



HIGH COURT OF AUSTRALIA

14 February 2024

CARMICHAEL RAIL NETWORK PTY LTD AS TRUSTEE FOR THE CARMICHAEL RAIL
NETWORK TRUST V BBC CHARTERING CARRIERS GMBH & CO KG & ANOR
[2024] HCA 4

Today, the High Court unanimously dismissed an appeal from the Full Court of the Federal Court of Australia. The appeal concerned the proper construction of Art 3(8) of the "Australian Hague Rules", which are the "Hague-Visby Rules" as modified and incorporated into Australian law by the *Carriage of Goods by Sea Act 1991* (Cth). The principal issue was whether an arbitration clause in a bill of lading was void on the basis that it was contrary to Art 3(8) of the Australian Hague Rules, which provides, relevantly, that any clause in a contract of carriage relieving or lessening a carrier's liability for loss or damage to goods otherwise than as provided in the Rules shall be void and of no effect.

The appeal arose from a contract of carriage (which included the bill of lading) between the appellant ("Carmichael", the shipper) and the first respondent ("BBC", the carrier), for the carriage by sea of steel rails from South Australia to Queensland. Clause 4 of the bill of lading provided that "any dispute arising under or in connection with this Bill of Lading shall be referred to arbitration in London" and that "English law is to apply" (the "arbitration clause"). When the rails arrived in Queensland, they were found to be damaged beyond use. Carmichael commenced proceedings in the Federal Court, claiming damages and seeking, by way of an interlocutory application, the restraint of arbitration initiated by BBC in London. In response, BBC filed an interlocutory application seeking a stay of the Federal Court proceedings. The competing interlocutory applications were referred to the Full Court of the Federal Court for hearing. The Full Court dismissed Carmichael's interlocutory application and ordered that Carmichael's proceeding in the Federal Court be stayed in favour of arbitration in London. The Full Court's decision to stay the Australian proceedings took into account an undertaking by BBC that the Australian Hague Rules as applied under Australian law would apply in the London arbitration, and the Full Court made a declaration by consent to similar effect ("the undertaking and declaration").

On appeal to the High Court, Carmichael argued that the Full Court erred in holding that the arbitration clause was valid when it should have been held void under Art 3(8) of the Australian Hague Rules. Carmichael advanced three reasons why BBC's liability might be lessened in the London arbitration, namely: (a) the risk that the arbitrators would consider themselves bound, in accordance with English law, to interpret Art 3(2) of the Hague-Visby Rules as imposing a delegable responsibility on BBC for carriage of the rails (rather than a non-delegable responsibility in accordance with Australian law); (b) the risk that the arbitrators would construe, under English law, the bill of lading as incorporating only Arts 1 to 8 of the Hague Rules, rather than the Hague-Visby Rules as compulsorily applicable under Australian law; and (c) the expense and practical difficulty Carmichael would face if pursuing its claims against BBC in arbitration in London.

The High Court unanimously dismissed Carmichael's appeal. The Court held that Art 3(8) required Carmichael to establish, on the balance of probabilities, that the arbitration clause relieved BBC from liability or lessened such liability otherwise than as provided for by the Australian Hague Rules. Carmichael did not prove this to the requisite standard. The Court also held that, in deciding

if a carrier's liability is relieved or lessened under Art 3(8), a court must consider all the circumstances as found at the time of its decision, which, in this case, included the undertaking and declaration.

Responding to Carmichael's three specific arguments, the High Court reasoned that: (a) the only risk that Art 3(2) would be interpreted in accordance with English law instead of Australian law was of "rogue" arbitrators acting contrary to the position agreed in the undertaking and declaration; (b) nothing in the bill of lading, on its face, would require the arbitrators to apply only Arts 1 to 8 of the Hague Rules (on its proper construction, the bill of lading required that the Australian Hague Rules apply); and (c) the expense and practical burden of a shipper cannot provide a principled basis for determining any relieving or lessening of a carrier's liability. It followed that Carmichael had not shown, on the balance of probabilities, that the arbitration in London risked lessening BBC's liability. Accordingly, the Full Court of the Federal Court was correct in granting BBC's application for a stay and dismissing Carmichael's application to restrain the London arbitration.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*