

Interstate sea carriage outside reach? Federal Court confirms Australian Court's jurisdiction can be excluded for interstate sea carriage bill of lading disputes

Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co. KG (The BBC Nile) [2022] FCAFC 171

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At a glance

- A recent Federal Court decision has confirmed that it is possible to exclude the jurisdiction of an Australian Court for disputes arising out of bills of lading for interstate carriage.
- In *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co. KG (The BBC Nile)* [2022] FCAFC 171, the Full Court of the Federal Court of Australia (FCA) determined that the effect of section 11 of the *Carriage of Goods by Sea Act 1991* (Cth) (COGSA), which renders ineffective foreign jurisdiction clauses in sea carriage documents, does not apply to interstate carriage of goods.
- That means parties to bills of lading or other sea carriage documents for interstate carriages will not succeed in obtaining an anti-suit injunction against foreign proceedings if the relevant bill of lading or sea carriage document contains a foreign jurisdiction clause, which is common practice.
- The implications of this are that Australian cargo owners (and their insurers) who routinely arrange interstate sea voyages could find themselves having to commence proceedings in a foreign court or arbitration under standard bill of lading terms (often London arbitration). That is an off-putting proposition that may see shippers exploring rail or road options where feasible. If so, that would cause a further decline in the already downward trending rate in domestic coastal shipping of the last few decades.

Takeaways for industry participants

Section 11 of COGSA usually renders ineffective any exclusive jurisdiction clause in a sea carriage document that seeks to oust the jurisdiction of Australian Courts for all outbound and inbound international carriage of goods by sea.

The FCA's decision in *The BBC Nile* exposes somewhat of a loophole in COGSA for interstate carriage by sea. It effectively permits parties, namely carriers, to avoid Australian Courts' jurisdiction and commence proceedings (including arbitration) in a foreign jurisdiction in line with the relevant clause under the sea carriage document.

Parties trading between states in Australia should consider insisting on an Australian jurisdiction clause if they are in a position to do so. Without it, any proceedings commenced in Australia could be stayed in favour of foreign proceedings or arbitration initiated by one of the parties. For cargo owners, this could be difficult where Australian domestic shipping largely relies on foreign-flagged vessels and carriers that are more likely to insist on foreign law and jurisdiction clauses.

It is likely cargo insurers seeking recoveries will encourage their insureds that routinely ship project or high-value cargoes by sea domestically to negotiate Australian jurisdiction clauses for interstate carriage. This would avoid subrogating insurers having to pursue recovery in a foreign court or tribunal with all the cost, inconvenience and uncertainty that can follow.

These concerns have been raised with the Australian Government as part of a review of s 11 of COGSA. Stakeholders say that the current position lacks clarity, certainty and adequate protection for Australian cargo interests.

Carriage of Goods by Sea Act

COGSA came into effect in Australia in 1991. The objective of COGSA is to¹ introduce a regime of marine cargo liability that:

- is up-to-date, equitable and efficient
- is compatible with arrangements existing in countries that are major trading parties of Australia, and
- considers developments within the United Nations regarding marine cargo liability arrangements.

¹ Section 3, COGSA.

In short, COGSA seeks to give the amended Hague Rules effect within Australia.

Section 11

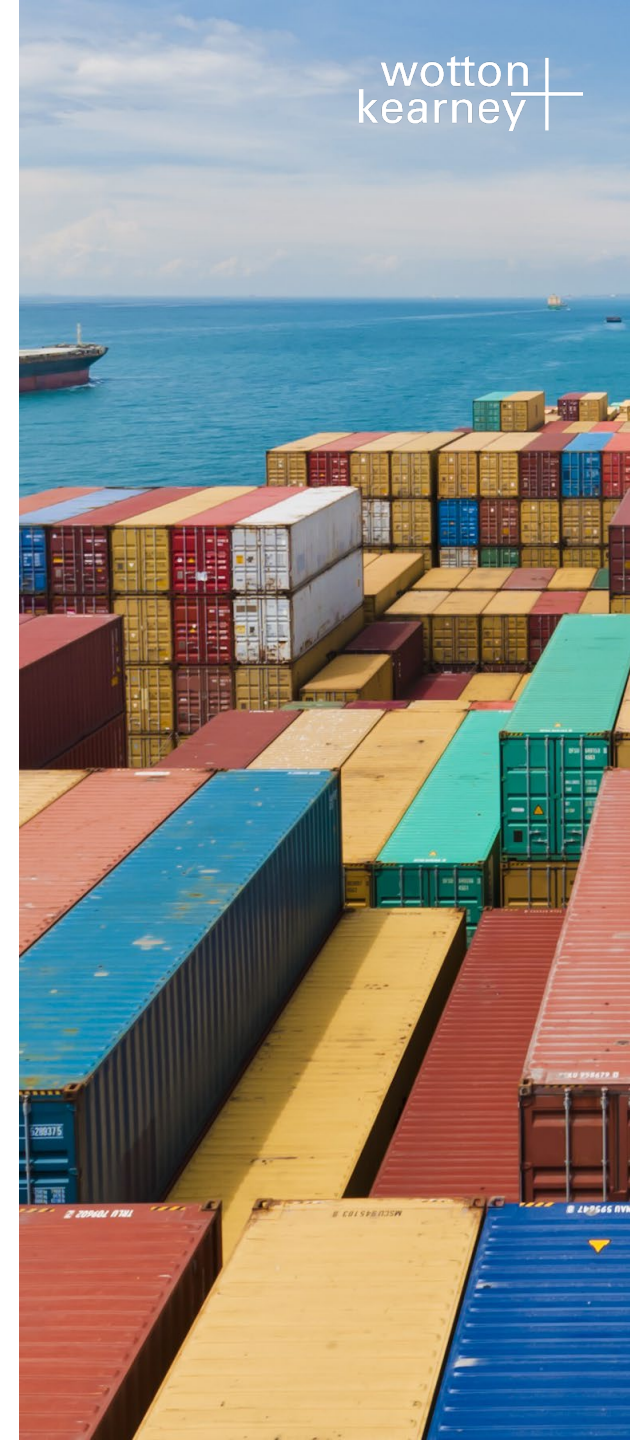
Section 11(1) of COGSA provides that all parties to a sea carriage document – relating to the carriage of goods from any place in Australia to any place outside Australia or a non negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii) of COGSA relating to such a carriage of goods – are taken to have intended to contract according to the laws in force at the place of the shipment.

Subsection 2 provides that an agreement between the parties that is made in Australia or elsewhere has no effect so far as it purports to preclude or limit:

- a) the effect of subsection 1 regarding the bill of lading or document mentioned in that subsection
- b) the jurisdiction of a court of Australia regarding a bill of lading or document mentioned in subsection 1
- c) the jurisdiction of a court of Australia regarding

- 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 the kind mentioned in subparagraph 10(1)(b)(iii) relating to such a carriage of goods.

Where section 11 of COGSA applies, a claim may be brought in an Australian court or arbitration centre where otherwise it would have been prevented from doing so due to a choice of forum clause in the carriage of goods by sea contract governing the agreement between the parties.



The BBC Nile

The key facts of the case are:

- a) Carmichael entered into an agreement with OneSteel for OneSteel to manufacture and supply Carmichael with steel rails. The manufacture of the steel rails was to occur in South Australia.
- b) Carmichael engaged BBC Chartering to transport the steel rails from South Australia to Queensland, where they were to be used in the construction of a train line.
- c) BBC Chartering arranged for the steel to be transported by sea from South Australia to Queensland.
- d) The steel rails were transported onboard the *BBC Nile*. They arrived in Queensland on 24 December 2020.
- e) On 25 December 2020, BBC Nile crew members observed that a part of one of the vessel's holds had collapsed, causing damage to the steel rails. The damage was sufficiently extensive that the rails were no longer compliant with the specifications for their intended use and had to be sold as scrap.

- f) On 2 August 2022, BBC Chartering notified Carmichael that it had commenced arbitration in London, in line with the dispute resolution clause contained in the bill of lading.

- g) The relevant clause in the bill of lading reads as follows:

"4. Law and Jurisdiction

Except as provided elsewhere herein, any dispute arising under or in connection with this Bill of Lading shall be referred to arbitration in London ..."

- f) On 12 August 2022 (the same month the arbitration in London was to commence), Carmichael sought an injunction against BBC Chartering in the FCA to prevent it from continuing the arbitration in London. It argued that the London arbitration should be stayed, and the dispute heard and determined by an Australian Court, as:

- 1) Section 11 of COGSA either applies, or should be read to apply, to bills of lading/sea carriage documents for interstate carriage.

- 2) Because the Australian amended Hague Rules apply substantively to the dispute, the English arbitral tribunal may not apply the same substantive laws resulting in the carrier reducing its liability contrary to Article 3, Rule 8 of the amended Hague Rules. Because of the effect of Article 3, Rule 8, which voids any clause that seeks to reduce the carrier's liability, Carmichael argued that this should have the effect of voiding the law and jurisdiction clause.

- i) BBC Chartering, in turn, applied for a stay of the FCA proceedings.

The FCA granted an interim injunction, restraining BBC Chartering from continuing its proceedings in London until the Court had determined the applications by the parties.

The FCA decision

Carmichael's application for the injunction was dismissed by the FCA.

The FCA reviewed the legislative history of COGSA and found no intent of preventing parties to a sea carriage document, including a bill of lading, from contracting out of the jurisdiction of Australian courts regarding interstate carriage of goods. Noting that section 11 does not deal with interstate carriage, Carmichael submitted it was appropriate to read additional words into the section 11 to effectively confer a complete protection for all Australian shippers (with the exception of intrastate carriage).

The FCA disagreed.

It held that section 11(2)(b) of COGSA did not operate to capture interstate bills of lading. The FCA distinguished between bills of lading for cargo transported from Australia to another country (which COGSA was intended to apply to) and bills of lading for cargo transported between Australian states.

Of note for stakeholders (in particular carriers), the FCA said in paragraph 64:

“Nothing in the materials leading to the enactment of COGSA 91, or the amendments to section 11 of that Act, discloses any legislative consideration that the parties to a sea carriage document, including a bill of lading, should be unable to contract out of the jurisdiction of Australian courts in respect of interstate carriage of goods.”

Unless parties contract out of the foreign choice of jurisdiction clauses usually contained in sea carriage documents, they will be bound by those terms for interstate carriages and section 11. Currently, that means they will not be able to apply to allow proceedings to be brought in Australian Courts.

Review of section 11 by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts

The timing of *The BBC Nile* litigation is, on one view, unfortunate as the key question and issue in the case is presently under legislative review. The three main concerns that are currently being looked at by the Australian Government are:

- 1) the definition of “a sea carriage document”, as stated in section 11(1)(a)
- 2) interstate voyages and the issues raised by *The BBC Nile* decision, and
- 3) the seat of arbitration.

Submissions closed on 1 November 2022. We will continue to monitor the review and will provide an update once the review is completed, along with any appeal of *The BBC Nile* FCA decision.



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