

Case Note

Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited

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Introduction

In the recent decision of *Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited*,³ the Federal Court of Australia allowed enforcement of certain foreign arbitral awards rendered in favour of Armada (the applicant).

The case raises a number of important issues in regard to the recognition of foreign awards and the grounds upon which the Federal Court of Australia may refuse to enforce a foreign award under the *International Arbitration Act 1974* (Cth) (**IAA**). The grounds of particular relevance to this case were the composition of arbitral authority (section 8(5)(e) IAA) and consistency with public policy (section 8(7)(b) IAA). The judgment has also applied the recent decision of the Full Court of Appeal of the Federal Court of Australia in *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd*⁴ which considered the application of section 11 of the *Carriage of Goods by Sea Act 1991* (Cth) (**COGSA**) to the enforcement of certain foreign arbitral awards.

Outline of the facts

The dispute arose out of a contract between Armada and Gujarat whereby Gujarat agreed to ship and Armada agreed to provide tonnage for the transportation of six cargoes of coking coal/coke annually for each of the years 2008 to 2012 inclusive.

Armada was placed under judicial management by the High Court of the Republic of Singapore from 1 June 2009, where the Court assists with corporate and debt restructuring to allow the corporation to continue its business. When Armada was placed under judicial management, Gujarat ceased to nominate any laycans under the contract in respect of the years 2009-2012. Subsequently, Armada instituted arbitral proceedings in London pursuant to the dispute resolution clause (clause 5) of the contract in relation to the contracted shipments for the years 2009 and 2010.

At the time of the proceedings before Foster J, further arbitration hearings were in contemplation in London in relation to the contracted shipments for the years 2011 and 2012.

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3 [2014] FCA 636.

4 (2012) 292 ALR 161.

Issues

Armada sought leave to enforce three separate foreign awards made by the Arbitral Tribunal in London. This relief was sought under section 8(3) of the IAA.

The three awards of the Arbitral Tribunal in London provided the following:

- 1 The First Partial Award determined that the arbitrators comprising the tribunal had substantive jurisdiction to determine the disputes referred to them.
- 2 The Second Partial Award dealt with whether Gujarat breached the contract and if so, Gujarat's liability in damages to Armada. The tribunal awarded Armada damages and made a declaration that Gujarat would be liable for any future shipments that it failed to perform.
- 3 The Third Partial Award determined the damages to which Armada was entitled for the years 2009 and 2010.

Gujarat relied on five grounds for resisting enforcement of the three awards of the Arbitral Tribunal in London. In summary, these grounds were:⁵

- 1 The nominated arbitral tribunal was not composed of 'commercial men' within clause 5 of the contract which failed to satisfy section 9 of the IAA (Ground 1);
- 2 The composition of the arbitral tribunal did not accord with the agreement between the parties or the legislation of the country where the arbitration took place (Ground 2);
- 3 The Second Award contained a declaration regarding contractual damages which had not yet been suffered (Ground 3);
- 4 The enforcement of the Second Award would be contrary to public policy in Australia under section 8(7)(b) (Ground 4); and
- 5 The contract, being a sea carriage document pursuant to section 11 of the *Carriage of Goods by Sea Act 1991* (Cth) (COGSA), meant that the arbitrators did not have jurisdiction to render Gujarat liable for damages meaning the Arbitral Tribunal's awards were not enforceable in Australia (Ground 5).

Judgment

Grounds 1 and 2

In relation to Grounds 1 and 2, Foster J held that Gujarat failed to make out its challenge under section 8(5)(e) of the IAA and that the arbitrators challenged by Gujarat were in fact 'commercial men' within clause 5 of the contract. Foster J found the fact that two of the arbitrators were lawyers did not exclude them from being 'commercial men' and their experience as arbitrators of commercial disputes satisfied that requirement.⁶ In overcoming these jurisdictional issues, the First, Second and Third Awards were

5 [2014] FCA 636 [29].

6 *Ibid* [55].

foreign awards made under the contract and within the meaning of section 8(1) of the IAA. Foster J also confirmed that clause 5 of the contract was a valid arbitration agreement pursuant to section 9(1) of the IAA.

Foster J would have also dismissed Grounds 1 and 2 on an alternative basis of waiver and estoppel.

Grounds 3 and 4

Foster J held that it would be inappropriate to grant declaratory relief in respect of future shipments on the basis that part of the award had not yet become binding on the parties in accordance with section 8(5)(f) of the IAA. In doing so, his Honour held that while the basis upon which an arbitral tribunal grants declaratory relief might not be consistent with the principles applied by an Australian court in exercising its discretion to grant such relief that, of itself, was insufficient to justify the refusal to enforce an award on public policy grounds.⁷ In order to deal with any further awards relating to periods after the commencement of the proceedings, his Honour granted Armada liberty to apply to amend its Originating Application in order to seek to enforce those awards.

Ground 5

Gujarat sought to rely on Foster J's decision in *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd*⁸ in which his Honour had held that section 11 of the COGSA rendered arbitration clauses in charterparties void on the basis that they were sea carriage documents, with the consequence that any subsequent arbitral awards unenforceable in Australia.⁹

During the proceedings, the Full Court of Appeal of the Federal Court of Australia overturned Foster J's decision in *Dampskibsselskabet Nordern A/S v Beach Building & Civil Group Pty Ltd*¹⁰ and held that section 11 of the COGSA did apply to voyage charterparties. Foster J considered himself bound to follow the Full Court's decision and rejected Gujarat's submission on this ground.

Conclusion

The decision raises important points regarding the Federal Court of Australia's discretion to enforce foreign arbitral awards and the particular grounds on which a party may seek relief from the Court to refuse to enforce an award. The finding that the enforcement of declaratory relief in a foreign arbitral award is not contrary to the public policy of Australia per se also raises the prospect that in certain circumstances, such relief may be enforceable. Further, it is evident that foreign arbitration clauses in voyage charterparties are not rendered void by virtue of the operation of section 11 of the COGSA.

This case is consistent with the pro-enforcement bias that Australian courts have displayed with respect to international arbitral awards. Australia remains a suitable jurisdiction within which foreign arbitral awards can be enforced, including those that arise from arbitration clauses contained in voyage charterparties.

7 Ibid [65]-[66].

8 (2012) 292 ALR 161.

9 [2014] FCA 636 [32]-[37].

10 Ibid.

