Federal Court of Australia

Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited [2014] FCA 636 (17 June 2014)

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FEDERAL COURT OF AUSTRALIA

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Citation:	**Armada (Singapore**) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited [2014] FCA 636
Parties:	**ARMADA (SINGAPORE) PTE LTD (UNDER JUDICIAL MANAGEMENT) v GUJARAT NRE COKE LIMITED**
File number:	NSD 644 of 2012
Judge:	**FOSTER J**
Date of judgment:	17 June 2014
Catchwords:	**ARBITRATION** – enforcement of a foreign award under the *International Arbitration Act 1974* (Cth) – whether the applicant has satisfied s 9 of that Act – whether the composition of the arbitral tribunal was in accordance with the relevant arbitration agreement – whether the making of a declaration as to future breaches of contract in an arbitral award should be the subject of enforcement – whether interlocutory freezing orders should be varied
Legislation:	*Arbitration Act 1996* (Eng), ss 30(1), 31(1) and 73 *Carriage of Goods by Sea Act 1991* (Cth), s 11 *International Arbitration Act 1974* (Cth), ss 2D, 8, 9 and 39

Cases cited:	*Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Limited* [2013] FCA 882 *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696; (2012) 292 ALR 161 *Dampskibsselskabet Nordon A/S v Gladstone Civil Pty Ltd* (2013) 216 FCR 469 *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109; (2013) 304 ALR 468 *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; (2011) 253 FLR 9 *Pando Compania Naviera SA v Filmo SAS* [1975] 1 QB 742 *Rahcassi Shipping Co SA v Blue Star Line Ltd* [1969] 1 QB 173 *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276; (2012) 201 FCR 535 *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131; (2011) 277 ALR 415 *WK Webster & Co v American President Lines*, 32F 3d 665 (2nd Cir, 1994)
Date of hearing:	5 June, 3–4 July, 3 August and 9 October 2012
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	82
Counsel for the Applicant:	Mr DL Williams SC and Mr RD Glover
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IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 644 of 2012**

BETWEEN:	**ARMADA (SINGAPORE) PTE LTD (UNDER JUDICIAL MANAGEMENT)** **Applicant**
AND:	**GUJARAT NRE COKE LIMITED** **Respondent**
JUDGE:	**FOSTER J**
DATE OF ORDER:	**17 JUNE 2014**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The Interlocutory Application filed by the respondent on 31 May 2012 seeking a variation of the freezing orders made by the Court on 8 May 2012 be dismissed.
2. The respondent pay the applicant's costs of and incidental to that Interlocutory Application.
3. Upon the applicant continuing the undertakings to the Court first given on 8 May 2012 and subsequently continued, Orders 2(c)(i) and 2(c)(iv) made on 8 May 2012 (as varied on 11 May 2012 and on 21 May 2012 and as extended on 14 May 2012 and on 5 June 2012) be extended until further order of the Court.
4. Liberty be granted to the applicant to apply to amend its Originating Application in order to seek enforcement of any arbitral award made after 9 October 2012, any such amendment application to be filed and served by 1 July 2014 and to be allocated a return date of 29 July 2014 at 9.30 am before Foster J.
5. By 1 July 2014, the applicant lodge with the Associate to Foster J and serve upon the respondent Short Minutes of Order to give effect to the Reasons for Judgment of Foster J published this day (***Armada (Singapore***) *Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited* [2014] FCA 636) and any order sought pursuant to an application lodged in accordance with Order 4 above.
6. By 15 July 2014, the respondent inform the Court whether it agrees with the orders proposed by the applicant.
7. In the event that the respondent does not agree with the applicant's proposed orders, by 15 July 2014 the respondent file and serve a draft of the orders which it considers the Court should make consequent upon the publication of the said Reasons.
8. The proceeding be listed for directions at 9.30 am on 29 July 2014 before Foster J.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 644 of 2012**

BETWEEN:	**ARMADA (SINGAPORE) PTE LTD (UNDER JUDICIAL MANAGEMENT)** **Applicant**
AND:	**GUJARAT NRE COKE LIMITED** **Respondent**
JUDGE:	**FOSTER J**
DATE:	**17 JUNE 2014**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1. The applicant, **Armada (Singapore**) Pte Ltd (Under Judicial Management) (**Armada**) is a corporation engaged in global shipping activities. On 1 June 2009, Armada was placed under judicial management by the High Court of the Republic of Singapore.

2. Judicial management under the laws of Singapore is not liquidation. A company under judicial management continues in business. The idea behind judicial management is that the Court will assist corporate and debt restructuring with a view to the relevant corporation continuing in existence.

3. Gujarat NRE Coke Limited (**Gujarat**) is the respondent in this proceeding. Gujarat carries on business as a manufacturer of metallurgical coke in India. It claims to have a substantial business.

4. On 16 October 2007, Armada and Gujarat entered into a contract pursuant to which Gujarat agreed to ship and Armada agreed to provide tonnage for the transportation of six cargoes of coking coal/coke annually for each of the years 2008–2012 (**contract**).

5. When Armada was placed under judicial management, Gujarat ceased to nominate any laycans under the contract in respect of the years 2009–2012.

6. As a result, Armada instituted an arbitration in London pursuant to a contractual arbitration clause contained in the contract.

7. Arbitration hearings took place in London on 11, 12 and 13 July 2011; 12 September 2011; and on 12 March 2012.

8. At the time of the hearings before me, further arbitration hearings were in contemplation.

9. By the present proceeding, Armada seeks to enforce three separate awards made by the Arbitral Tribunal in London.

10. The specific relief sought by Armada in its Originating Application is as follows:

Orders sought

On the grounds stated in the accompanying affidavit, the Applicant wants to enforce a foreign award under section 8(3) of the *International Arbitration Act 1974*.

1. Pursuant to section 8(3) of the *International Arbitration Act 1974*, a declaration that the Applicant is entitled to enforce the awards dated:

(a) 28 January 2011;
(b) 31 October 2011;
(c) 3 April 2012
as if they were judgments of the Court.

2. There be judgment for the Applicant:

(a) in the amount of US$7,799,126.30, plus interest on those amounts of US$676,753.39 to 1 April 2012 and continuing at 5% per annum compounded with three-monthly rests until judgment;
(b) in the amount of GBP£303,160.50, together with interest 5% per annum compounded with three-monthly rests as and from the date of the payment of those costs until judgment.

3. A declaration that Armada is entitled to damages in respect of any future shipments (if any) which Gujarat fails to perform in the amounts assessed by the tribunal, consisting of Messrs Hill QC, Isaacs QC and Tsastas;
4. The Respondent pay to the Applicant post-judgment interest on the amount sum of US$7,799,126.30 at a rate of 5% per annum compounded with three-monthly rests until paid.
5. A charging order, in the form annexed to this originating application and marked A, over the Respondent's fully-paid ordinary shares in Gujarat NRE Coking Coal

Limited ACN 111 244 896 in favour of the applicant.
6. Costs.
7. Any further or other such orders as the court thinks fit.
11. When Armada's Originating Application was first returned before the Court, I granted freezing orders against Gujarat. Those orders remain in place.
12. Gujarat opposes the relief sought by Armada on a number of bases.
13. By these Reasons for Judgment, I determine Armada's claims to enforce the three awards specified in its Originating Application.
14. At the time of the hearing before me, a further arbitration hearing was in prospect. After I reserved my decision, I was informed that the arbitrators had made a Fourth Partial Award on 30 November 2012. I was also informed that Gujarat had commenced a proceeding in the High Court of Justice in England seeking to set aside the Fourth Partial Award. I have not been informed of the outcome of this latter application nor have I been informed of any further developments in relation to the arbitration proceedings in London.

THE AWARDS

The Partial Final Award dated 28 January 2011 (the First Award)

15. The First Award was made by Timothy Hill QC, Stuart Isaacs QC and John Tsatsas. Mr Hill QC had been nominated as an arbitrator by Armada. Mr Isaacs QC had been nominated by Gujarat. Mr Tsatsas was jointly nominated by Messrs Hill and Isaacs.
16. By the First Award, the arbitrators decided a question of jurisdiction which had been raised by Gujarat during the course of the arbitration. By the First Award, the arbitrators declared that they had substantive jurisdiction to determine the disputes which had been referred to them, declared that the proper law of the contract is English law and made consequential orders for costs in respect of the arguments determined by the First Award.
17. In the First Award, after introducing the parties (at pars 1 and 2), at pars 3–6, the arbitrators said:

BACKGROUND

3. By a contract of affreightment dated Singapore, 16 October 2007 made on an amended Americanised Welsh Coal Charterparty form with additional clauses between Armada as Owners of the MV ARMADA TBN and Gujarat as Charterers (**"the COA"**), Gujarat agreed to ship and Armada agreed to provide tonnage for the transportation of six cargoes of coking coal/coal in bulk annually for the years 2008 to 2012 inclusive from

the East Coast of Australia to the West Coast of India, on the terms and conditions therein set out.

4. In these proceedings, Armada alleges that Gujarat is in breach of the COA in respect of each of the six shipments in 2009 and the first three shipments in 2010 (and reserves the right to allege further breaches in respect of subsequent shipments) by reason of Gujarat's failure to nominate any laycans in respect of the shipments in question; or alternatively is in breach of the COA in respect of each of the six shipments in 2009 by reason of its failure to nominate a laycan for any of those shipments by 22 November 2009. Armada claims damages in the sum of US$14,683,900 alternatively US$7,937,160 alternatively to be assessed, together with interest and costs. The details of the claim appear from Armada's claim submissions made in HFW's letter dated 8 June 2010.

5. Gujarat disputes any liability to Armada. For the reasons set out in detail in Gujarat's defence submissions dated 16 August 2010, Gujarat *inter alia* denies that it was in breach of the COA, alleges that Armada was itself in breach of the COA in respect of each lifting which ought to have occurred in the circumstances of Armada's insolvency and is guilty of misrepresentation for which Armada is liable in damages. Gujarat further alleges that those circumstances give rise to *force majeure* which relieves it of any obligation to ship cargo until (if at all) Armada's insolvency is resolved or else have frustrated the COA and destroyed its commercial purpose. Gujarat seeks to set off in these proceedings its damages claim against any sums which may be found due to Armada.

ARBITRATION CLAUSE

6. Clause of the COA **("Clause 5")** provides:

"If any dispute or difference should arise under this Charter, same to be referred to three parties in the City of London, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision, or that of any two of them, shall be final and binding, and this agreement may, for enforcing the same, be made a rule of Court. Said three parties to be commercial men who are members of the Institute of Arbitrators in London."

18. Under s 30(1) of the *Arbitration Act 1996* (Eng) (**the English Act**), an arbitral tribunal in England may rule on its own substantive jurisdiction unless otherwise agreed by the parties to the arbitration. The subsection provides that the concept of substantive jurisdiction encompasses the following issues:

(a) Whether there is a valid arbitration agreement;

(b) Whether the tribunal is properly constituted; and

(c) What matters have been submitted to arbitration in accordance with the arbitration agreement.

19. In the First Award, the arbitrators in the present case relied upon that provision and concluded that they had substantive jurisdiction.

20. At pars 23–36 of the First Award, the arbitrators set out the facts which they found for the purposes of deciding the jurisdictional question before them. Those facts were:

Facts

23. In a letter to HFW dated 31 March 2010, Dentons *inter alia* queried whether Mr Hill satisfied

the criteria in Clause 5 and invited clarification from HFW.
24. By email of 6 April 2010, HFW asked Gujarat to state whether it formally objected to Mr Hill's appointment.
25. On the same date, Dentons replied:

"... our view is that the stipulation in clause 5 of the COA for the Tribunal to be 'commercial men' means that they should not be lawyers, hence our request for clarification on the issue and clarification as to why you have selected a lawyer rather than a commercial man as your client' arbitrator. You have not provided the clarification requested.
Having taken instructions from our client, our client is prepared to consider the appointment of lawyers rather than commercial men, as it seems to us that this may be more appropriate in the circumstances of this dispute. We would have appreciated some discussion and clarification on this matter from you, rather than a unilateral selection of an arbitrator who would not appear, prima facie, to satisfy the requirements of the clause.
In the interests of proceeding amicably to the resolution of the dispute, therefore, we are prepared to proceed without a formal objection to Mr Hill as your client's arbitrator, provided that your client agrees to an extension of time for our client to appoint its arbitrator until 12 April 2010, as requested."

26. Also on the same date, HFW noted in an email in reply that Gujarat would accept Mr Hill's appointment on condition that the requested extension was granted and expressly asked Dentons to inform HFW by return if HFW's understanding was incorrect.
27. The next day, HFW, having taken instructions on the requested extension until 12 April 2010, agreed to it on the understanding that Gujarat agreed to Mr Hill's appointment. HFW's email ended *"We look forward to hearing from you before then if possible in order that this reference can get under way."*
28. In Dentons' email of 12 April 2010 by which Gujarat appointed Mr Isaacs as its arbitrator, it was stated that:

" ... we decided not to pursue a formal objection to the selection of Mr Hill QC in the interests of avoiding unnecessary procedural wrangling at the outset of the dispute. In the interests of equality of arms, we have followed suit by appointing Mr Isaacs QC (also, a lawyer, rather than a commercial man) as our client's arbitrator. We trust that your client has no objection to this appointment
Notwithstanding the above, our client insists that the requirements of Clause 5 of the COA be followed in respect of the appointment of the Chairman of the Tribunal, whom our client feels strongly ought to be a commercial man, rather than a lawyer, in accordance with the provisions of Clause 5. Again, we assume your client can have no objection to this and, for the avoidance of doubt, our agreement to the appointment of Mr Hill QC, and our appointment of Mr Isaacs QC, are not to be taken as any waiver of the requirements of Clause 5 in general, or in respect of the qualifications of the Chairman of the Tribunal."

29. On the same date, HFW requested Gujarat to confirm its agreement to the variation of Clause 5 so as to permit the appointments of Messrs Hill and Isaacs (despite they not being commercial men and despite Mr Isaacs not being a member of the Chartered Institute of Arbitrators (**"the CIA"**); not to make any jurisdictional or procedural objection with respect to those appointments at any later stage (including enforcement).
30. On 19 April 2010, HFW added that, without Gujarat's agreement to a variation of Clause 5 to

that effect, Armada would have to ask Messrs Hill and Isaacs to resign their appointments.
31. On the same date, Dentons replied that:

"We believe that we have already made our position clear regarding the effect of clause 5 of the COA and have nothing further to add (by way of confirmation or otherwise). We suggest therefore that the appointment procedure should continue unless HFW have any specific objections to this."

32. On 21 April 2010, Dentons further stated that they could see no reason why Messrs Hill and Isaacs, having been appointed by the parties, should then resign. The letter continued:

"We hope that our position regarding the appointment procedure is now clear and that we can now proceed with the appointment of a Chairman without further protracted correspondence and delay."

33. On 23 April 2010, HFW responded that:

"We note that you do not object to Mr Hill QC (the potential grounds would be that he is not a commercial man) and that your wish is that he and Mr Isaacs QC proceed with the appointment of a third man (please note not a Chairman) and progress the reference in accordance with clause 5. On this basis – and correct us now if we have misstated the position – we join with you in your invitation to Mr Hill QC and Mr Isaacs QC to appoint a third man."

34. On 27 April 2010, Dentons responded:

"These points have been fully dealt with in our e-mails of 12, 19 and 21 April 2010. We have made our position clear and have nothing to add by way of confirmation or otherwise. It is for your client to decide how best to proceed given our previously stated position.
It would, however, be helpful if you could confirm whether the arbitrators may now proceed in appointing a third arbitrator or whether your client intends to request their respective resignations as stated in your e-mail of 19 April 2010."

35. On the same date, Mr Hill wrote to the parties stating that:

"Mr Isaacs and I have discussed this matter. We intend to appoint John Tsatsas, the President of the LMAA, as a third arbitrator. However, unless the parties wish us to do so immediately, we would suggest following the usual practice of appointing a third arbitrator only when the first issue of substance arises (as opposed to procedural matters) or if Mr Isaacs and I cannot agree on any particular procedural matter. The main advantage of such a course is to keep costs down and to speed up the making of interlocutory decisions. If, however, the parties wish to have a full three-person tribunal immediately we shall go ahead with the appointment.
We look forward to hearing from each side."

36. On 28 April 2010, Dentons replied to Mr Hill's email, saying that Gujarat was content for Messrs Hill and Isaacs to proceed with uncontentious procedural matters and was happy with Mr Tsatsas' appointment as the third arbitrator so long as it did not entail the application of LMAA terms to the arbitration.

> 21. The arbitrators then recorded the parties' submissions on the question of jurisdiction. Gujarat contended that the appointments of both Mr Hill and Mr Isaacs were defective because neither is a *"commercial man"* within the meaning of cl 5 of the contract. The same argument has been advanced before me.
> 22. Armada provided a number of answers to Gujarat's submissions.

23. At par 40 of the First Award, the arbitrators commenced their consideration of the jurisdictional question. In that paragraph, they recorded that they were prepared to assume in favour of Gujarat that there was no *ad hoc* submission to jurisdiction on 7 April 2010 and also that Messrs Hill and Isaacs are not *"commercial men"* within the meaning of cl 5. The arbitrators said that, in light of their conclusions on the other submissions advanced by Armada, it was unnecessary for them to decide those questions.

24. In summary, the arbitrators held that:

(a) Gujarat waived any defects in the appointments of Messrs Hill and Isaacs (pars 42–49);

(b) Gujarat is estopped from denying that the arbitral tribunal was properly constituted (pars 50–55); and

(c) In any event, by reason of the application of s 31(1) and s 73 of the English Act, it was too late for Gujarat to challenge the tribunal's jurisdiction at the time when it took up that challenge (pars 56–65).

The Second Partial Award dated 31 October 2011 (the Second Award)

25. The Second Award addresses the substance of Armada's claims that Gujarat breached the contract and of Gujarat's main defences. These were defences based upon misrepresentation and the law of frustration. In the Second Award, the arbitrators also dealt with the principles governing the assessment of damages for the breaches alleged by Armada against Gujarat.

26. After describing the parties, the contract and the procedural history of the matter, at pars 43–54, the arbitrators set out the chronology of the main events relevant to the arbitration and the issues to be determined by them. Those paragraphs are in the following terms:

V. CHRONOLOGY OF MAIN EVENTS

43. Nomination and carriage of the first five shipments under the COA on vessels time-chartered by Armada took place in 2008 without incident. The fifth shipment took place in August 2008.

44. In the latter part of 2008, the global economic crisis led to the collapse of the shipping and financial markets.

45. Gujarat made no nomination for the sixth shipment and, in due course, damages for unpaid freight were agreed in the sum of US$1.6 million. This "wash out" was calculated by Gujarat on the basis of a voyage from Tanjung Bara Coal Terminal (**"TBCT"**) in Indonesia and settled at very close to that figure.

46. Armada was, according to Gujarat, one of the highest profile casualties of the collapse in the bulk shipping market. On 9 January 2009, Armada wrote to Gujarat stating that it was applying to the Singapore courts for a scheme of arrangement and in the New York courts for temporary protection.

47. On 12 January 2009, Armada sent Gujarat a notice informing it that despite the global turndown, Armada could and would perform the COA.

48. On 29 May 2009, a scheme of arrangement proposed by Armada failed to be approved by a meeting of creditors.

49. On 1 June 2009, the Singapore High Court ordered that Armada be placed under judicial

management for an initial period of six months. That period has been successively extended and Armada remains in judicial management.
50. Armada sought no nominations from Gujarat until early June 2009, by which time, on 9 June 2009, Armada informed Gujarat that it had been placed under judicial management but assured Gujarat that it would continue to perform its obligations under the COA.
51. On 10 February 2010, Armada again stated that it was ready and willing to perform its obligations and called on Gujarat to perform the COA.
52. However, Gujarat made no further nominations under the COA.

VI. THE ISSUES

53. There are two broad issues which arise for determination in the present award:
(1) Is Gujarat in breach of the COA?
(2) If so, what are the principles on which Gujarat's liability in damages to Armada is to be determined?
Each of those issues will be considered in turn.
54. All other claims and counterclaims, including the quantification of damages and the determination of the amount of interest and the incidence and amount of costs, are reserved for one or more future awards.

> 27. At par 224 of the Second Award, the arbitrators made their award in the following terms:

For the above reasons, the Tribunal:
(1) declares that Gujarat is liable in damages to Armada for breach of the COA in an amount to be assessed by the Tribunal (failing agreement) in accordance with the terms of this award;
(2) declares that, for the years 2009 and 2010, damages should be assessed on the following basis:

(a) from the date of breach, namely 22 November for each year;
(b) on the basis that Armada would have entered into substitute contracts over a period of seven days after 22 November each year;
(c) on the basis of three nominations for RBCT – Bedi and three nominations for TBCT – Bedi;
(d) the laytime incurred at RBCT would have been 1.75 days; and the laytime incurred at TBCT would have been 3.38 days;
(e) there should be a contingency allowance of 0.5 days.

(3) declares that Armada will be entitled to damages in respect of future shipments (if any) which Gujarat fails to perform;
(4) orders Gujarat to pay the Tribunal's costs of this award in the sum of £245,488;
(4)(sic) reserves for one or more future awards all other claims, counterclaims and allocation or re-allocation of costs.

The Third Partial Award dated 5 April 2011 (the Third Award)

> 28. By the Third Award, the arbitrators determined the damages to which Armada was entitled for the years 2009 and 2010. The terms of their award were set out at pars 41–44 of the Third Award in the following terms:
>
> > 41. For the above reasons, the Tribunal hereby declares that for the purposes of assessing damages due from Gujarat to Armada for the years 2009 and 2010:

a. The market price is to be assessed by reference to P3A rates between 23 November and 30 November 2009 (inclusive) and 22 November to 29 November 2020 (inclusive).

b. The market price is to be calculated using the price of bunkers between 22 November and 28 November 2009 (inclusive).

c. The port costs at TBCT are US$45,000 lump sum.

42. For the above reasons, the Tribunal adjudges and awards that

i. Gujarat shall pay to Armada the sum of US$7,799,126.30.

ii. Gujarat shall pay to Armada interest of US$676,753.39 to 1 April 2012 and continuing at 5% per annum compounded with three-monthly rests until payment.

43. The Tribunal further adjudges and awards that Gujarat shall pay the Tribunal's costs of this Third Partial Award in the sum of £43,500 (forty three thousand five hundred Pounds Sterling), which sum includes the Tribunal's interlocutory costs since its Second Partial Award. If Armada pays the said Tribunal's costs in the first instance, Gujarat shall pay to Armada interest on the said sum at 5% per annum to run from the date of payment compounded with three-monthly rests until reimbursement.

44. The Tribunal reserves for one or more future awards all other claims, counterclaims and allocation or re-allocation of costs.

GUJARAT'S GROUNDS FOR RESISTING ENFORCEMENT

29. Gujarat relies upon five grounds for resisting enforcement of the First, Second and Third Awards. Some of those grounds overlap. Those grounds were:

(a) Neither Mr Hill nor Mr Isaacs are *"commercial men"* within the meaning of cl 5 of the contract. For that reason, Armada has not satisfied the threshold requirements of s 9 of the *International Arbitration Act 1974* (Cth) (**IAA**) because it must satisfy the Court that the Awards as made were made by a tribunal which was operating under the arbitration agreement relied upon by it and produced to the Court (**ground 1**).

(b) Because neither Mr Hill nor Mr Isaacs is a *"commercial man"* within the meaning of cl 5 of the contract, the Court ought not to enforce the Awards made by the tribunal of which they were part because the composition of the arbitral authority which made those Awards was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place (s 8(5)(e) of the IAA) (**ground 2**).

(c) The Second Award has not yet become binding in relation to the subject matter of declaration (3) made by the arbitrators because that declaration purports to bind the parties in the future in relation to contractual damages at a time when the relevant damages have not been suffered (s 8(5)(f) of the IAA) (**ground 3**).

(d) Enforcement of the Second Award by giving effect to declaration (3) made by the arbitrators would be contrary to the public policy of Australia (s 8(7)(b) of the IAA) (**ground 4**); and

(e) The contract in the present case is a *"sea carriage document"* within the meaning of s 11 of the *Carriage of Goods by Sea Act 1991* (Cth) (**COGSA**) with the consequence that cl 5 of the contract was of no effect and the arbitrators had no jurisdiction to render Gujarat liable for damages. None of the Awards made by the arbitrators could therefore be enforced in Australia. For these reasons, the Court should also refuse to enforce any of the Awards pursuant to s 8(7)(b) of the IAA.

CONSIDERATION

30. Before addressing grounds 1 to 4 raised by Gujarat, I propose to deal with ground 5.

Ground 5

31. Ground 5 was raised by Gujarat after the initial round of hearings in this proceeding had concluded.

32. The arguments advanced by Gujarat were based upon the reasoning which I used in *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696; (2012) 292 ALR 161 (*DKN v Beach Civil)* at 186–190 [125]–[145]. In that case, I held that s 11 of the COGSA rendered the relevant arbitration clause to be of no effect with the consequence that DKN could not rely upon that arbitration clause as the source of the arbitrator's jurisdiction and power to make the two awards which DKN was seeking to enforce. That conclusion meant that the awards were unenforceable.

33. The applicability of s 11 of the COGSA was determined by me in *DKN v Beach Civil*.

34. On appeal (*Dampskibsselskabet Nordon A/S v Gladstone Civil Pty Ltd* (2013) 216 FCR 469) (*DKN v Gladstone Civil*), by majority, the Full Court overturned my decision in relation to the applicability of s 11 of the COGSA in the circumstances of that case (at 471–491 [1]–[73]). The Full Court did not disturb the conclusions which I had reached in *DKN v Beach Civil* in relation to Issue 1 which concerned the true identity of the contracting party and thus the identity of the party who would, but for s 11 of the COGSA, be bound by the arbitration agreement.

35. When Gujarat raised s 11 of the COGSA in the present case, the parties were given an opportunity to make detailed written and oral submissions directed to the applicability of that section to the present case. The proceeding was then held in abeyance until the Full Court delivered its decision in *DKN v Gladstone Civil.*

36. No Special Leave Application was filed in the High Court from the Full Court's decision in *DKN v Gladstone Civil*.

37. Accordingly, I am bound to apply the reasoning of the Full Court in that decision. That reasoning is a complete answer to the arguments advanced on behalf of Gujarat in the present case based upon s 11 of the COGSA. Accordingly, I reject ground 5.

Grounds 1 and 2

38. I propose to deal with grounds 1 and 2 together because the basis of those grounds is essentially the same, although the statutory provisions relied upon in each case are different.

39. Subsections (1), (2), (3), (3A), (5)(e), (5)(f) and (7) of s 8 of the IAA are in the following terms:

8 Recognition of foreign awards

(1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.

(2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.

(3) Subject to this Part, a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court.

(3A) The court may only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7).

...

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

...

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

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

...

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

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

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

40. Section 9 of the IAA provides:

9 Evidence of awards and arbitration agreements

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

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

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

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

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

court that it was not in fact so authenticated or certified; or
(b) it has been otherwise authenticated or certified to the satisfaction of the court.

(3) If a document or part of a document produced under subsection (1) is written in a language other than English, there shall be produced with the document a translation, in the English language, of the document or that part, as the case may be, certified to be a correct translation.
(4) For the purposes of subsection (3), a translation shall be certified by a diplomatic or consular agent in Australia of the country in which the award was made or otherwise to the satisfaction of the court.
(5) A document produced to a court in accordance with this section is, upon mere production, receivable by the court as *prima facie* evidence of the matters to which it relates.

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

42. Section 39(2) of the IAA is in the following terms:

39 Matters to which court must have regard

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

(a) the objects of the Act; and
(b) the fact that:

(i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and
(ii) awards are intended to provide certainty and finality.

43. The objects of the IAA are set out in s 2D.

44. At 177–178 [71]–[75] of *DKN v Beach Civil*, I said:

Section 9(1) of the Act obliges an applicant who seeks to enforce a foreign award under s 8 of the Act to produce the duly authenticated original award or a duly certified copy of that award and the original arbitration agreement under which the award "purports" to have been made or a duly certified copy of that agreement. Section 9 substantially reproduces Art IV of the Convention.
Subsection (5) of s 9 provides that a document produced to the court in accordance with s 9(1):

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

In the present case, a duly certified copy of the charterparty and a duly certified copy of each of the awards were produced to the court in conformity with the requirements of s 9(1).
In my view, the production of those documents in the present case constitutes *prima facie* evidence of:
(a) the fact that each award was made as it purports to have been made;
(b) the subject matter of each award; and
(c) the fact that each award purports to have been made pursuant to cl 32 of the charterparty.
This is so because the charterparty was the only place suggested either by the arbitrator or by DKN as the place where the relevant arbitration clause was to be found. That is to say, cl 32 of the charterparty was the only arbitration agreement relied upon by the arbitrator and by DKN as

the source of the arbitrator's jurisdiction and power to conduct the arbitration and to make the awards. These matters necessarily also inevitably imply that Beach Civil was the charterer under the charterparty. How else could it have been found liable to pay demurrage to DKN?
At [46] in *Altain Khuder LLC*, Warren CJ concluded that, in the absence of contrary evidence, the prima facie evidence described in s 9(5) of the Act would take on a stronger complexion and become conclusive evidence of the matters to which it relates. I am not convinced that this dictum is correct and do not propose to apply it in the present case.

> 45. Those observations apply with equal force to the present case.
> 46. Each of the First, Second and Third Awards purport to have been made under the auspices of cl 5 of the contract. The arbitration agreement relied upon by Armada for the purposes of s 9(1)(b) of the IAA is cl 5 of the contract. In my judgment, subs (5) of s 9 of the IAA is engaged.
> 47. It follows, therefore, that Armada has established to a *prima facie* level that each of the three Awards is a *foreign award* within the meaning of that expression in s 8(1) of the IAA. Subject to Pt II of the IAA, each of those Awards is binding upon Armada and Gujarat by virtue of the IAA for all purposes.
> 48. If Gujarat is to succeed in resisting enforcement of any of these Awards, it must make out one of the grounds specified in s 8(5)(e) and (f) and s 8(7) of the IAA, being the only subsections of s 8 relied upon by it in the present proceeding. Gujarat bears the onus of *"... proving to the satisfaction of the Court ..."* one or more of the matters specified in those subsections.
> 49. As I said in *DKN v Beach Civil* at pp 178–179 [78]–[84]:

This approach is supported by the reasoning of Mance LJ (as he then was) (with whom Neuberger and Thorpe LJJ agreed) in *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326 at [10]–[12] (*Dardana*) where his Lordship said:
(a) Under the UK Act, a successful party to a convention award has a prima facie right to enforcement. This reflects the pro-enforcement bias of the convention.
(b) At the first stage of enforcement, upon production of the award and of the arbitration agreement appropriately authenticated, the award creditor is entitled to have the award enforced. Enforcement may be refused at the second stage (the inter partes stage) only if the award debtor proves to the satisfaction of the court that the situation falls within [one of the heads in the UK Act equivalent to s 8(5) and (7) in the Act].
(c) Provided that the documents produced to the court at the first stage establish that the arbitrators had purported to act pursuant to the arbitration agreement produced at that stage, that is sufficient to move the inquiry to the stage where the award debtor must establish one or more of the statutory grounds for refusing to enforce the award.
(d) Once the award creditor establishes the matters referred to in (b) and (c) above, any challenge to the existence or validity of the arbitration agreement must be brought under [the statutory provision in the UK Act which is equivalent to s 8(5)(b) of the Act]. That is to say, it is for the party resisting enforcement of the award to raise and prove any challenge to the validity of the arbitration agreement.
In the later case of *Dallah Real Estate v Ministry of Religious Affairs* [2010] UKSC 46; [2011] 1 AC 763; [2011] 1 All ER 485; [2010] 2 Lloyd's Rep 691 (*Dallah Real Estate*), Lord Mance repeated these views.
In *Dallah Real Estate*, arbitrators had held that the government of Pakistan was bound by an arbitration agreement entered into between Dallah and a statutory trust even though the

government was not named therein. The arbitrators held that the government was the "true party" to the agreement because the trust was its alter ego. The primary issue in the case before the English courts was whether there existed between Dallah and the government any relevant arbitration agreement at all.
The UK Supreme Court held that the statutory equivalent to s 8(5)(b) in England covered the case before it: That is to say, it covered the case where the party resisting enforcement claimed that the asserted arbitration agreement was not binding on it because it was never a party to that arbitration agreement.
The court also held that the existence of any relevant arbitration agreement falls to be determined by the Supreme Court as a UK court under provisions of national law which are contained in the UK Act and which reflect Art V(1)(a) of the convention. The onus of proving that it was not a party to the relevant arbitration agreement rested on the government of Pakistan under the UK Act even though the arbitration clause, on its face, did not refer to the government of Pakistan. In this regard, Lord Mance at [12] expressly followed his reasoning in *Dardana* at [10]–[12].
Once the equivalent provision to s 8(5)(b) of the Act is invoked, in the opinion of Lord Mance (at [26]), the party resisting enforcement is entitled to an ordinary judicial determination of the issue of whether that party was a party to and thus bound by the arbitration agreement.
Lord Collins (at [77]–[98]) expressed similar views. Lords Hope, Saville and Clarke agreed with the reasons of Lords Mance and Collins.

> 50. This Court is not bound to follow or apply the findings of the arbitrators in the First Award in respect of the composition of the arbitral tribunal in question in the present case. It has the power to determine matters of jurisdiction for itself (see the discussion of this point in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; (2011) 253 FLR 9 at 86 [266]–[270] per Hansen JA and Kyrou AJA). However, if it chooses to exercise that power, it should only do so where it is necessary to do so.
>
> 51. In the First Award, the arbitrators set out in detail their findings of fact concerning the way in which each of the parties set about addressing the question of who should be nominated as arbitrator for the purposes of the dispute between them. They also set out in some detail their conclusions in respect of those facts.
>
> 52. I have set out the relevant primary facts as found by the arbitrators at [20] above. In my view, pars 23–36 of the First Award adequately address all of those primary facts.
>
> 53. In the proceeding before me, Gujarat focussed upon the issue of whether either Mr Hill or Mr Isaacs is a *"commercial man"* within the meaning of cl 5. In support of its submissions in this regard, Gujarat relied upon *Pando Compania Naviera SA v Filmo SAS* [1975] 1 QB 742 (*Pando Compania Naviera SA*), in which Donaldson J had to consider an arbitration clause in terms similar to cl 5 of the contract. In the case before him, his Lordship had to decide whether an experienced maritime arbitrator who had once practised as a solicitor qualified as a *"commercial man"* within the arbitration clause in the case before him. At 746–747, his Lordship said:

Mr. Legh-Jones submits, rightly in my judgment, that "commercial" is a word which takes its meaning from its context. Thus, "commercial action" in the Rules of the Supreme Court includes a wide range of causes. However, in the phrase "commercial area of the port" it has a different meaning and yet another in "commercial artist." He also submits, again rightly in my judgment, that Mr. Clyde's qualification as a "commercial man" has to be assessed as at the date of his appointment in this particular arbitration.

I have to construe the words in the context of an arbitration clause in a charterparty, In that context, Mr. Legh-Jones submits that the words "commercial man" means: "(a) a business man who is employed wholly or mainly in the conclusion or performance of trading transactions, or (b) a person who is engaged wholly or partly in the conclusion or performance of trading transactions at the time of his appointment or was so employed for a substantial time previously."

The particular point has never before had to be decided by the courts, although Mocatta J. in *Palmco Shipping Inc. v. Continental Ore Corporation* (*The Captain George K.*) [1970] 2 Lloyd's Rep. 21, 25, noted:

"It was not suggested that Mr. Clyde, with his great experience in maritime arbitrations since he retired a good many years ago from commercial practice as a solicitor, was other than a 'commercial man.'"

In *Rahcassi Shipping Co. S.A. v. Blue Star Line Ltd.* [1969] 1 Q.B. 173, Roskill J. considered at length the history of arbitration clauses which required the appointment of commercial men and concluded that it was not necessary or desirable to attempt to define "commercial men" with precision. I respectfully agree and would only add that in my judgment any such attempt would fail. Like the elephant, they are more easily recognised than defined. But he also said that it was a general phrase which enabled the parties to choose the arbitrators or umpires from a wide field of persons with commercial experience.

That observation points, I think, to the real test. It does not matter whether or not the arbitrator has retired from commerce or is still engaged in it. What matters is his practical commercial experience. It is well known that the shipping industry has two sides: the marine side and the commercial side. The parties to this charterparty wish the arbitrators to be chosen from the commercial rather than from the marine side. In some other case it may be necessary to decide whether commercial experience which is unrelated to the carriage of goods by sea—the retail distributive trade, for example—is sufficient under such a clause, but that does not arise in the present case. The use of the words "commercial men" would also exclude those whose experience is solely as practising members of the legal profession. Some of them can rightly be described as "commercial lawyers," but whilst they serve the commercial world they are not of it.

Mr. Clyde was a commercial lawyer before he ceased to practise, but this fact cannot disqualify him from becoming a "commercial man" thereafter if he would otherwise be qualified.

In the end the crux of the matter is whether a whole time professional maritime arbitrator is within the class of person to whom the parties to a charterparty must be deemed to be referring when they speak of "commercial men."

The shipping and commodity trades of the world are unusual in that they do not regard litigation or arbitration with abhorrence. On the contrary, they regard it as a normal incident of commercial life—a civilised way of resolving the many differences of opinion which are bound to arise. Would that the same intelligent attitude were adopted within industry. As a result, a domestic arbitration service has grown up in London, which serves the shipping and commodity trades on a world-wide basis. I say "domestic" because an important characteristic is that the arbitrators are not regarded as outsiders. As I said in *The Myron* [1970] 1 Q.B. 527, 532:

"A person who is actively engaged throughout all available working hours in maritime arbitrations is regarded in practice as being engaged in the shipping trade."

And I could well have added "and in the commercial side of that trade." I have no doubt that a member of the London Maritime Arbitrators Association practising as a full-time maritime arbitrator would be regarded by most ship owners and charterers throughout the world as a "commercial man."
Accordingly Mr. Clyde was qualified to be appointed an arbitrator under the arbitration clause contained in this charterparty. The fact that he had also had practical experience of another aspect of the commercial side of the shipping trade by virtue of having been a director of shipping companies merely reinforces this view.

54. In *Pando Compania Naviera SA*, Donaldson J referred to *Rahcassi Shipping Co SA v Blue Star Line Ltd* [1969] 1 QB 173. Senior Counsel for Gujarat also placed reliance upon that case. However, in that case the arbitration clause provided that the arbitrator should be *"commercial men"* and went on to expressly exclude lawyers from being appropriately qualified for appointment. See also the decision of the US Court of Appeals, 2nd Circuit, in *WK Webster & Co v American President Lines*, 32F 3d 665 (2nd Cir, 1994) at 668–669, where the Court rejected the proposition that the fact that an arbitrator was a practising lawyer disqualified him from being a *"commercial man"*. The Court held that it was the commercial experience of the arbitrator that mattered.

55. The curriculum vitae of each of Mr Hill and Mr Isaacs were tendered in evidence before me. Each of those gentlemen has considerable experience in arbitrating commercial disputes. They are also, of course, leading lawyers in London. In my judgment, however, the fact that they are lawyers does not disqualify them from satisfying the descriptor *"commercial men"*. As Donaldson J said in *Pando Compania Naviera SA*, experience as an arbitrator of commercial disputes may well be sufficient to satisfy the contractual requirement. This will particularly be so in circumstances where the individuals concerned are members of a reputable professional association which regularly appoints arbitrators to determine disputes submitted to arbitration, as was the case with both Mr Hill and Mr Isaacs.

56. I am not satisfied that Mr Hill and Mr Isaacs were not commercial men within the meaning of cl 5.

57. For this reason, the substratum of grounds 1 and 2 of Gujarat's resistance to enforcement falls away. In any event, if I am wrong in that conclusion, when careful regard is paid to the relevant facts (particularly the correspondence exchanged on 6 April and 12 April 2010), it is quite clear that, as the arbitrators found, the parties agreed on the appointment of Messrs Hill and Isaacs or, alternatively, Gujarat waived its right to insist on the appointment of a commercial man and thus waived its right to object to the appointment of Mr Hill or, alternatively, Gujarat is estopped from challenging that appointment.

58. In addition, on 28 November 2011, Gujarat applied to the High Court of Justice in England for leave to appeal against the Second Award. On 28 February 2012, Gujarat discontinued that application. As well, Gujarat applied for a stay of the arbitration proceedings pending the outcome of its application for leave to appeal from the Second Award. That application was dismissed by the tribunal.

59. Eventually, Gujarat ceased to participate in the arbitration proceedings. Instead, it sought to restrain Armada from giving effect to either the First or the Second Award by bringing proceedings in India.

60. In effect, Gujarat continued to participate in the arbitration for some time after the arbitrators had determined that they had substantive jurisdiction to proceed with the arbitration. It was only after the publication of the Second Award that Gujarat took steps to extricate itself from the arbitration. It seems quite clear to me that it had decided to participate in the arbitration after the initial ruling on jurisdiction in order to see whether it could procure a favourable outcome on the issues of substance in the arbitration. It was only in the face of an unfavourable outcome that it decided to attempt to resurrect the point which it now takes concerning the composition of the tribunal.

61. For all of the above reasons, Gujarat has failed to displace the *prima facie* position achieved by Armada complying with s 9(1) of the IAA and has also failed to make out the requirements of s 8(5)(e) of the IAA in respect of the composition of the arbitral tribunal.

Grounds 3 and 4

62. The complaint of Gujarat embedded in grounds 3 and 4 is that the declaration made in par 224(3) of the Second Award to the following effect:

declares that Armada will be entitled to damages in respect of future shipments (if any) which Gujarat fails to perform.

ought not to have been made.

63. Senior Counsel for Gujarat submitted that there could be no doubt that the Second Award has not yet become binding in relation to future shipments notwithstanding the terms of the declaration which I have extracted at [62] above. He also submitted that, in Australia, it would be contrary to principle to make a declaration in those terms.

64. It may have been the case that, at the time when this proceeding was commenced, Armada's claim for a declaration in the terms of the declaration made by the arbitrators at par 224(3) of the Second Award was inappropriate or premature. However, I have been informed that a fourth award dealing with additional damages has been made by the arbitrators although that award, at least initially, was challenged in the English High Court of Justice. It may also be that other additional awards have now been made.

65. It seems to me that the appropriate course for me to take in respect of grounds 3 and 4 is for me to decline to give effect to the declaration made in respect of future shipments but to give to Armada liberty to apply to amend its Originating Application so as to seek to enforce any additional awards which have been made subsequent to the date when I reserved judgment in this proceeding.

66. For this reason, I will give to Armada liberty to apply to amend its claims for relief in order to take into account such additional awards.

67. I prefer to rest this decision upon s 8(5)(f) of the IAA rather than on s 8(7). Consistent with other decisions which I have given on the question of public policy (as to which see, for example, *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131; (2011) 277 ALR 415 at 436–439 [125]–[133]; and *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276; (2012) 201 FCR 535 at 554–560 [87]–[105]), I do not think that enforcing a declaration in the terms of the declaration made in par 224(3) of the Second Award would be contrary to the public policy of Australia. The

mere fact that enforcing such a declaration might not be consistent with principles developed in Australia for the exercise of an Australian Court's discretion to make declarations would not, of itself, be sufficient to constitute a reason for refusing to enforce the award on the grounds that to do so would be contrary to public policy. In any event, the balance of the Second Award is clearly enforceable and I propose to enforce it accordingly.

Gujarat's Application to Vary the Freezing Orders made on 8 May 2012

68. Gujarat sought a variation to the freezing orders made on 8 May 2012 by filing an Interlocutory Application on 31 May 2012. That Interlocutory Application was stood over for hearing to the final hearing of the enforcement proceeding brought by Armada. The variation sought by Gujarat was to discharge the freezing orders made by me on 8 May 2012 and to replace those orders with an order restraining Gujarat from charging or otherwise encumbering, disposing of, dealing with or diminishing the value of its shareholding in the capital of Gujarat NRE Limited (ABN 31 121 382 438), a related corporation, until further order of the Court.

69. That Interlocutory Application was supported by an affidavit sworn by Gujarat's solicitor. The only evidence in that affidavit bearing upon the relief sought in that Application is found in par 17 thereof. That paragraph is in the following terms:

I am instructed that the Respondent has substantial assets within the jurisdiction and can, prior to 5 June, 2012 provide a form of security for the Applicant's potential damages over the shares it holds in Gujarat NRE Ltd (ABN 31 121 382 438) which it estimates to be of a value exceeding AU$40,000,000. The Respondent proposes that the form of security be in the same terms as the current freezing orders are framed, limited only to those shares.

70. The Application was, in the end, only faintly pressed.

71. At the hearing before me, Senior Counsel for Armada cross-examined Mr Jagatramka, the Chairman of Gujarat, as to the assets of Gujarat and repeatedly pressed Gujarat to produce documents directed to establishing the precise nature and value of those assets. In addition, in a Submission filed on 3 July 2012, Armada made detailed submissions as to why Gujarat had not made out a case for the variation which it sought.

72. I do not think it is necessary to traverse those submissions in detail. It is sufficient to note that I find those submissions persuasive and that the evidence before me did not support a case for the variation which Gujarat sought. I propose to refuse to vary the orders which I originally made on 8 May 2012.

73. Another reason for refusing to vary those orders is the circumstance that very similar freezing orders were made in a separate proceeding brought by a different award creditor against Gujarat (*Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Limited*, NSD 437 of 2013). In the *Coeclerici* matter, I made interlocutory freezing orders on 14 March 2013. Those orders were continued up to the date of judgment (*Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Limited* [2013] FCA 882, 30 August 2013). On the day when I delivered judgment, I continued those orders in aid of execution. An appeal from the orders which I made in *Coeclerici* was dismissed by the Full Court (*Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109; (2013) 304 ALR 468).

74. In light of the fact that Gujarat has been restrained from disposing of its assets in the *Coeclerici* proceeding, there would be little point in varying the orders in the present proceeding in the manner sought by Gujarat.

75. For these reasons, I decline to vary the freezing orders which I made on 8 May 2012.

Costs

76. Armada has substantially succeeded in its enforcement action. It should have the costs of that action including the costs of the appearance on 5 June 2012.

CONCLUSIONS

77. At this stage, I propose to dismiss the Interlocutory Application filed by Gujarat on 31 May 2012 by which it sought a variation of the freezing orders made by me on 8 May 2012. I will order Gujarat to pay Armada's costs of and incidental to that Application.

78. In addition, I propose to continue the freezing orders which I first made on 8 May 2012 until further order of the Court.

79. I will grant liberty to Armada to apply to amend its Originating Application in order to seek enforcement of any award made after I reserved my decision in this proceeding. That liberty should be exercised within fourteen (14) days of the date of the publication of these Reasons for Judgment.

80. Otherwise, I am inclined to think that, with the exception of the future shipments declaration about which complaint was made by Gujarat, Armada is entitled to orders along the lines of the proposed orders which I marked for identification as "MFI-1" at the hearing. I see no reason why garnishee orders along the lines of those contained in MFI-1 should not be made. As I have said, Armada should also have its costs of the enforcement hearing. I propose to order the applicant to bring in Short Minutes of Order to give effect to these Reasons for Judgment and to allow the respondent time to respond.

81. The orders submitted by the parties should address the quantum of any awards made after 9 October 2012 as well as the current position concerning interest and recoverable costs of the arbitration.

82. There will be orders accordingly.

I certify that the preceding eighty-two
(82) numbered paragraphs are a true
copy of the Reasons for Judgment
herein of the Honourable Justice
Foster.

Associate:

Dated: 17 June 2014