Kluwer Arbitration Blog

Enforcement of a London arbitration clause in a charter party refused in Australia

Kate Cronin (Linklaters) · Monday, October 15th, 2012

A recent Australian case has resulted in a ruling that arbitration clauses, jurisdiction clauses and choice of law clauses in charter parties involving shipments to or from Australia are now unenforceable if such clauses seek to limit the jurisdiction of any Australian court.

On 6 October 2009 the Claimant ship owner, Dampskibsselskabet Norden A/S ("**DKN**"), and the Respondent charterer, Beach Building & Civil Group Pty Ltd ("**BBCG**"), entered into a charter party (the "**Charter Party**") to carry a cargo of coal from Australia to China. The Charter Party contained a London seated arbitration clause and was governed by English law.

A dispute subsequently arose between the parties in relation to whether or not BBCG was required to pay demurrage at both the loading and discharging ports after the vessel had encountered delays. BBCG raised two preliminary issues for consideration by the arbitrator. One issue was whether or not the arbitrator had jurisdiction to hear disputes arising under the Charter Party. BBCG submitted (unsuccessfully) that the arbitration clause in the Charter Party was invalid and of no effect due to the operation of section 11 of the Carriage of Goods by Sea Act 1991 (Cth) ("**COGSA**"). Section 11 of COGSA reinforces the primacy of Australian Commonwealth or State jurisdiction over disputes arising out of certain sea carriage documents. DKN was ultimately successful in the arbitration, and obtained a declaratory arbitration award (the "**first Award**") in November 2010 and a final arbitration award (the "**final Award**", together with the first Award, the "**Awards**") in January 2011 in the amount of US$824,663.18 together with interest and costs.

In April 2011 DKN commenced enforcement proceedings in the Federal Court of Australia (the "**Federal Court**") pursuant to the Australian International Arbitration Act 1974 (Cth) (the "**Australian Arbitration Act**") which gives effect to the New York Convention.

One ground upon which BBCG resisted enforcement was that the arbitration clause in the Charter Party was invalid and ineffective by reason of the operation of section 11 of COGSA.

The New York Convention (and by extension the Australian Arbitration Act which gives effect to it) requires courts of contracting states to give effect to private agreements to arbitrate and to recognise and enforce arbitral awards made in other contracting states. However, section 2(c) of the Australian Arbitration Act also provides that nothing in the Australian Arbitration Act affects the operation of section 11 of COGSA.

Section 11 of COGSA states:

"Section 11: Construction and Jurisdiction

(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:

…

(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); 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 subparagraph 10(1)(b)(iii) relating to such a carriage of goods."

The primary question to be decided by the Federal Court was whether the Charter Party was a sea carriage document or a non-negotiable document so that it could determine whether section 11(2)(b) or section 11(2)(c) would operate to render the Awards unenforceable.

The term "sea carriage document" is not expressly defined in COGSA. However the term "sea carriage document" is defined in the Hague-Visby Rules, a set of international rules for the international carriage of goods by sea, which are incorporated into COGSA. BBCG contended that the meaning of "sea carriage document" should include a voyage charter on the basis that Article 1(1)(g)(iv) of the Hague-Visby Rules defined sea carriage document as *"[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"* and that on a literal reading the charter party fell within that definition.

Against this, DKN argued that the term "sea carriage document" should be interpreted not merely by reference to the ordinary meaning of the words used, but in the context of COGSA as a whole, with a purposive approach and having regard to the amendments made by the Commonwealth Parliament in 1998. DKN argued that though a "sea carriage document" may be characterised as a non-negotiable document that either contains or evidences a contract of carriage of goods by sea, it was not a consignment note, sea waybill or ship's delivery order and so did not fall within the class of documents captured by Article 1(1)(g)(iv) of the Hague-Visby Rules.

DKN referred to previous Australian case law (*Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* [2012] SASC 50) in which the meaning of "sea carriage document" had been considered by the Supreme Court of South Australia. In *Jebsens v Interfert* Justice Anderson held that:

- a charter party was not a "sea carriage document" within the definition contained in the Hague-Visby Rules (for instance because of Articles 5 and 10 of the amended Hague-Visby Rules which draw a distinction between charter parties and sea carriage documents);
- COGSA deals with the rights of persons holding bills of lading or similar instruments and not with the rights of persons to a charter party; and
- a charter party is not a sea carriage document simply because it is a document containing a contract for the carriage of goods by sea.

Accordingly the London arbitration award in *Jebsens v Interfert* was held to be enforceable in Australia.

In *DKN v BBCG* the Federal Court disagreed with the purposive approach taken to the interpretation of "sea carriage document" by Justice Anderson, and instead adopted a literal approach. The Federal Court held that *"[t]he expression "… document relating to the carriage of goods from any place in Australia …" as a matter of ordinary English is apt to encompass a voyage charter party."* Accordingly section 11(1)(a) and section 11(2)(b) together operated to render the arbitration clause unenforceable.

The *DKN v BBCG* decision is at odds with the parties' freedom of contract to decide the law, jurisdiction and means by which they wish any disputes to be resolved. It is also arguable that the decision is contrary to the key tenet of the New York Convention that foreign arbitral awards will not be discriminated against and that foreign awards will be recognised and enforced in the same manner as domestic awards. Does *DKN v BBCG* then represent a departure from the generally pro-arbitration approach of the Australian courts in relation to the enforcement of foreign awards? The decision has certainly caused some controversy, and no doubt will have caused some speculation that Australia may be unfriendly to arbitration. Taken alone, the outcome may suggest a divergence of the usual pro-arbitration approach of the Australian courts. However, there is nothing in the Judge Foster's reasoning to support this conclusion. Indeed in an earlier Federal Court case also decided by Justice Foster which was handed down in March 2011 (*Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131), Justice Foster adopted a resolutely pro-arbitration approach in relation to the enforcement of foreign awards (though it should be noted that *Uganda Telecom* was not a case decided in the context of shipping law and COGSA).

Whether or not there will be an appeal from the *DKN v BBCG* decision is as yet unknown. In view of the opposing decisions in *Jebsens v Interfert* and *DKN v BBCG* (each of which has been handed down within the last six months), it is likely that there will either be an appeal in *DKN v BBCG* or that the Commonwealth Parliament will update COGSA to clarify the position. In the short term however, parties to charter parties should assume that the *DKN v BBCG* decision represents the current law in Australia. Consequently any arbitration clauses in affected charter parties should be reviewed and carefully considered, in particular where are enforcement action might be contemplated in Australia. Parties contemplating entry into charter parties involving shipments to or from Australia should be mindful that currently Australian law and jurisdiction will override any attempt to choose foreign law or foreign arbitration.

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