

# CHOICE OF LAW AND FORUM CLAUSES IN SHIPPING DOCUMENTS — REVISING SECTION 11 OF THE CARRIAGE OF GOODS BY SEA ACT 1991 (CTH)

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*Since 1904, Australia has sought to protect shippers by prohibiting parties to contracts such as bills of lading from contracting out of Australian law and jurisdiction. Today, this protection lives on in s 11 of the Carriage of Goods by Sea Act 1991 (Cth). This section has recently been in the spotlight following a divergence of authority relating to its scope. This article argues that legislative revision of s 11 is necessary in order to clarify its scope and to ensure that its operation is consistent with the underlying policies justifying its existence, as expressed by the legislature.*

## I INTRODUCTION

Approaching the 19<sup>th</sup> century, the legal norms governing the liability of those who were contracted to carry goods by sea were regarded as forming part of a unified international maritime law.<sup>1</sup> Regarded as common carriers, they were held to be strictly liable for cargo damage or loss occurring during a voyage.<sup>2</sup> However, carriers began to take advantage of the liberal approach of English and European courts to the principle of freedom of contract, seeking to avoid liability through the use of exclusion clauses.<sup>3</sup> Regarded as a valid exercise of party autonomy, these exclusion clauses effectively denied redress for any losses

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- 1 William Tetley, 'The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law' (1999) 30 *Journal of Maritime Law and Commerce* 595, 596; Samuel Robert Mandelbaum, 'International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A US Approach to COGSA, *Hague/Visby, Hamburg and the Multimodal Rules*' (1995) 5 *Journal of Transnational Law & Policy* 1, 3; Paul Myburgh, 'Uniformity or Unilateralism in the Law of Carriage of Goods by Sea' (2000) 31 *Victoria University Wellington Law Review* 355, 357.
- 2 *The Australasian United Steam Navigation Co Ltd v Hiskens* (1914) 18 CLR 646, 663–8 (Isaacs J) ('*Hiskens*').
- 3 See, *Re Missouri Steamship Co* (1889) 42 Ch D 321; Jose Angelo Estrella Faria, 'Uniform Law for International Transport at UNCITRAL: New Times, News Players, and New Rules' (2008) 44 *Texas International Law Journal* 277, 281.

suffered by cargo interests.<sup>4</sup> Other jurisdictions were less than enthusiastic when it came to enforcing such clauses.<sup>5</sup>

## A The Sea-Carriage of Goods Act 1904 (Cth)

Australia joined a number of other jurisdictions such as New Zealand, South Africa and Canada in adopting legislation modelled on the United States' *Harter Act*.<sup>6</sup> The successful lobbying efforts of disgruntled Australian fruit exporters led to the introduction to Parliament of the Sea-Carriage of Goods Bill 1904 (Cth).<sup>7</sup> During the second reading speech before the Senate on 23 November 1904, the Attorney-General, Senator Sir Josiah Symon noted that '[i]n one sentence' the object of the measure was to 'prevent ship-owners from escaping liability for their own negligence'.<sup>8</sup>

- 4 English courts enforced bills of lading even where they included 'the most far-reaching exculpatory clauses': Mandelbaum, above n 1, 9. In an 1889 Annual Report, an English Protection and Indemnity Club stated: 'the Committee congratulates the members on the absence in recent years of cargo claims which has been brought about by the now general adoption of the negligence clause; the premium reduction for use of this clause is therefore discontinued': Francis Reynolds, 'The *Hague Rules*, the *Hague-Visby Rules*, and the *Hamburg Rules*' (1990) 7 *Australian and New Zealand Maritime Law Journal* 16, 16, quoting English Protection and Indemnity Club, 1889 Annual Report.
- 5 I L Evans, 'The *Harter Act* and its Limitations' (1910) 8 *Michigan Law Review* 637, 638. This was particularly so in the case of export nations such as the United States of America. This sentiment is reflected in a later Congressional document which noted: 'Such unjust special clauses in bills of lading were enforced by the foreign shipowners through the power of their practical monopoly of ocean transportation between the United States and foreign countries. Humiliating and burdensome as such conditions were, American shippers were forced to submit in order to get their merchandise carried': United States Congress, *Liability for Damages Arising in the Navigation of Vessels* (Argument in Support of Senate Bill 7208: A Necessary Amendment to the *Harter Act*) 4. 'The economic conflict over risk allocation between carriers and shippers goes back centuries. The earliest recorded occurrence of economic conflict was in the 1680s, when shipowners and merchants met at Lloyd's Coffeeshop in England to wrangle over terms of all-purpose marine insurance policies and the risks for loss and damage to cargo': Mandelbaum, above n 1, 2, citing Scott M Thompson, 'The *Hamburg Rules*: Should They Be Implemented in Australia and New Zealand?' (1992) 4 *Bond Law Review* 168. In 1893, the United States Congress enacted the *Harter Act* which mandated liability for goods carried from or to American ports: see *Harter Act of 1893*, 46 USC §§ 30701–30707 (2006) ('*Harter Act*'). The *Harter Act* was 'a great achievement of American maritime law': William Teltey, 'Reform of Carriage of Goods — The UNCITRAL Draft and Senate COGS' 99 (2003) 28 *Tulane Maritime Law Journal* 1, 23. See also Joseph Sweeney, 'Happy Birthday, Harter: A Reappraisal of the *Harter Act* on its 100<sup>th</sup> Anniversary' (1993) 24 *Journal of Maritime Law and Commerce* 1, 4. The original bill was introduced to Congress by Ohio Democrat Michael Harter. Harter later committed suicide: 'Suicide of M D Harter', *Chicago Tribune* (Chicago), 23 February 1896, 5. His legacy, however, remains. The *Harter Act* is still in force in the United States: see Martin Davies, 'Forum Selection, Choice of Law and Mandatory Rules' (2011) 2 *Lloyd's Maritime & Commercial Law Quarterly* 237, 238 n 5.
- 6 See *Shipping and Seamen Act 1903* (NZ); *Sea-Carriage of Goods Act 1904* (Cth); *Water-Carriage of Goods Act 1910* (Can); *Hiskens* (1914) 18 CLR 646, 655 (Griffith CJ); Sweeney, above n 5, 30; *Bulk Chartering & Wonsultants Australia Pty Ltd v T & T Metal Trading Pty Ltd "The Krasnogrosk"* (1993) 31 NSWLR 18, 22 (Kirby P) ('*The Krasnogrosk*').
- 7 See John Mo, *International Commercial Law* (Butterworths, 1997). 'Australia was predominantly an agricultural society in the nineteenth century' exporting 'mainly primary products, such as fruits, sugar and coal' to England: at 19 [1.33]. See also Michael Sturley, 'The History of COGSA and the *Hague Rules*' (1991) 22 *Journal of Maritime Law and Commerce* 1, 15.
- 8 Commonwealth, *Parliamentary Debates*, Senate, 23 November 1904, 7286–7 (Sir Josiah Symon).

From the perspective of the Attorney-General, an Australian enactment of a carbon copy of the *Harter Act* would have been sufficient to achieve the same outcome.<sup>9</sup> However, concerns were raised by other senators that carriers would be able to avoid liability by using English choice of law and forum clauses.<sup>10</sup> In response, Sir Josiah stated with confidence that the proposed law act as a ‘positive law’ invalidating foreign choice of law and forum clauses.<sup>11</sup> However, following considerable debate, Sir Josiah conceded that there was a need to ensure that the Australian regime was ‘absolutely without a loophole’.<sup>12</sup> He therefore introduced an amendment to the Sea-Carriage of Goods Bill 1904 (Cth) to insert the ‘wonderfully tautological’<sup>13</sup> s 6. The provision, titled ‘[c]onstruction and jurisdiction’ provided:

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.

Further, the cost and time required to travel to England at that time were other factors supporting the adoption of s 6.<sup>14</sup> The amended Sea-Carriage of Goods Bill 1904 (Cth) enjoyed support from both houses of the Commonwealth Parliament. It came into force on 1 January 1905.<sup>15</sup>

## B The Sea-Carriage of Goods Act 1924 (Cth)

Michael Sturley notes the ‘conflict among major maritime nations, which became more serious in the early 20<sup>th</sup> century, meant that the general maritime law no longer provided for uniform risk allocation’.<sup>16</sup> International uniformity was necessary in

9 Ibid 7286–8 (Sir Josiah Symon): ‘The *Harter Act* was the first Act of Congress passed on the subject. It still exists. It has worked well. The conditions in American bills of lading are considered by all mercantile people to be perfectly fair’.

10 Davies, ‘Forum Selection, Choice of Law’, above n 5, 239. See Commonwealth, *Parliamentary Debates*, Senate, 23 November 1904, 7306 (Paul Keating). Reference was made to the English decision in *Re Missouri Steamship Co* (1889) 42 Ch D 321. In that case, cattle were shipped from the United States of America under a bill of lading issued in Boston, Massachusetts. The ship, along with her bovine occupants, failed to arrive in England. The court applied English law to resolve the dispute as it was that body of law that was implied by the parties to the contract in question. The claimants were left without remedy as the bill of lading contained an exclusion clause that was valid as a matter of English law.

11 Commonwealth, *Parliamentary Debates*, Senate, 23 November 1904, 7286–8 (Sir Josiah Symon).

12 Ibid 7297 (Sir Josiah Symon).

13 Davies, ‘Forum Selection, Choice of Law’, above n 5, 239. See also *Hiskens* (1914) 18 CLR 646, 654–5 (Griffith CJ), 669 (Isaacs J).

14 Mo, *International Commercial Law*, above n 7, 19 [1.33]: Australian exporters forced to agree to the carrier’s terms in a bill of lading ‘would have to travel a long way to England for any legal action against the carrier under the bill’.

15 Sea-Carriage of Goods Bill 1904 (Cth) s 2.

16 Sturley, ‘The History of COGSA’, above n 7, 6.

order to provide commercial certainty to those involved in international trade.<sup>17</sup> In 1921, the Comité Maritime International (CMI) coordinated the negotiation of a set of uniform liability rules at a conference held at the Hague. They were adopted as an international convention, which opened for signature in August 1924.<sup>18</sup> The *Hague Rules* represented a compromise between ship owners, importers, and exporters, and applied by their own force to contracts of carriage covered by bills of lading and similar documents of title.<sup>19</sup> They were widely adopted, and given force of law in Australia by the *Sea-Carriage of Goods Act 1924* (Cth) ('1924 Act').

Following the 'successful deliberations' of the CMI in Stockholm in 1963, the *Visby Amendments* to the *Hague Rules* were adopted.<sup>20</sup> The *Hague Rules* as amended by the *Visby Amendments* are known as the *Hague/Visby Rules*. Since coming into force on 23 June 1968, the *Hague/Visby Rules* have been adopted by the vast majority of the world's shipping nations.<sup>21</sup> The significance of the *Hague/Visby Rules* was highlighted by the House of Lords in *The Hollandia*.<sup>22</sup> In that case, their Lordships refused to stay English proceedings on the basis of an exclusive jurisdiction clause that nominated the courts of the Netherlands to resolve disputes. Lord Diplock held that rules had mandatory application where the port of shipment was located within a contracting state.<sup>23</sup>

The *Hague Rules* remained silent on the question of issues relating to choice of forum.<sup>24</sup> Their widespread adoption and uniform application meant that for some time choice of forum became less important.<sup>25</sup> Despite this, the *1924 Act* continued the 'protectionist policy enshrined' in its predecessor.<sup>26</sup> Further, the

- 17 Justice Steven Rares, 'The Onus of Proof in a Cargo Claim Articles III and IV of the *Hague/Visby Rules* and the *UNCITRAL Draft Convention*' [2008] *Federal Judicial Scholarship* 37, [3]: 'As more nations enacted legislation, a number of ship owners, particularly in the then British Empire, expressed concern that they would be subject to different regimes for damage caused to cargo in many different countries of the world.' See also Faria, above n 3, 286.
- 18 *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules)*, signed 25 August 1924, 120 LNTS 187 (entered into force 2 June 1931) ('*Hague Rules*'); Sturley, 'The History of COGSA', above n 7, 30–2.
- 19 *Hilditch Pty Ltd v Dorval Kaiun KK [No 2]* (2007) 245 ALR 125, 144 [84] (Rares J).
- 20 *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Visby Amendments)*, opened for signature 23 February 1968, 1412 UNTS 127 (entered into force 23 June 1977) ('*Visibility Amendments*'); W Tetley, *Marine Cargo Claims* (The Carswell Company Limited, 4<sup>th</sup> ed, 2007) 11.
- 21 Tetley, *Marine Cargo Claims*, above n 20, 6.
- 22 [1983] 1 AC 565. See also M Davies, A Bell and P L G Brereton, *Nygh's Conflict of Laws in Australia* (Lexis Nexis Butterworths, 8<sup>th</sup> ed, 2010) 403 [19.41].
- 23 *The Hollandia* [1983] 1 AC 565, 572–3; Simon Baughen, *Shipping Law* (Routledge-Cavendish, 4<sup>th</sup> ed, 2009) 399.
- 24 In contrast, both the *United Nations Convention on the Carriage of Goods by Sea*, opened for signature 31 March 1978, 1695 UNTS 3 (entered into force on 1 November 1992) arts 21–2 ('*Hamburg Rules*') and *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, opened for signature 23 September 2009 (not yet in force) arts 75–6 ('*Rotterdam Rules*') cover choice of forum. Albeit on a opt-in basis in the *Rotterdam Rules*: Baughen, above n 23, 175–6.
- 25 Alexander von Zeigler, 'Jurisdiction and Forum Selection Clauses in a Modern Law on Carriage of Goods by Sea' in Martin Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force* (Kluwer Law International, 2005) ch 3 85, 89.
- 26 Davies, 'Forum Selection, Choice of Law', above n 5, 240. See also John Mo, "'The Duty to Obey'" versus an "Inherent Sense of Justice" (1995) 69 *Australian Law Journal* 276, 290; Commonwealth, *Parliamentary Debates*, Senate, 28 August 1924, 3677 (Senator Green).

jurisdictional protection was extended to the inward-bound carriage of goods. Section 9 of the *1924 Act*, titled '[c]onstruction and jurisdiction' provided:

- (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.

Section 9 was 'completely effective' in ensuring cargo claimants had access to Australian courts.<sup>27</sup> It was applied by the High Court of Australia in *Compagnie Des Messageries Maritimes v Wilson*.<sup>28</sup> In that case, Dixon CJ stated that s 9 was 'expressed in the strongest words'<sup>29</sup> and rendered any 'stipulation or agreement falling within its terms illegal, null, void and of no effect'.<sup>30</sup> The court relied upon s 9(2) to strike down a French exclusive jurisdiction clause contained in a bill of lading relating to the carriage of goods from Dunkirk, France to Sydney, Australia. The High Court held that s 9 rendered the clause invalid.<sup>31</sup>

### C The Carriage of Goods by Sea Act 1991 (Cth)

An attempt to modernise the rules of cargo liability was made with the adoption of the *Hamburg Rules* as drafted by the United Nations Commission on International Trade Law (UNCITRAL) in 1978. In 1991, Australia repealed the *1924 Act*, replacing it with the *Carriage of Goods by Sea Act 1991 (Cth)* ('*1991 Act*'). The *1991 Act* gave effect to the *Hague/Visby Rules*, but also provided for the future application of the *Hamburg Rules*. The changes to the liability regime

27 Davies, 'Forum Selection, Choice of Law', above n 5, 240. 'Not only strong words but in an ambit widely cast': *The Krasnogrozk* (1993) 31 NSWLR 18, 23 (Kirby P).

28 (1954) 94 CLR 577 ('*Wilson*'). See also Mo, 'The Duty to Obey', above n 26, 290.

29 *Wilson* (1954) 94 CLR 577, 583. See also *The Krasnogrozk* (1993) 31 NSWLR 18, 21 (Kirby P).

30 *Wilson* (1954) 94 CLR 577, 583. See also *The Krasnogrozk* (1993) 31 NSWLR 18, 23 (Kirby P):

The Federal Parliament has thus left no doubt as to its objective, emphatically expressed. A trilogy of invalidity is invoked. It is the duty of courts to obey, and faithfully implement, such strongly worded legislative instruction. Courts must do so, however unjust may be the apparent consequences in a particular case; however inconvenient to the parties; and however irritating may be the result having regard to the prior dealings between the parties.

31 *Wilson* (1954) 94 CLR 577, 583, 585 (Fullagar J): 'The contract contained in the bill of lading was made in France in the French language, and relates to the carriage of goods by a ship sailing under the French flag. For these and other reasons it seems clear that the governing law of the contract is French law.' However, s 9 was a 'law made by the Parliament of the Commonwealth, and must ... be applied by the Supreme Court of New South Wales in all cases to which it is, in terms, relevant'.

in the *1991 Act* were a ‘welcome piece of news for shippers throughout Australia’ because it was said that ‘at first blush’ the legislation ‘would save them the cost’ of insuring goods during transit.<sup>32</sup> The purpose was to allocate responsibility as simply as possible and to reduce the amount and cost of legal disputes. Section 11 was introduced to avoid ‘potential delays, increased costs and language difficulties’ thought to be associated with the resolution of disputes under foreign laws.<sup>33</sup> Headed ‘[c]onstruction and jurisdiction’, s 11 provided:

- (1) All parties to:
  - (a) a bill of lading, or a similar document of title, relating to the carriage of goods from any place in Australia to any place outside Australia;
  - (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 bill of lading, or a similar document of title, relating to the carriage of goods from any place outside Australia to any place in Australia; or
    - (ii) a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii) relating to such a carriage of goods.

The *Hamburg Rules* have failed to get sufficient support from other governments.<sup>34</sup> In 1997, the *Carriage of Goods by Sea Amendment Act 1997* (Cth) (*‘1997 Amendment Act’*) was passed to prevent the *Hamburg Rules* from

32 Commonwealth, *Parliamentary Debates*, House of Representatives, 17 October 1991, 2225 (John Sharp).

33 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 October 1991, 1926 (Robert Brown).

34 The *Hamburg Rules* failed to attract support from ‘major trading nations’ including Australia’s ‘major trading partners’: Explanatory Memorandum, Carriage of Goods by Sea Amendment Bill 1997 (Cth) 3. That support seemed unlikely in the near future.

coming into force.<sup>35</sup> In addition, s 7 was also amended to enable the *Hague/Visby Rules*, and parts of the *1991 Act*, to be amended by regulation.<sup>36</sup> The explanatory memorandum accompanying the Bill for the *1997 Amendment Act* stated that the intention behind the regulatory power to amend the *1991 Act* was inter alia to ensure that ‘all relevant shipping documents’ were covered.<sup>37</sup> Regulations were subsequently passed by the Commonwealth Parliament in 1998 which modified the *Hague/Visby Rules* in a number of respects,<sup>38</sup> as provided for by s 7 of the *1991 Act* as amended by the *1997 Amendment Act*. The Australian version of the *Hague/Visby Rules* as modified by these regulations are known as the ‘*Amended Hague Rules*’.<sup>39</sup>

## 1 The 1998 Regulations

The *Carriage of Goods by Sea Regulations 1998* (Cth) (‘*First 1998 Regulations*’) also amended s 11 of the *1991 Act* to replace the reference to ‘bills of lading, or similar documents of title’ with ‘a sea carriage document to which, or relating to a contract to which, the *Amended Hague Rules* apply’.<sup>40</sup> This amendment was made in order to be consistent with modifications that these regulations also introduced into the *Amended Hague Rules*. However, this new definition ‘inadvertently restricted’ the operation of s 11 to documents governed by the *Amended Hague Rules*.<sup>41</sup> A second set of regulations was introduced in 1998 to correct what was described as ‘technical drafting errors’ made in the first set of regulations.<sup>42</sup> These were the *Carriage of Goods by Sea Regulations (No 2) 1998* (Cth) (‘*Second 1998 Regulations*’). The *Second 1998 Regulations* redefined the phrase ‘a sea carriage document’ extending it to documents ‘relating to the carriage of goods’ to broaden the ‘categories of shipping documents under which import shippers have access to Australian courts’.<sup>43</sup>

As the *Second 1998 Regulations* were about to commence, the Federal Court held that the amendment to s 11 in the *First 1998 Regulations* was invalid.<sup>44</sup> Emmett J

35 Section 2 of the *1991 Act* provided for the *Hamburg Rules* to come into force in 1997 (‘the *Hamburg Rules* trigger’). It was ‘not appropriate’ to ‘adopt the *Hamburg Rules* at [that] ... time’: Explanatory Memorandum, Carriage of Goods by Sea Amendment Bill 1997 (Cth), 3. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 12 March 2007, 5554–5 (M Ronaldson).

36 This ‘very precise’ regulatory power might be ‘regarded as an “Henry VIII clause” [as it enabled] ... regulations [to] ... have the effect of amending the operation of an Act’: Explanatory Memorandum, Carriage of Goods by Sea Amendment Bill 1997 (Cth) 6–7.

37 Those documents included ‘sea waybills and certain consignment notes as well as bills of lading, and including electronic forms of such documents’: *ibid* 7. This reflected concern that the *Hague/Visby Rules* may not extend to non-negotiable sea carriage documents such as straight bills of lading and sea waybills: see generally Tetley, *Marine Cargo Claims*, above n 20, 18–20.

38 *Carriage of Goods by Sea Regulations 1998* (Cth).

39 *1997 Amendment Act* s 7(1); *1991 Act* sch 1A ‘*Amended Hague Rules*’.

40 *First 1998 Regulations* reg 6. The purpose was to ‘reflect the wider range of export sea carriage documents’ covered by ss 10 and 11: Explanatory Statement, *Carriage of Goods by Sea Regulations 1998* (Cth).

41 Explanatory Statement, *Carriage of Goods by Sea Regulations (No 2) 1998* (Cth).

42 *Ibid*. Section 11 was amended to make clear ‘that the same range of shipping documents is intended to be covered by the COGSA for outwards shipments as for inwards shipments’.

43 *Ibid*.

44 *Hi-Fert Pty Ltd v United Shipping Adriatic* (1998) 89 FCR 166, 182 (Emmett J) (‘*Hi-Fert*’).

stated that s 7(3)(b) of the *1991 Act* did not authorise such a ‘significant restriction’ to s 11.<sup>45</sup> Following that case, the *Second 1998 Regulations* commenced expanding the scope of s 11 as applying to sea carriage documents ‘relating to the carriage of goods’.<sup>46</sup> This is the definition that still exists today. The consequences of this are considered in the next Part.

## II SECTION 11 AND CHARTERPARTIES

### A *The Text of Section 11*

Section 11 of the *1991 Act* — titled ‘[c]onstruction and jurisdiction’ — in its current amended form provides:

- (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 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

<sup>45</sup> *Ibid* 181 (Emmett J).

<sup>46</sup> *Second 1998 Regulations* reg 3. See also Davies, ‘Forum Selection, Choice of Law’, above n 5, 246. The broadly encompassing phrase ‘a sea carriage document’ seems ‘broad enough to include all kinds of documents’ including ‘bills of lading, seawaybills, voyage charterparties and contracts of affreightment’: at 241.



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.

The current wording of s 11 has been considered in a number of recent cases, in which the courts were asked to determine whether a voyage charter was a ‘sea carriage document’ to which s 11 applied. As this Part will detail, this question has been answered with inconsistent results.

### **B Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd<sup>47</sup>**

In *Jebsens*, a ruling was sought on whether a voyage charter was ‘a sea carriage document’ within the meaning of and for the purposes of s 11(1)(a) of the *1991 Act*. Anderson J of the Supreme Court of South Australia held that the voyage charter did not come within the ambit of s 11 as it was not a ‘sea carriage document’ as defined in art 1 of the *Amended Hague Rules*.<sup>48</sup> According to his Honour, the *1991 Act* dealt ‘with the rights of persons holding bills of lading or similar instruments’ and a charter party ‘is a document of a different genus’.<sup>49</sup> His Honour held that a charter party was not a sea carriage document simply because it ‘contain[ed] a contract for the carriage of goods by sea’.<sup>50</sup>

This decision has been the subject of some comment (and criticism) since it was handed down.<sup>51</sup> The court’s reliance on the definition of ‘sea carriage document’ as contained in the *Amended Hague Rules* has been questioned as that definition is expressed as applying to the *Amended Hague Rules* and not ‘the Act itself’.<sup>52</sup> The decision has also been critiqued as lacking rigorous legal reasoning.<sup>53</sup>

### **C Dampskibsselskabet Norden A/S v Beach Building and Civil Group Pty Ltd<sup>54</sup>**

In 2012, the same issue arose for resolution by the Federal Court of Australia in *Norden*. The ship owners, DKN, brought arbitration proceedings against the charterers in London pursuant to cl 32 of the voyage charter in question. DKN asserted the charterers were liable for demurrage due to delays in loading the

47 (2011) 112 SASR 297 (*‘Jebsens’*).

48 Ibid 298 [6].

49 Ibid 298 [7].

50 Ibid 298 [8].

51 See, eg, Michael White and Lauren Humphrey, ‘Australian Maritime Law Update 2011’ (2012) 26 *Australian and New Zealand Maritime Law Journal* 172. ‘Despite the absence of reasons for the judgment the decision would appear to be a correct interpretation of the Act’: at 190. Cf Martin Davies, ‘Australian Maritime Law’ [2012] *International Maritime & Commercial Law Yearbook* 1, 7: ‘The Act uses the simple, general, expression “sea carriage document”. A voyage charterparty is a document. It contains a contract for carriage of goods by sea. To hold that it is not a “sea carriage document” is to ignore the plain words of the Act.’

52 Davies, ‘Australian Maritime Law’, above n 51, 6–7.

53 White and Humphrey, above n 51, 190.

54 (2012) 292 ALR 161 (*‘Norden’*).

cargo of coal at Dalrymple Bay Coal Terminal, Queensland and in discharging the coal at the destination port in Lianyungang, China.

The arbitrator found in DKN's favour. DKN sought to enforce this award against the charterer in Australia pursuant to s 8 of the *International Arbitration Act 1974* (Cth). The charterer sought to resist enforcement, arguing inter alia that the award was made subject to an arbitration agreement rendered ineffective by s 11 of the *1991 Act*. That argument ultimately found favour with the judge hearing the case, Foster J, who dismissed DKN's application to enforce the award.

In doing so, his Honour stated that the critical question was whether the voyage charter was a 'sea carriage document' pursuant to s 11(1)(a) or a 'non-negotiable document' of the kind described in s 11(1)(b) of the *1991 Act*.<sup>55</sup> If that question was answered in the affirmative, s 11 would operate to deprive the arbitral tribunal of jurisdiction to determine the dispute and any award made by it would be ineffective and unenforceable in Australia.

Foster J held that the reference to a 'document relating to the carriage of goods from any place in Australia' was, 'as a matter of ordinary English' apt to encompass a voyage charter.<sup>56</sup> Further, the subsequent amendments to s 11 indicated an intention to 'broaden the class of documents covered by' it.<sup>57</sup> His Honour went on to consider art 1(g) of the *Amended Hague Rules*.<sup>58</sup> It defines a 'sea carriage document' as:

- (i) a bill of lading; or
- (ii) a negotiable document of title that is similar to a bill of lading and that contains or evidences a contract of carriage of goods by sea; or
- (iii) a bill of lading that, by law, is not negotiable; or
- (iv) 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.<sup>59</sup>

Foster J noted that, '[s]trictly speaking, that definition applies only to those Rules' and not the *1991 Act*.<sup>60</sup> Despite this, his Honour commented that the definition was 'none the less of some assistance' given the 'Rules have the force of law and assume some significance' in the *1991 Act*.<sup>61</sup> As the voyage charter contained or

55 Ibid 189 [135] (Foster J).

56 Ibid 189 [135] (Foster J), citing with approval *Sonmez Denizcilik Ve Ticaret Anonim Sirketi v The MV "Blooming Orchard"* (1990) 22 NSWLR 273, 281 (Carruthers J) ('*The Blooming Orchard [No 2]*'); *BHP Trading Asia Ltd v Oceaname Shipping Ltd* (1996) 67 FCR 211, 235 (Hill J) ('*BHP Trading Asia*').

57 *Norden* (2012) 292 ALR 161, 189–90 [136]–[141]. Foster J stated it was 'difficult to discern from the relevant extrinsic materials an intention on the part of the legislature' to narrow the relevant class: at 189 [137]. Further, His Honour rejected DKN's contention that art 10 of the *Amended Hague Rules* drew a clear distinction between charter parties and sea carriage documents: at 185 [120]–[121].

58 Ibid 190 [142] (Foster J).

59 *1991 Act* (Cth) sch 1A art 1(g).

60 *Norden* (2012) 292 ALR 161, 188 [130].

61 Ibid 188–9 [130]–[131]. See Davies, 'Australian Maritime Law', above n 51, 6–7. Cf *Jebsons* (2011) 112 SASR 297, 298 [5]–[9] (Anderson J).

evidenced a contract for the carriage of goods by sea his Honour held that it was therefore a ‘sea carriage document’ as defined by the *Amended Hague Rules*.

Having established the voyage charter was a sea carriage document for the purposes of s 11, Foster J went on to discuss whether it was also a non-negotiable instrument of a kind mentioned in s 10(1)(b)(iii) of the *1991 Act*. Section 10(1)(b)(iii), headed ‘[a]pplication of *Amended Hague Rules*’ provides:

- (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.

Clause 24 of the voyage charter provided that the charter was subject to a clause paramount providing for the application of the *Hague Rules*, *Hague/Visby Rules* and other national legislation as mandatorily applicable at the port of shipment or discharge.<sup>62</sup> Foster J held the voyage charter was ‘not a non-negotiable instrument of the relevant kind’.<sup>63</sup> The clause made ‘no mention’ of the *Amended Hague Rules*, nor did it ‘suggest that those rules are to govern the charterparty as if it were a bill of lading’<sup>64</sup> as s 10(1)(b)(iii) of the *1991 Act* contemplated.

The decision of Foster J is consistent with a 1990 decision handed down by the Supreme Court of New South Wales in *The Blooming Orchard [No 2]*.<sup>65</sup> In that case, Carruthers J held that a voyage charter was a ‘document relating to the carriage of goods’ for the purposes of s 9 of the *1924 Act*.<sup>66</sup> As a result, the London arbitration clause it contained was held to be invalid. The ship owners had argued that a voyage charter was not a document relating to the carriage of goods, but rather a document relating to the hire of a ship. Carruthers J rejected this argument and stated that this submission confused a voyage charter with a time charter.<sup>67</sup> His Honour went on to state that it would be ‘absurd’ that the protection afforded

62 *Norden* (2012) 292 ALR 161, 183 [110]. Foster J appeared to accept DKN’s submission that s 10(1)(b)(iii) required: ‘(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”’: at 185 [122].

63 *Ibid* 190 [144] (Foster J).

64 *Ibid*.

65 (1990) 22 NSWLR 273 (Carruthers J).

66 *Ibid* 273.

67 *Ibid* 278.

[T]he primary difference between a voyage charter and a time charter is that the former is a contract to carry specified goods on a defined voyage or voyages, the remuneration of the shipowner being a freight calculated according to the quantity of cargo loaded or carried or sometimes a lump sum freight. A time charter on the other hand is a contract of services by which the owner makes the ship and crew available to the charterer.

At 278–9.

by the *1924 Act* would only apply to bills of lading issued pursuant to voyage charters and not the charter itself.<sup>68</sup>

### D The Narrow Purposive Reading: Norden on Appeal

*Norden* was subsequently overturned on appeal to the Full Federal Court by a 2:1 majority.<sup>69</sup> Rares J (with whom Mansfield J concurred) held that a voyage charter was not a sea carriage document for the purposes of s 11.<sup>70</sup>

For Rares J, the meaning of ‘sea carriage documents’ in s 11 ‘must be ascertained from that Act as a whole, including the [amended] ... *Hague Rules*’.<sup>71</sup> While ‘[t]he task of statutory construction commences with a consideration of the text itself’ that ‘may require the consideration of the context, including the general purpose and policy of a provision, in particular the mischief it sought to remedy’.<sup>72</sup> That context ‘includes the legislative history and extrinsic materials’ provided they are not used to ‘displace the clear meaning of the text and that the actual language used by the legislature’.<sup>73</sup>

Having established this, his Honour seems to have directed attention to those rules without having concluded whether the term ‘sea carriage document’ was capable of more than one expression. For Rares J, the words ‘relating to the carriage of goods from any place in Australia to any place outside Australia’ in s 11(1)(a) ‘did not change the intended function of a sea carriage document as a means of enabling a consignee or holder to use it as evidence of its contractual or legal right to receive the goods at the port of destination’.<sup>74</sup> The port of loading and discharge were ‘features of a sea carriage document’ to which s 11 applied.<sup>75</sup> As the actual text of s 11 did not modify the intended function a ‘sea carriage document’ referred to in art 3(3) of the *Amended Hague Rules* the same interpretation was adopted.<sup>76</sup> This is indicative of the somewhat superpurposive trend in his Honour’s reasoning.

For Rares J, ‘[o]rordinarily, a voyage charter, like most charterparties, is a contract for the hire of a ship’ where shipowners agree ‘to perform one or more designated voyages in return for the payment of freight and, when appropriate, demurrage’.<sup>77</sup> Rares J cited a recent decision of the Canadian Federal Court of Appeal in

68 Ibid 281.

69 *Dampskibsselskabet Norden A/S v Gladstone Civil Pty Ltd* (2013) 216 FCR 469 (*‘Norden on Appeal’*).

70 Ibid 477 [28].

71 Ibid 486 [57] (Rares J).

72 Ibid 485 [55] (Rares J), citing *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

73 *Norden on Appeal* (2013) 216 FCR 469, 485 [55], citing *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

74 *Norden on Appeal* (2013) 216 FCR 469, 486 [59] (Rares J).

75 Ibid.

76 Ibid.

77 Ibid 486–7 [60] (Rares J).

*Canada Moon Shipping Co Ltd v Companhia Siderurgica Paulista-Cosipa* where Gauthier JA stated:

One can readily see that the imbalance in the bargaining power that is the mischief that led to the development of the various international regimes discussed above did not exist in relation to charter-parties. The liner trade (common carriers operating regular services in certain areas, using the sea carriage documents covered by the various international regimes) is simply quite different from the tramp trade (chartered vessels). There was thus no policy to restrict the freedom to contract of parties to such agreements.<sup>78</sup>

Rares J echoed this sentiment, noting that charterparties ‘as an ordinary incident’ of shipping will contain arbitration clauses ‘freely negotiated by sophisticated, professional parties’ who ‘could bargain at arms length’ for their terms.<sup>79</sup> The ‘realities of commercial life and the evident purpose’ of s 11 ‘respect the free negotiation of charters by commercial parties in the international shipping trade’.<sup>80</sup> In the case of a bill of lading, the ‘shipper will have no substantive say’ and the consignee ‘no say at all, in the terms and conditions in such a document’.<sup>81</sup> Section 11 purports to protect those parties from ‘being forced to litigate or arbitrate, away from Australia’. Its purpose is to

protect, as part of a regime of marine cargo liability within the object of s 3, the interests of Australian shippers and consignees from being forced contractually to litigate or arbitrate outside Australia. That purpose does not extend to protection of charterers or shipowners from the consequences of enforcement of their freely negotiated charterparties subjecting them to the well-recognised and usual mechanism of international arbitration in their chosen venue.<sup>82</sup>

For Rares J, it was ‘unlikely that’ the ‘Parliament intended that agreements for international arbitration in voyage or other charterparties would be deprived of force or effect unless the arbitration occurred in Australia’.<sup>83</sup> His Honour continued:

Had the Parliament intended COGSA to make a sweeping change to the ways in which arbitration agreements in charterparties operated it would have needed to say so in clear terms. Section 11 cannot be read as depriving international arbitration clauses in charterparties made anywhere in the

78 Ibid, quoting *Canada Moon Shipping Co Ltd v Companhia Siderurgica Paulista-Cosipa* [2012] FCA 284 (26 March 2012) [61].

79 *Norden on Appeal* (2013) 216 FCR 469, 489 [66] (Rares J).

80 Ibid 490 [70] (Rares J).

81 Ibid. The statutory analogues enacted at the turn of the 20<sup>th</sup> century, and later the *Hague Rules* and their successors evolved from the *Harter Act 1893* (US). Those statutes and international conventions sought to protect the owners of cargoes from the harsh consequences of the actions of shipowners and carriers of goods creating virtual contracts of adhesion in bills of lading, and now sea carriage documents.

82 Ibid 488–9 [65] (Rares J).

83 Ibid.

world of force or effect, just because the charter relates to the carriage of goods from overseas to Australia.<sup>84</sup>

Article 3 of those rules requires a carrier issue a ‘sea carriage document’ to a shipper after goods have been delivered. A voyage charter could not be said to be evidence of the receipt of goods on board by a ship.

Buchanan J dissented.<sup>85</sup> While agreeing with the reasoning of the trial judge, his Honour was more prepared to read the phrase ‘sea carriage document’ consistently with the same phrase in the *Amended Hague Rules*.<sup>86</sup> However, in contrast to Rares and Mansfield JJ, Buchanan J was prepared to find that the definition would extend to cover a voyage charter.<sup>87</sup>

For Buchanan J, it was not a prerequisite of a ‘sea carriage document’ that it be a document to which the *Amended Hague Rules* applied.<sup>88</sup> Having regard to the definition in art (1)(g)(iv), Buchanan J went on to characterise the voyage charter in question as a ‘sea carriage document’ that ‘contains or evidences a contract of carriage of goods by sea’.<sup>89</sup> In deciding this, his Honour made clear that his conclusion was based on a characterisation of the voyage charter in question, stating his analysis did

not have the consequence that charterparties generally would be exposed to the operation of s 11 of COGSA, or that the arbitration clauses they contain would be rendered ineffective under Australian law. The present case (on the view I favour) turns on the particular provisions and character of the charterparty and the fact that it deals directly with the terms on which freight is to be carried.<sup>90</sup>

With Rares and Buchanan JJ on opposing sides, Mansfield J delivered the deciding judgment. For Mansfield J there was ‘obviously an available constructional choice as selected by the primary judge’.<sup>91</sup> However his Honour agreed with Rares J,

84 Ibid.

85 See *ibid* 506–7 [133]–[134].

86 *Ibid* 496–501 [92]–[106]. Cf *Norden* (2012) 292 ALR 161, 188 [130] (Foster J).

87 *Norden on Appeal* (2013) 216 FCR 469, 502 [116], 503 [120].

88 *Ibid* 501–2 [107]–[111].

89 *Ibid* 502 [116].

90 *Ibid* 503 [118]. Referring to clauses 1 and 2 of the voyage charter. Clause 1 ‘Loading Port(s)/ Discharging Port(s)’ provided

[t]hat the said Vessel being tight, staunch and strong, and in every way fit for the voyage, shall, with all convenient speed, proceed to ... Dalrymple Bay Coal Terminal, Australia and there load, always afloat, and in the customary manner from the Charterers, in such safe berth as they shall direct, a full and complete cargo Of [sic] coal 68,000 tons of ... 1000 kilos 10 % more or less in the Owners’ option; and being so loaded, shall therefrom proceed, with all convenient speed, to [China]. ... and there deliver her cargo, as ordered by the Charterers, where she can safely deliver it, always afloat, on having been paid freight at the rate of 17.00 US\$ per ton of ... 1000 kilos, free in and out spout trimmed, basis 1 port load, 2 port discharge, on bill of lading quantity.

Clause 2 ‘Freight Payment’ provided that [t]he FREIGHT shall be paid in Denmark in free transferable US currency into the following account designated by carriers. Payment to be effected within 3 New York banking days after signing/releasing Bills of Lading, marked FREIGHT PAYABLE AS PER C/P’: at 503 [119] (emphasis altered).

91 *Ibid* 474–5 [15].

giving the necessary majority to uphold the appeal.<sup>92</sup> He was in general agreement that the ‘better approach’ was to conclude that a charter party was not a sea carriage document.<sup>93</sup> Mansfield J’s reasoning echoed that of Rares J considering the context of the *1991 Act* and the widespread acceptance of arbitration as a method of resolving charter party disputes.<sup>94</sup> Further, his Honour noted a voyage charter party as being ‘a contract for the hire of a ship’ and ‘distinct from a contract for the carriage of goods by sea’.<sup>95</sup>

The decision and judgment of the majority of the Full Court has attracted support from commentators emphasising the importance of arbitration to the shipping community.<sup>96</sup> For Ashwin Nair, the first instance judgment in *Norden* ‘risked Australia’s legislative environment being perceived as hostile to international arbitration’ and the appeal decision ‘dispels such a perception’.<sup>97</sup>

### III THE OPERATION OF SECTION 11

#### A Which Agreements are Affected?

Once enlivened, s 11 renders ineffective any agreement purporting to preclude or limit the jurisdiction of an Australian court in respect of the sea carriage document; and the application of the laws in place at the place of shipment, as mandated by s 11(1) of the *1991 Act*, where the sea carriage document relates to the shipment of goods from Australia.<sup>98</sup>

Section 11 does not confer jurisdiction on Australian courts. Rather, it acts as a mandatory rule preventing the court’s existing jurisdiction from being ousted. It follows that it is necessary to demonstrate that an Australian court does have jurisdiction in respect of the sea carriage document before asking whether it

92 Ibid 471 [4].

93 Ibid 472–5 [14]–[15].

94 Ibid 474–6 [15]–[20].

95 Ibid 474–5 [15]. Cf Buchanan J at 494–5 [90], 501 [110], 502 [116], 504 [124]–[125].

96 See, eg, Patricia Saraceni, ‘Recent Cases: When Is a Voyage Charter Party Not a “Sea Carriage Document”?’ *Dampskibsselskabet Norden A/S v Gladstone Civil Pty Ltd* [2013] FCAFC 107 (2013) 87 *Australian Law Journal* 744, 747; Ashwin Nair, ‘A Note on *Norden*: Voyage Charterparties, the *Hague/Visby Rules* and Enforcing Foreign Arbitral Awards’ (2013) 27 *Australian and New Zealand Maritime Law Journal* 90, 99.

97 Nair, above n 96, 99. For example, the potential wide ranging reach of the *Insurance Contracts Act 1984* (Cth) and the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)) have, in addition to curial decisions such as that in *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH* [2001] 1 QDR 461, given Australia a reputation for being arbitration unfriendly. See Kate Lewins, ‘Maritime Law and the TPA as a “Mandatory Statute” in Australia and England: Confusion and Consternation’ (2008) 36 *Australian Business Law Review* 78; *Akai Pty Ltd v The People’s Insurance Co Ltd* (1996) 188 CLR 418 (*Akai*). See also *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 43 WAR 91 (*Rizhao*). In *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd* (2008) 168 FCR 169 (*BHPB*) a London arbitrator continued with proceedings despite the granting of an anti-suit injunction by an Australian court. The injunction was made to protect the jurisdiction of Australian courts to determine disputes arising under the *Trade Practices Act 1974* (Cth). Finkelstein J of the Federal Court of Australia was not impressed, warning the arbitrator that ‘he may be in for a rude shock were he to find himself subject to the personal jurisdiction of the Federal Court’: *BHPB* (2008) 168 FCR 169, 173–4 [6].

98 *Rail Equipment Leasing Pty Ltd v CV Scheepvaartonderneming Emmagracht* [2008] NSWSC 850 (18 August 2008) [18] (Rein J).

may be ousted. Australian courts are required to determine whether they have both subject matter jurisdiction to decide the substantive issues in dispute, and personal jurisdiction over the parties to the dispute.<sup>99</sup> Personal jurisdiction over a foreign defendant is governed by the rules of court regarding service out of the jurisdiction.<sup>100</sup>

Where a sea carriage document concerns the outward-bound international carriage of goods, s 11 requires that a court ignore any express choice of foreign law and mandates an intention of the parties ‘to contract according to the laws in force at the place of shipment’.<sup>101</sup> The imputed choice of Australian law would appear sufficient to justify service out of the jurisdiction. An action concerning the inward-bound international carriage of goods appears to be more complicated. Section 11 does not prevent the contract for the carriage of those goods being subject to some foreign law, including any system of law that the parties have themselves selected. In those circumstances, the plaintiff will generally have to rely upon some other factor connecting their claim with Australia in order to secure jurisdiction.<sup>102</sup> The jurisdiction of an Australia court may be protested where there is not the requisite connection required by the rules of court between the claim and Australia or the state in which the proceeding is commenced to authorise the service out of the court’s process on the foreign defendant.<sup>103</sup> Further, the doctrine of *forum non conveniens*<sup>104</sup> provides Australian courts with a discretion to stay proceedings which are otherwise within their jurisdiction but where that court is a ‘clearly inappropriate forum’ to hear the dispute.<sup>105</sup> However, this strict test poses an uphill battle for any party seeking a stay of proceedings on these grounds. While a stay may be easier to obtain where proceedings have already commenced in an foreign forum,<sup>106</sup> the protection afforded by the *1991 Act* will act as a significant factor weighing against a stay, particularly if the *1991 Act* will not be applied in a foreign forum.<sup>107</sup>

99 Subject matter jurisdiction is decided by looking at statutes conferring jurisdiction upon a court. In contrast, personal jurisdiction is determined by asking whether the party bringing proceedings is able to effect service of originating process on a proposed defendant: Drew James, ‘Cargo Claims in Australia; Establishing Jurisdiction’ (1995) 11 *Australian and New Zealand Maritime Law Journal* 23, 24.

100 See, eg, *Federal Court Rules 2011* (Cth) r 10.42; *Rules of the Supreme Court 1971* (WA) O 10 r 1.

101 *1991 Act* ss 11(1)–(2)(a).

102 Such as where the damage claimed was suffered in Australia as a result of a tortious act (see *Heilbrunn v Lightwood PLC* [2007] FCA 433 (28 March 2007)) or there having been an alleged breach of the contract of carriage within Australia, following the delivery of the damaged cargo there (see *Omega Tankers & Trailers Pty Ltd v East-West Air Services Co Ltd* [2009] FCA 648 (15 May 2009) [10]).

103 A failure may be fatal to the proceedings: *Rules of the Supreme Court 1971* (WA) O 10; *ANZ Grindlays Bank PLC v Fattah* (1991) 4 WAR 296.

104 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 564 (*‘Voth’*).

105 *Ibid* 565. Cf *Spiliada Maritime Co v Cansulex Ltd* [1987] AC 460, 477–8.

106 See, eg, *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197; *Henry v Henry* (1996) 185 CLR 571.

107 As a result of *Voth*, a plaintiff can ‘more easily rebuff’ an application, asserting it would be at a ‘juridical disadvantage’ by litigating abroad: Lewins, ‘Maritime Law and the TPA’, above n 97, 82–3. See also Richard Garnett, ‘Stay of Proceedings in Australia: A “Clearly Inappropriate” Test?’ (1999) 23 *Melbourne University Law Review* 30, 46–8.



## B Recognition and Application of Section 11

### 1 In Australian Courts

Australian courts have held that in order for s 11 to be effective and to prevent parties to a contract from avoiding its operation, it must apply regardless of the applicable law.<sup>108</sup> The Parliament, in enacting s 11, has displaced the default rules relating to private international law.<sup>109</sup> Where s 11 applies, a claimant may bring an action in an Australian court, where they would otherwise be prevented from doing so, due to a choice of forum clause in the contract.<sup>110</sup> In this respect, s 11 is a mandatory rule of the forum.<sup>111</sup> Mandatory rules are municipal laws that demand application in a particular forum.<sup>112</sup> A court subject to such laws has no choice but to apply them, ‘irrespective of the parties’ contractual choice’.<sup>113</sup> This applies even where the forum would otherwise apply the law of another state to resolve the dispute.<sup>114</sup> They displace the traditionally accepted principles relating to choice of law analysis.<sup>115</sup> Mandatory rules vary in form and can impact on any of the stages of resolution of international disputes.<sup>116</sup>

In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*,<sup>117</sup> the Full Court of the Federal Court considered whether a claimant could avoid a London arbitration agreement by bringing an action in Australian courts pursuant to the *Trade Practices Act 1974* (Cth). The arbitration agreement in question was contained

108 Mary Keyes notes there ‘are very few cases’ in which s 11 is relied upon. However, when it does arise, ‘courts always retain jurisdiction in accordance with [the] statutory direction’: Mary Keyes, *Jurisdiction in International Litigation* (Federation Press, 2005) 125, citing *Hi-Fert* (1998) 89 FCR 166; *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [No 5]* (1998) 90 FCR 1. See also Kate Lewins, *The Trade Practices Act (Cth) 1974 and Its Impact on Maritime Law in Australia* (PhD Thesis, Murdoch University, 2005) 5.

109 Davies, Bell and Breerton, above n 22, 403 [19.42].

110 Peter Nygh, *Autonomy in International Contracts* (Clarendon Press Oxford, 1999) 230; Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2011) 444–5 [17.12].

111 Lewins, ‘Maritime Law and the TPA’, above n 97. Lewins noting ‘Parliament has attempted to enshrine the mandatory status’ of such rules using ‘provisions designed to overcome attempts to avoid them’: at 79. See also *Wilson* (1954) 94 CLR 577, 585 (Fullagar J); Richard Garnett, ‘The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?’ (2009) 5 *Journal of Private International Law* 161, 166.

112 Lewins, ‘Maritime Law and the TPA’, above n 97. Mandatory rules ‘need not be encapsulated in statutes, but they are increasingly so. Statutes intended to be of mandatory status usually indicate their intent to take effect regardless of the proper law of the contract’: at 95.

113 Davies, Bell and Breerton, above n 22, 402 [19.40].

114 Peter Megens and Max Bonnell, ‘The Bakun Dispute: Mandatory National Laws in International Arbitration’ (2007) 81 *Australian Law Journal* 259. ‘There has been a reluctance on the part of many arbitrators to apply the notion of mandatory national laws to arbitrations, because they have considered themselves bound to give effect to the expressed intentions of the parties’: at 262.

115 Lewins, ‘Maritime Law and the TPA’, above n 97, 95; Michael J Whincop and Mary Keyes, *Policy and Pragmatism in the Conflict of Laws* (Ashgate Publishing Company, 2001) 52.

116 Andrew Barraclough and Jeff Waincymer, ‘Mandatory Rules of Law in International Commercial Arbitration’ (2005) 6 *Melbourne Journal of International Law* 205: ‘They can be either procedural, for example requiring due process, or substantive, such as certain tax, competition and import/export laws. Unsurprisingly, it is the application of substantive mandatory rules that creates the most controversy’: at 206.

117 (2006) 157 FCR 45 (*The Comandate*), on appeal from *Pan Australia Shipping Pty Ltd v Ship “Comandate” [No 2]* (2006) 234 ALR 483 (Rares J) (*The Comandate [No 2]*).

in a New York Produce Exchange standard form time charter. For Allsop J, the policy underlying the enactment of the *New York Convention*<sup>118</sup> in Australia was of assistance in reconciling the *International Arbitration Act 1974* (Cth) ‘with another statute exhibiting important public policy’.<sup>119</sup> To limit the arbitrability of a claim on the basis that it may not provide the same remedy as courts of a particular country would undermine the *New York Convention* by infringing on the autonomy of the parties recognised by the *New York Convention* in the scope of the arbitration agreement.<sup>120</sup> There was ‘nothing inimical to Australian public policy’ or the Australian statute in allowing commercial parties to agree to resolve disputes in London under English law.<sup>121</sup> His Honour added that having

freely entered a bargain to resolve their disputes in London [there were] ... powerful discretionary reasons why [the] ... arbitration agreement should be enforced, even if the contractually chosen venue and law [gave] ... rights not entirely the same as would arise under [Australian law. Where] Australian commercial parties desire Australian dispute resolution clauses they should bargain for them.<sup>122</sup>

It was for the arbitrator to determine, applying the relevant principles of conflict of laws, whether the Australian statute would be applied.<sup>123</sup>

## 2 By Foreign Courts and Arbitral Tribunals

A valid and binding arbitration agreement is an essential precondition to the arbitration of a dispute. However, the question of validity varies between jurisdictions. The prevailing approach is that the question of validity of an arbitration agreement is a question to be determined according to the governing law of the contract.<sup>124</sup> Following this approach, an arbitral tribunal seated in a foreign jurisdiction will determine the validity of an arbitration agreement according to their own laws and will not be bound to apply the mandatory laws of Australia to resolve the question. As a result, a foreign court, not bound by the mandate of the Australian legislature, may not give efficacy to s 11 of the *1991*

118 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) (*New York Convention*).

119 *The Comandate* (2006) 157 FCR 45, 94 [191]. The charterer sought damages pursuant to s 82 of the *Trade Practices Act 1974* (Cth), alleging that representations made by a shipbroker amounted to misleading or deceptive conduct. See also Peter Megens and Beth Cubitt, ‘Australian Case Report: *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*’ (2009) 5 *Asian International Arbitration Journal* 95.

120 *The Comandate* (2006) 157 FCR 45, 106–7 [237]. Allsop J noted that it would be ‘antithetical’ to the *New York Convention* to ‘limit the reference to arbitration to those parts of the differences of the parties that would be dealt with in the same way in the arbitration as they would be in the national court in which proceedings have been begun’.

121 *Ibid* 107–8 [240].

122 *Ibid* 109–10 [249].

123 *Ibid*. ‘It is not for this Court to pre-empt that decision’: at 108 [241], citing with approval *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, 167 (Gleeson CJ).

124 See, eg, *Sumitomo Heavy Industries v Oil and Natural Gas Commission* [1994] 1 Lloyd’s Rep 45.

*Act* where, in its view, Australian law is not the governing law of the contract.<sup>125</sup> In 2004, Davies and Dickey expressed with some confidence that s 11(2) would meet a fate similar to that encountered by s 8(2) of the *Insurance Contracts Act 1984* (Cth) in the *Akai* saga.<sup>126</sup> In that infamous set of cases, the English High Court upheld an English choice of law clause in an insurance contract,<sup>127</sup> despite a previous finding by the High Court of Australia that the clause was invalid pursuant to the Commonwealth statute.<sup>128</sup>

Section 9 of the *1924 Act* was recognised in English proceedings in the case of the *The Amazonia*.<sup>129</sup> That case concerned a voyage charter containing an agreement to arbitrate in London pursuant to English Law. However, the voyage charter also expressly provided that it was subject to the provisions of the *1924 Act*. Gatehouse J held that the arbitration agreement was invalid as the parties had expressly agreed that the *1924 Act* (which included s 9) should be applied.<sup>130</sup> Despite this, Gatehouse J held that the conduct of the parties in referring their dispute to London arbitration (albeit on the mistaken belief that the arbitration agreement was valid) had amounted to an ad hoc agreement to refer their disputes to London arbitration.<sup>131</sup> Gatehouse J concluded that proper law of the ad hoc agreement was English law.<sup>132</sup> The determinative factor was that London was the place of performance of the ad hoc arbitration and consequently English law had the closest and most real connection to the ad hoc agreement.<sup>133</sup> Having decided that English law was the proper law of the arbitration ‘no question of illegality’ arose as the *1924 Act* including s 9 no longer applied.<sup>134</sup>

### C The Status of Arbitration

The validity of an arbitration agreement providing for arbitration to take place in Australia was questioned in *The Krasnogrosk*,<sup>135</sup> when Sheller JA suggested that such agreements may also be invalid in light of s 11 of the *1991 Act* in the terms in which it was originally enacted.<sup>136</sup> In *The Krasnogrosk*,<sup>137</sup> the New South Wales Court of Appeal considered a situation where the appellant, having agreed to an ad hoc arbitration in Sydney pursuant to the law of New South Wales, and having

125 Mo, ‘The Duty to Obey’, above n 26, 300: it ‘must be pointed out that, as we have seen, such expected advantage is largely dependent on the operation of rules of conflict of laws adopted by the court exercising the jurisdiction’. See also *The Amazonia* [1990] 1 Lloyd’s Rep 236; Nygh, above n 110, 230.

126 See Martin Davies and Anthony Dickey, *Shipping Law* (Thompson Reuters, 3<sup>rd</sup> ed, 2004); *Akai Pty Ltd v The People’s Insurance Co Ltd* [1998] 1 Lloyd’s Rep 90; *Akai* (1996) 188 CLR 418.

127 See *Akai Pty Ltd v The People’s Insurance Co Ltd* [1998] 1 Lloyd’s Rep 90.

128 See *Akai* (1996) 188 CLR 418.

129 [1989] 1 Lloyd’s Rep 403. The decision was upheld on appeal: *The Amazonia* [1990] 1 Lloyd’s Rep 236, 244–5 (Staughton LJ), 247–8 (Mann LJ), 248–9 (Dillon LJ).

130 *The Amazonia* [1989] 1 Lloyd’s Rep 403, 406; Michael C Pryles, ‘Legal Issues Concerning International Arbitrations’ (1990) 64 *Australian Law Journal* 470, 472.

131 *The Amazonia* [1989] 1 Lloyd’s Rep 403, 407–8.

132 *Ibid* 408–9.

133 *Ibid*.

134 *Ibid*.

135 *The Krasnogrosk* (1993) 31 NSWLR 18.

136 See *ibid* 43 (Sheller JA).

137 See generally *ibid*.

participated in the arbitration, then sought to challenge the enforcement of the resultant award before the courts of New South Wales. The appellants contended that the arbitral award was invalid as it was made pursuant to an arbitration agreement rendered invalid pursuant to s 9 of the *1924 Act*. Handley and Sheller JJA upheld the validity of the award, holding that s 9 did not invalidate arbitral awards, even if made pursuant to an ineffective arbitration agreement.<sup>138</sup> Kirby P, in a dissenting judgment, stated that s 9 left little room to prevent the litigation of a dispute by a party unsatisfied with the decision of an arbitral tribunal.<sup>139</sup> Despite his finding, Kirby P empathised with the position taken by the rest of the court, noting that

it ... [was] understandable that a decision-maker, approaching the present case, would react with distaste to the arguments which the appellant advances. Having agreed to submit ... [the dispute to arbitration, the appellant] now seeks to reject the arbitrator's decision; to have the agreement to arbitrate (and the award which followed) declared void by statute; and to recontest the debt in the Federal Court of Australia.<sup>140</sup>

His Honour added: 'If I were deciding this case upon an inherent sense of justice, fairness or propriety, I would have no hesitation in upholding [the trial judge's decision by] dismissing the appeal'.<sup>141</sup>

This concern led to the insertion of s 11(3) into the *1991 Act* by the *1997 Amendment Act*. Section 11(3) provides that an arbitration agreement is not made ineffective by s 11 if under the agreement, 'the arbitration must be conducted in Australia'.<sup>142</sup> The amendment was designed to shield maritime arbitrations taking place in Australia from the operation of s 11.<sup>143</sup>

Despite this amendment, the status of arbitration in Australia is still in doubt. The physical location of an arbitral tribunal is considered distinct from its juridical 'seat'.<sup>144</sup> The seat determines which municipal courts have supervisory jurisdiction over the arbitration.<sup>145</sup> In most cases, the choice of seat is indicated by the country chosen as the place of the arbitration. Despite this, the parties are still able to

138 Ibid 28 (Handley JA), 42–3 (Sheller JA). The 'majority's decision in *The Krasnogorsk* arguably represents a judicial effort to fill in a gap left by the legislators in law': Mo, 'The Duty to Obey', above n 26, 299.

139 *The Krasnogorsk* (1993) 31 NSWLR 18, 25–6 (Kirby P); Mo, 'The Duty to Obey', above n 26, 300.

140 *The Krasnogorsk* (1993) 31 NSWLR 18, 25–6 (Kirby P).

141 Ibid. See, also, Allsop J in *Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102 (15 August 2005) [68]–[69].

142 *1991 Act* (Cth) s 11(3). Explanatory Memorandum, Carriage of Goods by Sea Amendment Bill 1997 (Cth) item 8 ('Arbitration'): 'Item 8 adds sub-s 11(3) which makes clear that an arbitration in Australia does not offend section 11 ... an agreement is of no effect which purports to preclude or limit the jurisdiction of a court of the Commonwealth' of Australia.

143 Fabrizio Marrella, 'Unity and Diversity in International Arbitration: The Case of Maritime Arbitration' (2005) 20 *American University International Law Review* 1055, 1074–5.

144 *Rizhao* (2012) 43 WAR 91, 128 [167] (Murphy JA), citing *Raguz v Sullivan* (2000) 50 NSWLR 236, 254–7 [90]–[103], 259 [122].

145 Sir Lawrence Collins (ed), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 14<sup>th</sup> ed, 2006) vol 1. 'The legal "seat" must not be confused with the geographically convenient place chosen to conduct particular hearings. The courts of the seat ... have the sole supervisory and primary supportive function in relation to the conduct of the arbitration': at 724–5 [16-035]–[16-036] (citations omitted).

agree on a seat that is different to the physical place of the arbitral tribunal.<sup>146</sup> Section 11(3) does not appear to distinguish between these two concepts. It is unclear whether an arbitration agreement that nominates Australia as the place of the arbitration but selects a different jurisdiction as its seat would be invalid.<sup>147</sup> This question goes unanswered and contributes to the uncertainty plaguing s 11.

## D Remedies, Recognition and Enforcement

Curial and arbitral disputes take place in pursuance by a party of one thing — remedies. Without a remedy, a cause of action is meaningless.<sup>148</sup> A remedy burdened by costs and lost time is little better. Sun Tzu's *Art of War* cautions against waging war unless thoroughly acquainted with its evils.<sup>149</sup> The resolution of international contract disputes requires a similar acquaintance.<sup>150</sup> In determining whether to bring an action, a claimant should consider whether any potential judgment or award will be recognised by the jurisdictions in which enforcement is sought — namely, where the judgment or award debtor's assets are located. In 2005, John Mo warned:

Although the foreign carrier is able to sue the Australian shipper in her or his own country, he or she is not able to enforce the judgment in Australia, because an Australian court will probably refuse to enforce this judgment on the ground of contravention to Australian law, in particular, s 11.<sup>151</sup>

Recognition and enforcement of foreign judgments is a question for the conflict of law rules as applicable in each jurisdiction.<sup>152</sup> In Australia, recognition and enforcement of foreign court judgments is governed by the *Foreign Judgments Act 1991* (Cth). This statute sets out a number of substantive requirements and procedural steps that must be followed, in addition to the grounds on which recognition and enforcement may be resisted. They include where a foreign court lacks jurisdiction and where enforcement would be contrary to public policy.<sup>153</sup>

146 See the discussion of *The Bay Hotel v Cavalier Construction Co Ltd* [2001] All ER (D) 229 (Jul) in Kanaga Dharmananda, 'The Unconscious Choice: Reflections on Determining the Lex Arbitri' (2002) 19 *Journal of International Arbitration* 151.

147 Davies and Dickey, above n 126, 281 (citations omitted): '[T]he rules of the London Maritime Arbitrators Association (LMAA) provide that arbitrations may be conducted without a hearing if the parties so agree, so it is quite possible to conduct a London arbitration "on the documents" entirely from Australia'.

148 Baughen, above n 23, 357.

149 *The Art of War by Sun Tzu* (translated by Lionel Giles) <<http://classics.mit.edu/Tzu/artwar.html>>.

150 Antonin Pribetic, 'The "Trial Warrior": Applying Sun Tzu's *The Art of War* to Trial Advocacy' (2008) 45 *Alberta Law Review* 1017, 1026, 1035; Lewins, *The Trade Practices Act (Cth) 1974 and Its Impact on Maritime Law in Australia*, above n 108, 6–7.

151 Mo, 'The Duty to Obey', above n 26, 300.

152 See, eg, *Foreign Judgments Act 1991* (Cth) s 7(2)(a)(xi); *Civil Jurisdiction and Judgments Act 1982* (UK) c 27, s 32.

153 *Foreign Judgments Act 1991* (Cth) ss 7(2)(a)(iv), (2)(a)(xi).

The broad adoption of the *New York Convention* means a more uniform approach is taken to the recognition and enforcement of arbitral awards.<sup>154</sup> The *New York Convention* is regarded as being ‘the high water mark of co-operation and uniformity between countries ... and also the high water mark of upholding party choice’.<sup>155</sup> The *International Arbitration Act 1974* (Cth) reflects the pro-enforcement bias of the *New York Convention*.<sup>156</sup> Its objects include ‘facilitat[ing] ... international trade and commerce by encouraging the use of [international] arbitration’.<sup>157</sup> Section 7 of the *International Arbitration Act 1974* (Cth) requires Australian courts recognise and enforce foreign arbitral awards as if they were a judgment of court.<sup>158</sup> Enforcement of an award may only be refused pursuant to the grounds as set out in s 8 of that Act.<sup>159</sup> They include where:

1. the subject matter of the dispute is not capable of settlement by arbitration under its laws; or
2. it would be contrary to its public policy.<sup>160</sup>

In addition, before a court exercises its power to refuse enforcement of a foreign arbitral award, s 39 states that the court must consider the objects of the Act, and the ‘fact’ that ‘(i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and (ii) [that arbitral] awards are intended to provide certainty and finality’.<sup>161</sup>

However, recourse to the public policy exception may be unnecessary. Section 2C of the *International Arbitration Act 1974* (Cth) provides that ‘nothing in this Act affects the continued operation’ of s 11 of the *1991 Act*.<sup>162</sup> In *Norden*, Foster J stated that the terms of s 2C provide a ‘carve out’ from the operation of the *International Arbitration Act 1974* (Cth) for maritime claims covered by s 11 of

154 Richard J Howarth, ‘*Lex Mercatoria*: Can General Principles of Law Govern International Commercial Contracts’ (2004) 10 *Canterbury Law Review* 36, 50; Michael Pryles, ‘Choice of Law Issues in International Arbitration’ (1997) 15 *Arbitrator* 260, 262: The Convention ‘has done more than any other development to promote and establish the ... effectiveness ... of arbitration’.

155 Lewins, ‘Maritime Law and the TPA’, above n 97, 116.

156 Garnett, ‘The Hague Choice of Court Convention’, above n 111, 171, citing *The Comandante* (2006) 157 FCR 45 (Allsop J).

157 *International Arbitration Act 1974* (Cth) s 2D(a).

158 Section 3(1) of the *International Arbitration Act 1974* (Cth) defines a ‘foreign award’ as ‘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’.

159 Pryles, ‘Legal Issues Concerning International Arbitrations’, above n 130, 487.

160 Section 8 of the *International Arbitration Act 1974* (Cth) reflects art V of the *New York Convention*. See Garnett, ‘The Hague Choice of Court Convention’, above n 111, 166. Broad public policy arguments have been used by Australian courts to defeat foreign choice forum. The arguments rely on mandatory statutes in an ‘expansive way’. Plaintiffs are able to ‘argue [they] would be denied justice’ if the choice of forum clause was enforced: at 166. See also Duncan Miller, ‘Public Policy in International Commercial Arbitrations in Australia’ (1993) 9 *Arbitration International* 167; Georgios I Zekos, *International Commercial and Maritime Arbitration* (Routledge-Cavendish, 2008) 45.

161 *International Arbitration Act 1974* (Cth) ss 39(2)(b)(i)–(ii). See also *Altain Khuder LLC v IMC Mining Inc* (2011) 276 ALR 733, 746 [38] (Croft J) (*Altain Khuder*).

162 See Davies, Bell and Bereton, above n 22, 134–5 [7.18].

the 1991 Act.<sup>163</sup> Where s 11 is invoked, s 2C operates to prevent enforcement of foreign arbitral awards.<sup>164</sup>

It is submitted that interaction between s 11 of the 1991 Act and the *International Arbitration Act 1974* (Cth) should be governed by the provisions of the *International Arbitration Act 1974* (Cth) (with the exception of s 2C).<sup>165</sup> Enforcement of a foreign arbitral award may still be refused as contrary to Australian public policy. However, as the power to resist enforcement of an award is subject to s 39 of the *International Arbitration Act 1974* (Cth), it would allow a court to balance the operation of s 11 with pro-enforcement bias of the *New York Convention*.<sup>166</sup> Further, given s 11 may not be recognised abroad, it is doubtful whether a foreign court will ‘enforce the judgment of an Australian court merely because s 11 declares Australian law to be the governing law’.<sup>167</sup>

Where it applies, s 11 may permit parties to participate without protest in a foreign arbitration and if unsatisfied with the outcome, recontest the dispute in Australia through reliance on s 11.<sup>168</sup> Questions relating to whether a party may be estopped from relying on s 11 remain unanswered.<sup>169</sup> In recent years two contrasting approaches to this issue have emerged.

In a 2011 decision, Croft J of the Supreme Court of Victoria adopted recent English authority to the effect that questions relating to the ‘existence or scope of the arbitrator’s jurisdiction’ are questions for the courts and law ‘of the place designated as the seat of the arbitration’.<sup>170</sup> The decision involved an application to enforce an award handed down by an arbitral tribunal seated in Mongolia. The award debtor sought to resist enforcement by arguing that as they were not a party to the arbitration agreement, the award would be rendered unenforceable through the operation of s 8 of the *International Arbitration Act 1974* (Cth). Croft J held that the debtor was not entitled to resist enforcement of the award in Australia as the arbitration agreement was valid under Mongolian law and having participated in the arbitration the award debtor was estopped from arguing that they were

163 (2012) 292 ALR 161, 190 [146] (Foster J). See also *Hi-Fert* (1998) 89 FCR 166, 184 (Emmett J): ‘Section 2C of that Act also provides that nothing in the Act affects the operation’ of s 11. Since the arbitration agreement was invalid, it was unnecessary to determine a public policy argument based on s 7(5).

164 *Norden* (2012) 292 ALR 161, 190 [146] (Foster J). As a result of s 2C ‘neither Award can be enforced in Australia under the Act’. See also *Hi-Fert* (1998) 89 FCR 166, 184 (Emmett J).

165 See generally *The Comandate* (2006) 157 FCR 45, 106–7 [237] (Allsop J).

166 *Altain Khuder* (2011) 276 ALR 733, 762 [64] (Croft J).

167 Mo, ‘The Duty to Obey’, above n 26, 300–1.

168 *Altain Khuder* (2011) 276 ALR 733, 766–7 [69] (Croft J): ‘[T]he utility of international arbitration would be diminished markedly as a result of the cost and delay [generated by] repetition of the arbitration proceedings again before an enforcing court’. It would ‘be intolerable if the law ... [required] an award creditor ... relitigate matters which were the subject of the arbitration; possibly many times and in a multiplicity of courts, and with the possibility of inconsistent findings’.

169 *Hi-Fert* (1998) 89 FCR 166, 195 (Emmett J): It was not necessary ‘to consider the question of whether s 11 applies to an ad hoc submission to arbitration. That appears to me to be a matter that is not without difficulty and since it is not necessary for me to resolve it, I do not propose to attempt to do so’.

170 *Altain Khuder* (2011) 276 ALR 733, 764 [67], quoting *C v D* [2008] 1 All ER (Comm) 1001, 1009 [17], quoting *A v B [No 2]* [2007] 1 All ER (Comm) 591, 617–18 [111]. See also Karen Maxwell, ‘British Arbitration Law’ [2012] *International Maritime & Commercial Law Yearbook 2012* 18; *Shashoua v Sharma* [2009] 2 All ER (Comm) 477, 483–5 [23]–[29] (Cooke J).

not party to the arbitration agreement as a basis for resisting enforcement of the award in Australia.<sup>171</sup>

The decision of Croft J was overturned on appeal.<sup>172</sup> The Court of Appeal does not appear to have explicitly rejected the application of the law of the seat to the validity of the award. However, the application of s 8 of the *International Arbitration Act 1974* (Cth) meant that the arbitration agreement did not extend to the award debtor and thus the award could not be enforced.<sup>173</sup> Despite this, Warren CJ found that nothing in the *International Arbitration Act 1974* (Cth) suggested it intended to exclude the application estoppel.<sup>174</sup> Gregory Nell notes some commentators have criticised the judgment as hostile to arbitration.<sup>175</sup> However, he also observes that ultimately the findings of the Court of Appeal turned on the facts of case and that in this regard, the ‘judgment and findings of the majority are of limited utility for future purposes’.<sup>176</sup>

Foster J considered the question of estoppel in *Coeclerici Asia (PTE) Ltd v Gujarat NRE Coke Limited*.<sup>177</sup> In that case the award debtor had previously applied to the English High Court to have the award set aside on the basis reasonable opportunity to be heard and that there had been a serious irregularity.<sup>178</sup> The award debtor then sought to resist enforcement of the award in Australia arguing they were not provided with a reasonable opportunity to present their case before the arbitral tribunal and that there was a breach of the rules of natural justice. Foster J found the question of natural justice had been determined by the English High Court and could not be re-litigated.<sup>179</sup> Even if issue estoppel could not be established it would, generally speaking, be inappropriate for enforcement court of a *New York Convention* country to form a different conclusion on the same issue is that reached by a court of the seat of arbitration. The decision was appealed unsuccessfully to the Full Court of the Federal Court.<sup>180</sup> In a unanimous judgment the appellate court upheld the decision of the trial judge.<sup>181</sup>

## E The Potential for Parallel Proceedings

According to the doctrine of *forum non conveniens*, the existence of parallel proceedings appears to be one of the few circumstances justifying a stay of

171 *Altain Khuder* (2011) 276 ALR 733, 782–3 [98].

172 See *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303.

173 *Ibid* 315 [42] (Warren CJ).

174 See Gregory Nell, ‘Recent Developments in the Enforcement of Foreign Arbitral Awards in Australia’ (2012) 26 *Australian and New Zealand Maritime Law Journal* 24, 56–7:

In this regard, her Honour recognised that an award debtor’s conduct in respect of the arbitration proceeding and any relevant proceedings brought before the courts having supervisory jurisdiction over the arbitration may give rise to an issue estoppel, estoppel by convention or some other established category of estoppel.

175 *Ibid* 67.

176 *Ibid* 49.

177 [2013] FCA 882 (30 August 2013).

178 See *Gujarat NRE Coke Limited v Coeclerici Asia (PTE) Ltd* [2013] All ER (D) 137 (Jul).

179 *Coeclerici Asia (PTE) Ltd v Gujarat NRE Coke Limited* [2013] FCA 882 (30 August 2013) [102].

180 See *Gujarat NRE Coke Limited v Coeclerici Asia (PTE) Ltd* (2013) 304 ALR 468.

181 *Ibid* 486–7 [65]–[67] (Allsop CJ, Besanko and Middleton JJ).



Australian proceedings.<sup>182</sup> The High Court of Australia has recognised that where proceedings have already been commenced in another jurisdiction, it would be prima facie vexatious and oppressive to have the same controversy litigated in Australia.<sup>183</sup> In such a situation, an Australian court may exercise its discretion to stay the proceedings before it in favour of the other forum in which similar proceedings are also pending.<sup>184</sup> Section 11 of the *1991 Act* appears to remove this discretion. Where it applies, Australian courts are required to give effect to the overriding mandatory rules of the forum. By rendering foreign choice of forum clauses ineffective, s 11 prevents Australian courts from recognising the jurisdiction of foreign courts and tribunals. There is clearly a significant risk of a jurisdictional stalemate arising where s 11 is not recognised by foreign courts and arbitral tribunals.<sup>185</sup> The consequence of this is that the resolution of a dispute becomes impractical, leaving a cargo claimant without redress.

Such a stalemate occurred in the *Magic Sportswear*<sup>186</sup> saga. Relying on s 46 of the *Canadian Marine Liability Act*, SC 2001, c 6, cargo claimants instituted proceedings in Canada in defiance of an English exclusive jurisdiction clause.<sup>187</sup> In response, an English court issued an ‘anti-suit injunction’ purporting to prohibit continuance of the Canadian proceedings.<sup>188</sup> The injunction was upheld by the English Court of Appeal who, relying on *Akai Pty Ltd v The People’s*

182 Despite the seemingly insurmountable hurdle provided in *Voth* (1990) 171 CLR 538.

183 *Henry v Henry* (1996) 185 CLR 571, 592–3 (Dawson, Gaudron, McHugh and Gummow JJ); *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 390–1 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

184 *Voth* (1990) 171 CLR 538, 564 (Mason CJ, Deane, Dawson and Gaudron JJ).

185 See Mo, ‘The Duty to Obey’, above n 26. Foreign courts are unlikely to give effect to s 11. As a consequence, it is not the ‘most efficient means of avoiding conflict’: at 297–8.

186 The saga was an ‘infamous’ and ‘awkward trans-national squabble between England and Canada’ with parallel proceedings taking place on ‘both sides of the Atlantic’: Lewins, ‘Maritime Law and the TPA’, above n 97, 112.

187 *Magic Sportswear Co v OT Africa Line Ltd* [2003] FC 1513; *Magic Sportswear Co v Mathilde Maersk* [2004] FC 1165. Section 46, while still favouring ‘local jurisdiction and arbitration is significantly less restrictive and nationalistic than the corresponding legislation in Australia’: William Tetley, ‘Jurisdiction Clauses and *Forum Non Conveniens* in the Carriage of Goods by Sea’ in Martin Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force* (Kluwer Law International, 2005) 183, 192. ‘The doctrine of *forum non conveniens* is not inconsistent with section 46, and may also be applied to determine the most appropriate forum’: Deborah A Laurent, ‘Foreign Jurisdiction and Arbitration Clauses in the New Zealand Maritime Context’ (2007) 21 *Australian and New Zealand Maritime Law Journal* 121, 151, citing *OT Africa Line Ltd v Magic Sportswear Corp* [2006] FCA 284 (9 March 2006).

188 *OT Africa Line Ltd v Magic Sportswear Co* [2005] 1 Lloyd’s Rep 252, 258 [38]–[40] (Langley J). Anti-suit injunctions are frequently granted by English courts where proceedings are brought in breach of a jurisdiction or arbitration agreement. There is ‘no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them’: *Aggeliki Charis Compania Maritima SA v Pagnan SPA (The ‘Angelic Grace’)* [1995] 1 Lloyd’s Rep 87, 96 (Millet LJ). To ‘reflect the interests of comity and in recognition of the possibility that an injunction, although directed against a respondent personally, may be regarded as an (albeit indirect) interference in the foreign proceedings, an injunction must be necessary to protect the applicant’s legitimate interest in English proceedings’: *OT Africa Line Ltd v Magic Sportswear Corporation* [2005] 2 Lloyd’s Rep 170, 183–4 [63] (Rix LJ).

*Insurance Co Ltd*,<sup>189</sup> held there were no ‘strong reasons’ not to enforce the exclusive jurisdiction clause.<sup>190</sup> The Canadian proceedings continued in defiance of the injunction<sup>191</sup> leaving, as Langley J aptly described, a ‘clash of jurisdictions, with the appalling prospect of an apparent challenge from [the English] ... Court to Canadian legislation and the cost and disruption of the same claims proceeding in two jurisdictions with the added risk of different outcomes’.<sup>192</sup> Kate Lewins cites the *Magic Sportswear* saga as confirming and solidifying the approach by English courts in ‘almost universally’ upholding jurisdictional clauses favouring English courts.<sup>193</sup>

## IV THE CALL TO REVISE SECTION 11

### A A Questionable Safeguard

Section 11 of the *1991 Act* was introduced to avoid ‘the potential delays, increased costs and language difficulties which may be involved with the resolution of disputes under foreign laws’.<sup>194</sup> The default jurisdiction rule, without s 11, is that unless otherwise agreed, the claimant may bring an action in a court provided the court has jurisdiction. In enacting s 11, the Parliament, has displaced the default rule. Where it applies, a claimant may bring an action in an Australian court, where, due to a foreign choice of forum agreement or foreign arbitration clause, they would otherwise be prevented from doing so. While s 11 may be explained by ‘entirely understandable’ policies such as protecting Australian shippers, it is, as Justice James Allsop (as he then was) notes, a species of ‘jurisdictional sabotage’.<sup>195</sup>

Section 11(1) requires an Australian court to apply Australian law where the port of shipment is in Australia. However, the same cannot be said for sea carriage documents relating to the carriage of goods to Australia from abroad. Where goods are carried to Australia, choice of law is left untouched by s 11.<sup>196</sup> Australian

189 [1998] 1 Lloyd’s Rep 90 (Thomas J). See also Yvonne Baatz, ‘An English Jurisdiction Clause Does Battle with Canadian Legislation Similar to the *Hamburg Rules*: *OT Africa v Magic Sportswear*’ [2006] 2 *Lloyds Maritime & Commercial Law Quarterly* 143, 147. Cf *Akai* (1996) 188 CLR 418.

190 *OT Africa Line Ltd v Magic Sportswear Co* [2005] 2 Lloyd’s Rep 170, 177–85. Leave to appeal to the House of Lords was refused: see *OT Africa Line Ltd v Magic Sportswear Co* [2007] 1 Lloyd’s Rep 85, 87.

191 Baatz, above n 189, 145.

192 *OT Africa Line Ltd v Magic Sportswear Co* [2005] 1 Lloyd’s Rep 252, 258 [38] (Langley J).

193 Lewins, ‘Maritime Law and the TPA’, above n 97, 115. ‘The home truth for Australian litigants is that in all but very limited circumstances, the English courts will uphold contractual clauses as to jurisdiction, choice of law or arbitration above all else, even an Australian statute that nullifies such a clause which would apply if the matter was before Australian courts’: at 125.

194 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 October 1991, 1926 (Robert Brown), quoted in Mo, ‘The Duty to Obey’, above n 26, 293–4. Shippers argued ‘with some justification that Australia should not allow its marine cargo interests to be dictated by “maritime” nations’: Department of Transport and Communications, ‘Australian Marine Cargo Liability: A Discussion Paper’ (Discussion Paper, September 1987) [7.20] (*Australian Marine Cargo Liability*’).

195 Justice James Allsop, ‘International Maritime Arbitration: Legal and Policy Issues’ (Paper presented to Australian Maritime and Transport Arbitration Commission, Sydney, 4 December 2007).

196 Mortensen, Garnett and Keyes, above n 110, 463 [17.49].

courts must still turn to their conflict of law rules to determine the proper law of the contract.<sup>197</sup> As a result, litigating parties may not be protected from the costs, delays and language difficulties associated with resolving a dispute that is subject to a foreign liability regime. In 1999, the Federal Court considered the carriage of a Texan built motor yacht from the United States to Sydney. The Court applied a United States statute to resolve the dispute, as it was the law in force at the place of shipment.<sup>198</sup>

Further, the danger of a jurisdictional stalemate may make the resolution of a dispute so impractical as to outweigh any benefit that s 11 intends to afford to cargo claimants. It is beyond argument that only one court should determine a particular dispute. The ability of courts to resolve ‘otherwise irreconcilable conflicts between national legal systems’ is a key objective of international commercial litigation necessary to achieve ‘substantial justice between the parties’.<sup>199</sup> There may be nothing more injurious to the efficient and just resolution of international commercial disputes than the risk posed by parallel proceedings. The simultaneous litigation and arbitration of a single dispute in two different jurisdictions, at the same time, would be a costly nightmare.<sup>200</sup> The resolution of the substantive dispute may become impractical, with the parties to a dispute liable for their own legal costs.

Further, where the assets are located outside an Australian territory, enforcement of any judgment made in defiance of s 11 will depend on the decision of foreign courts. Many jurisdictions, such as Australia and England, confer discretion on courts to refuse to enforce foreign judgments that they consider to be contrary to their public policy.<sup>201</sup> It is arguable that to enforce an Australian judgment made in breach of an arbitration agreement would infringe ‘on the autonomy of the parties [that is] recognised by the *New York Convention*’.<sup>202</sup> As a result, a remedy under s 11 may be vulnerable to public policy considerations relating to arbitration and freedom of contract in other jurisdictions.<sup>203</sup> Where enforcement is sought in England, this refusal is almost guaranteed.<sup>204</sup>

While the outcome under the default rule may not be the claimant’s preferred outcome, it is difficult to prove (with any degree of certainty) that the outcome

197 Davies and Dickey, above n 126, 176; *Wilson* (1954) 94 CLR 577, 584–5.

198 *Chapman Marine Pty Ltd v Wilhelmsen Lines A/S* [1999] FCA 178 (5 March 1999) [25] (Emmett J).

199 Chief Justice James Spigelman, ‘Law and International Commerce: Between the Parochial and the Cosmopolitan’ (Speech delivered to the New South Wales Bar Association, Sydney, 22 June 2010) 29. This ‘universally accepted’ consideration ensures a wide scope for the application of the subjective values of a judge, as they relate to the suitability of their Court to determine a dispute: at 8 (citations omitted).

200 Catherine Kessedjian, ‘Dispute Resolution in a Complex International Society’ (2005) 29 *Melbourne University Law Review* 765. There are ‘growing difficulties in arbitration, such as simultaneous proceedings before an arbitral tribunal and state courts’: at 768.

201 See, eg, *Foreign Judgments Act* (Cth) s 7; *Foreign Judgments (Reciprocal Enforcement) Act 1933* (UK) c 13, s 4.

202 *The Comandante* (2006) 157 FCR 45, 106–7 [237] (Allsop J).

203 Garnett, ‘The Hague Choice of Court Convention’, above n 111. It is ‘important to note that whatever attitude Australian courts take to choice-of-court clauses under the Convention, Australian parties can reasonably expect courts of *other* contracting states to be generally willing to respect such clauses’: at 167 (emphasis in original).

204 Lewins, ‘Maritime Law and the TPA’, above n 97, 125.

will be better by pursuing a claim in Australia in reliance on s 11. This issue must be considered up-front, even though it represents the end of the judicial process. It would appear to favour the resolution of a cargo dispute in the place where the defendant's assets are located.

## **B Commercial Certainty and International Trade**

In a press release accompanying the launch of the Australian Maritime and Transport Arbitration Commission (AMTAC), the then Commonwealth Attorney-General stated:

there is no reason why more arbitrations should not take place in Australia ... parties will now have a cheaper and more efficient avenue for the resolution of such disputes. ... I am committed to encouraging parties to disputes of all kinds to engage in alternative methods of dispute resolution ... The Commission paves the way for Australia to play a leading role in maritime transport arbitration ...<sup>205</sup>

While this sentiment is to be congratulated, there are clear reasons why Australia is not a popular venue for maritime arbitration. This is despite very active participation of Australian lawyers in arbitration taking place overseas.<sup>206</sup> Those reasons include the parochial approach taken by Australian courts to international commercial arbitration.<sup>207</sup> In addition, the enactment of legislation requiring

205 Phillip Ruddock, 'Launch of the Australian Maritime and Transport Arbitration Commission' (News Release, 72/2007, 26 April 2007). See also Robert McClelland MP, 'Simply Resolving Disputes' (Speech delivered at the ACICA International Commercial Arbitration Conference, Sydney, 21 November 2008): 'Australia is well placed to meet the growing demand for first-rate, cost-effective arbitration services in the Asia-Pacific ... Australian arbitration practitioners are among the world's best'.

206 Luke Nottage, 'International Commercial Arbitration Developments in Model Law Jurisdictions: Japan Seen from Australia' (2012) 29 *Japan Commercial Arbitration Association Newsletter* 3; Spigelman, 'Law and International Commerce', above n 199, 6–7; Mo, 'The Duty to Obey', above n 26, 295; Luke Nottage, 'Symposium Paper: Afterthoughts: International Commercial Contracts and Arbitration' (2010) 17 *Australian International Law Journal* 197, 203.

207 Chief Justice James Spigelman, 'Global Engagement by Australian Lawyers' (2011) 49(2) *Law Society Journal* 45, 49; Albert Monichino, Luke Nottage and Diana Hu, 'International Arbitration in Australia: Selected Case Notes and Trends' (Sydney Law School Research Paper, August 2012); Peter Megens and Beth Cubitt, 'The Continuing Role of the State Supreme Courts in Domestic and International Arbitration in Australia' (2010) 21 *Australasian Dispute Resolution Journal* 124, 133; Moonchul Chang, *The Autonomy of International Commercial and Maritime Arbitration: International, Canadian and Far Eastern Perspectives* (1989) 92. Australia has had an 'unhappy record of unfortunate judicial decisions in the arbitration sphere': Albert Monichino, 'International Arbitration in Australia: The Need to Centralise Judicial Power' (2012) 86 *Australian Law Journal* 118, 121 (citations omitted).

mandatory application stands in the way of parties to international commercial arrangements favouring an Australia forum for disputes resolution.<sup>208</sup>

As Allsop J correctly states, an ‘ordered efficient dispute resolution mechanism’ is an ‘essential underpinning of commerce’.<sup>209</sup> In contrast, ‘[u]nreliable or otherwise unsatisfactory decision making, or the fear of such, distorts commerce and makes markets less efficient, raising the cost of commerce’.<sup>210</sup> The parochial tendency of courts to assert jurisdiction over a cross-border dispute ‘fails to pay sufficient respect to the importance of the efficient disposition of international commerce’.<sup>211</sup> This criticism, levelled at courts who illustrate a potential misunderstanding of maritime law as a uniform, international body of law by adopting ‘national or chauvinistic public policy’ into their interpretation, would seem applicable to similar parochial public policy reflected in s 11.<sup>212</sup> The parochial nature of the s 9 of the *1924 Act* was reflected in comments by Kirby P as including:

- Considerations of national pride;
- The assertion of national jurisdiction, which has been a repeated phenomenon especially of United States jurisprudence for more than a century;
- The determination of the legislature to protect the economic interests of local traders;
- A partial mistrust of overseas courts, tribunals and arbitrators and their laws; [and]

208 Spigelman, ‘Global Engagement by Australian Lawyers’, above n 207, 49. ‘Whatever their domestic value, however, they are not likely to be welcomed by parties to multi-national agreements as a lucky door prize which comes with the choice of an Australian forum. That is especially so if Courts are disposed to take an expansive view of the application of these statutes’: Chief Justice Patrick Keane, ‘The Prospects for International Arbitration in Australia: Meeting the Challenge of Regional Forum Competition or our House our Rules’ (Address to the Australian Maritime and Transport Arbitration Commission, 25 September 2012) 7. A repeal of s 11 ‘may be strongly objected by those who believe in unilateral protection (if not parochialism). To those people, the nominal existence of the so-called protection ... is more important its practical functions ... The matter has to be ultimately settled at a policy level by the legislators’: Mo, ‘The Duty to Obey’, above n 26, 303. See also Garnett, ‘The Hague Choice of Court Convention’, above n 111, 166.

209 *The Comandate* (2006) 157 FCR 45, 94–5 [192] (Allsop J). It is a ‘sensible commercial presumption’ that parties do not intend on having ‘possible disputes from their transaction being heard in two places’: at 87 [165].

210 *Ibid* 94–5 [192] (Allsop J). The ‘simplest and most economic system for establishing the law applicable to a contract is to let the parties choose both the law and the court they wish to hear the dispute’: Lewins, ‘Maritime Law and the TPA’, above n 97, 125.

211 Allsop, above n 195: this failure is ‘especially important in well-understood and stable markets’ such as the chartering of ships.

212 *Ibid*. See also Lewins, *The Trade Practices Act (Cth) 1974 and Its Impact on Maritime Law in Australia*, above n 108, 6; William Tetley, ‘Reform of Carriage of Goods: The UNCITRAL Draft And Senate COGSA ‘99’ (2003) 28 *Tulane Maritime Law Journal* 1. Such unilateral measures ‘violate the normal rules of comity and of private international law’: at 29. Provisions on ‘arbitration and jurisdiction are exacerbated and are even more nationalistic’ as applied ‘inwards and outwards’: at 29. The notion of comity received a cold reception in the High Court of Australia in *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331. In that case, Gummow and Hayne JJ stated the concept was both ‘meaningless’ and ‘misleading’: at 363 [90].

- A reaction to the prevailing dominance of sea trade by certain foreign powers.<sup>213</sup>

Australia's approach to international commercial agreements is seen as anachronistic and interventionist.<sup>214</sup> For international commercial arbitration to succeed in Australia, it is vital for 'parochial nationalistic legal policy' to be avoided.<sup>215</sup> Our legal system should facilitate commercial certainty, not impair it.<sup>216</sup> In a recent submission, the Australian Centre for International Commercial Arbitration (ACICA) stated that it is

of critical importance that Australia is both seen to have, and does in fact have, a modern and consistently applied international arbitration law and system which at least meets world's best practice in the international arbitration community and embraces ... the most current international conventions.<sup>217</sup>

The *New York Convention* and *Model Law*<sup>218</sup> are designed to facilitate certainty for commercial parties to international agreements where they have 'by their own bargain, chosen arbitration as their agreed method of dispute resolution'.<sup>219</sup> The doctrine of party autonomy is a basal principle of law that has existed for centuries and is recognised by governments across the globe. The ability of parties to nominate both the law governing their contractual arrangements and the way in which disputes will be resolved provides commercial certainty necessary to

213 *The Krasnogorsk* (1993) 31 NSWLR 18, 22 (Kirby P).

214 Monichino, above n 207. Acknowledging that Australia is disadvantaged by its geographic location, Monichino goes on to state that it 'does not help that we have a fragmented legislative and judicial regulatory system governing domestic and international arbitration': at 132. It 'is instructive to look to Australian law' which Adrian Briggs regards as having 'developed a striking jurisprudence' invalidating agreements on jurisdiction where the 'provisions of Australian statutory law, made with the force of mandatory application, would be sidelined because the designated court would, for one reason or another, not apply them': Adrian Briggs, 'The Subtle Variety of Jurisdiction Agreements' [2012] 3 *Lloyd's Maritime & Commercial Law Quarterly* 364, 366 (citations omitted).

215 Chang, above n 207, 93. See also Mo, 'The Duty to Obey', above n 26, 295. Policies relating to the resolution of disputes arising out of international commerce may be characterised using a 'broad spectrum' ranging from 'parochialism at one end to cosmopolitanism at the other': Spigelman, 'Law and International Commerce', above n 199, 1.

216 The 'parties involved in the transportation of goods (and related maritime arrangements) would undoubtedly regard them as commercial arrangements first and foremost, rather than legal ones. But the legal framework is critically important. The wheels of international commerce work best when "greased" by a receptive legal framework': Lewins, *The Trade Practices Act (Cth) 1974 and Its Impact on Maritime Law in Australia*, above n 108, 2. Arbitration depends 'on the informed and sympathetic attitude of the courts to concepts such as the construction of arbitration agreements; arbitrability; public policy; and separability': Justice James Allsop, 'International Arbitration and the Courts: The Australian Approach' [2012] 17 *ADR Reporter* 18, 20. The approach of courts to these concepts can 'see arbitration flourish or suffocate': at 20, quoted in Monichino, above n 207, 124. The CMI representative 'was in favour of any system that ensured maximum unification of maritime law. The question as to which party the risk was allocated was less important than certainty in knowing where it lay': *Australian Marine Cargo Liability*, above n 194, [6.4].

217 Australian Centre for International Commercial Arbitration, Submission to the Attorney-General's Department, *Review of International Arbitration Act 1974*, 1.

218 *Model Law on International Commercial Arbitration*, UN GAOR, 40<sup>th</sup> sess, Supp No 17, UN Doc A/40/17 (21 June 1985).

219 Allsop, above n 195. It is the 'contractually bargained method or forum, often between parties who come from very different legal systems'. See also Mo, 'The Duty to Obey', above n 26, 295; Garnett, 'The Hague Choice of Court Convention', above n 111, 172.

international commerce.<sup>220</sup> This is particularly important in the case of nations ‘such as Australia so significantly involved in international trade and commerce’.<sup>221</sup>

English courts have built a strong reputation for upholding contractual choice regarding law and forum. Kate Lewins argues ‘certainty is the commodity in which the English Courts trade, and they are at pains to protect it’.<sup>222</sup> England has become the forum of choice for the commercial community, and its economy benefits from this.<sup>223</sup>

In a recent speech, Chief Justice Patrick Keane, then Chief Justice of the Federal Court of Australia, recognised the importance of international commercial arbitration in the region, stating that Australia’s

principal competitors, Hong Kong and Singapore, share our common law inheritance and the use of English. ... their embrace of international arbitration has been energetic and unequivocal. In Australia, however, our attitude may perhaps be described as two steps forward and one step back.<sup>224</sup>

As Moonchul Chang stated in his 1989 text, ‘freedom of arbitration is a matter of legal policy’ as opposed to ‘legal principle’ and therefore ‘depends on the political decisions of legislators’.<sup>225</sup> Policy makers need to ensure that our legal system facilitates the regional economic cooperation our governments seek within the Asia-Pacific.

220 Justice Steven Rares, ‘Australia’s Sea Change: Towards Developing a Comprehensive System of Admiralty and Maritime Dispute Resolution for Twenty-First Century Trade in the Asia-Pacific Region’ (2008) 30 *Australian Bar Review* 242, 243. It would be destructive of commercial confidence were a ‘nation’s courts to ignore the decisions of other judicial systems on aspects of international trade and commerce’: at 243. At a ‘practical level, the views of international traders, and their priorities and perspectives’ are crucial to the success of international arbitration in Australia: Keane, above n 208, 17. ‘One is reminded of the observation that it makes little sense for sheep to pass resolutions in favour of vegetarianism while the wolves remain of a different opinion.’

221 *The Comandate* (2006) 157 FCR 45, 96 [194] (Allsop J).

222 Lewins, ‘Maritime Law and the TPA’, above n 97, 125. The importance of ‘national courts recognising and enforcing international arbitration agreements’ cannot be understated, it is ‘critical that the courts respect and enforce arbitration agreements where they exist’ and that they avoid displaying ‘judicial prejudice or xenophobia against the parties’ chosen method or place of dispute resolution’: Rares, ‘Australia’s Sea Change’, above n 220, 243–4. Sam Luttrell notes that ‘Australia holds itself out as a free market, but there is a gap between economic policy and adjudicatory trend on the issue of what can and cannot be settled by arbitration’: Sam Luttrell, ‘Public Policy Conflicts in the Arbitrability of the *Trade Practices Act 1974* (Cth) — A Comment on *Clough Engineering*’ (2007) 4 *Macquarie Journal of Business Law* 139, 146. Australian courts ‘must follow’ the decision in *The Comandate* and prevent Australian companies from masquerading as ‘consumers’ and avoiding their ‘commitments to arbitrate’.

223 Lewins, ‘Maritime Law and the TPA’, above n 97, 125. ‘[C]ommercial litigation alone represents over £800 million of invisible export value to the UK each year’: at 125 (citations omitted). See also Justice David Steel, ‘Frank Stuart Dethridge Memorial Address 2002: The Modern Maritime Judge — Policeman or Salesman?’ (2003) 17 *Maritime Law Association of Australia and New Zealand Journal* 6, 7; Whincop and Keyes, above n 115, 29.

224 Keane, above n 208, 2 (citations omitted). Justice Steven Rares notes the opportunity for judicial cooperation within the region, suggesting that the ‘courts of the Asia Pacific region should seek to expand their familiarity with one another’s jurisprudence in international trade matters so as to develop such a regional law merchant’: Rares, ‘Australia’s Sea Change’, above n 220, 250.

225 Chang, above n 207, 92–3.

## C Interstate Carriage

One peculiarity of the protection under s 11 of the *1991 Act* is that it does not apply to vessels on an interstate voyage.<sup>226</sup> Foreign choice of law and forum clauses will still be valid in this instance. It would seem perverse that the law would allow parties to contracts of carriage relating to a voyage between Australian ports to go to London to resolve disputes where the contract of carriage contains a London arbitration clause (for example), whilst protecting Australian jurisdiction to hear claims relating to international voyages. This clearly needs revision.

## D The Rotterdam Rules

As the *Hamburg Rules* awaited adoption, UNCITRAL began drafting yet another cargo liability regime, known as the *Rotterdam Rules*. On first glance, it would appear that the *Rotterdam Rules* will provide global uniformity to the question of choice of forum under sea carriage documents (excluding charterparties). Under the *Rotterdam Rules*, a claimant is given a choice of jurisdictions in which they may pursue a claim against a carrier, notwithstanding an exclusive jurisdiction clause to the contrary. They include:

- (i) The domicile of the carrier;
- (ii) The place of receipt agreed in the contract of carriage;
- (iii) The place of delivery agreed in the contract of carriage; or
- (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship ...<sup>227</sup>

A claim may also be brought in a competent court designated by a jurisdiction agreement.<sup>228</sup> Where a claimant has agreed to arbitration, the election to arbitration will be upheld.<sup>229</sup> However the claimant is not required to arbitrate in the nominated forum and may instead proceed to arbitration in the same jurisdictions that they would be entitled to in the case of judicial proceedings.

However, there are two key impediments to this solution. First, the choice of forum provisions contained in the *Rotterdam Rules* are only binding on an opt-in basis by state parties.<sup>230</sup> This discretion reflects the controversial nature of those provisions during the negotiations.<sup>231</sup> Some maritime nations such as the United

226 The provisions of s 11 only apply to applicable documents relating to the carriage of goods from any place in Australia to any place outside Australia (ss 11(1)(a)–(b), (2)(a)–(b), (3)) and applicable documents relating to the carriage of goods from any place outside Australia to any place in Australia (ss 11(2)(c)(i)–(ii), (3)).

227 *Rotterdam Rules* art 66(a). This applies unless agreed to after a dispute arises (art 72(1)), or where an exception applies (art 67).

228 *Ibid* art 66(b).

229 *Ibid* art 75(1).

230 *Ibid* arts 74, 78.

231 Michael F Sturley, 'Jurisdiction and Arbitration under the *Rotterdam Rules*' (2009) 14 *Uniform Law Review* 945, 946, 950, 951–2.



Kingdom were fiercely opposed to changing the status quo, resulting in fears that the negotiations would fail to produce a convention unless a compromise could be reached.<sup>232</sup> Even if nations such as the United Kingdom adopted the *Rotterdam Rules*, it is unlikely that they would opt-in to the choice of forum provisions. Second, the *Rotterdam Rules* have failed receive widespread adoption and appear unlikely to do so. Four conventions later, the uniformity achieved by the *Hague Rules* has been fragmented.<sup>233</sup>

## E Options for Revision

Any legislative change should reflect Australia's legislative policy on international commercial arbitration. That policy should be clarified, and perhaps reformulated and restated, having regard to the views of stakeholders in industry. In terms of the form legislative revision may take, a number of options may be worth considering. They include: amending s 11 of the *1991 Act* to clarify its documentary scope; clarifying the reference to arbitration taking place in Australia in s 11(3); and, ensuring that interstate contracts of carriage are dealt with consistently with international contracts of carriage. However, it may be that it is preferable to do away with the s 11 protection altogether (and correspondingly, s 2C of the *International Arbitration Act 1984* (Cth)). In any event, the revision process should begin with a clarification of Australia's arbitration and shipping policies.

## V CONCLUSION

While concerning, it is submitted that the application of s 11 of the *1991 Act* to voyage charters is justified according to the accepted principles of statutory construction. If this is correct, it means that the mandated application of Australian law extends well beyond the cargo liability regime implemented by the *1991 Act*.

Section 11 as it stands is not the outcome of a legislative process. Its expansive scope represents the aftermath of a difficult task 'faced by the drafters of Australia's unilateral amendments to the *Hague/Visby Rules*'.<sup>234</sup> It has been over a decade since the Federal Court invalidated part of the 1998 regulatory amendments to s 11.<sup>235</sup> Since that decision, the Commonwealth Parliament has

232 Ibid 950–1.

233 There is also the question of who is the appropriate international body to draft new rules. See Tetley, 'Reform of Carriage of Goods', above n 212, 3–6. Paul Myburgh describes the processes leading to the *Hague Rules*, *Hague-Visby* and *Hamburg Rules* and the subsequent debates as suffering from a surplus of 'legal discourse, voodoo economics and generalised speculation, and an almost total lack of detailed empirical economic research': Myburgh, above n 1, 365.

234 Davies and Dickey, above n 126, 179.

235 *Hi-Fert* (1998) 89 FCR 166, 181 (Emmett J); *Norden* (2012) 292 ALR 161, 189 [139]. In *Norden* Foster J noted that the current form of words found in s 11 is a product of second regulatory amendment in 1998. In his view, the 'legislative changes indicate that, from 1997 onwards, the legislature was intending ... to broaden the class of documents covered' by s 11: *Norden* (2012) 292 ALR 161, 190 [140]–[141].

made no effort to clarify or amend s 11. First principles of statutory interpretation require Australian courts to give s 11 its ordinary and natural meaning.<sup>236</sup> In 2004, Davies and Dickey suggested that the 1998 regulatory modification of s 11 had ‘perhaps inadvertently’ restored the pre-1991 *Blooming Orchard* position, extending the scope of s 11 to include voyage charters.<sup>237</sup> In the author’s opinion, they were right.<sup>238</sup>

It is submitted that this is still a live issue despite the Full Federal Court decision in *Norden on Appeal*. The reading of s 11 by the Full Federal Court is arguably an example of courts having to ‘amend’ legislation to fix the mistakes made by Parliament. This should not detract from the ultimate responsibility of Parliament to ensure statutes are clear and provide certainty to those that it relates to. While the *Norden on Appeal* decision appears to resolve ambiguity relating to the scope of s 11 of the 1991 Act, at least so far as voyage charters are concerned, it is clear from both a textual analysis of s 11 and from a number of decisions that an alternative reading of s 11 (as done by Foster J) is available. Mansfield J, the decider in *Norden on Appeal* admitted as such.<sup>239</sup> That is, a majority of judges in *Norden on Appeal* agreed that an interpretation of s 11 that extended its scope to include voyage charters was available, although by a majority the Full Court ultimately rejected that position and found that s 11 did not apply.<sup>240</sup> The decision of the Full Federal Court will be binding on first instance judges in the Federal Court and Federal Circuit Court and will be highly persuasive on other state courts, especially at first instance and in the absence of any appellate authority within that Court to the contrary. With Buchanan, Mansfield, Foster and Carruthers JJ, joined by Martin Davies, finding that a voyage charter could be regarded as a sea carriage document it is difficult to deny that the legislation needs revision. Remedying the uncertainty plaguing s 11 can be best achieved through clearly formulated legislative policy and consequent legislative amendment. This responsibility should not be left to the judiciary.

236 Davies and Dickey, above n 126, 280; *The Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161–2 (Higgins J).

237 Davies and Dickey, above n 126, 177–8; *Norden* (2012) 292 ALR 161, 190 [142] (Foster J).

238 *Norden* (2012) 292 ALR 161, 189–90 [135]–[143]. Foster J noted his ‘conclusion [was] ... consistent with the jurisprudence contained in the cases which interpreted s 9 of the 1924 Act’: at 190 [143]. See also *The Blooming Orchard [No 2]* (1990) 22 NSWLR 273, 281 (Carruthers J); *BHP Trading Asia* (1996) 67 FCR 211, 235 (Hill J).

239 *Norden on Appeal* (2013) 216 FCR 469, 474–5 [15] (Mansfield J).

240 *Ibid* 471 [4], 474–5 [15] (Mansfield J), 485–90 [55]–[72] (Rares J).