Response of the Australian Maritime and Transport Arbitration Commission (*AMTAC*) to the

Review into the "*Carriage of Goods By Sea Act* 1991 – potential amendments to section 11"

Introduction

1. The following submissions are advanced on behalf of the Australian Maritime and Transport Arbitration Commission (***AMTAC***) in response to the issues raised by the 3 Concerns identified by the Department's Review into the "*Carriage of Goods by Sea Act 1991 – Potential Amendments to section 11*" (***the Review***). These submissions should be read both in light of the particular legislative provisions identified in paragraphs 3 and 4 below and in the context of the legislative history of those provisions set out in paragraphs 5 to 37.

Background

2. The *Carriage of Goods By Sea Act* 1991 (Cth) (**COGSA**) regulates certain contracts for the carriage of goods by sea into and out of Australia, as well as between the Australian States.

3. Within COGSA, s.11 contains mandatory provisions relating to both the governing law of such contracts, as well as the effectiveness of jurisdiction and arbitration clauses within such contracts. In particular, s.11(1) of COGSA provides that all parties to (inter alia) a "*sea carriage document*" relating to the carriage of goods from any place in Australia to any place outside of Australia are taken to have intended to contract according to the laws in force at the place of shipment within Australia. Section 11(2) provides that any clause which purports either to limit the effect of s.11(1) or to preclude or limit the jurisdiction of Australian courts to entertain a claim in respect of any contract for the carriage of goods by sea into or out of Australia[1] has no effect. It is these provisions that are subject to the first two Concerns identified by the Review, and which are addressed in paragraphs 38 to 79 and 80 to 95 of these submissions.

4. Further, the operation of s.11(2)(b) and (c) of COGSA is expressly subject to the limited exception provided for by s.11(3) of that Act, which provides that an agreement for the resolution of a dispute by arbitration is not rendered ineffective by s.11(2) if, under that agreement, the "*arbitration must be conducted in Australia*". It is the scope of the application of this provision that is subject to the third Concern identified by the Review and addressed in paragraphs 96 to 115 of these submissions.

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1 such as a foreign jurisdiction clause or foreign arbitration clause

(a) the legislative provisions

5. The legislative history of COGSA, and in particular s.11 of that Act, has been the subject of comment by the Full Court of the Federal Court of Australia in *Dampskibsselskabet Norden A/S v Gladstone Civil Pty Ltd* [2013] FCAFC 107; 216 FCR 469 (***Norden***) at [29] et seq. and more recently *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co. KG (the BBC Nile)* [2022] FCAFC 171 (***BBC Nile***) at [53] et seq. as well as in a number of published articles and commentaries.[2] The following summary is drawn from (*inter alia*) these sources.

6. In 1904, as result of the successful lobbying efforts of disgruntled Australian fruit exporters who complained that shipping companies took no responsibility whatever for the safe carriage of the products, the Commonwealth Parliament passed the *Sea Carriage of Goods Act* 1904 (Cth) (***the 1904 Act***). That Act was modelled on the US *Harter Act* and designed to protect Australia shippers by preventing carriers from contracting out of their liability for negligence. [3]

7. It was recognised at that time that the protection intended to be provided by the 1904 Act could be avoided by the simple device of the inclusion of an English (or other foreign) choice of law clause and / or forum clause in the contract of carriage. Accordingly, s.6 of the 1904 Act provided that 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 which purports to oust the jurisdiction of the Australian courts in respect of that bill of lading or document shall be "*illegal, null and void and no effect*".[4]

8. In 1924, the 1904 Act was repealed and replaced by the *Sea Carriage of Goods Act* 1924 (Cth) (the ***1924 Act***). That Act gave effect to what was to become the Hague Rules,[5] which provided a more balanced allocation of risk and liability between carriers and cargo interests. The protection previously afforded by s.6 of the 1904 Act to outbound shipments was retained and extended to inbound shipments, so far as the protection of the jurisdiction of Australian Courts was concerned, by s.9 of the 1924 Act.

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2 such as "*Australian Recognition and Enforcement of Foreign Charterparty Arbitration Clauses*" by N. Gaskell (2014) LCMLQ 174 (***Gaskell***); "*Forum Selection, choice of law and mandatory rules*" by M Davies (2011) LCMLQ 237 (***Davies***); "*Choice of Law and Forum Clauses in Shipping Documents – Revising section 11 of the Carriage of Goods by Sea Act* 1991 (Cth)" by S Allison 40 MUR 639 (***Allison***)

3 see Gaskell at 177-78; Davies at 238; Allison at p.640 et seq

4 see *Bulk Chartering & Consultants Australia P/L v T&T Metal Trading P/L* (1993) 31 NSWLR 18 (**the "Krasnogrosk"**) at 22 per Kirby P for a list of the protectionist reasons underpinning these provisions

5 *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules)* 25 August 1924

9. In 1990 Justice Carruthers of the Supreme Court of New South Wales held in *Sonmez Denizcilik ve Ticaret A/S v mv "Blooming Orchard" (no. 2)* (1990) 22 NSWLR 273 (**the "*Blooming Orchard*"**) that the words "*document relating to the carriage of goods*" in s.9 of the 1924 Act included a voyage charterparty. As a result, a foreign jurisdiction or arbitration clause[6] in a voyage charterparty relating to the carriage of goods into or out of Australia was rendered "*illegal, null and void, and of no effect*" by s.9 of the 1924 Act. This construction and application of s.9 was subsequently endorsed by Justice Hill of the Federal Court of Australia in *BHP Trading Asia Ltd v Oceaname Shipping Ltd* (1996) 67 FCR 211 (**the "*Arawa Bay*"**) at 235.

10. The 1924 Act was repealed in 1991 with the enactment of COGSA. The object of COGSA is set out in s.3(1) of that Act and was to be achieved (pursuant to s.3(2) of that Act)[7] first by replacing the 1924 Act and its application of the Hague Rules with provisions that gave effect to the Hague Rules as amended by the Visby Protocol and SDR Protocol (***the Hague Visby Rules***) and as a second later step by replacing those provisions with provisions giving effect to the Hamburg Rules.[8]

11. The protection that had been earlier found in s.6 of the 1904 Act and s.9 of the 1924 Act was repeated in s.11 of COGSA. In particular, s.11(1) deemed Australian law to apply to certain outbound shipments from Australia; s.11(2)(a) provided that any clause that purported to preclude or limit the operation of s.11(1) was of no effect; and s.11(2)(b) and (c) rendered of no effect any clause purporting to preclude or limit the jurisdiction of an Australian Court in respect of certain inbound and outbound shipments respectively.

12. Two observations may be made of the above provisions of s.11 of COGSA, as they were originally enacted in 1991.

13. First, notably, the contracts to which s.11 applied were expressed in significantly narrower terms than its predecessor sections. In particular, s.11 only applied to "*a bill of lading or similar document of title*" relating to the carriage of goods. Unlike ss.6 and 9 of the 1904 and 1924 Acts respectively, s.11 did not apply to "*documents relating to the carriage of goods by sea*". It therefore did not appear on its face to apply to voyage charterparties,[9] thereby in effect rendering the "*Blooming Orchard*" and "*Arawa Bay*" no longer applicable. It is assumed that the legislature must

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6 including then even a clause providing for arbitration in Australia (see *the Krasnogrosk* at p. 37E)

7 see *Norden* at [29] and [39]. The terms of s.3(2) are quoted in the first instance judgment in *Norden* (namely *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696 (***Norden 1***) at [126]

8 the United Nations Convention on the Carriage of Goods by Sea, being Annex I to the Final Act of the United Nations Conference on the Carriage of Goods by Sea done at Hamburg on 31 March 1978

9 which was neither *a bill of lading* nor *similar document of title* within the meaning of s.11 of COGSA

have been aware of those earlier decisions when COGSA was enacted and the adoption of this narrower language in s.11 was therefore likely to have been deliberate.

14. Secondly, and consistently with the corresponding provisions of the 1904 and 1924 Act, s.11(1) and (2) of COGSA did not apply to the inter-State carriage of goods by sea under a bill of lading or similar document of title. This was notwithstanding that pursuant to s.10(1)(b)(ii) of COGSA, the Hague Visby Rules that COGSA gave effect did apply to inter-State carriage.[10] This gap in the application of s.11(1) and (2) as a consequence of their non-application to inter-State carriage has been described as an "*apparent lacuna*" in the operation of that section.[11]

15. In 1994, after extensive consultation with the shipping industry, the Commonwealth decided to defer the implementation of the Hamburg Rules. Nevertheless, it was also thought appropriate that some features of the Hamburg Rules as well as some other changes be made to the then existing Hague Visby regime that was given effect to by COGSA. These included amendments both:

a) to reflect the broader group of documents that were being currently used in the maritime industry, in particular non-negotiable documents (such as seaway bills and consignment notes) and electronic bills of lading; and

b) to extend the coverage of COGSA to this wider range of documents.[12]

16. At the same time, the State and Territories were enacting the *Sea Carriage Documents Acts,* being cognate legislation to deal with the transfer of rights under a broader range of documents for the carriage of goods by sea than just bills of lading.[13]

17. In 1997 and 1998, COGSA was amended to give effect to the considerations referred to in paragraph 15 above. These amendments included:

a) modifications to the Hague Visby Rules which were inserted into COGSA as Schedule 1A[14] and which applied to contracts of carriage in the circumstances identified in s.10 of COGSA and Article 10 of the modified Rules;

b) the addition of sub-section (3) to s.11; and

c) a broadening of the description of the contracts of carriage or documents to which the

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10 this is in the same way that (a) the provisions of the 1904 Act other than s.6 applied to inter-State shipments (see s.4(1) of that Act) and (b) the 1924 Act applied the Hague Rules to inter-State shipments (see s.4 of the 1924 Act)

11 see "*An apparent lacuna*" by G Nell SC in Shipping Australia magazine (Winter 2021) at pp.32-37

12 see *Norden* at [15] per Mansfield J and [31]-[37] per Rares J

13 *Norden* at [15](7) per Mansfield J

14 and described as "*the modified Rules*" (and referred to in *BBC Nile* as the "*amended Hague Rules*")

provisions of the modified Rules and s.11 of COGSA were to apply henceforth.[15]

18. In relation to the latter, these amendments involved the replacement of the words "*a bill of lading or similar document of title*" in s.11(1)(a) and (2)(c) of COGSA as originally enacted[16] with the words "*a sea carriage document relating to the carriage of goods*".[17] However, this expression "*sea carriage document*" was not defined in COGSA itself.[18] Although a definition of that expression was included in Article 1(1)(g) of the modified Rules,[19] that was expressly predicated by the words "*In these Rules* …", being a reference to the modified Rules found in the Schedule 1A of COGSA (and which were also added as part of the 1997 amendments). Accordingly, the definition in Article 1(1)(g) was not expressly said to apply or to also apply to the use of the expression "*sea carriage document*" in the substantive provisions of COGSA itself.

19. Further, under that definition in Article 1(1)(g) of the modified Rules, a "*sea carriage document*" included "*(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*". This part of the definition of "*sea carriage document*" and what is meant by the general words contained within this paragraph (iv) was the subject of inconsistent application in *Norden* (in the respects identified later in this submission).

20. The 1997 and 1998 amendments to s.11 were not expressly said to have been made with the intention of either reversing the effect that the original terms of s.11 had on the application of the decisions in the "*Blooming Orchard*" or "*Arawa Bay*" or reinstating the effect of those earlier decisions on s.9 of the 1924 Act and thereby the pre-1991 position. However, prior to the judgment of the majority of the Full Court in *Norden* (discussed more fully below) it was suggested that this may have been the consequence of these amendments.[20]

21. The 1997 and 1998 amendments to s.11 also did not expressly address the "*apparent lacuna*" in the non-application of that section to inter-State shipments (referred to in paragraph 14 above), as a result of which foreign choice of law and foreign jurisdiction and arbitration clauses in contracts for the inter-State carriage of goods by sea were not struck down or rendered ineffective by s.11(1) or (2) of COGSA (in the same way as such clauses in contracts for the

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15 see *Norden* at [38] and [40]-[48] per Rares J. The 1998 amendments to COGSA were made to overcome unintended drafting errors in the original 1997 amendments (*Norden* at [44])

16 although paradoxically not in s.11(2)(a) and (b). Presumably this was due to an oversight on the part of the Commonwealth Parliament and the rectification of this omission is discussed later in these submissions

17 the amended terms of s.11 are quoted in *Norden* at [43].

18 as Mansfield J noted in *Norden* at [12](1) and [15](4)

19 see *Norden* at [46] where its terms are quoted

20 Shipping Law by Davies & Dickey (3rd ed 2004) p.178.

carriage of goods by sea from Australia overseas). Rather, such clauses in contracts for the inter-State carriage of goods by sea remained valid and capable of being enforced.[21]

(b) Norden

22. In *Norden*, proceedings were brought in the Federal Court of Australia to enforce an arbitral award in respect of a claim under a contract of affreightment (COA) in the nature of a voyage charterparty. The award had been made in an arbitration that had taken place in London pursuant to an arbitration clause in the COA. In resisting enforcement of the award, the respondent to those proceedings argued *inter alia* that the COA was a contract to which s.11(2) of COGSA applied, that the arbitration clause therefore had no effect under that sub-section, and that the award therefore could not be enforced.

23. This argument was accepted at first instance by Foster J [22] who held that a voyage charterparty was a "*sea carriage document*" for the purposes of s.11 of COGSA, both (a) as a matter of ordinary English and (b) because it was "*a non-negotiable document … that either contains or evidences a contract of carriage of goods by sea*" within the definition in Art. 1(1)(g)(iv) of the modified Rules. In so concluding, Foster J endorsed the approach of Carruthers J in the "*Blooming Orchard*". Whilst recognising that the terms in which s.11 of COGSA was originally enacted narrowed the class of documents covered by that section, Foster J nevertheless found that the legislative changes made in 1997 and 1998 were intended to broaden the class of documents covered by s.11(1) and (2) of COGSA, relevantly now to include a voyage charterparty.[23]

24. In reaching his above decision, Foster J rejected[24] an earlier decision of Anderson J of the Supreme Court of South Australia in *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* [2012] SASC 50; (2012) 112 SASR 297 (***Jebsens***) who found at [6]-[8] that a voyage charterparty was not a "*sea carriage document*" within and for the purposes of either s.11 or Article 1(1)(g). In particular, Anderson J found that a voyage charterparty was not a "*sea carriage document*" for those purposes just because it was a document containing a contract for the carriage of goods by sea. Instead his Honour held that a "*sea carriage document*" was a document of a different genus to a bill of lading and the other documents referred to in the definition of that expression in Article 1(1)(g) of the modified Rules and therefore did not fall within that

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21 see Shipping Law by Davies & Dickey (4th ed 2016) at p.221; see also *Degroma Trading Inc. v Viva Energy Australia Pty Ltd* [2019] FCA 649 in which a claim for damages in the Federal Court of Australia arising out of the inter-State carriage of goods was stayed in favour of foreign arbitration

22 *Norden A/S v Beach Building & Civil Group P/L* (2012) FCA 696; 292 ALR 161 (***Norden 1***)

23 especially having regard to his conclusion as to the meaning of the words used in the section since 1997; see *Norden 1* per Foster J at [136]-[142]; *Norden* at [12] per Mansfield J and [49]-[52] per Rares J

24 at [147]

definition.

25. In 2013, the judgment of Foster J in *Norden 1* was overturned on appeal by a majority of the Full Court of the Federal Court of Australia in *Norden* (Mansfield and Rares JJ).[25] In particular, the majority held that a voyage charterparty was not a "*sea carriage document relating to the carriage of goods*" within the meaning and for the purposes of s.11 of COGSA and a foreign jurisdiction or arbitration clause within such a charterparty for the carriage of goods into or out of Australia was therefore not struck down by s.11(2).

26. In so holding, the majority adopted a narrower construction of the expression "*sea carriage document*" as it was used in s.11 of COGSA than that found by Foster J, having regard to:

- the legislative history of COGSA;
- the intention behind the 1997 and 1998 amendments which introduced that expression into both s.11 and Schedule 1A of COGSA;
- the context in which that expression appeared in both COGSA and the modified Rules;
- the use of that expression in cognate State *Sea Carriage Documents Acts*;[26] and
- the distinction between on the one hand a voyage charterparty and on the other hand a bill of lading or similar contract of carriage to which the Hague Rules, Hague Visby Rules and since 1997 the modified Rules applied.[27]

27. However, the third judge on appeal in *Norden*, Buchanan J, dissented, concluding that Foster J was correct to find as he did. In particular, Buchanan J held that the effect of the 1997 and 1998 amendments was to remove the restriction on the operation of s.11 of COGSA imposed by the terms in which it was initially enacted and to thereby reinstate the effect of the "*Blooming Orchard*" and "*Arawa Bay*".[28]

(c) BBC Nile

28. In *BBC Nile*, the consignee of a cargo of steel rails (the ***Consignment***) that had been shipped from Whyalla, South Australia, to Mackay, Queensland on board the mv "*BBC Nile*" in December 2020 brought proceedings in the Federal Court of Australia (the ***Proceedings***) claiming damages from (inter alia) the owner of that ship for damage that the Consignment

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25 consistently with the conclusion of Anderson J in *Jebsens*
26 see paragraph 16 above
27 see *Norden* at [15]-[20] per Mansfield J and [55]-[73] per Rares J
28 see *Norden* at [120] – [125]

allegedly sustained during that carriage.[29] The Consignment had been shipped and carried under a contract of carriage contained in or evidenced by a Booking Note and Bill of Lading under which the ship owner was the carrier. The consignee's substantive claim for damages in the Proceeding was against the ship owner as the contractual carrier and for breach of that contract of carriage.

29. Prior to the commencement of the Proceedings, the ship owner had referred the consignee's claim to arbitration in London in accordance with clause 4 of the terms of the contract for the carriage. This clause provided for all disputes arising under or in connection with the Bill of Lading to be referred to arbitration in London, with English law to apply.[30]

30. At the same time as it commenced the Proceedings, the consignee also (i) filed an interlocutory application seeking a permanent anti-suit injunction restraining the ship owner from pursuing the London arbitration in order that the consignee's claim could be dealt with by the Federal Court in the Proceedings and (ii) obtained *ex parte* a temporary anti-suit injunction restraining the ship owner from taking any steps in the London arbitration pending the Federal Court's determination of the consignee's interlocutory application.[31]

31. The consignee advanced 3 grounds in support of its claims for an anti-suit injunction:

    a) first, the consignee contended that the agreement to arbitrate in London in clause 4 of the terms of the contract of carriage with the ship owner was rendered of no effect by s.11(2)(b) of COGSA which (according to the consignee) applied to inter-State shipments carried under bills of lading, as well as to outbound shipments;[32]

    b) secondly, the consignee contended that even if the words of s.11(2)(b) of COGSA were in themselves insufficient to apply that section to inter-State shipments, the Court should nevertheless read into either s.11(2)(b) or s.11(1)(a) of COGSA some additional words applying those provisions to inter-State shipments, purportedly consistent with what the consignee alleged was the intention of the Commonwealth Parliament when it enacted the 1904 Act, as disclosed by the second reading speeches;[33] and

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29 the consignee also sued a second defendant in the proceedings, who had participated in the loading of the Consignment onto the vessel, for breach of contract and negligence (see *BBC Nile* at [2]). But this other defendant took no active role in the recent hearing and continues to remain a defendant to these proceedings notwithstanding the orders made by the Full Court on the application of the ship owner

30 see *BBC Nile* at [6]

31 see *BBC Nile* at [3]

32 see *BBC Nile* at [49] and [50] cf paragraphs 14 and 21 above

33 see *BBC Nile* at [50]. The proposed additional words were noted by the Full Court in *BBC Nile* at [92] and [93]

c) thirdly, the consignee contended that the choice of law and London arbitration components of clause 4 of the bill of lading terms were contrary to mandatory law of Australia,[34] namely Article 3(8) of the modified Rules which s.10 of COGSA gave force of law to in Australia. This was because (according to the consignee) clause 4 had the real potential to lessen the liability of the ship owner as carrier to something less than the liability that was otherwise provided for by the modified Rules. Accordingly, the consignee contended that clause 4 should therefore be disregarded by the Court.[35]

32. The ship owner disputed that the consignee was entitled to an anti-suit injunction on any of the above 3 grounds. It also filed its own interlocutory application in the Proceeding, seeking a stay of the consignee's claim against it, pursuant to s.7 of the *International Arbitration Act* 1974 (Cth) (***IAA***) and in reliance upon the agreement to arbitrate in clause 4 of the bill of lading terms.[36] In support of that application, the ship owner contended that s.11(2)(b) of COGSA did not invalidate clause 4 or render the agreement in that clause to arbitrate disputes arising under the Bill of Lading in London of no effect because, consistent with its express terms, s.11(2)(b) did not apply to contracts for inter-State carriage.[37]

33. Pursuant to s.20(1A) of the *Federal Court of Australia* 1976 (Cth) both the consignee's and ship owner's respective interlocutory applications were referred by the Chief Justice of the Federal Court to be heard by a Full Court of the Federal Court exercising the original jurisdiction of that Court.[38]

34. In a judgment delivered on 12 October 2022, the Full Court rejected each of the three grounds advanced by the consignee in support of its interlocutory application and thereby concluded that the consignee's application for a permanent anti-suit injunction must be refused. Further, having found that the agreement to arbitrate in clause 4 was not caught by s.11(2)(b) of COGSA and therefore not rendered ineffective by that provision, the Full Court ordered that the consignee's claim against the ship owner be stayed in favour of arbitration in London, albeit on conditions that the ship owner had offered in support of its application for that stay.

35. Of the three grounds that the consignee advanced in support of its application for an anti-suit injunction (and referred to in paragraph 31 above), the first and second grounds are directly

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34 that is to say, Australian law that the Court was bound to apply even in the face of a foreign choice of law clause
35 applying *the "Hollandia"* [1983] 1 AC 565 - see *BBC Nile* at [17] and [18]
36 see *BBC Nile* at [2] and [107]-[109]
37 see paragraph 14 above
38 see *BBC Nile* at [4]

relevant to the second of the three Concerns identified by the Review.

36. In relation to the first ground, the Full Court noted that this was the first occasion on which the construction of s.11(2) of COGSA has been litigated.[39] Further, the Full Court found that upon its proper construction, s.11(2)(b) of COGSA did not apply to interstate shipments and therefore did not prevent a party to a bill of lading or other document encompassed by the expression "*sea carriage document*" relating to inter-State carriage of goods by sea from agreeing to a foreign jurisdiction clause or (as here) a foreign arbitration clause.[40] In so concluding, the Full Court rejected the consignee's submission that such shipments were caught by s.11(2)(b) as a consequence of its continued use of the phrase "*bill of lading*" following the 1997 and 1998 amendments to COGSA, which phrase the consignee argued was of general application and not confined to the documents referred to in s.11(1) of COGSA (namely bills of lading for outbound shipments). This was especially where the Full Court described the continuing reference to a "*bill of lading*" in s.11(2)(a) and (b) of COGSA even after the amendment of similar language in s.11(1)(a) as being the "*infelicitous leftover wording … created by the amendment of one subsection [namely s.11(1)] … without amending two paragraphs of another subsection [namely s.11(2)(a) and (b)] that refer to the first subsection*".[41]

37. In relation to the consignees' second ground, the Full Court found that it could not be concluded from any of the second reading speeches that the consignee had relied upon "*that there was a clear legislative intent, at least in 1904, to ensure that foreign choice of law and jurisdiction clauses were to be foreclosed with respect to inter-State carriage*".[42] Similarly, the Court also found that nothing in the materials leading to the enactment of COGSA or the subsequent amendments to s.11 of that Act "*discloses any legislative consideration that the parties to a sea carriage document, including a bill of lading, should be unable to contract out of the jurisdiction of Australian courts in respect of inter-State carriage of goods*".[43] In those circumstances, the Full Court concluded that however regrettable or absurd the apparent overlooking of inter-State contracts of carriage of goods by sea is in s.11 of COGSA, the will of the Commonwealth Parliament as expressed in the terms in which s.11 was enacted "*does not allow the Court to stretch that legislative expression far beyond the text of the Act*".[44] Accordingly, the Full Court was not prepared to read into either s. 11(1) or s.11(2)(b) the words proposed by the consignee. This was because those words "*would not be consequent upon a conclusion*

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39 see *BBC Nile* at [1]
40 see *BBC Nile* at [74] – [91]
41 see *BBC Nile* at [90]
42 see *BBC Nile* at [58]
43 see *BBC Nile* at [64] and [73]
44 see *BBC Nile* at [103]

that there had been a simple grammatical or drafting error which defeats the object of the provisions".[45] According to the Full Court, the additional words proposed by the consignee "*cannot be made to fill a gap that appears to have been disclosed in COGSA … because to do so would require an insertion which is 'too big, or too much of a variance with the language in fact used by the legislature'* ".[46] In short, "*[i]t was not for the Court to fill that gap*".[47] Rather it was a matter for the Commonwealth Parliament.

The first Concern: definition of a "*sea carriage document*"

38. There are three issues raised by the first Concern identified by the Review and which are addressed in these submissions. They are:

a) first, the absence of any definition in COGSA itself of the expression "*sea carriage document*" as that expression is used in COGSA;

b) secondly, the meaning that is to be given to the expression "*sea carriage document*" when it is used in the substantive provisions of COGSA itself; and

c) thirdly, the current inclusion within the existing provisions COGSA of references to a "*bill of lading*" despite and inconsistently with the adoption elsewhere in the Act of the expression a "*sea carriage document*", and whether those references to a "*bill of lading*" should be amended.

(a) the absence of a definition of "sea carriage document" in COGSA itself

39. To the extent that the expression "*sea carriage document*" is used in COGSA itself, this is only in s.11(1)(a) and 2(c) of that Act. As already noted, this expression is not defined in COGSA itself.[48] Although there is a definition of that expression in Article 1(1)(g) of the modified Rules in Schedule 1A of COGSA, that definition expressly only applies to the use of this expression in the modified Rules themselves,[49] and on its face, does not purport to apply expressly to the use of the expression "*sea carriage document*" in the substantive provisions of COGSA itself.

40. In *Norden 1* it was submitted that the expression "*sea carriage document*" as used in s. 11 of COGSA ought to be construed in accordance with the ordinary meaning of the words used in that expression, and so as to thereby include the COA on voyage charter party terms that was the subject of that case. That submission was accepted by Foster J.[50]

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45 see *BBC Nile* at [104]
46 (ibid)
47 see *BBC Nile* at [105]
48 see paragraph 18 above
49 (ibid)
50 although admittedly, Foster J also found in that case that the COA was within the definition of a "*sea carriage document*" in Article 1(1)(g) of COGSA, as it fell within the category of documents described in para (iv)

41. However, as has already been noted, that finding was reversed on appeal by a majority of Full Court of the Federal Court who concluded that the COA was not a "*sea carriage document*" for the purposes of s.11(2) of COGSA.[51] Moreover, in so concluding, the majority held that the meaning of the expression "*sea carriage document*" as it was used in the substantive provisions of COGSA itself must be ascertained from that Act read as a whole, including thereby the modified Rules in Schedule 1A.[52] Accordingly, the majority held that in construing the expression "*sea carriage document*" as used in s.11(2) of COGSA, regard could be had to the definition of that expression in Article 1(1)(g) of the modified Rules,[53] as well as to the State *Sea Carriage Documents Acts* (which also used the same expression) as cognate legislation.[54] This was with a view to construing the expression when used in the substantive provisions of the Act in the same way as that expression was to be construed in its use in the modified Rules.

42. Accordingly, the absence of any express definition of the expression "*sea carriage document*" in COGSA itself and for the purposes of the use of that expression in the substantive provisions of COGSA,[55] and any potential difficulty that might be thought to arise from the absence of that definition, has at least in part been remedied by the judgment of the majority of the Full Court in *Norden*, and more particularly the majority's endorsement of the approach referred to in paragraph 41 above and recourse thereby being had to the definition of the expression "*sea carriage document*" in Article 1(1)(g) of the modified Rules.

43. Moreover, as that majority judgment is binding on all Federal Court judges at first instance,[56] as well as on the Federal Circuit and Family Court of Australia, and should also be followed by first instance and intermediate appellate State and Territory Courts unless *plainly wrong*,[57] then the approach of the majority is likely to be followed and applied in the future.

44. Nevertheless, it is AMTAC's submission that the position would be much clearer and there would be less uncertainty (or at least less scope for uncertainty in the future) if COGSA itself contained a definition of the expression "*sea carriage document*", for the purposes of the application of that expression in the substantive provisions of COGSA itself, such as in s.11(2).

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51 see paragraph 25 above

52 see *Norden* at [57]

53 as well as to the other provisions of the modified Rules - see *Norden* at [15](4) per Mansfield J and [57] per Rares J. Whilst both Foster J in *Norden 1* at [142] and Buchanan J in *Norden* at [116]-[118] also referred to and relied upon the definition of "*sea carriage document*" in Art 1(1)(g) of the modified Rules to ascertain the meaning of that expression, in doing so, they came to the opposite conclusion to the majority in *Norden*

54 see paragraphs 16 and 26 above

55 as opposed to its use in the modified Rules in Schedule 1A

56 *Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited* [2014] FCA 636 at [32]-[37]

57 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 at [135]

45. This could be readily and easily done, either:

a) by including an express definition of that expression in s.4 of COGSA either:

i) in the same terms as the definition in Article 1(1)(g) of the modified Rules; or

ii) in some other terms, if it was thought that the expression should have a different meaning when used in the substantive provisions of COGSA itself (such as s.11), to its meaning when used in the modified Rules;[58] or

b) by including a definition of the expression "*sea carriage document*" in s.4 of COGSA which picks up and applies in a shorthand way the existing definition of that expression in Article 1(1)(g) of the modified Rules.[59]

46. Of course, the latter option would only be appropriate if it was ultimately concluded that the expression "*sea carriage document*" should have the same meaning when it is used in the substantive provisions of COGSA (and in particular in s.11 of that Act) as it has when used in the modified Rules (and as the majority of the Full Court found in *Norden*).

(b) the definition of a "sea carriage document"

47. If (as suggested above) a definition of the expression "*sea carriage document*" is to be included in COGSA itself, then AMTAC submits that (subject to the comments that follow) this definition should at the very least be in the same terms as that found in Article 1(1)(g) of the modified Rules. This is especially where that would also be consistent with the decision and reasoning of the majority of the Full Court in *Norden*.

48. But the foregoing submission is subject to the following observations and possible caveats.

49. First, there are undoubtedly good reasons why a COA and/or voyage charter party are not considered to be a "*sea carriage document*" for the purposes of the application of the modified Rules. This is especially having regard to Article 10(6) of those Rules, which expressly provides that those Rules do not apply to the carriage of goods by Sea under a charterparty "*unless a sea carriage document is issued for the carriage*", in which case the modified Rules would apply to that "*sea carriage document*" consistent with the application of the modified Rules generally.

50. Nevertheless, it might be thought appropriate either as a matter of policy or by those Australian shippers and consignees who are charterers under COAs and/or voyage charterparties that the

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58 the possibility of some different definition is discussed later in these submissions

59 for example, in the same way that the expressions "*gross tonnage*" and "*incident*" are defined in s.3 of the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act* 2008 (Cth).

prohibition of foreign choice of law clauses and foreign jurisdiction or arbitration clauses contained within s.11(1) and (2) of COGSA ought also be extended to such clauses when found in such COAs and/or voyage charterparties, and thereby to claims made under those COAs and/or voyage charterparties, consistent with the operation of s.9 of the 1924 Act and its application to charterparties by the judgments in the "*Blooming Orchard*" and "*Arawa Bay*".[60]

51. Indeed, Australian shippers and consignees for whose benefit and protection s.11(1) and (2) were included in COGSA in the first place might well argue that the policy considerations that support both:

a) the deeming of the application of Australian law to outbound shipments made under a "*sea carriage document*" (as well as to inter-State shipments under sea carriage documents, if AMTAC's submissions below in relation to Concern 2 of the Review are accepted); and

b) the preservation of the jurisdiction of Australian Courts in relation to both inbound and outbound shipments under a "*sea carriage document*" (as well as in relation to inter-State shipments under sea carriage documents, if AMTAC's submissions below in relation to Concern 2 are accepted)

apply equally to inbound, outbound and inter-State shipments undertaken pursuant to a COA and/or voyage charterparty. It may also be argued that there is little difference between an Australian shipper or consignee of a shipment into or out of Australia under a "*sea carriage document*" (to which s.11(1) and/or (2) of COGSA applies) and an Australian shipper or consignee of a shipment into or out of Australia under a COA and/or voyage charterparty (to which s.11(1) and (2) does not apply, in particular following the judgment of the majority in *Norden*). Further, it may also be thought that the mere fact that a shipment out of Australia under a COA and/or voyage charter is not directly subjected by the provisions of COGSA to the modified Rules in Schedule 1A of COGSA[61] is of itself insufficient to displace the policy considerations that otherwise underlie both the inclusion within COGSA of s.11(1) and (2), and the application of those provisions. This is especially where it might be said that these policy considerations do not depend upon the application of the modified Rules and arise independently of the provisions of those Rules or their application.

52. Admittedly, the foregoing arguments are inconsistent with the conclusion of the majority of the Full Court in *Norden*, and in particular with the distinction that the majority drew in that

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60 see paragraph 9 above

61 by reason of Article 10(6) of the modified Rules and assuming that a sea carriage document was not also issued in addition to that COA and/or voyage charterparty

case between on the one hand the functions and characteristics of a bill of lading or "*sea carriage document*" (to which the modified Rules and its historical analogues such as the Hague and Hague Visby Rules apply) and on the other hand the functions and characteristics of a COA or voyage charterparty[62] which are not subject to any of those Rules. This distinction drawn by the majority also included on the one hand the imbalance that was said to exist in the bargaining power as between the carrier and cargo interests in relation to shipments under a bill of lading or "*sea carriage document*" and which was said to be the catalyst for the Hague Rules and its subsequent analogues (including the modified Rules) and on the other hand the absence of any such imbalance in relation to shipments effected under COAs and/or charterparties, which were said to be negotiated in a free market subject only to the laws of supply and demand and where the relative bargaining strengths of the parties depend on the current state of the market, and the shipowner and charterer are otherwise able to negotiate their own terms free from any statutory interference.[63] In this regard, Rares J concluded in *Norden*:[64]

> The purpose of s 11 of COGSA is to protect, as part of a regime of marine cargo liability within the object of s3, the interest 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 unusual mechanism of international arbitration in their chosen venue**. (emphasis added)

53. However, Australian shippers and consignees under COAs and/or voyage charterparties may disagree with the emphasised portion of the passage quoted above, or at least disagree that they ought not have the same protection as Australian shippers and consignees of inbound and outbound shipments effected under a "*sea carriage document*". Of course, the above conclusion of Rares J was also not shared by two other Federal Court judges in *Norden* (namely Foster and Buchanan JJ), and both Justice Carruthers and Justice Hill reached a contrary view in the "*Blooming Orchard*" and the "*Arawa Bay*" respectively.

54. Whether or not there is either a demand for the extension of the application of s. 11(1) and (2) of COGSA to shipments under a COA and/or voyage charter party (in the same way that s.9 of the 1924 Act applied to such shipments) or sufficient public policy considerations to support such an extension, is ultimately a matter for those stakeholders directly involved with such shipments and who are parties to such COAs and/or voyage charterparties. In particular, this is a matter for Australian shippers and consignees under such COAs and/or voyage charterparties who are most likely to be affected by the inclusion of a foreign choice of law

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62 see *Norden* per Rares J at [59] to [71]
63 see *Norden* at [60]
64 see *Norden* at [71]

and/or foreign jurisdiction or foreign arbitration clauses in such contracts and who under the current law would remain bound by those clauses (contrary to the position of Australian shippers and consignees of inbound and outbound cargoes carried under a "*sea carriage document*" who are not bound by any such clauses contained within that sea carriage document by reason of the application of s.11(1) and/or (2) of COGSA).

55. AMTAC is not itself such a relevant stakeholder in this regard and therefore expresses no concluded view on this issue In particular, it expresses no concluded view as to whether Australian shippers or consignees under COAs and/or voyage charterparties are no less deserving of the protection afforded by s.11(1) and (2) of COGSA than Australian shippers or consignees of shipments carried under sea carriage documents ? whether the position and reasoning that found favour with the majority of the Full Court in *Norden* should therefore continue to prevail ? or whether that position should be reversed and s.11(1) and (2) of COGSA should also now be applied to inbound, outbound and inter-State shipments under COAs and/or voyage charterparties, as well as to such shipments under "*sea carriage documents*" (in the same way that s.9 of the 1924 Act was applied prior to 1991).

56. But if there is a or sufficient demand for such an extended operation of s.11(1) and (2) of COGSA, and/or if it is concluded that the policy considerations underpinning the current application of s.11(1) and (2) also support an extension of the application of those provisions to inbound, outbound and inter-State shipments under a COA and/or voyage charter party, then it is AMTAC's submission that this should be stated clearly and expressly in the substantive provisions of COGSA. This could be done, for example, by including an express reference to a COA and/or voyage charter party either (a) in any definition of the expression "*sea carriage document*" that is to be added to COGSA itself for the purposes of the application of that expression in the substantive provisions of COGSA such as s.11(1) and (2), or (b) in and by way of an amendment to s.11 itself.

57. Secondly, strictly speaking, the finding of the majority in *Norden* was limited to a finding that a COA on voyage charterparty terms (and thereby arguably also a voyage charterparty on the same terms) is not caught by either the expression "*sea carriage document*" where used in s.11 of COGSA or the current terms of that section. But that finding does not itself determine either what if any other types of contracts of carriage by sea also do not fall within the expression "*sea carriage document*" as used in s.11 of COGSA and/or are thereby not subject to the prohibitions contained in s.11(2) of COGSA or what if any other types of such contracts do fall within that expression and are thereby subject to the prohibitions in s.11(1) and (2). This is

especially so of any contract for the carriage of goods by sea that may be capable of falling within the definition in Article 1(1)(g) of the modified Rules, and more particularly within the broad terms of paragraph (iv) of that definition, especially if the general words of that paragraph are construed in accordance with their ordinary and usual meaning.

58. Even accepting that the majority in *Norden* concluded that regard could be had to the definition of a "*sea carriage document*" in Article 1(1)(g) of the modified Rules[65] for the purposes of construing the use of that expression in s.11 of COGSA,[66] and that this definition lists a number of types of contracts or documents that expressly fall within that definition, this is still not a definition that clearly identifies or delineates all of the particular types of contracts of carriage of goods by sea or documents containing or evidencing such contracts[67] that are within that expression. This is especially given the catch-all in paragraph (iv) of the definition, which is expressed in very general terms,[68] and pursuant to which a document need only be non-negotiable and contain or evidence a contract of carriage to be caught by that paragraph and thereby fall within the expression a "*sea carriage document*". Although examples of the documents caught by this catch-all are listed in paragraph (iv),[69] that list is prefaced by the word *including*, suggesting that this part of the definition is not confined to just those documents listed but is to have a more expanded or enlarged meaning.[70] However, the majority in *Norden* did not hold that the general terms of paragraph (iv) must be read *ejusdem generis* this list. Accordingly, despite the majority judgment in *Norden* and its approval of recourse to the definition in Article 1(1)(g), there nevertheless remains scope for some potential uncertainty in its future application.

59. Nor does the majority judgment in *Norden* define or identify the limit of those contracts of carriage of goods by sea and/or the documents containing or evidencing such contracts to which s.11(1) and (2) of COGSA applies. In order to determine whether s.11 applies to any type of contract of carriage or document containing or evidencing such a contract other than a COA or voyage charterparty that is not listed specifically in the definition in Article 1(1)(g), or to ascertain what other types of documents beyond those specifically listed in Article 1(1)(g)

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65 as well as to the other provisions of the modified Rules

66 see *Norden* at [15(4)] per Mansfield J and [57] per Rares J. Whilst both Foster J in *Norden 1* at [142] and Buchanan J in *Norden* at [116]-[118] also referred to and relied upon the definition in Art 1(1)(g) to ascertain the meaning of the express *sea carriage document*, in doing so, they came to the opposite conclusion to the majority in *Norden*

67 beyond those expressly listed in the definition

68 namely "*a non-negotiable document … that either contains or evidences a contract of carriage of goods by sea*"

69 see paragraph 19 above

70 *Dilworth v The Commissioner of Stamps* [1899] AC 99 at 105-6

are caught by that section, it is still necessary to construe the terms of the legislation and in particular the expression "*sea carriage document*" and definition in Article 1(1)(g).

60. Accordingly, to the extent that it is thought desirable that any other particular types of contract of carriage and/or documents containing or evidencing such contracts that are not expressly already listed in the existing definition of the expression "*sea carriage document*" should either be included within the expression as it is applied in the substantive provisions of COGSA itself such as s.11, or should be excluded from that expression as it is used in provisions of COGSA such as s.11, then it is AMTAC's submission that that should also be expressly provided for in any definition of that expression that is to be added to COGSA itself.[71] This is especially to the extent that the inclusion or exclusion of any such contracts / documents may be inconsistent with the definition of the expression "*sea carriage document*" in Article 1(1)(g) of the modified Rules and the application of that expression in the modified Rules.

61. Once again, ultimately, it is a matter for the relevant stakeholders to identify whether there are any such contracts of carriage and/or documents containing or evidencing such contracts (beyond those already listed in the existing definition) which ought to be expressly identified. Once again, as AMTAC is not a relevant stakeholder, it expresses no concluded view on this issue. That is other than to submit that if any such contracts and/or documents (beyond those currently listed in the definition in Article 1(1)(g) of the modified Rules) are identified by relevant stakeholders as contracts and/or documents that should either be included in or excluded from the expression "*sea carriage document*" and/or the operation of s.11 of COGSA, then those contracts and/or documents should be referred to expressly either in any definition of the expression "*sea carriage document*" that is to be included in COGSA itself[72] or in s.11 itself.

62. Thirdly, whilst the majority of the Full Court in *Norden* acknowledged the State *Sea Carriage Documents Acts* as cognate legislation, and therefore legislation to which regard could also be had in construing the expression "*sea carriage document*" in s.11,[73] this was limited to supporting the distinction drawn in that case between a voyage charterparty and "*sea carriage document*" of the type to which the modified Rules applied.[74] Recourse to this State legislation may be less appropriate and/or effective in the context of whether other contracts for the carriage of goods by sea and/or the documents containing or evidencing such contracts not expressly listed in

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71 as AMTAC has suggested in paragraphs 45 and 46 above

72 as suggested in paragraphs 45 and 46 above

73 see *Norden* at [15](7) per Mansfield J {35]-[37] per Rares J; see also paragraph 26 above

74 and thereby in support of a construction of s.11 of COGSA that confined the operation of that section to the latter, to the exclusion of the former

Article 1(1)(g) are or should be included within the meaning of a "*sea carriage document*".

63. Further, to the extent that reference might be made in the future to the definition of "*sea carriage document*" in the State legislation as an aid in determining the meaning of the expression "*sea carriage document*", it should also be noted that the definition in that State legislation is not in the same terms as that found in Article 1(1)(g) of the modified Rules.[75] In particular, the definition in the State legislation does not include the same or any catch-all or broader category of documents found in paragraph (iv) of the definition in Article 1(1)(g) of the modified Rules.

64. Accordingly, despite the majority of the Full Court in *Norden* approving recourse to the State Acts and their use of the expression "*sea carriage document*" as an aid to the construction and interpretation of that expression as it is used in COGSA itself (including in s.11), on one view, this may be of only limited utility given the absence of a general catch all. This is especially in the context of a contract of carriage or document containing or evidencing such a contract that is not otherwise expressly listed in either definition. Therefore once again, AMTAC submits that it would be preferable for any definition of the expression "*sea carriage document*" to be added to COGSA itself to expressly identify any particular contracts of carriage and/or documents containing or evidencing such contracts that are to be included or excluded from that definition for the purposes of the application of that expression in the substantive provisions of COGSA itself, rather than Courts being asked to make that determination at some future time applying the principles and *Norden* and in the context of a specific dispute.

65. Fourthly, to the extent that paragraph (vi) of the definition of a "*sea carriage document*" in Article 1(1)(g) of the modified Rules contains very broad and general language, it is itself thereby potentially a source of future uncertainty.[76] If that is so and if a definition of the expression "*sea carriage document*" is to be added to COGSA itself, then a possible alternative to the suggestion in paragraph 47 above would be to include the definition from the cognate State legislation which does not have that catch-all and which is limited to a number of expressly identified types of documents.

66. On the one hand, that would admittedly be inconsistent with both the definition and use of the expression "*sea carriage document*" in the modified Rules. Although the benefits of a broadly expressed catch-all such as that found in paragraph (iv) may be more apt in that latter context, where that catch-all is used to subject a broader range of contracts and/or documents than

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75 see for example s.5 of the *Sea Carriage Documents Act* 1997 (NSW)

76 for the reasons noted in paragraph 58 above

those expressly listed but which are nevertheless of the same character as those listed, to the provisions of the modified Rules. On the other hand, it might be argued that the desire for greater certainty as to precisely which contracts and/or documents containing or evidencing such contracts are to be subjected to the s.11 of COGSA and in particular the prohibitions contained within sub-section (2) of that section by reference to that section's use of the expression "*sea carriage document*" supports in this context a definition of that expression that (a) does not contain any general catch-all, in particular one that is expressed in terms that is potentially productive of possible future uncertainty in the application of that definition and (b) identifies expressly and as best it can all those contracts and/or documents that are to be included in that definition, as well as any contracts and/or documents that it is thought appropriate to expressly exclude from that definition (and thereby also from the scope of s.11).

67. To this end, as an alternative to AMTAC's "*at the very least*" submission in paragraph 47 above, AMTAC would add that if a definition of the expression "*sea carriage document*" is to be included in COGSA itself and it is wished to avoid any potential uncertainty in the scope or limits of that definition, then this definition could at the very least be in the same terms as that found in the cognate State legislation – namely " '*sea carriage document' means a bill of lading, sea way bill or ship's delivery order*" as well as any other particular contract of carriage and/or document containing or evidencing such a contract that it is thought ought also be expressly identified.[77]

68. In short, the potential application or non-application of s.11 of COGSA to other types of contracts of carriage beyond the COAs and/or voyage charterparties that were the subject of the majority judgment in *Norden* and which might otherwise be possibly characterised as a "*sea carriage document*"[78] is ultimately a question of both construction and policy considerations. In the former regard, the use either within any definition of the expression "*sea carriage document*" to be included in COGSA or within s.11 itself of language and provisions which leave open their potential application (and thereby the potential application of s.11(1) and (2)) to types of documents not expressly referred to in either that definition or section and which may or may not be caught by any broad language or catch all included in such definition, creates potential uncertainty as to the scope and application of that definition and thereby scope of the operation of s.11.[79] Moreover, this is so despite the judgment of the majority of the Full Court in *Norden*.

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77 such as a COA and voyage charterparty if the extension referred to in paragraph 54 above were to be adopted

78 and/or to documents containing or evidencing such contracts

79 especially insofar as the operation of s.11 turns on the use of the expression "*sea carriage document*"

69. This is also especially in light of the purposive construction favoured by the majority in *Norden*, where the above question was not answered simply by applying the plain meaning of the words used in either the legislation itself or the expression "*sea carriage document*",[80] but in a broader context and having regard to factors such as those listed in paragraph 26 above. Whilst the majority judgment in *Norden* provides some guidance as to the approach that Courts should take in the future when construing these provisions, it is an approach which emphasises the context and legislative history of these provisions, including for the purposes of discerning the legislature's intention. As the outcome in *Norden* itself demonstrates, different minds may discern different intentions and come to different conclusions from the same circumstances.[81] Applying the approach of the majority to any future determination of whether some contract (other than a voyage charterparty or COA) that is not expressly listed in either any definition of the expression a "*sea carriage document*" or s.11 itself is caught by that section or whether like the voyage charterparty or COA in *Norden* that contract falls outside the purview of that definition or section, leaves open the scope for further debate and potentially inconsistent views and thereby potential further uncertainty as to the application of s.11.

70. It is desirable that those who are engaged in the shipping, import and export industries have confidence and certainty as to the scope and application of s.11(1) and (2) of COGSA. This is especially:

a) in relation to the types of contracts (and documents containing or evidencing those contracts) to which the provisions of s.11 are to apply, beyond the contracts (documents) expressly listed or mentioned in either s.11 or any definition of the expression "*sea carriage document*" to the extent that that expression is used in s.11;[82]

b) where the effect of s.11 is to render ineffective agreements as to choice of foreign law and foreign jurisdiction and arbitration clauses that the parties to those contracts have otherwise concluded and were otherwise free to conclude under Australian law (but for the provisions of s.11); and

c) where s.11 applies to all shipments in and out of Australia under contracts of the type caught by it, as well as potentially to inter-State shipments under such contract if

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80 as both Foster J (*Norden 1* at [135] and [142]) and Buchanan J (at [116]-[118], [121] and [124]) did

81 whereas the majority in *Norden* concluded that the legislature's intention in making the 1997 amendments was not to apply s.11(2) to voyage charterparties and thereby depart from the position when COGSA was first enacted, both Foster J and Buchanan J found to the contrary, concluding that the Commonwealth legislature had intended to reinstate the pre-1991 position

82 and consistent with legislature's apparent intention that s.11(2) should have a broader application than just the documents listed, as the inclusion of (iv) in the definition in Art 1(1)(g) would suggest

AMTAC's submissions on Concern 2 are accepted.

71. Whilst s.11 of COGSA is based on deliberately pro-protectionist public policy considerations, it nevertheless conflicts with the freedom of contract that the parties to a contract for the carriage of goods by sea otherwise have under Australian law;[83] the legislature's otherwise strong promotion and favouring of arbitration (including international arbitration overseas) as a means of resolving disputes in connection with international trade;[84] and the current pro-arbitration approach of the Australian Courts, giving effect to parties' agreements to arbitrate disputes between them, in particular in connection with international trade.[85]

72. Accepting that certainty as to the scope and application of s.11(1) and (2) of COGSA is desirable if not necessary for our shipping, import and export industries, then if there is to be such certainty, the categories of those contracts and/or documents containing or evidencing such contracts to which s.11 is to apply (consistent with the policy considerations supporting both its original enactment[86] as well as its continued retention) and which are intended to be caught by any use of the expression "*sea carriage document*" in s.11 should be defined with precision and not in general terms. Although the majority judgment in *Norden* has provided some certainty in this regard in relation to COAs and/or voyage charterparties, it says nothing of other types of contracts of carriage by sea and/or documents containing or evidencing such contracts that it might now be thought appropriate either to be caught by s.11 or to be excluded from the scope and operation of that section (apart from those otherwise listed in the definition of the expression "*sea carriage document*" in the modified Rules). Therefore, whilst the majority judgment in *Norden* is instructive of the approach that the Courts should or are likely to take in the future in applying s.11 of COGSA to such other contracts of carriage and/or documents containing or evidencing such contracts (and which are not otherwise expressly referred to in any definition of the expression "*sea carriage document*"), this is nevertheless an approach which is potentially productive of some uncertainty.

73. Accordingly, if there is to be certainty as to use of the expression "*sea carriage document*" in s.11(1) and (2) of COGSA and thereby to the scope and application of s.11(1) and (2), then it is AMTAC's submission that this is best achieved by (if possible) listing both (a) those categories

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83 *pacta servanda*

84 as reflected by the *International Arbitration Act* 1974 (Cth) s.2D and s.39(1) and (2) and the mandatory stay of any curial proceedings brought in contravention of an enforceable arbitration agreement found in s.7

85 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 (2013) 87 ALJR 410; "Judicial support of arbitration" (FCA) [2014] FedJSchol 5 by Allsop CJ at p.8

86 including in predecessor legislation such as the 1904 and 1924 Act

of contracts of carriage by sea and/or the documents containing or evidencing such contracts to which the expression "*sea carriage document*" and thereby s.11 is to apply as well as (b) those categories of contracts and/or documents that are to be excluded from this expression / the operation of s.11. Moreover, this should be done with some specificity in COGSA itself, and in particular in any definition of the expression "*sea carriage document*" that might be added to COGSA (and in particular s.4) as suggested in paragraphs 44 to 47 above.

(c) inconsistent references within s.11

74. As noted earlier, the expression "*sea carriage document*" was inserted into s.11(1)(a) and s.11(2)(c) by the 1997 and 1998 amendments to COGSA and in substitution for the original reference in those provisions to a "*bill of lading or similar document of title*". However, corresponding changes were not made to the similar language found in s.11(2)(a) and (b) of COGSA, either at that time or at any time since. This was despite that similar language being used in s.11(2)(a) and (b) to refer back to the documents mentioned in s.11(1). As a result, the references to a "*bill of lading*" in s.11(2)(a) and (b) when those provisions were originally enacted have been retained, despite the removal of that same language from s.11(1)(a) and (2)(c) and its substitution with the expression "*sea carriage document*".

75. It was the continuing presence of this reference to a "*bill of lading*" in s.11(2)(b) of COGSA despite the substitution of the expression "*sea carriage document*" for the original reference to a "*bill of lading or similar document of title*" in s.11(1)(a) in 1998 that the consignee in *BBC Nile* sought to rely upon in order to argue that the words "*bill of lading*" in s.11(2)(b) must be interpreted as being more than merely a reference back to the documents referred to in s.11(1).[87] In particular, the consignee contended in *BBC Nile* that this continued presence of the phrase "*bill of lading*" in s.11(2)(b) of COGSA embraced (a) a wider class of bills of lading than just those caught by s.11(1)(a), namely outbound bills of lading that fell within the expression "*sea carriage document*" and (b) thereby bills of lading for the carriage of goods inter-State (such as the shipment that was the subject of the consignee's claim in that proceeding).[88]

76. Admittedly, that submission was rejected by the Full Court.[89] This included because the Court found that there was no legislative intention to expand the operation of s.11(2)(a) or (b) in particular to inter-State shipments[90] by substituting the expression "*sea carriage document*" for

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87 see paragraph 36 above
88 see *BBC Nile* at [82]
89 for the reasons stated at paragraphs [83] to [90] in *BBC Nile*
90 and to which those sections had not applied in the terms in which they were originally enacted in 1991

"*bill of lading or similar document of title*" in s.11(1)(a) and leaving s.11(2)(a) and (b) unamended and continuing to refer to a "*bill of lading*".[91] Rather, the Full Court described the retention within s.11(2)(a) and (b) of the original reference to "*bill of lading*" as "*infelicitous leftover wording*".[92]

77. Accordingly, any attempt to apply s.11(2)(a) or (b) of COGSA to types of contracts of carriage of goods by sea and/or the documents containing or evidencing such contracts beyond those contracts / documents referred to in s.11(1), in particular in order to avoid the "*apparent lacuna*" referred to in paragraph 14 above, is unlikely to be advanced again in light of the judgment in *BBC Nile*. It is also even less likely to succeed, even if it were advanced again.

78. Nevertheless, given the use of the expression "*sea carriage document*" in s.11(1)(a)[93] and that s.11(2)(a) and (b) both refer back to s.11(1) and the types of documents referred to in s.11(1), it is AMTAC's submission that it would be both consistent with the legislative intention behind the enactment of s.11 and productive of greater certainty in the application of s.11(2) if the existing references to a "*bill of lading*" in both s.11(2)(a) and (b) of COGSA were deleted and replaced with the expression "*sea carriage document*" (consistent with the language that is now used in s.11(1)(a) and (2)(c)(i)(of COGSA).

79. Such an amendment would put beyond any doubt that the application of s.11(2)(a) and (b) is confined to the contracts of carriage and/or documents containing or evidencing those contracts referred to in s.11(1), as these provisions were in the terms in which they were originally enacted and as the Full Court concluded in *BBC Nile* they should be construed.[94]

The second Concern: the "apparent lacuna" in the application of s.11 to inter-State shipping

80. As noted earlier in these submissions, the operative provisions of COGSA and its application of the modified Rules apply not only to contracts for the carriage of goods by sea into and out of Australia, but also to contracts for the carriage of goods by sea from a port in Australia to a port in another State or Territory of Australia.[95]

81. But whilst s.11(1) of COGSA provides that the parties to contracts for the carriage of goods by sea from any place in Australia are taken to have intended to contract according to the laws in force at the place of shipment, this only applies where the goods are to be carried "*to any*

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91 see *BBC Nile* at [83] and [84]
92 see *BBC Nile* at [90] and paragraph 36 above
93 and also s.11(2)(c)(i)
94 see *BBC Nile* at [88] to [90]
95 s.10(1)(b)(ii) and s.10(2) of COGSA. The carriage of goods from a port within one State to a port in that same State is not governed by COGSA (see s.10(2) of COGSA) but by the *Carriage of Goods by Sea Acts* of the various States (for example the *Sea Carriage of Goods (State) Act* 1921 (NSW) s.4)

place outside Australia". Section 11(1) does not apply to contracts for the carriage of goods from a place in Australia to any another port in Australia.[96] Nor is there any other provision to this effect elsewhere in COGSA.

82. Moreover, whilst s.11(2)(a) of COGSA provides that any agreement which purports to preclude or limit the operation of s.11(1) in respect of a contract of carriage of the type referred to in that sub-section has no effect, s.11(2)(a) would not apply to strike down a foreign choice of law clause in a contract for the carriage of goods by sea inter-State. This is because any such contract does not fall within s.11(1). This is for the reasons stated immediately above.

83. Where a contract for an inter-State shipment is made in Australia, ordinarily it might be expected to be governed by Australian law, either as the inferred choice of the parties to the contract having regard to the circumstances in which it was made[97] or as the system of law with which the contract has the closest and most real connection.[98] But this is subject to the express agreement of the parties, who in the absence of provisions such as s.11(1) and s.11(2)(a) of COGSA, are free to choose the law governing their contract. In particular, they are free to agree that their contract should be governed by a system of law other than Australian law.[99] Moreover, in the absence of provisions such as s.11(1) and s.11(2)(a) of COGSA or public policy considerations,[100] Australian Courts will give effect to the parties' express choice of the law to be applied to the contract between them, even where that contract otherwise has no connection with the system of law selected. Where the provisions of COGSA do not expressly deem that the parties to a contract for the inter-State carriage of goods by sea are intended to have contracted in accordance with Australian law and do not preclude or prevent those parties from agreeing that their contract be subject to a law other than Australian law,[101] then that choice of law may not be set aside on public policy grounds or other considerations.

84. The ability of the parties to a contract for the carriage of goods inter-State to agree to their contract being governed by other than Australian law – which is a consequence of the non-application of s.11(1) and (2)(a) of COGSA to such contracts – is anomalous when compared to the position taken by COGSA and in particular s.11 in relation to contracts for the carriage

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96 cf s.10(1)(b)(ii) of COGSA

97 *Amin Rasheed Shipping Corp v Kuwait Insurance Co.* [1984] AC 50

98 *Bonython v the Commonwealth* [19512] AC 201 at 219

99 ALRC Report No. 58 1992 "*Choice of Law*" at [8.9]

100 including illegality (as to which see *Vita Food Products v Unus Shipping* [1939] AC 277) or the agreement being contrary to a mandatory law of Australia, such as Article 3 rule 8 of the modified Rules and struck down for that reason (as to which see the *Hollandia* 1983 1 AC 565 and *BBC Nile* at [17] and [18])

101 as is the case for inter-State shipments for the reasons stated above

of goods from Australia overseas. Moreover, the policy considerations underlying the enactment and effect of s.11(1) and (2)(a) of COGSA,[102] would at the very least equally apply to contracts for the carriage of goods by sea inter-State. Indeed, one would think that these policy considerations are more likely to apply in that latter situation where the whole of the carriage is to be performed within Australia. This is also especially where contracts for the inter-State carriage of goods can now be made with foreign shipping companies, who are more likely to include or insist on including in their standard terms or contracts of carriage clauses providing for the application of a foreign system of law to which they are more amenable (and the Australian shippers and consignees of these inter-State shipments are not).

85. Whilst it might be argued that an Australian Court would strike down a foreign choice of law clause in a contract for the carriage of goods inter-State by the application of Article 3 rule 8 of the modified Rules:[103]

a) there is no guarantee that any claim under a contract for the carriage of goods inter-State would be pursued in an Australian Court for the reasons discussed below; and

b) where the contract is expressed to be governed by a system of law other than Australian law, a foreign court or arbitral panel is unlikely to apply the provisions of COGSA (including s.10) or the modified Rules to that contract.[104]

In any event, the application of the presumed intention of the legislature currently reflected in s.11(1) to contracts for the carriage of goods inter-State could more readily be put beyond doubt by the modification of s.11(1) to extend its operation to inter-State carriage expressly (as AMTAC suggests should be now done).

86. Further, insofar as s.11(2)(b) and (c) of COGSA render ineffective foreign jurisdiction and arbitration clauses that purport to preclude or limit the jurisdiction of the Australian Courts, the application of these provisions is also confined to contracts for the carriage of goods by sea into and out of Australia. Section 11(2)(b) and (c) of COGSA and the prohibition against such clauses found in those provisions do not apply to contracts for the carriage of goods by sea inter-State. This is now clearly beyond doubt, following the judgment and conclusions of the Full Court of the Federal Court in *BBC Nile.*[105] Nor is there any other provision within

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102 as well as its predecessors s.6 of the 1904 Act and s.9(1) of the 1924 Act

103 to which the inter-State contract would be subject under s.10(1)(b)(ii) of COGSA (see paragraph 14 above) and as the consignee sought to argue in *BBC Nile* (being its third ground in support of an anti-suit injunction)

104 at least absent any admission or undertaking being given along the lines of that offered by the shipowner in *BBC Nile* (as to which see paragraphs [28] and [44] of that judgment)

105 see paragraph 35 above

COGSA that contains any such prohibition in respect of inter-State shipments.

87. Accordingly, the parties to a contract for the carriage of goods inter-State of the type otherwise described in s.11(2)(b) and (c) of COGSA are free to agree that any claims arising between them under or in relation to that contract are to be dealt with by either the Courts of a foreign jurisdiction or in a foreign arbitration.

88. In the absence of provisions such as s.11(2)(b) and (c) and public policy considerations, under Australian law, the parties to a contract are free to agree that disputes between them are to be determined in the courts of some foreign jurisdiction or by means of alternate dispute resolution such as arbitration, including arbitration abroad. Moreover, where the parties to a contract have concluded such an agreement, in the absence of any provision such as s.11(2)(b) and (c) or public policy considerations, Australian courts will give effect to that agreement. In particular, where the parties have agreed that any disputes between them are to be arbitrated, any curial proceedings brought contrary to that agreement in Australia must be stayed on the application of one of the parties.[106] Where the parties have agreed that any disputes between them are to be litigated in the exclusive jurisdiction of a foreign Court, an Australian Court will stay proceedings brought before it contrary to that agreement unless there is a strong cause or substantial grounds to allow those curial proceedings to continue.[107] Whilst in this latter situation the Australian Court retains a discretion to refuse a stay,[108] it nevertheless recognises that the starting point is the fact that the parties have agreed to litigate elsewhere, and absent strong countervailing circumstances, they should be held to their bargain.

89. Although the Full Court concluded in *BBC Nile* that it could not be concluded from any of the second reading speeches that the consignee had relied upon in that case that there was a clear legislative intent, at least in 1904, to ensure that foreign choice of law and jurisdiction clauses were to be rendered ineffective with respect to inter-State carriage,[109] nevertheless it is AMTAC's submission that the policy underlying the prohibition in s.11(2)(b) and (c) of COGSA in relation to inbound and outbound shipments is at the very least equally applicable to contracts for the carriage of goods inter-State, if not stronger. Once again, it is anomalous that Australian importers and exporters under contracts of carriage of the type referred to in s.11(2)(b) and (c) are guaranteed to be able to bring any claims they may wish to pursue against

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106 s.7 of the *International Arbitration Act* 1974 (Cth); s.8 *Commercial Arbitration Act* 2010 (NSW)

107 *Incitec Ltd v Alkimos Shipping Corp.* (2004) 138 FCR 496 at [42]-[43]

108 unlike the position where the parties have agreed on arbitration, where a stay under s.7 of the *International Arbitration Act* 1974 (Cth) and s.8 *Commercial Arbitration Act* 2010 (NSW) is mandatory

109 see paragraph 35 above and *BBC Nile* at [58]

the carrier in Australia, yet Australian shippers and consignees under contracts of carriage for the carriage of goods by sea inter-State are not. Equally, it is anomalous that foreign carriers are free to include in their contracts for inter-State carriage terms providing that disputes arising under or in relation to such shipments are to be determined by arbitration or Courts outside of Australia, and to insist upon the enforcement of such clauses, whereas those carriers are not free to do so in relation to contracts for the carriage of goods into or out of Australia.

90. In view of the findings and conclusions of the Full Court of the Federal Court in the *BBC Nile,* it is clear beyond doubt:

a) that s.11(1) and (2) of COGSA do not apply to inter-State shipments and that the lacuna referred to in paragraph 14 above is real and not just apparent; and

b) that this lacuna in the application of s.11(1) and (2) to contracts for the carriage of goods by sea inter-State is not something that can be avoided by a Court either:

i) attempting to construe the existing terms of s.11(1) and (2) so as to extend their application to inter-State shipments (where the existing language of those provisions do not comprehend or allow such an extension) or

ii) reading into the existing terms of s.11(1) or (2) additional words that would be sufficient to then apply those provisions to inter-State carriage.[110]

91. Admittedly, if the application of a foreign choice of law or foreign jurisdiction or arbitration clause would have the effect of reducing a carrier's liability to less than that under the modified Rules, then such a clause may be rendered ineffective by Article 3 rule 8 of the modified Rules even if that clause was not struck down by s.11(2). But as the outcome in the *BBC Nile* reveals, that will not always be the case, for example where it may not be possible to say that the carrier's liability would be excluded or reduced to something less than that under the modified Rules[111] or where the carrier has made an admission or given an undertaking that the modified Rules as applied in Australia are to apply to the claim even if determined overseas (as the carrier did in *BBC Nile*).[112] As a practical matter, the giving of that admission / undertaking achieved the same outcome as s.11(1) and (2)(a), namely the application of the modified Rules, including in the foreign arbitration. But the Court's acceptance of the undertaking resulted in the arbitration clause being upheld, which would not have been the case is s.11(2)(b) had applied.

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110 see paragraphs 37 and 38 above
111 see *BBC Nile* at [43]
112 see *BBC Nile* at [44]

92. Accordingly, if this lacuna in the application of s.11 of COGSA to inter-State carriage is to be remedied, then that must be done by the Commonwealth Parliament amending the existing terms of s.11.

93. Moreover, for the reasons stated in paragraphs 84, 85 and 88 above, it is AMTAC's submission that this lacuna should be remedied, in particular by extending the application of s.11(1) and (2) of COGSA to contracts for the carriage of goods by sea of the type otherwise caught by those provisions and which relate to inter-State shipments. This current lacuna and the resultant difference in the treatment of foreign choice of law and foreign jurisdiction and arbitration clauses in inter-State and overseas (both inbound and outbound) shipments are perverse. They are not supported by any credible policy considerations. Indeed, it is not possible to point to any good policy reasons why the protection afforded by s.11(1) and (2) to Australian importers and exporters is also not available to those shippers and consignees involved in the inter-State carriage of goods by sea. As such, this existing lacuna potentially prejudices Australian shippers and consignees of inter-State carriage, especially where goods are carried on foreign flagged and owned vessels and where a foreign carrier is more likely to insist on terms within its contracts providing for the application of foreign law and for any claims against it to be determined in a foreign jurisdiction, being terms that (absent the application of s.11(1) and (2)) are likely to be valid and enforceable against the Australian shipper or consignee.

94. It is submitted that this existing lacuna in the application of s.11(1) and (2) could be easily and readily remedied by an amendment to s.11(1) of COGSA in the following terms:

> (1) All parties to:
>
> (a) a sea carriage document relating to the carriage of goods:
>
> (i) from any place in Australia to any place outside Australia; or
>
> (ii) from a port in any State or Territory in Australia to a port in any other State or Territory in Australia; and
>
> (b) a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii), relating to ~~such~~ a carriage of goods within subparagraph (a)(i) or (ii) above;
>
> are taken to have intended to contract according to the laws in force at the place of shipment.

95. If such an amendment were to be made to s.11(1), then it would not be necessary to also amend the current terms of either s.11(2)(a) or (b) of COGSA[113] in order for those provisions to also apply to inter-State shipments. This is because the current terms of s.11(2)(a) and (b) would of

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113 leaving aside any amendment to the existing reference to a "*bill of lading*" suggested earlier in these submissions

themselves be sufficient apply those provisions to inter-State carriage by their existing reference back to s.11(1) of COGSA and thereby to the extended operation of s.11(1) of COGSA if and once it has been amended as suggested above.

The third Concern – the terms and scope of the application of s.11(3)

96. Section 11(3) of COGSA was added in 1997 and as an exception to the prohibition against foreign jurisdiction and arbitration clauses in s.11(2)(a) and (b) of COGSA. It provides:

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

97. Its purpose was to make plain that an arbitration in Australia does not offend the prohibition in s.11(2)(a) and (b)[114] or the policy considerations underlying it. The inclusion of s.11(3) was prompted by remarks made by the NSW Court of Appeal in the "*Krasnogrosk*",[115] and the recognition that an agreement to arbitrate a dispute in Australia does not necessarily oust or lessen the jurisdiction of Australian courts,[116] inasmuch as Australian Courts would still have jurisdiction over any arbitration in Australia and to that extent also over the underlying dispute.

98. The third Concern identified by the Review relates to the scope of s.11(3) and raises two issues that are addressed in these submissions:

a) the first is what is meant by the requirement in s.11(3) that the arbitration be "*conducted*" in Australia, and whether that requirement should be retained;

b) the second is the requirement that under the terms of the arbitration agreement, the arbitration that it provides for "*must*" be conducted in Australia and whether such a mandatory requirement ought to be retained.

(a) conducting an arbitration in Australia

99. In relation to the first issue, the language of s.11(3) refers to where an arbitration is to be "*conducted*" and as such fails to apply the well-recognised distinction between the juridical *seat* or *place* of an arbitration and the *venue* or place of the hearing.[117]

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114 see the Explanatory Memorandum to the *Carriage of Goods by Sea (Amendment) Bill* 1997 (Cth); see also pp.21 and 42 of the Report of the Marine Cargo Liability Working Group (referred to in *Norden* at [31])

115 (1993) 31 NSWLR 18 at 42-43

116 or necessarily purport to do so

117 which were considered in *Raguz v Sullivan* (2000) 50 NSWLR 236; [2000] NSWCA 240 (***Raguz***) at [93]–[97]

100. This distinction is important. The law does not recognise the concept of arbitral procedures "*floating in the transnational firmament unconnected with any municipal system of law*".[118] Every international arbitration must be localised, in the sense of having a juridical base or home which is generally where the arbitration is deemed or located, although physically the arbitration process may involve venues and participants in a number of jurisdictions. It is this seat[119] or the place of the arbitration[120] that provides the *lex arbitri* or procedural law governing the arbitration. This is not confined to mere matters of form or procedure. It can also affect substantive matters, such as possible rights of appeal (including whether there are such rights in the first instance), the parties' entitlement to challenge an award, and the grounds upon which such an entitlement may be exercised (if available).[121] Where the seat or place of the arbitration is in Australia, then that arbitration will be subject to the supervisory jurisdiction of the Australian courts. This is so irrespective of whether the arbitration is domestic[122] or international.[123] This is also irrespective of where the arbitration is heard.

101. However, the seat of an arbitration is not necessarily where the arbitration or any hearing in an arbitration is or is to be held. That is the *venue*. It is possible for the seat of an arbitration to be in one jurisdiction but for the arbitration to be conducted or the hearing to take place in another.[124] Where that occurs, it is still the law of the *seat* and not the *venue* that is the *lex arbitri*. Accordingly, where the *seat* of an arbitration is in Australia but the hearing is held in another country, then it is still Australian law (rather than the law of that other country) that applies to that arbitration and it is the Australian courts who will have supervisory jurisdiction over that arbitration and any award that it may produce and thereby indirectly over the dispute being arbitrated.

102. Given the intention behind the enactment of s.11(3) of COGSA,[125] it is AMTAC's submission that it would be appropriate for that sub-section to apply to an arbitration agreement that provides for an arbitration whose *seat* (or place of arbitration) is in Australia. Moreover, it is also AMTAC's submission that this should be so even if the *venue* for the hearing or part of the

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118 *Bank Mellat v Helliniki Techniki SA* [1984] QB 291 at 301

119 see s. 2(1) and (3) of the *Arbitration Act* 1996 (Eng)

120 see Articles 1(2) and 20 of the UNCITRAL Model Law (***Model Law***) which has force of law in international arbitrations in Australia (pursuant to s.16(1) of the *International Arbitration Act* 1974 (Cth)). In this regard, the *place of the arbitration* in the Model Law is the same as the juridical seat under English law (*PT Garuda Indonesia v Birgen Air* [2002] 1 SLR (R) 401 at [19]-[22])

121 for example Art 34 of the Model Law

122 see for example ss.1(2) and 20 of the *Commercial Arbitration Act* 2010 (NSW)

123 see footnote 116 above

124 as occurred in *Raguz*, where the seat was Lausanne, but the hearing took place in Sydney

125 including as noted in paragraph 97 above

hearing of that arbitration under that arbitration agreement is to be or may be or was (where the hearing has already commenced or been completed) overseas and not in Australia.

103. However, it would appear that such an arbitration agreement would **not** fall within the existing terms of s.11(3) of COGSA, because the arbitration or at least the hearing of that arbitration was not or may not be *conducted* in Australia. That is assuming that the word "*conducted*" as used in s.11(3) is to be construed in accordance with the ordinary and usual meaning of that word, and as such is to be construed as meaning "*physically takes place*". If that is so, then both the arbitration agreement providing for an Australian seated arbitration and the arbitration contemplated by that arbitration agreement are likely to fall outside of the scope and operation of s.11(3) of COGSA. This is especially where the current terms of that section state that the arbitration "*must*" be conducted in Australia. Moreover, if that is so, then assuming that the arbitration agreement was in a contract for the carriage of goods by sea that was subject to s.11(2) of COGSA, that agreement to arbitrate would as a consequence be thereby caught by prohibition in s.11(2)(b) and (c) and as such rendered invalid and unenforceable.

104. It is submitted that such an outcome in respect of an Australian seated arbitration agreement is contrary to the policy considerations behind the decision to include sub-section (3) in s.11 of COGSA (referred to in paragraph 97 above).

105. Moreover, such an outcome, and the interpretation of s.11(3) on which it is based would severely constrain the number of arbitration agreements that would fall within the existing terms of s.11(3) and which would thereby remain valid and enforceable despite the prohibition otherwise provided for by s.11(2)(b) and (c) of COGSA. This is especially where the existing terms of s.11(3) also require that the arbitration provided for by the arbitration agreement "*must*" be conducted in Australia.

106. At the very least, there is uncertainty as to whether such an arbitration agreement providing for an Australian seated arbitration is within the scope of the existing terms of s.11(3) and thereby valid and enforceable or whether it would be caught by the prohibition in s.11(2)(b) and (c). This is notwithstanding the presumed intention behind s.11(3) to promote the adoption and use of Australian seated arbitration.

107. Such uncertainty, as well as the existing constraints on the application of s.11(3) could easily and readily be removed by amending s.11(3) so as to make clear that it applies to Australian seated arbitrations (in particular in the terms proposed in paragraph 120 below).

108. Even if this was not the intention of the legislature when s.11(3) was first enacted and included in COGSA in 1997, it is nevertheless submitted that this approach ought to be adopted now and that the terms of s.11(3) ought to be amended to reflect that intention now.

109. The adoption of the above approach and an amendment to s.11(3) along the above lines guarantees that any arbitration that is permitted as an exception of s.11(2)((b) and (c) of COGSA remains subject to possible supervision by the Australian Courts (subject to the terms of the relevant legislation governing that arbitration), consistent with both the observations of the Court of Appeal in the *"Krasnogrosk*" and the policy considerations adverted to in paragraph 97 above and which were behind the addition of s.11(3) to COGSA in the first place.

110. The adoption of the above approach also promotes Australian arbitration as an acceptable means of dispute resolution alternative to the Australian Courts, if the parties to a contract for the carriage of goods by sea of the type referred to in s.11 of COGSA wish to secure the various benefits that both commercial arbitration and arbitration in Australia have to offer. These benefits include (inter alia) neutrality, a modern and transparent legislative framework based on the UNCITRAL Model Law (which has force of law in Australia pursuant to s.16 of the IAA), recourse to the New York Convention and the benefits that offers for the enforcement of arbitral awards, expert arbitrators and a sophisticated legal profession, supportive arbitral institutions such as ACICA, AMTAC and CIARB, greater confidentiality than Court proceedings and more flexibility in the conduct of claims.[126] The above list is not intended to be exhaustive. It also correlates broadly with many of the factors listed on p.9 of the Review.

(b) the arbitration must be conducted in Australia

111. Whilst an agreement to arbitrate may specify a location for the arbitration (for example "*in Sydney*"), it is very rare for that to be expressed in mandatory terms, that is to say that the arbitration "*must*" take place at the location specified.

112. Moreover, the identification of a location in an arbitration agreement is usually taken to be the specification of the *seat* or *place* of the arbitration. As already noted, this is not necessarily where the arbitration provided for by that arbitration agreement may be heard and it is possible for the arbitration to be heard in some other location, including overseas, whilst the arbitration is nevertheless still being seated at the place specified.

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126 see for example the benefits listed at https://acica.org.au/why-arbitrate-in-australia/

113. Accordingly, an arbitration agreement in the terms noted in paragraph 111 above would appear to not fall within the current terms of s.11(3) of COGSA because that arbitration agreement does not provide that the arbitration "*must*" be conducted in the location specified or in Australia. Moreover, if that is so, then if an arbitration agreement in those terms were to be included in a contract for the carriage of goods by sea of the type referred to in s.11(2)(b) or (c) of COGSA, then that agreement would be rendered ineffective by s.11(2)(b) or (c). Further, and once again, this would be so notwithstanding that the arbitration agreement otherwise contemplated and provided for an Australian seated arbitration.

114. If the application of s.11(3) of COGSA is to be applied to agreements to arbitrate where the *seat* of that arbitration is in Australia (as suggested above) then it is AMTAC's submission that there is no need for the retention in s.11(3) of COGSA of either the word "*must*" or any mandatory requirement that the arbitration be conducted or take place in Australia, or that it "*must*" be seated in Australia.

115. Indeed, the retention of the word "*must*" or such a mandatory requirement (even if expressed in different words) may result in removing from the scope of s.11(3) of COGSA arbitration agreements that provide for Australian seated arbitrations merely because the arbitration agreement does not include any words of compulsion, in circumstances where such words of compulsion are not usually found in such clauses nor usually thought to be necessary.

116. Further, in its existing terms, s.11(3) would also not apply to an arbitration that was in fact held or is in fact currently being conducted in Australia, if there was no mandatory requirement that the arbitration take place in Australia in the arbitration agreement. Again, this includes even where under the terms of the arbitration agreement that arbitration was seated in Australia. It is difficult to see why the policy considerations supporting the enactment of s.11(3) as an exception to s.11(2)(b) and (c) would also not apply to situations where an arbitration has either been conducted in Australia (for example where any resultant award is sought to be enforced) or is currently still being conducted in Australia, even if that was not mandated by the terms of the arbitration agreement itself. Again this is also all the more so where the arbitration agreement provided for an Australian seated arbitration. Yet an award made in such an arbitration in Australia pursuant to such an arbitration agreement may face obstacles in its enforcement if it is found to not fall within the scope of s.11(3) of COGSA because the arbitration agreement pursuant to which that arbitration was held and the award issued did not

expressly mandate that the arbitration be in Australia (even though it was) and did not therefore fall within s.11(3) and was thereby rendered ineffective by s.11(2)(b) or (c) of COGSA.[127]

(c) conclusion in relation to this third Concern

117. There is currently (for the reasons stated above) both uncertainty as to the scope of the application of s.11(3) of COGSA and the potential for many arbitration agreements including those providing for Australian seated arbitrations to not fall within s.11(3) and to be thereby rendered ineffective by s.11(2)(b) and (c) of COGSA if contained in contracts for the carriage of goods by sea of the type referred to in s.11(2) as a consequence of the existing terms of s.11(3) and more particularly the use within s.11(3) of the words "*conducted*" and "*must*".

118. It is AMTAC's submission that both this uncertainty and the potential for s.11(3) to have an unnecessarily constrained application, inconsistent with the policy considerations that underlie the enactment of s.11(3) in the first place can and should be remedied by amending s.11(3) to make explicit the connection with Australia that is required in order for an arbitration agreement to obtain the benefits of that sub-section and to thereby avoid the operation of s.11(2)(b) and (c). Moreover, it is submitted that these amendments should be in language that has regard to and adopts both the well-recognised concepts of the *seat* or *place* of an arbitration and its *venue* and the well-recognised distinction between these two concepts.

119. It is submitted that amendments to s.11(3) along these lines will enhance the exception that this sub-section provides to the prohibition that is otherwise found in s.11(2)(b) and (c) of COGSA, and as such will promote and foster arbitration in Australia as a means of resolving disputes falling within both the scope of COGSA and those contracts for the carriage of goods by sea that are subject to COGSA. To this end, it is AMTAC's submission that an amendment to s.11(3) of COGSA to clarify and expand the arbitrations to which that sub-section applies, in particular by emphasising that it is those arbitrations where the seat of the arbitration is in Australia, and thereby encouraging arbitrations that have their seat in Australia, is both in the public interest and consistent with the Commonwealth and State legislature's existing strong promotion and favouring of commercial arbitration as a dispute resolution mechanism, including in connection with international and domestic (inter-State) trade.[128]

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127 adopting the approach taken by Foster J and Buchanan J in *Norden* that in proceedings to enforce an arbitral award, if the underlying arbitration agreement pursuant to which the arbitration in which the award was issued was held is invalid, then any award made in that arbitration and thereby pursuant to that arbitration agreement is also invalid (cf *the Krasnogorsk* at 41G)

128 see paragraph 28 above

120. It is AMTAC's submission that the above objectives and benefits can and will be best achieved by an amendment to s.11(3) in the following terms:

> (3) An agreement or provision of an agreement that provides for the resolution of a dispute by arbitration is not made ineffective by subsection (2) (despite the fact that it may preclude or limit the jurisdiction of a court) if:
>
> (a) under the agreement or provision, the seat or place of the arbitration is ~~must be conducted~~ in Australia or
>
> (b) an arbitration has taken place or is currently taking place in Australia pursuant to that agreement or provision clause and the seat or place of that arbitration is in Australia.

Conclusion

121. AMTAC welcomes and supports the Department's review of s.11 of COGSA and of the objectives that this review seeks to achieve. AMTAC is of the opinion that it is in the Australian national interest for s.11 of COGSA to be amended, in particular in the respects suggested in these submissions, in order to provide the Australian shipping, import and export industries and those dealing with inter-State carriage with greater certainty and clarity in the application of the provisions of s.11. This is not only in relation to the identification of those arbitration clauses that are valid and enforceable pursuant to s.11(3), and thereby not rendered ineffective by s.11(2)(b) and (c) of COGSA. It also includes applying the policy considerations that underlie s.11(1) and (2) of COGSA uniformly across the above industries, including to inter-State carriage, and possibly also to the carriage of goods by sea other than under "*sea carriage documents*" (such as under COAs and/or voyage charterparties).

122. If AMTAC is able to provide further assistance or information relevant to this Review and/or any proposed amendments to s.11, please do not hesitate to contact me.

Gregory Nell SC
Chair, AMTAC

2 November 2022