Enforcement of Awards in Australia – Voyage Charterparty Arbitration Clauses

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides a mechanism by which non-domestic arbitration awards are permitted to be enforced within signatory states in the same way as that state's domestic awards.

The mere fact of accession to the Convention has never provided an absolute assurance that an award will be recognised and enforced in a particular signatory state. The way in which signatories approach the Convention is based on their own domestic law. For example, Practitioners may have come across issues arising from domestic rules when enforcing in jurisdictions where a defendant has not entered an appearance in arbitration and a default award is produced in London or elsewhere, or where no signed contract exists in which the arbitration clause appears, for example where a charterparty is never produced and is instead based on an unsigned recap incorporating a pro forma contract.

A recent example of a Court failing to enforce an Award under the 1958 Convention has arisen in Australia. The Australian Federal Court in *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696 has held, contrary to an earlier Australian Supreme Court Decision, that a voyage charterparty is *"a sea carriage document"* for the purpose of the Australian Carriage of Goods by Sea Act (COGSA) 1991 Sections 11(1)(a) and 11(2)(a). On that basis and as with Bill of Lading arbitration, clauses are rendered unlawful and ineffective at least where the shipment takes place from or within Australia. As arbitration clauses are not effective, then awards based on the same are unenforceable, even where a respondent has taken full part in the arbitration. Australian arbitrations are however permitted by virtue of Section 11(3) COGSA 1991.

The Federal Court therefore refused to enforce a non-domestic (London) final arbitration award, despite the defendant being held to be a party to the charter, specifically agreeing the incorporation of a London arbitration clause in it and then taking full part in the dispute and defending the arbitration and also refused to recognise a choice of law provision on the same basis.

The decision may have a potentially serious impact on those Members contracting on voyage terms, in particular where the carriage of goods from Australian ports is concerned and where a counterparty has assets/a presence solely in Australia. The decision also seems to suggest that the same issue could arise for carriages to Australia as well, whilst choice of law provisions may escape this prohibition.

It remains to be seen whether an appeal will proceed and/or whether legislators will clarify whether their intention was indeed, as held, to extend the definition of a sea carriage document within COGSA 1991 to voyage charters, with the apparent contradiction this creates between that Act which expressly allows domestic Australian arbitrations to take place and the 1958 Convention which states that international awards are to be enforced in the same way.