THE OFFICIAL JOURNAL OF SHIPPING AUSTRALIA LIMITED

SHIPPING AUSTRALIA

WINTER 2021

02 FROM THE BRIDGE

10 BATTLING THE BEETLE

14 WORLD FLEET, STRATEGIC FLEET

18 CONTROVERSIES IN CONTAINERISATION

CAPTAIN ROBERT BUCK and the UNFORGIVING SEA

32 MARITIME LAW

48 FUTURE FUELS

An apparent lacuna

By GREGORY NELL SC, chair, AMTAC, barrister, New Chambers, Sydney.

A striking feature of the Carriage of Goods By Sea Act 1991 (Cth) (COGSA) is s.11 of that Act which contains mandatory provisions relating to the governing law of, and effectiveness of foreign jurisdiction and arbitration clauses in, certain contracts for the carriage of goods by sea. But paradoxically, whilst COGSA regulates such contracts for the carriage of goods by sea into and out of Australia, as well as between Australian States, s.11 is more confined in its application, being limited only to the former types of contracts. As a result, the parties to contracts for the inter-State carriage of goods by sea are free to agree to their contract being governed by foreign law rather than Australian law, and for any claims arising under such inter-State contracts for the carriage of goods by sea to be determined by foreign courts or arbitration overseas. This is notwithstanding that such contracts are otherwise subject to and regulated by both COGSA and the modified Rules which COGSA gives effect to, and that COGSA otherwise renders such agreements in contracts for the carriage of goods by sea into and out of Australia inoperative and of no effect.

This apparent lacuna in the application of s.11 of COGSA appears to be the result of legislative oversight and/or inertia, rather than a deliberate decision based on policy considerations. That being so and given its potential to prejudice the shippers and consignees of inter-State shipments, especially when compared to Australian importers and exporters, this lacuna should be rectified.

Background

In 1904, as a result of the successful lobbying efforts of disgruntled Australian fruit exporters who complained that shipping companies took no responsibility for the safe carriage of their produce, the Commonwealth Parliament passed the Sea Carriage of Goods Act 1904 (Cth). This was modelled on the US Harter Act and designed to protect Australian shippers by preventing carriers from contracting out of their liability for negligence.

The drafters of the 1904 Act recognised that the protection intended to be provided by that Act could be avoided by the simple device of the inclusion of an English (or other foreign) choice of law and/or choice of forum clause in the contract of carriage. Accordingly, s.6 of the 1904 Act provided that all parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment and that any stipulation or agreement to the contrary or which purports to oust the jurisdiction of the Australian Courts in respect of that bill of lading or document shall be "illegal, null and void and of no effect".

The 1904 Act was repealed and replaced by the Sea Carriage of Goods Act 1924 (Cth). This gave effect to what was to later become the Hague Rules, which provided a more balanced allocation of risk and liability between carriers and cargo interests. The protection afforded by s.6 of the 1904 Act was retained in s.9(1) of the 1924 Act.

Further, through the addition of a new s.9(2), the 1924 Act also extended

Pictured: a mid-sized box ship heads out to sea.
Photo credit: Mohamed Aly via Pixabay.

the protection of the jurisdiction of Australian Courts to cargoes carried into Australia. This protection had not been available under the 1904 Act. However, in doing so, s.9(2) did not replicate s.9(1) completely. Its application was limited to foreign jurisdiction clauses only. Unlike s.9(1), s.9(2) of the 1924 Act did not prevent the parties to inbound shipments from contracting with a system of law other than Australian law or the law at the place of shipment. Nor did s.9(2) deem the parties to an inbound shipment to have contracted in accordance with any specified system of law, including the law at the place of shipment.

The 1924 Act was in turn repealed with the enactment of COGSA in 1991. This was with the object of inter alia replacing the application of the Hague Rules under the 1924 Act with provisions that gave effect to those Rules as amended by the Visby and SDR Protocols (the Hague Visby Rules), as well as possibly in due course the Hamburg Rules (although that never came to fruition). The protections afforded by ss.9(1) and (2) of the 1924 Act were in substance continued and repeated in ss.11(1) and (2) of COGSA.

In 1997 and 1998, COGSA was amended with the result that a modified version of the Hague Visby Rules (the modified Rules) was to apply to (inter alia) certain contracts for the carriage of goods by sea from Australian ports. These amendments also introduced into s.11 of COGSA a new subs.(3) which provided that any agreement for the resolution of a dispute by arbitration was not made ineffective by s.11(2) of COGSA if under that agreement the arbitration must be conducted in Australia.

Inter-State shipments and choice of law

The current provisions of COGSA and its application of the modified Rules regulate not only certain contracts for the carriage of goods by sea into and out of Australia, but also from a port in Australia to a port in another State or Territory of Australia (inter-State shipments). This is pursuant to s.10(1)(b)(ii). The types of contracts to which COGSA and the modified Rules apply are those contained in or evidenced by a bill of lading, sea waybill, consignment note or similar document falling within the definition of a "sea carriage document" found in Schedule 1A of COGSA.

Section 11(1) of COGSA provides that the parties to such contracts for the carriage of goods by sea from any place in Australia are taken to have intended to contract according to the laws in force at the place of shipment, and thereby Australian law. However, s.11(1) only applies where those goods are to be carried "to any place outside Australia". It does not apply to any such contracts for the carriage of goods by sea from a port in Australia to any port in another State or Territory of Australia. This is notwithstanding that such contracts are subjected to the modified Rules by the operation of s.10(1)(b)(ii) of COGSA. Nor is there any provision either elsewhere in COGSA or in any other legislation which is to the same effect as s.11(1) and which applies to inter-State shipments.

Further, s.11(2)(a) of COGSA renders inoperative any agreement that purports to preclude or limit the above operation

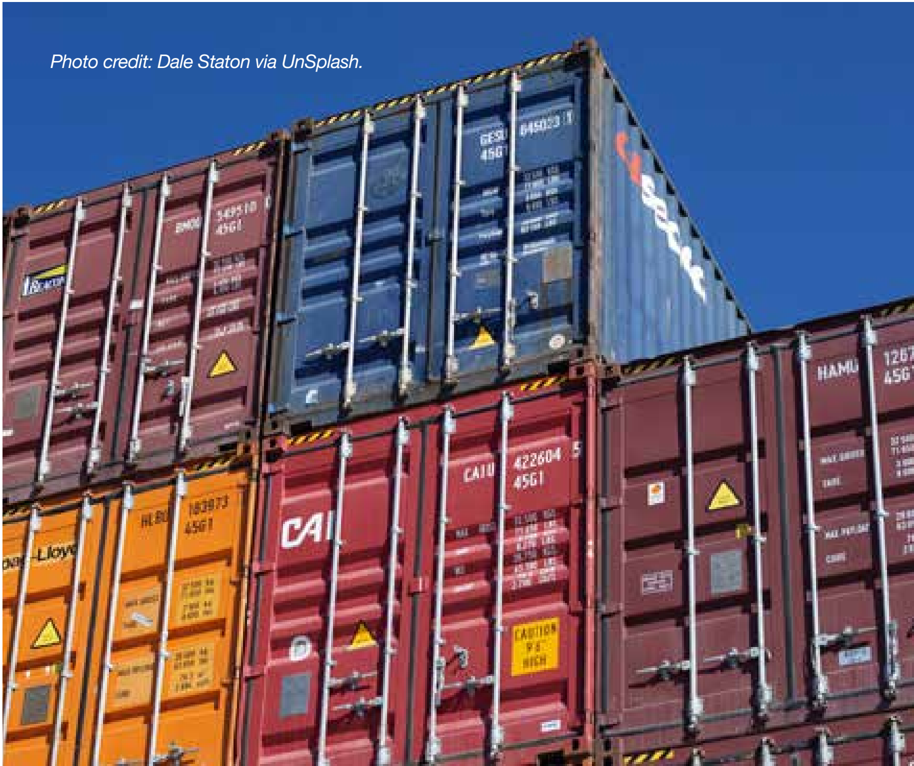
Photo credit: Dale Staton via UnSplash.

of s.11(1). It is therefore not possible for the parties to a contract of carriage of goods by sea of the type described in s.11(1) to avoid or override the effect of that subsection, for instance by agreeing that their contract is subject to some foreign law. However, s.11(2)(a) is also limited to only those contracts falling within s.11(1), and as such does not apply to contracts for the carriage of goods by sea inter-State. Accordingly, s.11(2)(a) of COGSA does not render a foreign choice of law clause in a contract for the inter-State carriage of goods by sea inoperative or of no effect (even though it does render such a clause in a contract for the carriage of those goods by sea from the same Australian port overseas ineffective).

Where a contract is made in Australia for the inter-State carriage of goods by sea, that contract might ordinarily be expected to be governed by Australian law, and in particular the law of the State or Territory from which those goods are shipped. That is either as the inferred choice of the parties to that contract of carriage having regard to the circumstances in which it was made, or as the system of law with which that contract of carriage has its closest and most real connection. But this is subject to the express agreement of the parties, who in the absence of provisions such as s.11(1) and (2)(a) of COGSA or other public policy considerations, are free to choose the system of law that is to govern the contract of carriage between them. In particular, the parties are free to agree that their contract of carriage should be governed by a system of law other than that in place at the port of shipment, including any foreign law. Furthermore, in the absence of provisions such as s.11(1) and (2)(a) of COGSA or other public policy considerations, Australian courts will generally give effect to the parties' express choice of the law that is to govern their contract. Moreover, this is so even where that contract otherwise has no connection with the system of law that the parties have chosen.

Accordingly, where COGSA neither deems the parties to a contract for the inter-State carriage of goods by sea to have intended to contract in accordance with the law in force at the place of shipment in Australia, nor precludes or prevents those parties from agreeing that their contract is to be governed by a system of law other than the law in force at the port of shipment and thereby Australian law, then that choice is both unlikely to be set aside on public policy grounds and therefore likely to be upheld and enforced, even by an Australian Court.

This ability of the parties to a contract for the inter-State carriage of goods by sea of the type regulated by COGSA to agree that their contract of carriage is governed by a system of law other than that in force at the place of shipment, including thereby foreign law, is anomalous. This is especially when compared to contracts for the carriage of goods by sea from that same Australian port overseas. This is even more so for shipments from ports in New South Wales where similar protections to those afforded by s.11 of COGSA also apply to contracts for the carriage of goods by sea wholly within that State, pursuant to s.6 of the Sea-Carriage of Goods (State) Act 1921 (NSW).

Moreover, the policy considerations underlying s.11(1) and (2)(a) of COGSA would seem at the very least to apply equally to contracts for the inter-State carriage of goods by sea. Indeed, one might be forgiven for thinking that the case for the application of these policy considerations to inter-State shipments is stronger and more apt where the intended carriage is from one Australian port to another port in Australia and essentially performed within Australian waters. This is especially where such contracts for the inter-State carriage of goods by sea can be made with foreign ship owners and shipping companies operating on coastal routes within Australia, who are more likely to include

Photo credit: PublicDomainPictures via Pixabay.

or insist upon including in the terms upon which they carry those goods inter-State, clauses providing for the application of a foreign system of law to which they are more amenable, in preference to Australian law.

Admittedly, it may be open to an Australian Court to strike down a foreign choice of law clause in a contract for the inter-State carriage of goods by sea by the application of Article 3 rule 8 of the modified Rules. But that is only if (a) that contract of carriage is subject to the modified Rules by operation of s.10(1)(b)(ii) of COGSA and (b) the application of that foreign choice of law clause either (a) relieves the carrier or ship from liability for loss of or damage to the goods carried arising from negligence, fault or failure in their duties and obligations under the modified Rules or (b) lessens the carrier's liability from that otherwise provided for by the modified Rules. In any event, this presupposes that this issue arises in the context of an underlying dispute that is or can be properly brought before an Australian Court. However, for the reasons stated below, there is no guarantee that any claim under such a contract for the carriage of goods by sea inter-State would be able to be pursued in an Australian Court if that contract also contained a foreign jurisdiction or arbitration clause. Further, where that contract of carriage is expressly said to be governed by a system of law other than Australian law, a foreign court or arbitral panel seized with a dispute under that contract may be unlikely to apply any of the provisions of COGSA or the modified Rules under COGSA, to that contract, especially if they are inconsistent with the foreign law that the parties have expressly chosen as the law governing their contract of carriage.

Inter-State shipments and foreign jurisdiction and arbitration clauses

Further, s.11(2)(b) and (c) of COGSA provides that any clause that purports to preclude or limit the jurisdiction of Australian Courts to entertain a claim in respect of any contract for the carriage of goods by sea into or out of Australia which is of the type regulated by COGSA, such as a foreign jurisdiction clause or foreign arbitration clause, is of no effect. But once again, these provisions do not apply to such contracts for the carriage of goods by sea from a port in Australia to a port in another State or Territory in Australia (i.e. inter-State shipments). Moreover, this is (once again) notwithstanding that COGSA may otherwise apply to the contract of carriage for that inter-State shipment, in particular so as to apply the modified Rules to that shipment. Nor is there any provision elsewhere within COGSA or otherwise in any other legislation which has the same effect as s.11(2)(b) and (c) in relation to inter-State shipments.

In the absence of provisions such as s.11(2)(b) and (c) of COGSA or other public policy considerations, the parties to a contract for the carriage of goods by sea (including one regulated by COGSA in the manner suggested above) are free to agree that disputes arising between them are to be determined exclusively in the courts of a foreign jurisdiction or by alternate dispute resolution, including arbitration overseas.

Pictured: a person signs legal documents. Photo credit: Scott Graham via UnSplash.

Moreover, where the parties to such a contract have concluded such an agreement, then in the absence of any provision such as s.11(2)(b) and (c) or other public policy considerations, Australian Courts will give effect to that agreement. This is especially so where the parties have agreed that any disputes between them are to be arbitrated overseas. In those circumstances, provided that the agreement to arbitrate is in writing and not null and void, inoperative or incapable of being performed, an Australian Court must stay any proceedings brought before it contrary to that agreement and refer the dispute to arbitration in accordance with that agreement, if any of the parties to that arbitration agreement seek it. Further, where the parties to a contract of carriage of goods by sea inter-State have agreed that any disputes between them are to be litigated in the exclusive jurisdiction of a foreign court, an Australian Court will generally stay proceedings brought before it contrary to that agreement, if any of the parties seek it. That is unless there is a strong case or substantial grounds for allowing those curial proceedings to continue despite the parties having agreed otherwise. Whilst an Australian Court therefore retains a discretion to refuse to stay proceedings before it that have been brought in breach of a foreign exclusive jurisdiction clause, Australian law nevertheless recognises that the starting point for the exercise of that discretion is the fact that the parties have agreed to litigate their disputes elsewhere and that, in the absence of strong countervailing circumstances, the parties should be held to their bargain. Further, the threat of the commencement of proceedings in an Australian Court, contrary to the parties' agreement to arbitrate or litigate their disputes overseas, may also be restrained by an anti-suit injunction.

Again, the policy underlying s.11(2)(b) and (c) of COGSA would seem to be at the very least equally applicable to contracts for the carriage of goods by sea inter-State, as for shipments into and out of Australia. Indeed, the case for the application of that policy to inter-State shipments would appear to be much stronger. It is anomalous that Australian importers and exporters under contracts of carriage contained in or evidenced by sea carriage documents are guaranteed by s.11(2)(b) and (c) of COGSA to be able to bring any claims they may wish to pursue against the carrier

(including a foreign carrier) before an Australian Court, yet inter-State shippers and consignees are not. It is equally anomalous that foreign carriers are able both to include in their contracts for the inter-State carriage of goods by sea clauses providing that disputes arising under or in relation to such contracts or the goods shipped under them, are to be determined by foreign courts or arbitration overseas, and to insist upon the enforcement of such clauses by anti-suit injunction and/or applying to stay proceedings brought in Australian Courts contrary to such clauses. Yet those same foreign carriers are not able to do so in relation to contracts for the carriage of goods by sea into and out of Australia.

The need for legislative amendment

This failure of ss.11(1) and (2) of COGSA to apply to the inter-State carriage of goods by sea under contracts of carriage that are otherwise subject to and regulated by COGSA can only be due to an oversight in legislative drafting and/or legislative inertia.

That is because there is no good policy reason why the protection afforded to Australian exporters and importers by ss.11(1) and (2) of COGSA is also not available to the shippers and consignees of inter-State shipments. This is especially where COGSA may otherwise apply to those inter-State shipments and the contracts of carriage under which those shipments are effected, including by rendering those contracts and the carriage of those shipments inter-State subject to the modified Rules (in Schedule 1A of COGSA) in the same way that shipments from Australia overseas are subject to those Rules. This existing lacuna in the operation and application of s.11 potentially prejudices Australian shippers and consignees of inter-State shipments. This is especially where such goods are carried on foreign flagged and/or owned and/or operated vessels, which is all the more likely as Australia's blue water fleet diminishes. This is also especially where foreign carriers are more likely to insist on terms within their bill of lading contracts providing for the application of foreign law and any claims against them to be determined by a foreign court or arbitration, and where Australian shippers and consignees are likely to have little or no bargaining power

Pictured: a figurine representing Lady Justice, the personification of law. Photo credit: Tingey Injury Law Firm via Unsplash.

to renegotiate these terms, in particular so as to provide for the application of Australian law and jurisdiction to their contract.

The potential impact of this lacuna is not just hypothetical. For instance, in Degroma Trading Inc v Viva Energy Australia Pty Ltd [2019] FCA 649, proceedings brought by cargo interests in the Federal Court of Australia in relation to a dispute regarding the alleged contamination of a cargo of oil which was to have been shipped under a bill of lading from Geelong to Tasmania were, upon the application of the foreign carrier, stayed by the Court in favour of arbitration in London in reliance upon an alleged agreement to arbitrate disputes arising out of that bill of lading. However, had that dispute arisen in connection with a shipment from Geelong to anywhere in the world outside of Australia, the alleged agreement to arbitrate would have been rendered of no effect by s.11(2) of COGSA and the Federal Court would have been able to continue to hear and determine the underlying substantive claim (as cargo interests presumably intended when they first commenced proceedings in that Court).

It is possible that this lacuna has occurred because, in the past there were no attempts by carriers to include foreign jurisdiction, arbitration or choice of law clauses in their contracts of carriage, and there was therefore not seen to be the same need for protection from such clauses in the context of inter-State shipments, as there was in relation to shipments into and out of Australia. This is especially when Australia's coastal trade was carried on Australian owned and registered ships. This possible explanation is perhaps borne out by the fact that neither s.6 of the 1904 Act nor s.9 of the 1924 Act extended the protections made available in those sections to the carriage of goods by sea inter-State, notwithstanding that both Acts otherwise applied to inter-State carriage. But with the greater use of foreign shipping on the coastal trade, that may no longer be the position.

This lacuna in both of the aspects of s.11 of COGSA identified above could readily and easily be remedied by a slight short amendment to that section.

In the interim, its impact may also be ameliorated by the parties to contracts for inter-State carriage of goods by sea under bills of lading or other sea carriage documents agreeing to resolve disputes between them by arbitration in Australia. This is especially bearing in mind the protection afforded by s.11(3) of COGSA. Australia has an established and well-regarded system of commercial arbitration, which is strongly supported by both institutions such as ACICA, AMTAC and CIARB, as well as the Australian Courts. But admittedly it may not always be possible to persuade foreign ship owners, operators, and carriers to agree to have any claims against them determined by arbitration in Australia, rather than overseas. In those circumstances, and unless and until s.11 is amended to remove the present lacuna, Australian shippers and consignees of contracts for the inter-State carriage of goods by sea contained in or evidenced by a "sea carriage document" will continue to be treated less favourably than Australian shippers or consignees of any such contract for the carriage of goods into or out of Australia. On the face of it, that is a perverse outcome for which there is and can be no justification on policy grounds and which should therefore be remedied.

Author note: this an abbreviated version of a paper delivered to the Western Australian Branch of the Maritime Association of Australia and New Zealand (MLAANZ) on 24 February 2021, as part of its 2021 Webinar Series.