FEDERAL COURT OF AUSTRALIA

Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd

[2012] FCA 696

Citation:	Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd [2012] FCA 696
Parties:	**DAMPSKIBSSELSKABET NORDEN A/S v BEACH BUILDING & CIVIL GROUP PTY LTD (ACN 081 893 414)**
File number:	NSD 86 of 2011
Judge:	**FOSTER J**
Date of judgment:	29 June 2012
Catchwords:	**ARBITRATION** – international arbitration – whether it is open to an award debtor to challenge the validity of the relevant arbitration agreement at the stage when the Court is hearing and determining on an *inter partes* basis an application to enforce an award purportedly made pursuant to that arbitration agreement pursuant to s 8 of the *International Arbitration Act 1974* (Cth) – relevant principles discussed – whether a voyage charterparty is a *sea carriage document* relating to the carriage of goods from any place in Australia to any place outside Australia within the meaning of that phrase in s 11(1)(a) and s 11(2)(b) of the *Carriage of Goods by Sea Act 1991* (Cth) with the consequence that, by operation of s 11(2)(b) and s 11(3) of that Act, by reason of the fact that the charterparty includes an arbitration clause requiring disputes to be arbitrated in London, a voyage charterparty is of no effect to the extent that it purports to preclude or limit the jurisdiction of Australian courts – whether, in the circumstances of the present case, the foreign arbitration clause has no effect
Legislation:	*Arbitration Act 1996* (UK), ss 30, 48, 67 and 73(2) *Carriage of Goods by Sea Act 1991* (Cth), ss 3, 4(2), 7, 8, 9, 10 and 11 and Schedule 1A *Carriage of Goods by Sea Amendment Act 1997* (Cth) *Carriage of Goods by Sea Regulations 1998* (Cth) *Carriage of Goods by Sea Regulations 1998 (No 2)* (Cth) *International Arbitration Act 1974* (Cth), ss 2D, 3, 8, 9 and 39 *International Arbitration Act Amendment Act 2010* (Cth)

(Act No 97 of 2010)
Sea-Carriage of Goods Act 1924 (Cth), s 9

Cases cited:	*BHP Trading Asia Ltd v Oceaname Shipping Ltd* (1996) 67 FCR 211 cited *Compagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577 cited *Dallah Real Estate v Ministry of Religious Affairs* [2010] 2 Lloyd's Rep 691 followed *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326 followed *El Greco (Aust) Pty Ltd v Mediterranean Shipping Co SA* (2004) 140 FCR 296 cited *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1 cited *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 282 ALR 717 followed *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* [2012] SASC 50 distinguished *Nittan (UK) Ltd v Solent Steel Fabrications Ltd* [1981] 1 Lloyd's Rep 633 followed *Noon v Bondi Beach Astra Retirement Village* [2010] NSWCA 202 followed *Sonmez Denizcilik ve Ticaret Anonim Sirketi v MV "Blooming Orchard" (No 2)* (1990) 22 NSWLR 273 cited
Date of hearing:	12 April 2011
Date of last submissions:	16 November 2011
Place:	Canberra via video link to Sydney (heard in Sydney)
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	149
Counsel for the Applicant:	Mr GJ Nell SC and Ms JA Soars
Solicitor for the Applicant:	James Neill Solicitors
Counsel for the Respondent:	Mr A Morris QC and Mr L Jurth
Solicitor for the Respondent:	Worcester & Co Solicitors

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 86 of 2011**

BETWEEN:	**DAMPSKIBSSELSKABET NORDEN A/S** **Applicant**
AND:	**BEACH BUILDING & CIVIL GROUP PTY LTD (ACN 081 893 414)** **Respondent**

JUDGE: **FOSTER J**
DATE OF ORDER: **29 JUNE 2012**
WHERE MADE: **CANBERRA (VIA VIDEO LINK TO SYDNEY)**

THE COURT ORDERS THAT:

1. The Application be dismissed.

2. The applicant pay the respondent's costs of and incidental to that Application.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

IN THE FEDERAL COURT OF AUSTRALIA
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AND:	**BEACH BUILDING & CIVIL GROUP PTY LTD (ACN 081 893 414)** **Respondent**
JUDGE:	**FOSTER J**
DATE:	**29 JUNE 2012**
PLACE:	**CANBERRA VIA VIDEO LINK TO SYDNEY (HEARD IN SYDNEY)**

REASONS FOR JUDGMENT

INTRODUCTION

1 The applicant (**DKN**) is a ship owner.

2 DKN is the award creditor under two Awards, each of which was made by Robert Gaisford (**the Arbitrator**).

3 The two Awards are:

(a) A Declaratory Arbitration Award made on 22 November 2010 (**the first Award**); and

(b) A Final Arbitration Award made on 14 January 2011 (**the final Award**).

4 The Awards determined a claim by DKN for demurrage under a Charterparty dated 6 October 2009 (**the Charterparty**). Clause 32 of the Charterparty provided that all disputes arising out of the Charterparty should be determined by arbitration in London. The Arbitrator was appointed pursuant to cl 32 and conducted the arbitration upon the basis that cl 32 was the parties' arbitration agreement which authorised him to do so.

5 Under the final Award, the Arbitrator awarded to DKN the sum of USD824,663.18 together with interest thereon at the rate of 4% per annum and pro rata, compounded at three-monthly rests, from 27 January 2010 until the date of payment. Under the final Award, the

Arbitrator also awarded costs in favour of DKN and made an order that the costs and expenses of the arbitration be paid by the award debtor.

6 The award debtor named in both the first Award and in the final Award is the respondent, Beach Building & Civil Group Pty Ltd (ACN 081 893 414) (**Beach Civil**). Beach Civil is not named as a party in the Charterparty: The entity identified in the Charterparty as the charterer was *"Beach Building and Construction Group (of which Bowen Basis Coal Group forms a part), Australia"*.

7 Before the Arbitrator, DKN contended that the charterer had been misdescribed in the Charterparty. It was the contention of DKN that it was the common intention of those who negotiated the terms of the Charterparty that the charterer under the Charterparty would be Beach Civil. By the first Award, the Arbitrator rectified the Charterparty by altering the name of the charterer specified therein from *"Beach Building and Construction Group"* to *"Beach Building & Civil Group Pty Ltd"*, the corporate name of the respondent. Thereafter, the Arbitrator proceeded to hear and to determine DKN's claim upon the basis that the entity against whom that claim was being made was Beach Civil.

8 DKN has applied to the Court for orders recognising and enforcing both the first Award and the final Award pursuant to s 8 of the *International Arbitration Act 1974* (Cth) (**the Act**). Both Awards were made in England in accordance with terms of reference promulgated by the London Maritime Arbitrators Association.

9 In its Originating Application, DKN seeks leave to enforce both Awards. Under the Act, there is no longer any requirement that the leave of the Court be obtained in order to enforce such awards. In par 3 of its Originating Application, DKN claims the following relief:

> 3. An order that judgment be entered against the respondent in terms that:
>
> (a) the respondent pay to the applicant the sum of US$824,663.18 together with interest thereon at the rate of 4% per annum and pro rata, compounded at three-monthly rests, from 27 January 2010 until the date of payment;
>
> (b) the respondent pay to the applicant the sum of £6,075 together with interest thereon at the rate of 4% per annum and pro rata, compounded at three-monthly rests, from 23 November 2010 until the date of payment; and

(c) the respondent pay to the applicant the sum of £2,270 together with interest thereon at the rate of 4% per annum and pro rata, compounded at three-monthly rests, from 17 January 2011 until the date of payment.

10 DKN also claims the costs of the present proceeding.

11 There is an issue as to whether the first Award can be enforced as a separate independent foreign award under the Act. For all practical purposes, it is the final Award which is the foundation for Order 3 in DKN's Originating Application and therefore it is the final Award which matters.

12 In its Amended Defence filed on 8 April 2011, Beach Civil *"... denies that* [DKN] *is lawfully entitled, as against* [Beach Civil] *to enforce either ..."* of the two Awards.

13 In that Amended Defence and in its submissions, Beach Civil contends that the Arbitrator lacked jurisdiction to determine DKN's claims and argues that, for this reason, there is no valid or efficacious foreign award within the meaning of that expression in the Act which is capable of being enforced. In support of these contentions, Beach Civil advances two grounds.

14 The first ground advanced by Beach Civil is that, because it was not named as a contracting party on the face of the Charterparty, it is not bound by either of the two Awards. By way of amplification of that contention, Beach Civil contends that, absent rectification of the Charterparty, it was not a party thereto nor was it bound thereby. For that reason, so it submits, the Arbitrator had no jurisdiction in respect of Beach Civil at the time when he entered upon the arbitration or at the time when he made the first Award. Beach Civil submits that it was not competent for the Arbitrator retrospectively to give himself jurisdiction in respect of Beach Civil by purporting to rectify the Charterparty after he had commenced the arbitration.

15 The second ground of defence raised by Beach Civil is that the arbitration clause in the Charterparty, pursuant to which the arbitration was conducted, is, and was at all material times, invalid and of no effect by reason of the operation of s 11 of the *Carriage of Goods by Sea Act 1991* (Cth) (**COGSA 1991**).

THE FACTS

16 By the Charterparty and on an Americanised Welsh Coal Charter (AMWELSH 93 form), DKN (as disponent owner) chartered a vessel to be nominated for a laden voyage from one safe port, safe berth always accessible Dalrymple Bay Coal Terminal Australia to one safe port, safe berth, Ningbo and one safe port, safe berth, Jiangyin China with a cargo of 68,000 mt of coal, 10% more or less at the option of the owners.

17 The Charterparty is evidenced by a clean final recap email from Karl Soares (of Anderson Hughes Australia, ship broker, on behalf of the charterer) to Christian Hornum (on behalf of DKN) dated 6 October 2009 and a draft Charterparty prepared in accordance with the terms of that recap.

18 In the final recap email, Captain Soares said:

> Dear Christian,
>
> With confirmation that subjects are now in order am pleased to recap how we are fixed clean with CP dated today, 6th. October 2009 between Norden and BBCG, Australia asf:
>
> ///FINAL RECAP///
>
> Owners: Norden A/S Denmark
>
> Acct: Beach Building and Construction Group (of which Bowen Basin Coal Group forms a part), Australia
>
> …

19 As I have already mentioned, it was DKN's case in the arbitration that the description of the charterer in the final recap email was a misdescription and that the entity which had always been intended by the parties to the Charterparty to be the contracting party was Beach Civil, the award debtor under both Awards and the respondent in the present proceeding. In the first Award, the Arbitrator found that the name of the charterer had been incorrectly recorded in the Charterparty. He decided that the charterer should have been described in that document as *"Beach Building and Civil Group"* which was, at that time, a business name of Beach Civil. For this reason, the Arbitrator rectified the Charterparty by specifying Beach Civil as the charterer.

20 The vessel *"Ocean Baron"* was nominated to perform the Charterparty. In December 2009, the vessel loaded a cargo of 72,752 mt of coal at Dalrymple Bay Coal Terminal and then proceeded to the port of Lianyungang, China, where she discharged that cargo.

21 A dispute arose as between DKN, as disponent owner, and Beach Civil, as the alleged charterer, in relation to demurrage payable under the Charterparty in respect of delays to the vessel at both the load and discharge ports. DKN claimed that Beach Civil was liable to it for demurrage totalling USD824,663.20 in respect of both ports. The liability of the charterer to pay demurrage was provided for by cll 6, 7 and 10 of the Charterparty.

22 This dispute was referred by DKN to arbitration in London pursuant to cl 32 of the Charterparty which provided:

> **32. Arbitration**
>
> (a) [deleted]
>
> (b) *LONDON
>
> All disputes arising out of this contract shall be arbitrated at London and, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic Mercantile & Shipping Exchange and engaged in Shipping, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his action be taken before the award is made. Any dispute arising hereunder shall be governed by English Law.
>
> For disputes where the total amount claimed by either party does not exceed US $
>
> ** the arbitration shall be conducted in accordance with the Small Claims Procedure of the London Maritime Arbitrators Association.
>
> * *Delete (a) or (b) as appropriate*
>
> ** *Where no figure is supplied in the blank space this provision only shall be void but the other provisions of this clause shall have full force and remain in effect.*

23 Both DKN and Beach Civil agreed to the appointment of the Arbitrator as sole arbitrator. The seat of the arbitration was London, England.

24 Prior to the service of Beach Civil's substantive defence submissions, the Arbitrator agreed to determine two preliminary issues which had been raised before him by Beach Civil. These issues were:

(a) The Arbitrator's jurisdiction to hear an arbitration concerning a dispute arising out of the Charterparty; and

(b) The identity/correct name of the charterer.

25 It appears that Beach Civil agreed to allow the Arbitrator to determine the preliminary issues described at [24] above. That is to say, Beach Civil appears to have accepted before the Arbitrator that the Arbitrator had jurisdiction or power to determine those two issues.

26 The first of these preliminary issues turned upon the validity of the London arbitration clause in the Charterparty. Before the Arbitrator, Beach Civil contended that the clause was invalid and unenforceable by reason of the operation of s 11 of COGSA 1991. Beach Civil relies on the same point in the present proceeding in support of its argument that this Court should not enforce either of the two Awards.

27 Written Submissions supported by documentary evidence were exchanged by the parties and provided to the Arbitrator in relation to the two preliminary issues which I have identified at [24] above. Neither party requested an oral hearing in respect of those issues. By the first Award, the Arbitrator found that the name of the charterer had been incorrectly recorded in the Charterparty and rectified the document accordingly. He also held that the arbitration clause was valid and enforceable and that he had jurisdiction to decide the disputes between the parties which had arisen out of the Charterparty.

28 The Arbitrator also awarded to DKN its costs of the first part of the arbitration. He directed Beach Civil to pay the costs of the Award in the amount of £6,075 and directed that, if DKN paid all or any part of those costs, DKN would be entitled to reimbursement from Beach Civil of that amount (together with interest). DKN has, in fact, paid to the Arbitrator the costs of the first Award. For this reason, it claims against Beach Civil the sum of £6,075 as part of its monetary claims in the present proceeding.

29 In the present proceeding, DKN submitted that, under English law, the Arbitrator had both the power and jurisdiction to determine the two preliminary issues which he decided by publishing the first Award. DKN also submitted that, under English law, the Arbitrator had the power to determine whether or not he had jurisdiction in the arbitration. DKN submitted that these conclusions followed from s 30 of the *Arbitration Act 1996* (UK) (**the UK Act**).

30 Under the UK Act, the parties also had the right to apply to the English Commercial Court to challenge the first Award and also to challenge the Arbitrator's declaration as to his jurisdiction. Such an application must be brought within 28 days of the date of the award by

which the Arbitrator determined his jurisdiction. No such application was made by Beach Civil to the English Commercial Court in relation to the first Award.

31 Section 73(2) of the UK Act provides:

> Where the arbitral tribunal rules that it has substantive jurisdiction and a party to the arbitral proceedings who could have questioned that ruling –
>
> (a) by any available arbitral process of appeal or review;
>
> (b) by challenging the award
>
> does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part [of the UK Act], he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.

32 After the Arbitrator published the first Award, the Arbitrator ordered Beach Civil to serve Defence Submissions by 24 December 2010. No Submissions were served by Beach Civil and the Arbitrator was subsequently informed by Beach Civil's then solicitors that they were no longer acting for Beach Civil in relation to the arbitration. The Arbitrator was then requested by Beach Civil to direct all future correspondence to two persons nominated by it. Ultimately, the Arbitrator was informed by those persons that Beach Civil did not intend to defend the arbitration. The Arbitrator then declared submissions closed and proceeded to consider the material before him and to make the final Award. Beach Civil took no part in the substantive arbitration.

33 At the hearing before me, DKN also read and relied upon an affidavit sworn by Christian Hornum on 21 March 2011 and an affidavit sworn by Karl Soares on 28 March 2011. The evidence contained in those two affidavits was, as I understood matters, essentially the same evidence as that which had been adduced in the arbitration in support of DKN's contention that the charterer under the Charterparty was, in fact, Beach Civil. The evidence adduced before me was intended to place before this Court evidence in support of DKN's contention that Beach Civil was indeed the charterer under the Charterparty so that, were I to come to the view that I had to determine this question afresh for myself, there was a proper evidentiary basis upon which to do so.

34 Senior Counsel for Beach Civil did not object to either of these affidavits nor did he cross-examine either of the deponents. The evidence in these two affidavits stands unchallenged and, in my view, amply supports the ultimate holding which the Arbitrator

made in respect of the true identity of the charterer under the Charterparty. Senior Counsel for Beach Civil did not contend otherwise.

THE FIRST AWARD

35 By the first Award, the Arbitrator made a Declaratory Arbitration Award as follows:

> **1.** **I FIND, HOLD AND DECLARE** as follows:
>
> (i) I have jurisdiction to decide the disputes between the parties arising out of the Charterparty;
>
> (ii) That the name of the Charterers was incorrectly recorded in the Charterparty and should have been stated to be "Beach Building & Civil Group", which was at that time a business name of Beach Building & Civil Group Pty Ltd, and the Charterparty is hereby rectified so to state. Consequently, the name of the Respondents in this reference is amended to Beach Building & Civil Group Pty Ltd.
>
> **2.** **I AWARD AND DIRECT** that the Charterers shall bear their own costs and shall pay the Owners' costs in relation to the two preliminary issues determined by this my Declaratory Arbitration Award on the standard basis (for the assessment of which, if not agreed, I hereby reserve my jurisdiction) together with interest thereon at the rate of 4% per annum and pro rata, compounded at three-monthly rests, from the date of this my Declaratory Arbitration Award until the date of payment
>
> **3.** **I FURTHER AWARD AND DIRECT** that the Charterers shall pay the costs of this my Declaratory Arbitration Award which amount to £6,075.00 provided, however, that if, in the first instance the Owners shall have paid all or any part thereof, they shall be entitled to the immediate reimbursement of the sum so paid together with interest thereon at the rate of 4% per annum and pro rata, compounded at three-monthly rests, from the date of such payment until that of reimbursement.
>
> **4.** **I HEREBY FURTHER DECLARE** that this my Declaratory Arbitration Award is final as to all matters determined herein **AND I HEREBY RESERVE** my jurisdiction to determine all other disputes arising out of the Charterparty and to make a further award or further awards in relation thereto.

36 For reasons which the Arbitrator explained in the reasons which he appended to the first Award, the Arbitrator held that a voyage Charterparty of the kind involved in the present case was not *"a sea carriage document"* within the meaning of s 11 of COGSA 1991 with the consequence that the London arbitration clause in the Charterparty was not rendered invalid by that section.

37 As to the second preliminary issue, the Arbitrator recorded (as was the fact) that there was no registered corporation in Australia bearing the name *"Beach Building and*

Construction Group" and no business registered in Australia with that name. Before the Arbitrator, Beach Civil agreed that there was an error in the description of the charterer in the Charterparty but argued that the corporation which the parties had intended would be the charterer was in fact *"BBCG Bowen Basin Coal Group Pty Ltd"* (**BBCG Coal Ltd**). It was also established before the Arbitrator that *"Beach Building & Civil Group"* was the registered business name of the respondent, Beach Civil, at least from early 2009 until 23 December 2009. The Arbitrator recorded the argument advanced by Beach Civil to the effect that, by reason of the reference in brackets in the Charterparty to *"Bowen Basin Coal Group"*, it must have been intended that BBCG Coal Ltd would be the contracting party.

38 After considering the evidence in detail, the Arbitrator, at [21]–[23] concluded as follows:

> 21. As to the witness statement of Mr Hornum, this was similar to that of Captain Soares and confirmed the Owners' refusal to agree the fixture with BB Coal but willingness to enter into the Charterparty with BB Civil and that this was agreed. He, likewise, did not spot the typographical error in the name of the Charterers in that instead of stating this to be "Beach Building & Civil Group" it stated it to be "Beach Building and Construction Group". When he became aware of it, he raised it with Captain Soares who confirmed that there had been a typographical error. He further stated that he was in no doubt that the fixture was made with BB Civil and that it was not possible that it could have been made with BB Coal because he specifically said that he would not fix with that company and it was made clear that the Charterers were to be BB Civil.
>
> 22. It is, I consider, eloquent that the Charterers did not seek to contradict the evidence of Captain Soares and Mr. Hornum as to the Owners' refusal to fix with BB Coal and the subsequent agreement to fix with BB Civil. It is also eloquent that in the evidence of Mr Thomson, he makes no reference whatsoever to BB Civil or to why BB Civil were not the Charterers. Furthermore, no attempt was made to explain why BB Civil should not be the Charterers bearing in mind the fact that the pro forma used for the purposes of drawing up the Charterparty, i.e. the Charterparty dated 30 May 2009, was made between Swissbulk Carriers S.A. as Owners and BB Civil as Charterers, bearing their stamp and apparently signed by Mr Thomson.
>
> 23. On the evidence, it is clear to me that Mr Brewer had actual authority to conclude the Charterparty in the name of BB Civil, a business name at that time of BB Civil Limited (i.e. Beach Building & Civil Group Pty Ltd). Likewise, on the evidence, it is clear that the parties agreed that BB Civil were to be the Charterers and that a mistake was made in drawing up the Charterparty where the word "Construction" was used instead of the word "Civil" in the name of the Charterers. This plainly should be rectified and I have so declared.

THE FINAL AWARD

39 In the final Award, the Arbitrator recited the procedural history of the arbitration and then briefly addressed the uncontested evidence tendered before him in support of DKN's claim for demurrage. The Arbitrator then made his final Award as follows:

> **1.** **I FIND AND HOLD** that the Owners' claim succeeds in the amount of US$824,663.18, and no more.
>
> **2.** **I AWARD AND DIRECT** that the Charterers shall forthwith pay to the Owners the sum of US$824,663.18 together with interest thereon at the rate of 4% per annum and pro rata, compounded at three-monthly rests, from 27 January 2010 until the date of payment.
>
> **3.** **I FURTHER AWARD AND DIRECT** that the Charterers shall bear their own costs and shall pay the Owners' costs in relation to this reference (insofar as not already awarded by my Declaratory Arbitration Award dated 22 November 2010) on the standard basis (for the assessment of which, if not agreed, I hereby reserve my jurisdiction) together with interest thereon at the rate of 4% per annum and pro rata, compounded at three-monthly rests, from the date of this my Final Arbitration Award until the date of payment
>
> **4.** **I FURTHER AWARD AND DIRECT** that the Charterers shall pay the costs of this my Final Arbitration Award which amount to £2,270.00 provided, however, that if in the first instance the Owners shall have paid all or any part thereof, they shall be entitled to the immediate reimbursement of the sum so paid together with interest thereon at the rate of 4% per annum and pro rata, compounded at three-monthly rests, from the date of such payment until that of reimbursement.
>
> **5.** **I HEREBY FURTHER DECLARE** that this Final Arbitration Award is final as to all matters determined herein.

THE LEGISLATIVE SCHEME

40 Section 8 of the Act provides for the recognition and enforcement of foreign arbitral awards in Australia. That section is in the following terms:

> **8 Recognition of foreign awards**
>
> (1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.
>
> (2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.
>
> (3) Subject to this Part, a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court.
>
> (3A) The court may only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7).
>
> (4) Where:

(a) at any time, a person seeks the enforcement of a foreign award by virtue of this Part; and

(b) the country in which the award was made is not, at that time, a Convention country;

this section does not have effect in relation to the award unless that person is, at that time, domiciled or ordinarily resident in Australia or in a Convention country.

(5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:

(a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him or her, under some incapacity at the time when the agreement was made;

(b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;

(c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings;

(d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;

(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

(6) Where an award to which paragraph (5)(d) applies contains decisions on matters submitted to arbitration and those decisions can be separated from decisions on matters not so submitted, that part of the award which contains decisions on matters so submitted may be enforced.

(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:

(a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or

(b) to enforce the award would be contrary to public policy.

(7A) To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award.

(8) Where, in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may, if it considers it proper to do so, adjourn the proceedings, or so much of the proceedings as relates to the award, as the case may be, and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

(9) A court may, if satisfied of any of the matters mentioned in subsection (10), make an order for one or more of the following:

(a) for proceedings that have been adjourned, or that part of the proceedings that has been adjourned, under subsection (8) to be resumed;

(b) for costs against the person who made the application for the setting aside or suspension of the foreign award;

(c) for any other order appropriate in the circumstances.

(10) The matters are:

(a) the application for the setting aside or suspension of the award is not being pursued in good faith; and

(b) the application for the setting aside or suspension of the award is not being pursued with reasonable diligence; and

(c) the application for the setting aside or suspension of the award has been withdrawn or dismissed; and

(d) the continued adjournment of the proceedings is, for any reason, not justified.

(11) An order under subsection (9) may only be made on the application of a party to the proceedings that have, or a part of which has, been adjourned.

41 Subsection (3A) of s 8 of the Act was inserted into the Act by the *International Arbitration Act Amendment Act 2010* (Cth) (Act No 97 of 2010) and applies in relation to proceedings to enforce a foreign award brought on or after 6 July 2010. That subsection makes very clear, in my view, that the only grounds upon which this Court is entitled to refuse to enforce a foreign award are those specified in subs (5) and subs (7) (read with subs (7A)) of s 8 of the Act.

42 Act No 97 of 2010 also removed the requirement that the leave of the Court be obtained before a foreign award could be enforced.

43 Section 9 of the Act provides:

9 Evidence of awards and arbitration agreements

(1) In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, he or she shall produce to the court:

(a) the duly authenticated original award or a duly certified copy; and

(b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.

(2) For the purposes of subsection (1), an award shall be deemed to have been duly authenticated, and a copy of an award or agreement shall be deemed to have been duly certified, if:

(a) it purports to have been authenticated or certified, as the case may be, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it was not in fact so authenticated or certified; or

(b) it has been otherwise authenticated or certified to the satisfaction of the court.

(3) If a document or part of a document produced under subsection (1) is written in a language other than English, there shall be produced with the document a translation, in the English language, of the document or that part, as the case may be, certified to be a correct translation.

(4) For the purposes of subsection (3), a translation shall be certified by a diplomatic or consular agent in Australia of the country in which the award was made or otherwise to the satisfaction of the court.

(5) A document produced to a court in accordance with this section is, upon mere production, receivable by the court as *prima facie* evidence of the matters to which it relates.

44 Section 39(1) of the Act provides that this Court must have regard to the matters specified in s 39(2) of the Act when interpreting the Act, when considering exercising a power under s 8 of the Act to enforce a foreign award or when considering exercising the power under s 8 to refuse to enforce a foreign award including a refusal because the enforcement of the award would be contrary to public policy.

45 Section 39(2) of the Act is in the following terms:

39 Matters to which court must have regard

…

(2) The court or authority must, in doing so, have regard to:

(a) the objects of the Act; and

(b) the fact that:

(i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and

(ii) awards are intended to provide certainty and finality.

46 The objects of the Act are set out in s 2D. Section 2D provides:

> **2D Objects of this Act**
>
> The objects of this Act are:
>
> (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
>
> (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
>
> (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
>
> (d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting; and
>
> (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and
>
> (f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.

47 Various terms are defined in s 3(1) of the Act for the purposes of *Part II – Enforcement of foreign awards*. Relevantly, those expressions and definitions are:

> ***agreement in writing*** has the same meaning as in the Convention.
>
> ***arbitral award*** has the same meaning as in the Convention.
>
> ***arbitration agreement*** means an agreement in writing of the kind referred to in sub article 1 of Article II of the Convention.
>
> ***Convention country*** means a country (other than Australia) that is a Contracting State within the meaning of the Convention.
>
> ***foreign award*** means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies.

48 Section 3(2) of the Act provides:

> **3 Interpretation**
>
> …
>
> (2) In this Part, where the context so admits, ***enforcement***, in relation to a foreign award, includes the recognition of the award as binding for any purpose, and ***enforce*** and ***enforced*** have corresponding meanings.

49 Section 3 is in *Part II—Enforcement of foreign awards*, as are s 8 and s 9.

50 The *Convention* referred to in s 3(1) and in Pt II of the Act is:

> … the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting, a copy of the English text of which is set out in Schedule 1.

51 Articles II, III, IV and V of the Convention provide:

> ARTICLE II
>
> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.
>
> ARTICLE III
>
> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.
>
> ARTICLE IV
>
> 1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
>
> (a) The duly authenticated original award or a duly certified copy thereof;
>
> (b) The original agreement referred to in article II or a duly certified copy thereof.
>
> 2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.
>
> ARTICLE V
>
> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(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.

52 The Act is intended to give effect to the Convention. The Act (including s 8) must be interpreted in light of the Convention.

53 The onus of establishing one or more of the grounds upon which enforcement may be refused under s 8(5) and s 8(7) rests upon the party resisting enforcement (*IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 282 ALR 717 at [45] (p 730) (per Warren CJ) and at [153]–[173] (pp 759–762) (per Hansen JA and Kyrou AJA)).

SOME PRELIMINARY MATTERS

54 DKN contends that the arbitration agreement pursuant to which both the first Award and the final Award were made is cl 32 of the Charterparty. It then argues that each of those Awards is a *foreign award* within the meaning of the Act (in particular, within the meaning of that expression in s 8 of the Act).

55 In order to prove the terms of the arbitration agreement and the Awards, DKN tendered before me:

(a) A copy of the first Award duly certified by the Arbitrator;

(b) A copy of the final Award duly certified by the Arbitrator; and

(c) A copy of the Charterparty (including cl 32 thereof) duly certified by the Arbitrator.

56 In this way, DKN satisfied the requirements of s 9 of the Act. It was common ground that it had done so. Beach Civil did not contend before me that the terms of the two Awards were other than as certified by the Arbitrator nor did it argue that the terms of the Charterparty were other than as certified by the Arbitrator. Beach Civil's acceptance of that position before me was, of course, always subject to the two substantive defences which it had raised.

57 It was also common ground between the parties that the United Kingdom was a Convention country within the meaning of the Act and a Contracting State within the meaning of the Convention.

CONSIDERATION

Issue 1—Beach Civil not a Party

Beach Civil's Submissions

58 Senior Counsel for Beach Civil submitted that Beach Civil was never a party to the Charterparty and was therefore never contractually bound to submit all disputes arising out of that contract to arbitration in accordance with cl 32 of that agreement which (*inter alia*) provided that such disputes would be governed by English law. Senior Counsel submitted that the Arbitrator did not rest his decision that Beach Civil was bound by the Charterparty upon a construction of the Charterparty but rather founded that decision upon his conclusion that the Charterparty should be rectified by removing the description of the charterer in the document and replacing it with the registered business name of Beach Civil. It was then submitted on behalf of Beach Civil that, once the Arbitrator had decided that the charterer, as described in the Charterparty, was not the respondent, he had no jurisdiction over the respondent or any other entity not being a party to the Charterparty. In particular, it was said

that the Arbitrator had no jurisdiction to determine that the Charterparty should be rectified in the manner in which he ultimately ordered that it should be rectified.

59 It was submitted on behalf of Beach Civil that it was logically impossible for the Arbitrator to exercise the power to rectify an agreement in order to create the very jurisdiction which he pretended to exercise in ordering rectification of that agreement.

60 Senior Counsel for Beach Civil went so far as to submit that, whilst it might have been open to DKN to make a claim for rectification of the Charterparty either in this proceeding or in some separate proceeding in this Court or in another court in Australia in the terms of its rectification claim made before the Arbitrator, it had not done so and, even if it had done so and had secured an appropriate order, such an order could not retrospectively confer jurisdiction upon the Arbitrator.

61 The conclusion which Beach Civil urged upon the Court in light of these submissions was that the Court should hold that the Arbitrator never had jurisdiction to arbitrate the dispute submitted to him by DKN and that this lack of jurisdiction could never be cured by some subsequent order made by the Arbitrator or by a court appropriately seised of the issues.

62 Beach Civil submitted that an *arbitration agreement* within the meaning of that expression in s 3(1) of the Act had to be in writing and had to contain a commitment by the parties, as part of that writing, to submit to arbitration all or any differences which might arise between them in respect of a defined legal relationship, whether contractual or otherwise, concerning a subject matter capable of settlement by arbitration. In order to satisfy the definition of *arbitration agreement* in s 3(1) of the Act, the agreement need not be constituted by or form part of a formal contract executed by both parties but may be evidenced by other writings. But there must be an agreement between the award claimant and the award respondent which binds the award respondent to a commitment to arbitrate. In order to meet the definition of *foreign award* within the meaning of the Act, the award must be made *"... in pursuance of an arbitration agreement ..."* in a country other than Australia, being an arbitral award in relation to which the Convention applies. In the present case, so it was submitted, the first Award and the final Award were not made *"... in pursuance of an arbitration agreement ..."* because there never was an arbitration agreement to which Beach Civil was a party and by which it was legally bound.

63 In the alternative, Beach Civil relied upon s 8(5)(b) of the Act as the statutory foundation for its broad contention that, because Beach Civil was not a party to the Charterparty, it was not bound thereby with the consequence that the arbitration agreement relied upon was not valid under English law or, indeed, under Australian law. It did not rely upon s 8(7) of the Act.

DKN's Submissions

64 Against these submissions, DKN submitted that:

(a) Neither its Originating Application in this proceeding nor Beach Civil's Defence to that Application involves or raises a review of the first Award or of the reasoning of the Arbitrator underlying the first Award. Beach Civil's opposition to DKN's claim in this proceeding does not amount to or give rise to an appeal from the first Award; and

(b) For these reasons, no issue arises for determination in this proceeding as to whether the Arbitrator retrospectively rendered Beach Civil subject to his jurisdiction or retrospectively gave himself jurisdiction over Beach Civil by purporting to rectify the Charterparty or whether it was incompetent for the Arbitrator to purport to do so.

65 Senior Counsel for DKN then submitted that, unless Beach Civil could bring itself within the statutory grounds upon which enforcement may be refused adumbrated in s 8(5) and s 8(7) of the Act (as amplified by s 8(7A)), then the Court should enforce both Awards. Senior Counsel submitted that the question as to whether Beach Civil was a party to the Charterparty and was thereby bound by its terms is not an element of DKN's claim for recognition and enforcement and does not give rise to a threshold issue upon which DKN bears the burden of proof in this proceeding. He submitted that this proposition was sound, even though the arbitration agreement which is the source of the Award, on its face, makes no reference to Beach Civil.

66 It was submitted on behalf of DKN that, for Beach Civil to succeed in its opposition to DKN's claim upon the basis that it was not a party to the relevant arbitration agreement, it must prove (and the onus of doing so rests squarely upon it) upon the balance of probabilities that:

(a) It was not a party to the Charterparty and therefore not a party to the arbitration agreement contained within that contract; and

(b) Upon the assumption that it has established that it was not a party to the arbitration agreement, that that circumstance constitutes a valid ground which would justify the Court refusing to enforce the Award pursuant to s 8(5) or s 8(7) of the Act.

67 Senior Counsel for DKN submitted that, in the present case, Beach Civil adduced no evidence in support of its claim that it is not a party to the Charterparty with the consequence that it must fail in that claim.

68 Senior Counsel for DKN went on to submit that, insofar as Beach Civil asserts that, by reason of the fact that it was not named as a party to the Charterparty in the document itself, the evidentiary onus shifted to DKN to establish that it was a party, then:

(a) The misdescription of the charterer was a mere typographical error, misnomer or misdescription;

(b) That fact was confirmed by the author of the documents in which the misdescription appears (Captain Soares);

(c) At all relevant times, Beach Civil has accepted that the description of the charterer in the Charterparty was incorrect but has advocated that the entity which the parties intended would be the charterer was BBCG Coal Ltd. Thus, the starting point for any consideration of the identity of the charterer is that the description of the charterer in the Charterparty is acknowledged by both parties to be incorrect;

(d) Beach Civil was the charterer in the Swiss charterparty that was used as the basis for the negotiation of the terms of the Charterparty;

(e) It was the financial statements of Beach Civil (and not those of BBCG Coal Ltd) that were provided by Mr Brewer at the request of DKN and as a precondition to DKN agreeing to the Charterparty;

(f) It was Beach Civil that paid the 10% freight due under cl 2 of the Charterparty; and

(g) There was never any discussion between the parties' agents and representatives who made the contract that the entity which was to be the charterer was called *"Beach Building and Construction Group"*.

69 The matters summarised at [68] above are all established by the evidence of Captain Soares and Mr Hornum and the documents tendered by DKN in its case.

70 Upon the basis of the matters extracted at [68] above, Senior Counsel for DKN then submitted that this Court should itself make a positive finding that Beach Civil was the charterer under the Charterparty. It was submitted that it could do so by applying ordinary rules of contractual interpretation. The evidence clearly established that the charterer was misdescribed. That was the conclusion which the Arbitrator reached. He did not find at any stage of the process that the respondent was not a party to the Charterparty, as was submitted by Beach Civil. The error in the description of the charterer could be remedied by simply construing the reference to *"Beach Building and Construction Group"* as a reference to the respondent, Beach Civil. That being so, the ultimate submission was that the contention advanced by Beach Civil that it was not a party to the Charterparty and thus not bound by cl 32 should be rejected. Beach Civil was always a party. Beach Civil was always the charterer in the Charterparty—it had just been misdescribed. DKN went on to submit that, once the Court was satisfied that cl 32 constituted an *arbitration agreement* within the meaning of the Act, it was inevitable that the two Awards were *foreign awards* within the meaning of the Act and thus should be enforced pursuant to s 8 of the Act.

Consideration of Issue 1

71 Section 9(1) of the Act obliges an applicant who seeks to enforce a foreign award under s 8 of the Act to produce the duly authenticated original award or a duly certified copy of that award and the original arbitration agreement under which the award *"purports"* to have been made or a duly certified copy of that agreement. Section 9 substantially reproduces Article IV of the Convention.

72 Subsection (5) of s 9 provides that a document produced to the Court in accordance with s 9(1):

> … is, upon mere production, receivable by the court as *prima facie* evidence of the matters to which it relates.

73 In the present case, a duly certified copy of the Charterparty and a duly certified copy of each of the Awards were produced to the Court in conformity with the requirements of s 9(1).

74 In my view, the production of those documents in the present case constitutes *prima facie* evidence of:

(a) The fact that each Award was made as it purports to have been made;

(b) The subject matter of each Award; and

(c) The fact that each Award purports to have been made pursuant to cl 32 of the Charterparty. This is so because the Charterparty was the only place suggested either by the Arbitrator or by DKN as the place where the relevant arbitration clause was to be found. That is to say, cl 32 of the Charterparty was the only arbitration agreement relied upon by the Arbitrator and by DKN as the source of the Arbitrator's jurisdiction and power to conduct the arbitration and to make the Awards. These matters necessarily also inevitably imply that Beach Civil was the charterer under the Charterparty. How else could it have been found liable to pay demurrage to DKN?

75 At [46] (pp 730–731) in *Altain Khuder LLC*, Warren CJ concluded that, in the absence of contrary evidence, the *prima facie* evidence described in s 9(5) of the Act would take on a stronger complexion and become conclusive evidence of the matters to which it relates. I am not convinced that this dictum is correct and do not propose to apply it in the present case.

76 Beach Civil called no evidence in the proceeding before me. It made no attempt whatsoever to demonstrate by evidence that it was not truly the charterer in the Charterparty. All that Beach Civil did was point to the description of the charterer in the Charterparty and assert that, on the face of that document, it was not named as charterer. That assertion, without more, is not enough to overcome the evidentiary effect provided for in s 9(5) of the Act of the production of a certified copy of the Charterparty and of each of the Awards in the circumstances of this case.

77 It follows, in my judgment, that, subject to Issue 2, in this case, DKN has established to a *prima facie* level that each of the two Awards is a *foreign award* within the meaning of that expression in s 8(1) of the Act. Therefore, if Beach Civil is to succeed in resisting enforcement of those Awards, it must make out one of the grounds specified in s 8(5) and s 8(7) of the Act. In order to achieve that result, it is incumbent upon Beach Civil to identify for the benefit of DKN and the Court one or more of those grounds as grounds upon which it

intends to rely and then *"... prove to the satisfaction of the Court ..."* one or more of the matters specified in s 8(5) and s 8(7).

78 This approach is supported by the reasoning of Mance LJ (as he then was) (with whom Neuberger and Thorpe LJJ agreed) in *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326 at [10]–[12] (pp 331–332) where his Lordship said:

(a) Under the UK Act, a successful party to a Convention award has a *prima facie* right to enforcement. This reflects the pro-enforcement bias of the Convention.

(b) At the first stage of enforcement, upon production of the award and of the arbitration agreement appropriately authenticated, the award creditor is entitled to have the award enforced. Enforcement may be refused at the second stage (the *inter partes* stage) only if the award debtor proves to the satisfaction of the Court that the situation falls within [one of the heads in the UK Act equivalent to s 8(5) and s 8(7) in the Act].

(c) Provided that the documents produced to the Court at the first stage establish that the arbitrators had purported to act pursuant to the arbitration agreement produced at that stage, that is sufficient to move the enquiry to the stage where the award debtor must establish one or more of the statutory grounds for refusing to enforce the award.

(d) Once the award creditor establishes the matters referred to in (b) and (c) above, any challenge to the existence or validity of the arbitration agreement must be brought under [the statutory provision in the UK Act which is equivalent to s 8(5)(b) of the Act]. That is to say, it is for the party resisting enforcement of the award to raise and prove any challenge to the validity of the arbitration agreement.

79 In the later case of *Dallah Real Estate v Ministry of Religious Affairs* [2010] 2 Lloyd's Rep 691, Lord Mance repeated these views.

80 In *Dallah Real Estate,* arbitrators had held that the Government of Pakistan was bound by an arbitration agreement entered into between Dallah and a statutory trust even though the Government was not named therein. The arbitrators held that the Government was the *"true party"* to the agreement because the trust was its alter ego. The primary issue in the case before the English courts was whether there existed between Dallah and the government any relevant arbitration agreement at all.

81 The UK Supreme Court held that the statutory equivalent to s 8(5)(b) in England covered the case before it: That is to say, it covered the case where the party resisting enforcement claimed that the asserted arbitration agreement was not binding on it because it was never a party to that arbitration agreement.

82 The Court also held that the existence of any relevant arbitration agreement falls to be determined by the Supreme Court as a UK court under provisions of national law which are contained in the UK Act and which reflect Article V(1)(a) of the Convention. The onus of proving that it was not a party to the relevant arbitration agreement rested on the Government of Pakistan under the UK Act even though the arbitration clause, on its face, did not refer to the Government of Pakistan. In this regard, Lord Mance at [12] (p 697) expressly followed his reasoning in *Dardana* at [10]–[12] (pp 331–332).

83 Once the equivalent provision to s 8(5)(b) of the Act is invoked, in the opinion of Lord Mance, (at [26] (p 701)), the party resisting enforcement is entitled to an ordinary judicial determination of the issue of whether that party was a party to and thus bound by the arbitration agreement.

84 Lord Collins at [77]–[98] (pp 712–716) expressed similar views. Lords Hope, Saville and Clarke agreed with the reasons of Lords Mance and Collins.

85 In *Altain Khuder LLC*, at [125]–[187] (pp 754–765), Hansen JA and Kyrou AJA, in their joint judgment, discussed the correct interpretation of s 8 of the Act with particular emphasis on the level of proof required of an award creditor in order to engage s 8(1) and thereby shift the onus of proof to the award debtor and to do so in respect of the grounds for refusing enforcement specified in s 8(5) and s 8(7).

86 At [134]–[135] (p 756), their Honours said:

> 134 As the party invoking the court's jurisdiction, the award creditor has an evidential onus of satisfying the court, on a prima facie basis, that it has jurisdiction to make an order enforcing a foreign arbitral award. Section 9 of the Act assists the award creditor to discharge the evidential onus. If prima facie proof is established to the court's satisfaction pursuant to s 8(2), the court may make an order enforcing the award, subject to the order being set aside upon application by the award debtor.

> 135 In our opinion, at stage one, the award creditor must satisfy the court, on a prima facie basis, of the following matters before the court may make an order enforcing the award:
>
> (a) an award has been made by a foreign arbitral tribunal granting relief to the award creditor against the award debtor;
>
> (b) the award was made pursuant to an arbitration agreement; and
>
> (c) the award creditor and the award debtor are parties to the arbitration agreement.

87 At [139]–[140] (p 757), their Honours went on to explain that, if the named parties to the relevant arbitration agreement were X and Y and the award was made in favour of X against Z, production of the arbitration agreement would not suffice for the making of an *ex parte* order for the enforcement of the award even if the award stated that it was made pursuant to the arbitration agreement. Where the contents of the documents produced to the Court do not provide a sufficient basis for engaging s 8 of the Act, their Honours held that the court should move to an *inter partes* hearing.

88 Their Honours continued at [144]–[149] (pp 758–759) as follows:

> 144 In our view, where a judge determines that the documents filed in accordance with s 9(1) of the Act do not satisfy the prima facie evidential requirements set out at [135] above and orders that the application for enforcement proceed inter partes, at the inter partes hearing, the evidential onus would be on the award creditor to adduce evidence, in addition to the arbitration agreement and the award, to satisfy the court of those prima facie evidential requirements.
>
> 145 Once the award creditor establishes a prima facie entitlement to an order enforcing a foreign arbitral award, if the award debtor wishes to resist such an order, it can do so only by proving "to the satisfaction of the court" one of the matters set out in s 8(5) or (7) of the Act. This follows from s 8(3A), (5) and (7). If the award debtor fails to satisfy the court of one of the matters set out in s 8(5) or (7), the award creditor would be entitled to an order enforcing the award.
>
> 146 In practice, in an inter partes hearing, both parties will usually adduce evidence and make submissions on all the issues in dispute. That does not mean, however, that the legal onus will immediately be on the award debtor to prove one of the matters in s 8(5) or (7). That will occur only if the award creditor discharges the evidential onus of adducing prima facie evidence of the matters set out at [135] above.
>
> 147 The award creditor's evidential onus remains important in an inter partes hearing because, at the conclusion of the award creditor's evidence, the award debtor could make a "no case submission" seeking the dismissal of the proceeding on the basis that the award creditor has not established a prima facie case. The fact that such a course may be infrequent because of the potential risks that may be involved if the award debtor elected not to call evidence, does not gainsay the possibility.

> 148 Where an inter partes hearing proceeds in the normal way, the court will decide the issues in dispute by determining whether each party's evidence was sufficient to discharge the onus falling on that party.
>
> 149 The fact that s 8(5) and (7) of the Act do not expressly include a ground that the award debtor was not a party to the arbitration agreement in pursuance of which the award was made, gives rise to the question of whether s 8(1), (3A), (5) and (7) apply differently in relation to onus where the award debtor denies being a party to the arbitration agreement. In particular, the question arises whether, in such a case, s 8(3A), (5) and (7) are subject to s 8(1).

89 These observations made by Hansen JA and Kyrou AJA are not entirely consistent with the views of Lord Mance. Lord Mance reasoned that, as long as the documents produced to the Court at the first stage established that the arbitrators had *"purported"* to act pursuant to the relevant arbitration agreement, that was sufficient to move the relevant enquiry and the onus of proof onto the award debtor. Hansen JA and Kyrou AJA seem to require more than this.

90 I pause to note that it is not the practice of this Court to make an enforcement order under s 8 of the Act on the return date of the Originating Application *ex parte*. It is the usual practice of this Court in such matters to require an *inter partes* hearing. The enforcement hearing would only proceed *ex parte* if the award debtor failed to appear at that hearing. In point of principle, however, that difference in practice does not affect the question presently under discussion.

91 I prefer the approach of Lord Mance. His Lordship's approach accommodates more satisfactorily the language of s 9(1)(b) (read with s 9(5)). What is required to be produced is the arbitration agreement under which the award *"purports"* to have been made.

92 At [150]–[187] (pp 759–765), Hansen JA and Kyrou AJA then considered the issues which they had raised at [149] (p 759). At [169]–[170] (p 762), their Honours concluded as follows:

> 169 Regarding the matter overall, the considerations supporting the view that s 8(3A), (5) and (7) are not subject to s 8(1) are more compelling than the considerations supporting the opposite view. To interpret the Act in a manner that treated the issue of whether a person was a party to an arbitration agreement as standing outside the legislative scheme that applies to all other grounds of impugning an award, would fly in the face of the express language in s 8(3A) that the court may only refuse to enforce a foreign award in the circumstances mentioned in s 8(5) and (7).

> 170 Similarly, it would fly in the face of the carefully enacted statutory scheme to impose a legal onus on the award creditor to prove that the award debtor was a party to the arbitration agreement in pursuance of which the award was made, while placing the legal onus on the award debtor to prove other grounds which are implicitly covered by s 8(1), such as the validity of the award and the arbitration agreement. It is neither logical nor consistent with the language of the Act to elevate the importance of privity of contract over the importance of the validity of the contract.

93 Their Honours followed *Dardana Ltd* and *Dallah Real Estate* on these points.

94 At [266]–[270] (pp 789–796), their Honours considered the nature of the enforcement court's power to consider for itself questions relating to the foreign arbitral tribunal's jurisdiction.

95 Their Honours concluded that the enforcement court can determine for itself not only whether the tribunal correctly determined that it had jurisdiction but whether the tribunal, in fact, did have jurisdiction to arbitrate the disputes determined by the award. Their Honours held that the enforcement court ought to do so if requested by a party to the award.

96 If I am wrong in the conclusions which I have expressed at [74]–[79] above, the uncontested evidence before me (which I have summarised in my synopsis of DKN's submissions at [68] and [69] above) establishes that the charterer was misdescribed in the Charterparty and that the entity which was intended to be nominated in that document was Beach Civil. This error can be remedied by applying appropriate rules of construction (see eg *Noon v Bondi Beach Astra Retirement Village* [2010] NSWCA 202 at [180]–[182] per Young JA; and *Nittan (UK) Ltd v Solent Steel Fabrications Ltd* [1981] 1 Lloyd's Rep 633).

97 To the extent that the question of whether Beach Civil was a party to the Charterparty is raised for determination by this Court, I find that it was the charterer under the Charterparty.

98 I now turn to s 8(5)(b).

99 The law expressed in the arbitration agreement as applicable to it was English law. But, in my view, English law should not be held to be the law under which the question of the validity of the arbitration agreement is to be determined for that reason, given that Beach

Civil argues that it is not a party to and therefore not bound by the Charterparty. However, English law is the law of the country where both Awards were made. England is the seat of the arbitration. It is for these latter reasons that I think that the question of whether Beach Civil was a party to the Charterparty should be decided according to English law.

100 There is no evidence before me as to the relevant principles of construction of contracts under English law. I am, therefore, entitled to assume that it is the same as Australian law. It follows that, as a matter of construction of the Charterparty, for the reasons which I have already given at [96] and [97] above, Beach Civil was the charterer under the Charterparty.

101 That conclusion may also be arrived at by a different route.

102 Section 30 of the UK Act empowered the Arbitrator to rule on his own substantive jurisdiction and, in particular, to rule on the question of whether there is a valid arbitration agreement. Section 48(5)(c) gave to the Arbitrator the same powers as the English Commercial Court to order the rectification of a document. A party who has unsuccessfully challenged the arbitrator's jurisdiction before the arbitrator may apply to the Court for an order overturning the arbitrator's decision as to his own jurisdiction (s 67) but must do so within 28 days of the date of the award. In the present case, no such challenge was made within that timeframe, or at all. The first Award cannot now be challenged under English law and is therefore determinative of the point at issue.

103 For all of the above reasons, I am of the view that the challenge to the validity of the Award based upon the proposition that Beach Civil was never a party to the Charterparty and thus not a party to and bound by the arbitration agreement embodied in cl 32 fails.

Issue 2—Preclusion or Limitation of Jurisdiction Void

Beach Civil's Submissions

104 It was submitted on behalf of Beach Civil that, in the circumstances of the present case, s 11 of COGSA 1991 was engaged with the consequence that the Charterparty has no effect insofar as it purported to preclude or limit the jurisdiction of Australian courts by reason of the inclusion therein of cl 32.

105 The question of whether s 11 of COGSA 1991 is engaged depends upon whether the Charterparty is *"a sea carriage document relating to the carriage of goods from Australia to any place outside Australia ..."* or *"a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii)* [of COGSA 1991]*, relating to such a carriage of goods"*.

106 Pursuant to s 7 and s 9 of COGSA 1991, *"sea carriage document"* is defined in Art 1(1)(g)(iv) of the amended Hague Rules relevantly, 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.

107 The Charterparty plainly falls within that definition. For that reason, the Charterparty is *"a sea carriage document"* within the meaning of s 11(1)(a) of COGSA 1991.

108 The Charterparty is also a non-negotiable document of the kind mentioned in subpar 10(1)(b)(iii) of COGSA 1991.

109 Section 10(1)(b)(iii) of COGSA 1991 provides that:

> (1) The amended Hague Rules only apply to a contract of carriage of goods by sea that:
> …
> (b) is a contract:
> …
> (iii) contained in or evidenced by a non-negotiable document (other than a bill of lading or similar document of title), being a contract that contains express provision to the effect that the amended Hague Rules are to govern the contract as if the document were a bill of lading.

110 Clause 24(a) of the Charterparty provided that:

> **24. Protective Clauses**
>
> This Charter Party is subject to the following clauses all of which are also to be included in all bills of lading issued hereunder:
>
> (a) "CLAUSE PARAMOUNT": This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, the Hague Rules, or the Hague-Visby Rules, as applicable, or such other similar national legislation as may mandatorily apply by virtue of origin or destination of the bills of lading, which shall be deemed to be incorporated herein and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said applicable Act. If any term of this bill

> of lading be repugnant to said applicable Act to any extent, such term shall be void to that extent, but no further."

111 It is clear that the Charterparty *"... contains express provision to the effect that the amended Hague Rules are to govern the contract as if the document were a bill of lading"* and is thus *"... a non-negotiable document"* of a kind mentioned in subpar (10)(1)(b)(iii) of COGSA 1991 for the purposes of s 11(1)(b) of COGSA 1991.

112 For these reasons, s 11(2) provides that the arbitration agreement embodied in the Charterparty has no effect. Section 11(3) of COGSA 1991, which provides for an exception for arbitration clauses provided that the arbitration conducted pursuant thereto is conducted in Australia, does not save the clause.

113 Senior Counsel for Beach Civil relied upon the decision of Hill J in *BHP Trading Asia Ltd v Oceaname Shipping Ltd* (1996) 67 FCR 211 at 235 where his Honour followed the decision of Carruthers J in *Sonmez Denizcilik ve Ticaret Anonim Sirketi v MV "Blooming Orchard" (No 2)* (1990) 22 NSWLR 273 in holding that a voyage charterparty was for relevant purposes a document relating to the carriage of goods and that a requirement to submit to arbitration abroad in such a contract was void. That decision was made in respect of s 9(2) of the *Sea-Carriage of Goods Act 1924* (Cth), the wording of which differs from the wording of s 11(1) of COGSA 1991.

114 It was submitted on behalf of Beach Civil that, when regard is had to the relevant Explanatory Memorandum in respect of COGSA 1991, it is clear beyond argument that the intention of the Parliament was that s 11 of COGSA 1991 would operate in the same way as the former s 9 of the *Sea-Carriage of Goods Act 1924* (Cth). Senior Counsel for Beach Civil also relied upon the proposition that provisions of international conventions and domestic legislation giving effect to them have traditionally been broadly interpreted (as to which see *El Greco (Aust) Pty Ltd v Mediterranean Shipping Co SA* (2004) 140 FCR 296 at [139]–[144] (pp 326–327)).

115 It was submitted on behalf of Beach Civil that, in the first Award, the Arbitrator's reasoning which led him to reject the same argument when advanced in the arbitration was fallacious.

DKN's Submissions

116 Senior Counsel for DKN submitted that there are three elements to s 11 of COGSA 1991 and that they are:

(a) A choice of law element. This is found in subs (1) and subs (2)(a) of s 11 of COGSA 1991 and applies to outbound shipments only, that is shipments from any place in Australia to any place outside Australia. Parties to documents described in s 11(1) of COGSA 1991 are taken to have intended to contract according to the laws in force at the place of shipment.

(b) The second element concerns agreements which preclude or limit the jurisdiction of Australian courts. This element is found in subs (2)(b) and subs (2)(c) of s 11 of COGSA 1991. These provisions apply both to outbound and inbound shipments.

(c) The third element is contained in subs (3) of s 11 of COGSA 1991. That subsection provides for an exception to the operation of the second element in respect of agreements to arbitrate in Australia.

117 It was submitted on behalf of DKN that it is only the second of the above elements which (if applicable) would render cl 32 invalid and ineffective in the present case. More particularly, it was submitted on behalf of DKN that it is only subs (2)(b) of s 11 of COGSA 1991 which could conceivably render cl 32 invalid. That subclause provides that an agreement (whether made in Australia or elsewhere) has no effect so far as it purports to 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 subs (1) [of s 11 of COGSA 1991]. The Charterparty is not a bill of lading. Accordingly, the Charterparty will only be denied effect if it is properly classified as one of the other types of documents referred to in s 11(1) of COGSA 1991, namely, a *"sea carriage document"* or a *"non-negotiable document"* of the kind mentioned in s 10(1)(b)(iii) of COGSA 1991. Senior Counsel for DKN submitted that the Charterparty does not fall within either of those definitions.

118 It was submitted on behalf of DKN that the expression *"sea carriage document"* as used in s 11(1)(a) of COGSA 1991 should be construed not simply by reference to the ordinary meaning of the words used, but rather:

(a) In the context of COGSA 1991 as a whole, including the terms of the amended Hague Rules which are reproduced in Schedule 1A to COGSA 1991;

(b) With a purposive approach and having regard to the history of the Commonwealth's legislation in this area, including the amendments made to the position that had existed under the earlier legislation with the enactment of COGSA 1991 and the subsequent amendments in 1997 and 1998 to COGSA 1991 including s 11; and

(c) With regard to the legislative power by which the 1998 amendments to s 11 were made.

119 Adopting this approach, the phrase *"sea carriage document"* in s 11(1) has the same meaning that it has in Art 1(1)(g) of the amended Hague Rules. A charterparty (including a voyage charterparty) does not fall within the classes of documents referred to in subpars (i), (ii) or (iii) of that definition. Whilst it may be argued that a voyage charterparty falls within the words of subpar (iv) of that definition, it is not a document of the same type or within the same class of documents referred to in the text in parentheses, namely, a consignment note, sea waybill or ship's delivery order (each of which is analogous to and a substitute for a bill of lading).

120 It was then submitted that the definition of *"sea carriage document"* in the amended Hague Rules and in particular the type of non-negotiable documents falling within par (iv) of the definition which appears in Art 1(1)(g) of those Rules should also be read in the context of the amended Rules themselves and their application, including in particular:

(a) Article 1(1)(b) of those Rules, which, when defining a contract of carriage, states that it means a contract of carriage covered by a sea carriage document (to the extent that the document relates to the carriage of goods by sea) and includes a negotiable sea carriage document issued under a charterparty;

(b) Article 10(6) which qualifies the operation of Art 10(1) and Art 10(2) and states that the amended Rules do not apply to the carriage of goods by sea under a charterparty unless a sea carriage document is issued for their carriage; and

(c) Article 10(7) which provides that the amended Hague Rules apply to a sea carriage document issued under a charterparty only if the sea carriage document is a negotiable

sea carriage document, and only while the document regulates the relationship between the holder of it and the carrier of the relevant goods.

121 Senior Counsel for DKN submitted that the amended Hague Rules plainly draw a distinction between a charterparty and a sea carriage document and that that distinction has been maintained in the definitions in Art 1(1)(g).

122 DKN went on to submit that the Charterparty was not a non-negotiable document of the kind mentioned in s 10(1)(b)(iii) of COGSA 1991. It was submitted that there are four elements to the class of documents referred to in s 10(1)(b)(iii) of COGSA 1991. These are:

(a) The document must be a non-negotiable document;

(b) There must be an *"express provision"* to the necessary effect;

(c) That effect is *"that the amended Hague Rules"* are to govern the contract; and

(d) Those rules are to govern the contract *"as if the contract were a bill of lading"*.

123 The last three of these requirements are not met by the Charterparty. In particular, cl 24, upon which Beach Civil relies, does not satisfy these requirements. Clause 24 does not expressly render the Charterparty subject to the amended Hague Rules nor does it do so as if the Charterparty were a bill of lading. The fact that, under previous legislation, a voyage charterparty has been held to be within a predecessor of s 11 of COGSA 1991 is neither here nor there.

124 DKN ultimately submitted that, in any event, Beach Civil has not proven to the satisfaction of the Court that the arbitration agreement (viz cl 32) is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the Award was made. This is the matter which must be established for the purposes of engaging s 8(5)(b) of the Act, that provision being the only provision which would justify a refusal on the part of the Court to enforce the Awards in the present case.

Consideration of Issue 2

125 Section 2C of the Act provides (*inter alia*) that nothing in the Act affects the operation of COGSA 1991.

126 Sections 3, 4(2), 7, 8, 9, 10 and 11 of COGSA 1991 are in the following terms:

3 Object of Act

(1) The object of this Act is to introduce a regime of marine cargo liability that:

(a) is up to date, equitable and efficient; and

(b) is compatible with arrangements existing in countries that are major trading partners of Australia; and

(c) takes into account developments within the United Nations in relation to marine cargo liability arrangements.

(2) The object of the Act is to be achieved by:

(a) as a first step—replacing the *Sea Carriage of Goods Act 1924* with provisions that give effect to the Brussels Convention as amended by the Visby Protocol and the SDR Protocol, and as modified in accordance with regulations under section 7; and

(b) as a second step—replacing those provisions with provisions that give effect to the Hamburg Convention, if the Minister decides, after conducting a review, that those provisions should be so replaced.

4 Interpretation

…

(2) A reference in this Act to a non-negotiable document includes a reference to a sea waybill.

…

7 The amended Hague Rules

(1) The ***amended Hague Rules*** consists of the text set out in Schedule 1, as modified in accordance with the Schedule of modifications referred to in subsection (2). The text set out in Schedule 1 (in its unmodified form) is the English translation of Articles 1 to 10 of the Brussels Convention, as amended by Articles 1 to 5 of the Visby Protocol and Article II of the SDR Protocol.

(2) The regulations may amend this Act to add a Schedule (the ***Schedule of modifications***) that modifies the text set out in Schedule 1 for the following purposes:

(a) to provide for the coverage of a wider range of sea carriage documents (including documents in electronic form);

(b) to provide for the coverage of contracts for the carriage of goods by sea from places in countries outside Australia to places in Australia in situations where the contracts do not incorporate, or do not otherwise have effect subject to, a relevant international convention (see subsection (6));

(c) to provide for increased coverage of deck cargo;

(d) to extend the period during which carriers may incur liability;

(e) to provide for carriers to be liable for loss due to delay in circumstances identified as being inexcusable.

The modifications do not actually amend the text set out in Schedule 1, however the text has effect for the purposes of this Act as if it were modified in accordance with the Schedule of modifications.

(3) The regulations may:

(a) amend the Schedule of modifications, but only in connection with the purposes set out in subsection (2); and

(b) amend the provisions of this Part to the extent necessary or appropriate, having regard to the modifications set out in the Schedule of modifications as in force from time to time.

Note: For example, regulations extending the range of sea carriage documents to be covered by the text in Schedule 1 may create a need for associated amendments of sections 10 and 11.

(4) Before regulations are made for the purposes of this section, the Minister must consult with representatives of shippers, ship owners, carriers, cargo owners, marine insurers and maritime law associations about the regulations that are proposed to be made.

(6) In this section:

relevant international convention means:

(a) the Brussels Convention; or

(b) the Brussels Convention as amended by either or both of the Visby Protocol and the SDR Protocol; or

(c) the Hamburg Convention.

8 The amended Hague Rules to have the force of law

Subject to section 10, the amended Hague Rules have the force of law in Australia.

9 Interpretation

In this Part and the amended Hague Rules, unless the contrary intention appears, a word or expression has the same meaning as it has in the Brussels Convention as amended by the Visby Protocol and the SDR Protocol.

10 Application of the amended Hague Rules

(1) The amended Hague Rules only apply to a contract of carriage of goods by sea that:

(a) is made on or after the commencement of Schedule 1A and before the commencement of Part 3; and

(b) is a contract:

(i) to which, under Article 10 of the amended Hague Rules, those Rules apply; or

(ii) subject to subsections (1A) and (2)—for the carriage of goods by sea from a port in Australia to another port in Australia; or

(iii) contained in or evidenced by a non-negotiable document (other than a bill of lading or similar document of title), being a contract that contains express provision to the effect that the amended Hague Rules are to govern the contract as if the document were a bill of lading.

Note: The amended Hague Rules are set out in Schedule 1A—see ss 4(1) and 7(1).

(1A) If a contract for the carriage of goods by sea referred to in subparagraph 10(1)(b)(ii) is contained only in, or evidenced only by, a consignment note, the amended Hague Rules apply to the contract only if paragraph 5 of Article 10 of those Rules so requires.

(2) The amended Hague Rules do not apply in relation to the carriage of goods by sea from a port in any State or Territory in Australia to any other port in that State or Territory.

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 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.

(3) An agreement, or a provision of an agreement, that provides for the resolution of a dispute by arbitration is not made ineffective 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.

127 In s 4(1) *"amended Hague Rules"* is defined as having the meaning given in s 7. Those rules are set out in Schedule 1A to COGSA 1991.

128 The critical question for present purposes is, as was submitted by DKN, whether s 11(2)(b) of COGSA 1991 is engaged in the present case so as to lead to the conclusion that cl 32 has no effect so far as it purports to preclude or limit the jurisdiction of Australian courts in respect of a sea carriage document relating to the carriage of goods from any place

in Australia to any place outside Australia or in respect of a non-negotiable instrument of a kind mentioned in subpar 10(1)(b)(iii) of COGSA 1991 relating to such carriage of goods.

129 The Charterparty relates to the carriage of goods from Australia to China. Clause 32 precludes or limits the jurisdiction of Australian courts (as to which see *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1 and *Compagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577 at 583). Therefore, the critical question is to be resolved by determining whether the Charterparty is either a *"sea carriage document"* within the meaning of s 11(1)(a) of COGSA 1991 or a *"non-negotiable document"* of the kind described in s 11(1)(b). If the Charterparty is either one of those documents, then cl 32 has no effect and the arbitration agreement embodied therein did not compel Beach Civil to accept arbitration as the agreed contractual method of dispute resolution with the consequence that this Court cannot enforce either of the Awards against Beach Civil.

130 There is no definition of *"sea carriage document"* in COGSA 1991. That expression is, however, defined in Art 1(1)(g)(iv) of the amended Hague Rules which are set out in Schedule 1A to the Act. Strictly speaking, that definition applies only to those Rules, not to COGSA 1991 itself. However, those Rules have the force of law and assume some significance in COGSA 1991. I agree with Senior Counsel for DKN that the types of documents covered by subpars (i), (ii) and (iii) of Art 1(1)(g) are not relevant in the present case. Those documents comprise bills of lading and their analogues.

131 That definition is nonetheless of some assistance. It provides that *"a sea carriage document"* is a non-negotiable instrument (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.

132 I do not think that the words which appear outside the parentheses in the above definition should be read down by reference to the type of document described in the text which is within those parentheses. The parentheses operate to carve out a subclass of documents from the class generally referred to in the definition and the use of the word *"including"* reinforces that position.

133 Nor do I think that recourse can be had to other parts of the amended Hague Rules (eg Art 10, as submitted by DKN) in order to demonstrate that, in at least one part of those Rules, a distinction is made between a *"sea carriage document"*, on the one hand, and a *"charterparty"*, on the other hand. In any event, I do not think that the distinction between those two types of documents is so stark in the particular sub-articles of Art 10 relied upon by DKN.

134 Section 9 of the 1924 Act was in the following terms:

> **Sect 9 Construction and jurisdiction**
>
> (1) 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 any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.
>
> (2) Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect.

135 The 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 charterparty. This was the effect of the decision of Carruthers J in *Sonmez Denizcilik ve Ticaret Anonim Sirketi* which was followed by Hill J in *BHP Trading Asia Ltd v Oceaname Shipping Ltd* at 235.

136 Section 11(1)(a) of COGSA 1991, in the form in which it was originally enacted, referred to *"... a bill of lading, or a similar document of title, relating to the carriage of goods from any place in Australia ...,"*. This form of words narrowed the class of documents covered by s 11(1)(a) of COGSA 1991 and thus narrowed the class of documents affected by s 11(2)(b).

137 It is difficult to discern from the relevant extrinsic materials an intention on the part of the legislature thereafter to narrow the relevant class.

138 By 1997, the legislature appeared to be preparing to widen the definition of *"sea carriage document"* in the amended Hague Rules (see the substituted s 7 in COGSA 1991 inserted by *Carriage of Goods by Sea Amendment Act 1997* (Cth)).

139 The *Carriage of Goods by Sea Regulations 1998* (Cth) removed the phrase *"... a bill of lading, or a similar document of title"* in s 11(1)(a) and replaced it with *"... a sea carriage document to which, or relating to a contract of which, the amended Hague Rules apply"*. An identical change was effected to s 11(2)(c)(i).

140 The current form of words found in s 11(1)(a) of COGSA 1991 was inserted by Item 1 in Schedule 1 of the *Carriage of Goods by Sea Regulations 1998 (No 2)* (Cth). Item 2 of that Schedule effected an identical change to s 11(2)(c)(i).

141 In my view, these legislative changes indicate that, from 1997 onwards, the legislature was intending by the relevant amendments which it made to broaden the class of documents covered by s 11(1)(a) and s 11(2)(b) of COGSA 1991.

142 I see no warrant for doing other than giving the words of the definition in Art 1(1)(g)(iv) a meaning reflective of ordinary English usage. Taking that approach, because the Charterparty is a contract of carriage of goods by sea it *"contains or evidences"* such a contract. It is, therefore, a *"sea carriage document"* within the meaning of s 11(1)(a). The same result would be arrived at by simply construing the phrase *"sea carriage document"* in s 11(1)(a) without recourse to Art 1(1)(g)(iv) of the amended Hague Rules.

143 For these reasons, cl 32 has no effect because its whole purpose (leaving aside the last sentence, which is a choice of law provision), is to preclude or limit the jurisdiction of Australian courts. This conclusion is consistent with the jurisprudence contained in the cases which interpreted s 9 of the 1924 Act to which I was referred by Senior Counsel for Beach Civil.

144 As to the case put by Beach Civil which is dependent upon s 11(1)(b) of COGSA 1991, I am unable to agree with Beach Civil that the Charterparty is a contract which contains an express provision to the effect that the amended Hague Rules are to govern the contract as if the document were a bill of lading. Clause 24 of the Charterparty is not such a provision.

There is no mention of the amended Hague Rules in cl 24 and nothing to suggest that those rules are to govern the Charterparty as if it were a bill of lading. The Charterparty is not a non-negotiable instrument of the relevant kind.

145 The contention advanced by Beach Civil that s 11(1)(b) and s 11(2)(b) were engaged in this case is rejected.

CONCLUSIONS

146 Beach Civil has succeeded in establishing that cl 32 has no effect by reason of the operation of s 11(1)(a) and s 11(2)(b) of COGSA 1991. It follows that DKN cannot rely upon cl 32 as the source of the Arbitrator's jurisdiction and power to make the two Awards. Therefore, the Arbitrator had no power to render Beach Civil liable to pay the amounts claimed by DKN by making the final Award and Beach Civil is not liable to pay any of the amounts awarded against it under either of the two Awards. These conclusions are consistent with the terms of s 2C of the Act which seems to carve out from the scheme of the Act such maritime claims as are covered by s 11. For these reasons, neither Award can be enforced in Australia under the Act.

147 These conclusions are contrary to the opinions expressed by Anderson J of the Supreme Court of South Australia in *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* [2012] SASC 50. In a short ruling styled *"Ruling on Preliminary Question"*, his Honour held that the voyage charterparty in question in the case before him was not a *"sea carriage document"* within the meaning of that phrase in s 11(1). His Honour came to that conclusion because his Honour was of the view that COGSA 1991 only deals with the rights of persons holding bills of lading or similar instruments, not charterparties. His Honour held that a charterparty is a document of a different genus and is therefore not caught by s 11. For the reasons which I have explained, I respectfully disagree with his Honour.

148 Although DKN has had some success in overcoming some of the arguments advanced on behalf of Beach Civil, it did not overcome the argument based upon the engagement of s 11(1)(a) and s 11(2)(b) of COGSA 1991 in the circumstances of this case. Its defeat on this point means that its Application must be dismissed. Costs should follow the event.

149 The proceeding must therefore be dismissed with costs. There will be orders accordingly.

I certify that the preceding one hundred and forty-nine (149) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Foster.

Associate:

Dated: 29 June 2012