Voyage Charter as Sea Carriage Document?

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 domestic awards within the state.

The mere fact of accession by a country to the Convention has never provided an absolute assurance that an award will be recognised and enforced in a particular signatory state, simply that there is a strong presumption that if proper procedures are followed that it will be. There are differences in approach between signatory states.

The way in which signatories approach the Convention is based on their own domestic law. For example, practitioners and readers may have seen issues where a defendant has not entered an appearance in arbitration at all, or has only taken a very nominal part in the arbitration. Then, when a default award is published in London or elsewhere the domestic court in which enforcement is sought, that is the “enforcing court”, may re-open the decision or not enforce at all, particularly where there are questions as to whether proper service has been given (as required by the law of the enforcing court) of notices, pleadings, documents, orders and the award itself. Also, where there is a difference in interpretation as to whether there is an underlying contract or arbitration clause appearing therein, that is a written agreement for the purpose of the Convention. For example, if the charterparty is never signed or if the arbitration provision is in an unsigned pro forma document simply referred to in the main contract, in certain jurisdictions that may prove fatal or certainly make enforcement slower and more expensive when time may be of the essence.

Also signatories may refuse to recognise and enforce an arbitral award if either (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country. A recent and perhaps surprising 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 held in relation to a Federal Statute that a voyage charterparty is "a sea carriage document" for the purpose of Australian COGSA 1991 Sections 11(1)(a) and 11(2)(a). This is contrary to a very short decision earlier in 2012 of the Supreme Court of South Australia: Jacobsen International (Australia) Pty Ltd v Interfert Australia Pty Ltd [2012] SASC 50 which held a voyage charterparty was not in fact a sea carriage document.

The relevant Section 11 of COGSA 1991 states as follows:-

"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:
(a) preclude or limit the effect of subsection (1) in respect of a bill of lading or a document mentioned in that subsection, or
(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 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)(ii) relating to such a carriage of goods.

(3) An agreement, or a provision of an agreement, that provides for the resolution of a dispute by arbitration is not made ineffectual by subsection (2) (despite the fact that it may preclude or limit the jurisdiction of a court) if, under the agreement or provision, the arbitration must be conducted in Australia."

On the basis of the Federal Court’s conclusion that a voyage charter fulfils the criteria of a sea-carriage document (and as with similar clauses in bills of lading) arbitration and choice of law clauses are rendered ineffective under Section 11 where the shipment takes place from Australia and, for carriage to Australia, arbitration provisions also now appear contrary to law whilst choice of law provisions may still be acceptable. 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. It can be seen, however, that Australian arbitrations are nonetheless permitted in certain circumstances by virtue of Section 11(3) COGSA 1991.

The Federal Court in the Norden decision refused to enforce the non-domestic (London) final arbitration award despite the defendant being held to be a party to the charter, agreeing the incorporation of a London arbitration and English law clause in it and then taking a full part in the dispute and defending the arbitration. It is a perhaps curious result if indeed this was the intention of the federal legislature, to extend the protection often given to those who take possession of bills by negotiation and who become parties to law and arbitration provisions to those who freely enter into a voyage contract.

Of course, where the counterparty to the contract is trading and has assets outside Australia against which an award can be enforced then the decision will be of limited effect but where the party trades solely from or within Australia then the usual focus on asset location and enforceability becomes even more acute and at an early stage.

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 and 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 as domestic awards and where, prima facie, the presumption is to allow enforcement. In the interim care must be taken.
in deciding strategy for arbitrations against Australian counterparties on voyage terms and, particularly, where assets are to be found solely in that jurisdiction.

Time charterparties and their law and arbitration provisions are unaffected by the decision.

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