foreign arbitration clauses in voyage charterparties relating to carriage of goods into or out of Australia³⁶ would wither in the glare of s 11(2)(b). On that basis, it is easy to imagine s 11 being wielded to oppose an application to stay court proceedings in favour of contractually agreed foreign arbitration.³⁷

²⁷ Ibid [36]. The State *Sea Carriage Documents Acts* were loosely modelled on the *Carriage of Goods by Sea Act 1992* (UK) but the phrase ‘sea carriage documents’ was not used in the UK counterpart.

²⁸ Ibid [15]. See also *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* (2004) 140 FCR 296, [133] (Allsop J).

²⁹ Ibid [45], [101].

³⁰ (1998) 89 FCR 166.

³¹ *Norden* [104].

³² For example, *The Blooming Orchard (No 2)* (1990) 22 NSWLR 273 and *BHP Trading Asia Ltd v Oceaname Shipping Ltd* (1996) 67 FCR 211.

³³ (2012) 112 SASR 297.

³⁴ Ibid, [7].

³⁵ [2012] FCA 696, a far lengthier decision than *Jebsens*.

³⁶ By virtue of s 11(2)(c)(i), such a result would also obtain in an inward-bound carriage.

³⁷ Which would otherwise be permissible in certain circumstances under s 7 of the *International Arbitration Act 1974* (Cth). While English courts may as a matter of inherent jurisdiction stay proceedings in favour of arbitration, that does not appear to be the case in Australia: *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd* (2008) 168 FCR 169, [42]–[45] (Finkelstein J). See the recent decision of the UK Court of Appeal in *Joint Stock Company ‘Aeroflot Russian Airlines’ v Berezovsky* [2013] EWCA Civ 784 on the circumstances in which a UK court may grant a stay in favour of arbitration under s 9 of the *Arbitration Act 1996* (UK).

These decisions presented a divergence of authority on the point that was fatal to that holy grail of commercial jurisprudence, certainty.³⁸ It was in this climate of uncertainty that unsuccessful owners in *Beach Building* appealed to the Full Court of the Federal Court, which on 18 September 2013, handed down its decision – *Norden*.

Facts

The facts in *Norden* are relatively straightforward. The appellant owners chartered out their vessel to the respondent charterers on an Amwelsh 93 voyage charter in respect of the carriage of coal from Queensland to a port in China. The charterparty was governed by English law, and disputes were to be referred to and determined by arbitration in London. It does not appear that a bill of lading or similar document was issued for the purpose of the voyage in question.

Following delays at both the load and discharge ports, owners sought demurrage amounting around US\$824,000. Charterers disputed that they had to pay and the matter was submitted to arbitration in London. A single arbitrator determined that he had jurisdiction to determine the dispute despite s 11 of COGSA,³⁹ and subsequently found for owners, awarding them demurrage, interest and costs. Once the jurisdiction point was decided against them, charterers did not participate further in the arbitration.

Charterers did not pay pursuant to the award and the owners sought to enforce it in Australia pursuant to s 8(3) of the *International Arbitration Act 1974* (Cth) ('IAA'). The charterers resisted this principally on the basis that s 11(2)(b) of COGSA rendered the arbitration clause in the charterparty ineffective.⁴⁰ As a result, charterers contended, the source from which the arbitrator drew his authority to make the award was displaced and the award was therefore unenforceable.

The primary judge in the Federal Court found for charterers and owners appealed to the Full Court.

Questions on appeal

Owners appealed on 2 grounds. The principal one was the s 11 point, namely that s 11(2)(b) did *not* render the arbitration clause in the voyage charterparty ineffective.

The law on the effect of a foreign jurisdiction clause, such as the London arbitration clause in *Norden*, has been settled at least since 1954.⁴¹ A foreign jurisdiction clause (or foreign arbitration clause) is not simply an agreement that if either party sues in a forum in the stipulated foreign jurisdiction, the other party will not challenge the competence of the forum in that foreign jurisdiction. It is also clearly an agreement that any suit in respect of a dispute concerning the contract shall be brought in the stipulated foreign jurisdiction. Both aspects of the clause are not severable for the purpose of a statutory provision such as s 11(2).⁴² So construed, such a clause is a stipulation that offends s 11 by purporting to preclude or limit the jurisdiction of Australian courts.⁴³

³⁸ *The Scaptrade* [1983] 2 AC 694, 703 (Lord Diplock), cited by Rares J in *STX Pan Ocean Co Ltd v Bowen Basin Coal Group Pty Ltd* (No 2) [2010] FCA 1240, [66]. See also the comments of Lord Diplock in *The Maratha Envoy* [1978] AC 1, 8.

³⁹ There is an interesting question here about how foreign courts will treat a statutory exclusive jurisdiction provision. See for example, the contrasting outcomes in *Ocean Steamship Co Ltd v Queensland State Wheat Board* [1941] 1 KB 402 and *The Amazonia* [1990] 1 LI Rep 236. It has been suggested that s 11 may be indirectly upheld because of the application of conflict of laws rules in a foreign jurisdiction: John Mo, above n 20, 297. For a more bullish approach to negating the effect of Australian protective statutory provisions in overseas courts, see *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 LI Rep 90; cf *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418. On the evidence of this approach, the authors of Davies and Dickey opine that it 'can be expected with some confidence that English Courts, at least, would ignore s 11': M Davies and A Dickey, *Shipping Law* (3rd ed, Lawbook, 2004) 177. See also the discussion in Lewins, above n 16, 109-112, 115-6, and 123-136.

⁴⁰ Section 11 of COGSA prevails over the IAA to the extent of any inconsistency: s 2C(b) of the IAA.

⁴¹ *Compagnie Des Messageries Maritimes v Wilson* (1954) 94 CLR 577. This case concerned the construction of s 9(2) of the *Sea-Carriage of Goods Act 1924* (Cth), but the principle is equally applicable to its legislative successor, s 11(2) of COGSA.

⁴² *Ibid* 582-3 (Dixon CJ).

⁴³ *Ibid* 585 (Fullagar J). The 1924 Act was directed at agreements which 'oust or lessen' the jurisdiction of Australian courts. It does not appear that anything turns on the distinction between that and the phrase 'preclude or lessen', which is used in COGSA.

The next part of the principal ground, and the question that occupied most of the court's attention, was therefore whether the voyage charterparty was a 'sea carriage document' within the meaning of s 11(1)(a).

On a secondary point, owners argued that even if COGSA rendered the arbitration clause ineffective, the award was nonetheless enforceable because there was nothing within s 8(5) or s 8(7) of the IAA which permitted the court to refuse to enforce the award. Although dealt with by Buchanan J in dissent, this argument is not considered further in this note.

The decision

In a 2 to 1 decision, the Full Court comprising Mansfield and Rares JJ, Buchanan J dissenting, allowed the appeal holding that a voyage charterparty was not a 'sea carriage document' under s 11 of COGSA. Therefore, the London arbitration clause did not offend s 11(2)(b) and the award was enforceable.

Majority decision

Rares J

Rares J, delivering the leading judgment of the court, began by outlining the history of the provision and COGSA generally,⁴⁴ before proceeding to consider the scheme of the legislation.⁴⁵ His Honour analysed the scheme with reference to the objects of COGSA,⁴⁶ the amendments to s 7,⁴⁷ and the subsequent amendments to s 11.⁴⁸ His Honour also considered the relevant amendments to the Hague Rules as reflected in Schedule 1A of COGSA.⁴⁹

His Honour took the approach that, this being a question of the statutory construction of the phrase 'sea carriage document', the starting point is consideration of the text itself.⁵⁰ The meaning of the text may be derived from the context, general purpose and policy of a provision, including legislative history and extrinsic materials.⁵¹ It was implicit in his Honour's reasons that a clear unambiguous meaning could not be elicited from the plain words 'sea carriage document'.

Rares J observed that s 3(1) of COGSA made it clear that in providing a regime of 'marine cargo liability', the Act sought to regulate the relationship between carriers and shippers.⁵² In doing so, COGSA sought to give legal force to the Hague/Visby Rules, and subsequently to an amended version thereof, both of which expressly did not apply to charterparties.⁵³

Like his learned brethren, Rares J held that the meaning of the phrase 'sea carriage document' must be ascertained from COGSA as a whole, including the amended Hague Rules.⁵⁴ Turning to the amended Hague Rules, his Honour identified that the role a sea carriage document played in the Rules was '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.'⁵⁵

⁴⁴ *Norden* [29]-[38].

⁴⁵ *Ibid* [39]-[47].

⁴⁶ *Ibid* [39].

⁴⁷ *Ibid* [40].

⁴⁸ *Ibid* [42]-[45].

⁴⁹ *Ibid* [46]-[48].

⁵⁰ *Alcan (NT) Alumina Pty Ltd v Commissioner Territory Revenue (NT)* (2009) 239 CLR 27.

⁵¹ *FCT v Consolidated Media Holdings Ltd* (2012) 293 ALR 257. The effect of s 15AA of the *Acts Interpretation Act 1901* (Cth) did not appear to be considered.

⁵² *Norden* [56].

⁵³ Arts 5 and 10(6) of the Hague/Visby Rules and the amended Hague Rules.

⁵⁴ *Norden* [57].

⁵⁵ *Ibid* [59].

In contrast, Rares J observed that a voyage charterparty is a ‘contract for the hire of a ship’⁵⁶ and in that respect contains distinctive laytime and demurrage provisions, and does not have a receipt function.⁵⁷ These observations demonstrate the distinction between the concept of a sea carriage document on the one hand and a voyage charterparty on the other.

Section 3(1)(b) of COGSA states that the marine cargo liability regime sought to be imposed by COGSA was intended to be ‘compatible with arrangements existing in countries that are major trading partners of Australia.’ With reference to this objective, his Honour highlighted the effect of the IAA,⁵⁸ which encourages private arbitration,⁵⁹ and that the ‘ready availability of international arbitration to resolve disputes between owners or disponent owners and charterers arising under charterparties is a fundamental feature of the shipping trade that has been entrenched for decades’.⁶⁰ His Honour pointed out that it was ‘unlikely’ that Parliament had intended for the two regimes to collide in respect of disputes arising under charterparties.⁶¹

Piecing each of the above considerations together, Rares J concluded that:⁶²

The purpose of s 11 of COGSA is to protect, as a 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.

Accordingly, his Honour found that the voyage charterparty in question did not come within the meaning of ‘sea carriage document’ in s 11, and therefore that the award was enforceable.

Mansfield J

Mansfield J generally agreed with the reasons of Rares J but added some ‘complementary observations’.⁶³ His Honour gave 8 main reasons.⁶⁴

Firstly, there is a traditional distinction between charterparties, including voyage charterparties, and sea carriage documents. *Secondly*, there is a long standing acceptance of the role of arbitration in resolving international commercial disputes which, *thirdly*, militates against a construction of s 11 which limits the effect of arbitration clauses in respect of such disputes.⁶⁵ *Fourthly*, it was appropriate to define the term ‘sea carriage document’ in s 11 with reference to the amended Rules. *Fifthly*, the relevant article in the amended Rules, article 1(g) does not ‘indicate a clear intention to encompass a voyage charterparty.’ *Sixthly*, the amended Rules generally evince a distinction between charterparties and contracts for the carriage of goods by sea. *Seventhly*, the *Sea Carriage Documents Acts* of the States and Territories also reflect the distinction between a voyage charterparty and a sea carriage document. *Finally*, the legislative history of s 11⁶⁶ reveals that it was intended to be narrower than the scope of s 9 of the 1924 Act.

⁵⁶ This directly contradicts the finding by Carruthers J in *The Blooming Orchard (No 2)* (1991) 22 NSWLR 273, 278. It comes as no surprise then that later in his reasons, Rares J opined that the decision in the earlier NSW case was ‘wrong and contrary to principle’: *Norden*, [69].

⁵⁷ *Norden* [62].

⁵⁸ Which gives effect to the Convention on Recognition and Enforcement of Foreign Arbitral Awards, made at New York, 1958 and the UNCITRAL Model Law on International Commercial Arbitration, one or both of which are in force in most nations Australia conducts trade with: *Norden* [63] (Rares J).

⁵⁹ See also *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5.

⁶⁰ *Norden* [63].

⁶¹ *Ibid* [65].

⁶² *Ibid* [71].

⁶³ *Ibid* [14].

⁶⁴ These reasons are set out in 8 sub-paragraphs to [15].

⁶⁵ This brings to mind a comment by former Chief Justice of the Federal Court, now High Court justice Patrick Keane, that ‘some of Australia’s high-minded domestic laws, if given an expansive interpretation by the courts, may diminish Australia’s relative attractiveness as an arbitral seat’: Justice Patrick Keane, ‘The Prospects for International Arbitration in Australia: Meeting the challenges of regional forum competition or our house our rules’ (AMTAC address, 25 September 2012) <<http://www.fedcourt.gov.au/publications/judges-speeches/speeches-former-judges/chief-justice-keane/keane-cj-20120925>>.

⁶⁶ Not the coverage of the Hague/Visby Rules or the amended Hague Rules.

The logical thread running through these reasons is his Honour's view that there was a distinction between 'sea carriage document' on the one hand and voyage charterparty on the other, and that such distinction is maintained in s 11 of COGSA.

Dissent

Buchanan J dissented. In his Honour's view, the voyage charterparty contained provisions relating to freight and the loading, carriage and discharge of the cargo of coal and 'obviously was, in part therefore, a contract for carriage by sea' and in that sense, was a 'sea carriage document'.⁶⁷

That conclusion being insufficient to dispose of the question, his Honour considered that 'the term sea carriage document where used in s 11 of COGSA must be given the defined meaning supplied by the amended Hague Rules.'⁶⁸ In order to determine such meaning, he posed a series of 4 questions which led ultimately to his conclusion that a voyage charter was a document within the definition of 'sea carriage document'.

The first question was whether the phrase as used in s 11 had the same meaning as that used in the amended Hague Rules.⁶⁹ After considering the history of the provision and the introduction of the term into the legislation, his Honour was of the view that it was.⁷⁰ However he was careful to stress that 'defined that way, s 11 might apply to sea carriage documents to which the amended Hague Rules did not themselves apply.'⁷¹

Then his Honour asked whether the documents which fall within the definition of art 1(1)(g) of the amended Hague Rules are necessarily ones to which the amended Rules apply.⁷² The answer was no. Among the reasons was that the definition of 'sea carriage document' was not intended to be co-extensive with art 10 of the amended Hague Rules and s 10 of COGSA.⁷³

Thirdly, his Honour asked whether a charterparty was a document to which the Hague Rules applied – and the answer was unsurprisingly no. Exceptions in art 5 and 10(6) make this self-evident.

This laid the framework for Buchanan J's answer to the last question: whether a charterparty fell within the definition in art 1(1)(g) – the answer to which was yes. His Honour identified the relevant sub-paragraph as art 1(1)(g)(iv) and reasoned that because a voyage charterparty either contained or evidenced a contract of carriage of goods by sea, it fell within the meaning of art 1(1)(g)(iv), and therefore ss 11(1)(a) and 11(2)(b).⁷⁴ This characterisation was a result of the observation that the voyage charterparty contained provisions relating to freight, loading, carriage and discharging, all of which 'constituted an enforceable contract for the carriage of freight.'⁷⁵

Analysis

All 3 judges held that the correct approach was to give the term 'sea carriage document' the same meaning it has in the amended Hague Rules. Aside from Mansfield J (who made it clear he was making a constructional choice), it was implicit from the other 2 judgments that the meaning of the term could not be ascertained from its plain words.⁷⁶

⁶⁷ *Norden* [90].

⁶⁸ *Ibid.*

⁶⁹ *Ibid* [92]-[106].

⁷⁰ *Ibid* [106].

⁷¹ *Ibid* [104].

⁷² *Ibid* [107]-[111].

⁷³ *Ibid* [109].

⁷⁴ *Ibid* [116].

⁷⁵ *Ibid* [120].

⁷⁶ Cf Davies and Dickey, above n 39, 178.

This means that the critical point of difference among the majority and dissenting judgments was the different conclusions on the meaning of ‘sea carriage document’ within the amended Hague Rules.

Mansfield and Rares JJ relied upon a clear separation between sea carriage document on the one hand and charterparties on the other. Rares J also looked at the roles a sea carriage document plays in the amended Hague Rules and pointed out that such roles simply cannot be satisfied by a voyage charterparty.

Buchanan J determined that art 1(1)(g)(iv) plainly contemplated a voyage charterparty because the latter either contained or evidenced a contract of carriage. His Honour’s decision seems to suggest that voyage charterparties are a subset of sea carriage documents that are expressly carved out from the broader sea carriage documents for the purpose of the application of the amended Hague Rules. However, with the greatest respect, and for the reasons given by Rares J, that does not seem to have textual support in the amended Hague Rules, when considered as a whole.

Furthermore, the relationship between charterer and owner has long and often been governed by standard form contracts which in turn either reflect or guide industry practice and understanding. The balance of power between the parties is significantly affected by the movement in freight rates. As a matter of practice, both parties enter the negotiation on relatively equal footing and amend these standard form contracts to suit their particular needs, and almost invariably they select arbitration as the mechanism by which disputes arising from the contract are to be resolved.

In respect of the freight market in which owners and charterers strike their bargain, Lord Diplock commented:

The freight market for chartered vessel still remains a classic example of a free market. It is world-wide in coverage, highly competitive and sensitive to fluctuations in supply and demand. It is a market in which the individual charterers and shipowners are matched in bargaining power and are at liberty to enter into charterparties in whatever contractual terms they please.⁷⁷

This generally does not apply to shippers,⁷⁸ who are usually in a far weaker position vis-a-vis shipowners when entering into a carriage contract. In fact, it is usually the case that a shipper, or a seller on a CIF basis, will receive a bill of lading which (unless different terms are agreed with the carrier, which is in any event unlikely) will represent the agreement with the carrier. The bill of lading is issued by the carrier who no doubt will ensure it is drafted as far as is legal in its favour, leaving the shipper (and the consignee) at the mercy of the carrier’s terms. In those circumstances, s 11 of COGSA operates to protect the interests of Australian shippers by providing that Australian law applies to such contracts of carriage and by preventing them from being forced contractually to litigate or arbitrate outside Australia.

The majority decision in *Norden* provides clarity on the meaning of ‘sea carriage document’ within COGSA, particularly that the phrase does not include a voyage charterparty. It makes it clear that COGSA’s protective reach does not extend to voyage charterparties, in respect of which parties are free to agree on an appropriate and mutually-acceptable dispute resolution processes.

Conclusion

Just as the High Court decision in *Westport Insurance Corp v Gordian Runoff Ltd*⁷⁹ caused some concern about the potential for expanded judicial interference in international arbitration,⁸⁰ *Beach*

⁷⁷ *Federal Commerce and Navigation Co Ltd v Tradax Export SA* [1978] AC 1, 7.

⁷⁸ Or consignees who are even further removed from the process of entering into the contract with the carrier.

⁷⁹ [2011] HCA 37.

⁸⁰ See for example, Chief Justice James Allsop, ‘The Authority of the Arbitrator’ (Speech delivered at the 2013 Clayton Utz University of Sydney International Arbitration Lecture, Sydney, 29 October 2013) <http://www.claytonutz.com/ialecture/2013/speech_2013.html>. The High Court decision related to a domestic commercial arbitration under the old *Commercial Arbitration Act 1984* (NSW), but the decision was feared as a reflection of the High Court’s approach to arbitration generally, including international arbitration.

Building had caused some raised eyebrows internationally.⁸¹ As an agreement by parties to submit to arbitration is usually accompanied by an intention to ‘keep as far away from the courts as practicable,’⁸² *Beach Building* risked Australia’s legislative environment being perceived as hostile to international arbitration.

Norden dispels such a perception and arguably enhances Australia’s attractiveness as an arbitral seat. Being consistent with the topical comments recently made by the High Court in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*,⁸³ it clarifies the statutory and judicial stance on arbitration agreements in voyage charterparties, and adds an element of certainty to this aspect of the ‘law of international commerce’.⁸⁴

It gives effect to the 17-century French merchant’s plea by encouraging (in accordance with the objectives of the IAA) commercial parties to make and enforce agreements to arbitrate while at the same time highlighting the reach of COGSA to guarantee the protection of Australian law and courts over weaker parties that may be forced into (what may be perceived as) unfair contracts or dispute resolution processes in respect of sea carriage documents.

⁸¹ For example, Edward Yang Liu, ‘Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd [2012] FCA 696’ *Shipping & Trade Law*, 30 October 2012.

⁸² Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) 199.

⁸³ [2013] HCA 5.

⁸⁴ As the term was used by Lord Hope of Craighead when discussing the broad construction of arbitration agreements in the House of Lords decision of *Premium Nafta Products Ltd v Fili Shipping Company Ltd* [2007] UKHL 40 (the Fiona Trust case) [31].