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An ACICA Commission
ACN 006 404 664

20 May 2024

Mr. Melwyn Noronha,
Shipping Australia Limited
Suite 606, 80 William Street,
WOOLLOOMOOLOO NSW 2011

Dear Melwyn,

Review of Section 11 of Carriage of Goods by Sea Act (Cth) 1991 (Australian COGSA)

As you are aware, in September 2022 the Federal Department of Infrastructure, Transport, Regional Development, Communications and the Arts (***the Department***) announced a Review into whether section 11 of the *Carriage of Goods by Sea Act* (Cth) 1991 (***Australian COGSA***) should be amended for the benefit of Australian industries and so as to increase the use of, and trust in, Australian arbitration. This Review was initiated after a number of stakeholders – including AMTAC – had raised concerns about the terms of s.11, and whether its operation was impeding Australian industries in settling disputes, both in connection with the carriage of goods by sea inter-State and including through arbitration in Australia.

As part of this Review, an Issues Paper was published by the Department and the views of stakeholders sought. A number of submissions were received, including from AMTAC, and they are currently being considered by the Department. These submissions are available on the Review's website.

We understand that you intend to engage with the Department in relation to this Review and have asked for a summary of both the three Concerns raised by the Review, and their proposed solutions.

Background

Australian COGSA regulates certain contracts for the carriage of goods by sea into and out of Australia, as well as between Australian States. Its object (as stated in section 3) is to introduce a regime of marine cargo liability that is both "*up-to-date, equitable and efficient*" and "*compatible with arrangements existing in countries that are major trading partners of Australia*".

Section 11 of the Act is headed "*Construction and Jurisdiction*" and contains mandatory provisions relating to both the governing law of those contracts, as well as the validity and efficacy of jurisdiction and arbitration clauses within those contracts.

In particular, s.11(1) of Australian COGSA provides that all parties to a "*sea carriage document*" relating to the carriage of goods from any place in Australia to any place outside of Australia are taken to have intended to contact according to the laws in force at the place of shipment.

Section 11(2)(a) provides that any clause which purports to limit the effect of s.11(1) has no effect. Further, s.11(2)(b) and (c) provide that any clause that purports to preclude or limit the jurisdiction of Australian courts to entertain a claim in respect of a contract for the carriage of goods by sea into or out of Australia also has no effect. The latter provisions are expressly subject to a limited exception found in s.11(3) of Australian COGSA, which provides that an agreement for the resolution of a dispute by arbitration is not rendered ineffective by s.11(2) if, under that agreement, "*the arbitration must be conducted in Australia*".

The Department's Review addresses three Concerns that were raised in relation to the current terms and operation of s.11 of Australian COGSA, namely:

1. a lack of clarity and certainty relating to the types of documents to which s.11 applies (***Concern 1***);
2. the level of protection afforded by s.11 to inter-State cargo interests being less than the protection afforded to Australian importers and exporters (***Concern 2***); and
3. the possibility of an arbitration clause being rendered valid by s.11(3) where the seat of the arbitration it provides for is located in a different jurisdiction or place to the venue in Australia where the arbitration is to take place (***Concern 3***).

Concern 1: Definition of a "sea-carriage document" for the purposes of s.11

Although s.11 of Australian COGSA is expressed to apply to a "*sea-carriage document*", that phrase is not defined in or for the purposes of the Act itself. Further, although that phrase is defined in the amended Hague Rules set out in Schedule 1A of COGSA (***the Australian Rules***), strictly speaking, that definition is limited to those Rules and does not apply to the provisions of the Act itself. In any event, there is some potential uncertainty as to what contracts are encompassed by that definition.

As a result, there has in the past been uncertainty as to whether a voyage charterparty or contract of affreightment (***COA***) is a "*sea-carriage document*" to which s.11 applies and therefore whether a foreign arbitration or jurisdiction clause within such a charterparty or COA is valid or ineffective. In particular:

a) in *Jebsens International (Australia) v Interfert Australia* [2012] SASC 50, the South Australian Supreme Court held that a voyage charterparty was not within the ambit of s.11 because it was not "*a sea carriage document*" as that phrase is defined in the Australian Rules;

b) however in *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696 Justice Foster of the Federal Court of Australia subsequently held that a voyage charterparty was a "*sea carriage document*" for the purposes of s.11, both as a matter of ordinary English and because it was a "*non-negotiable document … that either contains or evidences a contract of carriage of goods by sea*" within the definition found in Art 1(1)(g) of the Australian Rules;

c) but that decision was in turn overturned on appeal ([2013] FCAFC 107) by a majority of the Full Court of the Federal Court of Australia (Mansfield and Rares JJ) who held that a voyage charterparty was not a "*sea carriage document relating to the carriage of goods*" within the meaning and for the purposes of s.11 and that a foreign arbitration or exclusive jurisdiction clause in a voyage charterparty was not rendered invalid by s.11. In so concluding, the majority drew a clear distinction between "*a sea carriage document*" to which the Australian Rules apply by the operation of Australian COGSA and a charterparty which is not subject to those Rules. However, the third judge on appeal (Buchanan J) dissented and agreed with the conclusion of Justice Foster.

Concerns have therefore been raised first about the lack of a definition of the phrase "*sea-carriage document*" in Australian COGSA itself where that phrase is used in the text of the Act, and secondly if a definition is to be inserted, as to the terms of that definition and what contracts would be caught by it.

Concern 2: Inter-State voyages

Section 11(2) of Australian COGSA operates to strike down foreign arbitration and exclusive jurisdiction clauses in sea-carriage documents covering the carriage of goods into and out of Australia. However s.11(2) does not apply to the inter-State carriage of goods by sea around Australia, leaving the parties to such contracts free to agree to foreign dispute resolution provisions. Moreover, where such provisions have been agreed to in the context of inter-State carriage, Australian courts may be required to stay proceedings brought before them in favour of the foreign court or arbitration referred to in those provisions.

This *apparent lacuna* in the operation of s.11 was confirmed by the Full Federal Court of Australia in *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* [2022] FCAFC 171. An appeal from that judgment to the High Court of Australia was dismissed earlier this year ([2024] HCA 4).

Concerns have been raised in this regard as to the unequal treatment of cargo interests involved in the inter-State carriage of goods by sea, in comparison to importers and exporters of cargo, and where the former do not receive the benefit of the long-standing public policy considerations underlying the enactment of s.11 of Australian COGSA (and its previous analogues).

Concern 3: Seat of arbitration

Section 11(3) of Australian COGSA provides that an arbitration clause that is otherwise contrary to s.11(2) (and would therefore otherwise be rendered void and of no effect) will nevertheless be valid if that clause provides for an arbitration where the "*venue*" of that arbitration, that is the location of the physical hearing, is to be in Australia. However, s.11(3) is silent as to whether the "*seat*" of that arbitration must also be located in Australia if that arbitration clause is to be valid under that sub-section. The seat of an arbitration is important as it determines both the procedural law that governs the arbitration and the national court providing supervisory jurisdiction over that arbitration.

Concerns have been raised as to whether the terms of s.11(3) should be amended so that the exception to s.11(2) that it provides for *only* applies to an arbitration clause if both the seat and venue of the arbitration are in Australia, and so as to better promote the use of arbitration in Australia as an alternative means of resolving disputes concerning the carriage of goods by sea into and out of Australia, as well as inter-State.

Recommendation

It is the submission of each of our respective organisations that it is in the Australian national interest for these three Concerns to be addressed by amending s.11 of Australian COGSA in order to provide those Australian entities involved in inter-State and international shipping, with greater certainty and clarity in the application of the provisions of that section to their contracts of carriage of goods by sea. This is especially where the policy considerations that underlie s.11 and its application are significant and longstanding, and where, in our opinion, those policy considerations should be clearly and uniformly applied across all those interested and participating in the carriage of goods by sea both inter-State and internationally.

The three Concerns that have been raised by the Department and its Review are relevant to both carrier and cargo interests operating in Australia. This is especially given that they impact directly on the potential resolution by Australian seated arbitrations of claims arising out of the carriage of goods by sea not only into and out of Australia, but also inter-State and around Australia.

A summary of these three Concerns and their possible Solution is set out on the following page.

Yours faithfully,

Gregory Nell SC
AMTAC Chair

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Naraya Lamart,
Australian Vice President, MLAANZ
On behalf of MLAANZ Board

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Ms. Georgia Quick
President ACICA

Concerns and Solutions

Concern 1: Definition of a "*sea-carriage document*" for the purposes of s.11

The text of Australian COGSA does not contain any definition of the phrase "*sea-carriage document*" as it is used in s.11 of COGSA.

Solution

Amend s.4 of Australian COGSA so as to define "*sea-carriage document*" either:

(a) by using the definition found in the State based *Sea-Carriage Documents Act* 1997, namely as "*a bill of lading, sea waybill or ship's delivery order*"; or

(b) by repeating or referring to the definition of that phrase in Article 1(1)(g) of the amended Hague Rules in Schedule 1A of Australian COGSA.

Concern 2: application of s.11 to inter-State carriage of goods by sea

Section 11(2) of Australian COGSA strikes down foreign arbitration and exclusive jurisdiction clauses in sea carriage documents for the carriage of goods by sea into and out of Australia. But that sub-section does **NOT** apply to contracts for the carriage of goods by sea inter-State, nor strike down foreign arbitration and exclusive jurisdiction clauses in such contracts. Failing to provide those involved in the inter-State carriage of goods by sea with the same protections that s.11 gives Australian importers and exporters (in particular as to where disputes concerning such carriage are to be resolved), is damaging to the interests of the former.

Solution

Amend s.11 to ensure equal treatment of both international and inter-State carriage of goods by sea, by extending to contracts for inter-State carriage of goods by sea the same protection against foreign arbitration and exclusive jurisdiction clauses that is currently available under s.11(2) to contracts for the carriage of goods by sea into and out of Australia.

Concern 3: Seat of arbitration

Section 11(3) of Australian COGSA provides an exception to the prohibition otherwise found in s.11(2) for arbitration clauses where the actual physical hearing of the arbitration provided for by that clause is to be held in Australia. This is irrespective of the seat of that arbitration. Further, the exception available under s.11(3) would also not apply to an arbitration clause providing for an Australian seated arbitration, if the hearing is to take place elsewhere.

Solution

Amend s.11(3) to stipulate that the seat and the venue of the arbitration proceeding must be in Australia, in order for s.11(3) to apply to an arbitration clause and for that clause to not be made ineffective pursuant to s.11(2) of Australian COGSA.