

ENFORCEMENT OF AWARDS IN AUSTRALIA – FOREIGN VOYAGE CHARTERPARTY ARBITRATION CLAUSES NOW ENFORCEABLE

We can report that the Australian Federal Court has overturned on appeal the decision in *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696 which held that a voyage charterparty is “a sea carriage document” for the purpose of Australian COGSA 1991 Sections 11(1)(a) and 11(2)(a) and therefore law and arbitration clauses and International Awards produced thereunder were void and unenforceable in Australia. The decision last year had attracted some criticism.

The decision on 18th September 2013 in **Dampskibsselskabet Norden A/S v Gladstone Civil Pty Ltd [2013] FCAFC 107** has held that a voyage charterparty is not a “sea carriage document” for the purposes of s. 11 of the *Carriage of Goods by Sea Act 1991* (COGSA 1991) and therefore foreign awards, in this particular case a London Arbitration award is involved, are enforceable in Australia.

The full text of the decision can be found at the following link:-
<http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2013/2013fcaf0107>

The decision of the Court clarified and highlighted the clear line between a voyage charterparty involving a contract for the hire or use of a ship, and a sea carriage document such as a bill of lading.

The Court considered important that disputes involving charterparties (including voyage charterparties) have historically have been settled by arbitration and that parties to these charters have freedom of contract and should have the ability to agree where their disputes are to be heard. The Federal Court acknowledged that this policy of allowing freedom of contract is also reflected under Australian Law elsewhere by the adoption of the New York Convention and UNICITRAL Model Law.

Owners and Charterers need not have the same protection as intended for parties to bills of lading and way bills, i.e. other “sea carriage documents”, where the position is protected under COGSA 1991.

The Court considered that interpreting voyage charterparties as equivalent to bills of lading, thus rendering their law and arbitration provisions ineffective, would run against the stated objects of COGSA itself (Section 3) and was not, they held, intended by Australian Parliament.

The Federal Court has therefore resolved the contradiction between COGSA and the New York Convention incorporated domestically in Australia, which states that international awards are to be enforced in the same way as domestic awards.

Parties to a charterparty (whether time or voyage) therefore can breathe more easily and have had confirmed they do indeed have freedom of contract and can choose their law and arbitration provisions. They can obtain arbitration awards in London or elsewhere and, if otherwise compliant with principles on enforceability, can enforce the same in Australia.

This had been a welcome clarification to the Australian position and practice under voyage charters and reverses what had been considered a difficult Australian decision to reconcile with international understanding and practice the definition of a “sea carriage document” and what that encompasses. It also of course reconciles the tension between the earlier decision permitting enforcement of foreign awards.

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