HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, STEWARD, GLEESON AND JAGOT JJ

CARMICHAEL RAIL NETWORK PTY LTD
AS TRUSTEE FOR THE CARMICHAEL
RAIL NETWORK TRUST APPELLANT

AND

BBC CHARTERING CARRIERS GMBH & CO KG
& ANOR RESPONDENTS

Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG
[2024] HCA 4
Date of Hearing: 17 October 2023
Date of Judgment: 14 February 2024
B32/2023

ORDER

1. Appeal dismissed.

2. The appellant pay the respondents' costs of the appeal.

On appeal from the Federal Court of Australia

Representation

E G H Cox SC with D J Reynolds for the appellant (instructed by Mills Oakley)

G J Nell SC with J K Kennedy for the first respondent (instructed by Aus Ship Lawyers)

J A Hogan-Doran SC for the second respondent (instructed by HWL Ebsworth Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG

Statutes – Construction – Where Sch 1A of *Carriage of Goods by Sea Act 1991* (Cth) contained amended Hague-Visby Rules (the "Australian Hague Rules") – Where Art 3(8) of Australian Hague Rules provided that any clause in contract for carriage of goods by sea relieving or lessening carrier's liability for loss or damage to goods otherwise than as provided for in Australian Hague Rules shall be void – Where arbitration clause in bill of lading provided for resolution of disputes between carrier and shipper by arbitration in London under English law – Where arbitration commenced – Where shipper commenced proceedings in Federal Court of Australia and sought to restrain arbitration – Where carrier sought stay of Federal Court proceedings in favour of arbitration – Where carrier undertook to admit in London arbitration that Australian Hague Rules as applied under Australian law were to apply in arbitration – Where Federal Court made declaration by consent to similar effect – Whether arbitration clause in bill of lading rendered inoperative by Art 3(8) – Whether conduct of arbitration would relieve or lessen carrier's liability – Whether carrier's undertaking and Federal Court's declaration should be taken into account – Proper approach to standard of proof under Art 3(8).

Words and phrases – "arbitration", "arbitration clause", "Australian Hague Rules", "balance of probabilities", "burden of proof", "carrier's liability", "contract of carriage of goods by sea", "declaration", "declaration by consent", "foreign arbitration", "lessen the carrier's liability", "liability would be relieved or lessened", "ordinary civil standard of proof", "standard of proof", "undertaking".

Carriage of Goods by Sea Act 1991 (Cth), ss 4, 7, 8, 9, Schs 1, 1A, Art 3(8).
International Arbitration Act 1974 (Cth), ss 7, 39.

1 GAGELER CJ, GORDON, STEWARD, GLEESON AND JAGOT JJ. This appeal concerns the proper construction of Art 3(8) of the "Australian Hague Rules", incorporated into Australian law by s 8 of the *Carriage of Goods by Sea Act 1991* (Cth)[1] ("the COGSA"). By s 10(1) of that Act, the Australian Hague Rules apply to a contract of carriage of goods by sea, relevantly, from a port in Australia to another port in Australia. Article 3(8) provides that any "clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to ... goods ... or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect".

2 The appellant ("Carmichael", the shipper) contracted with the second respondent ("OneSteel") for the manufacture and supply of head-hardened steel rails. OneSteel manufactured the rails and, pursuant to a booking note between the first respondent ("BBC", the carrier) and an agent for Carmichael, it was arranged for the rails to be shipped by sea from the Port of Whyalla in South Australia to the Port of Mackay in Queensland. BBC prepared a stowage plan for the rails on the ship. OneSteel's subcontractor loaded the rails onto the ship. A mate's receipt for the goods loaded on the ship was issued and the ship departed from the Port of Whyalla. On the same day, BBC issued a bill of lading for the rails to Carmichael's agent. When the ship arrived in the Port of Mackay the goods on board were unloaded. It was discovered that a collapse of the stowed goods had damaged the rails to the extent they became unusable. The rails were sold as scrap.

3 The bill of lading contained cl 3, "Liability under the Contract", and cl 4, "Law and Jurisdiction". It is sufficient to record that cl 4 provided that "any dispute arising under or in connection with this Bill of Lading shall be referred to arbitration in London" and "English law is to apply" to the arbitration. BBC commenced an arbitration proceeding in London under the bill of lading in relation to the damage to the rails. Carmichael filed an originating application in the Federal Court of Australia claiming damages. By an interlocutory application in the proceeding commenced by the originating application, Carmichael sought to restrain any arbitration in connection with the consignment of the rails. BBC then filed an interlocutory application of its own seeking a stay of the proceeding.

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1 Schedule 1 to the COGSA contains the amended Hague Rules (unmodified text), generally referred to as the Hague-Visby Rules. Schedule 1A sets out the modifications of the text in Sch 1. The Australian Hague Rules (as referred to in these reasons for judgment) are the amended Hague Rules in Sch 1 as modified by the text in Sch 1A.

4 The competing interlocutory applications were referred for hearing before the Full Court of the Federal Court of Australia. The question for the Full Court was whether the arbitration clause in cl 4 of the bill of lading was rendered inoperative by Art 3(8) on the basis that there existed a risk that BBC's liability would be relieved or lessened in the arbitration and was therefore void.

5 The Full Court, on the basis of an undertaking by BBC, dismissed Carmichael's interlocutory application and ordered that Carmichael's proceeding in the Federal Court of Australia be stayed in favour of arbitration in London.[2] The undertaking by BBC that the Full Court accepted included, relevantly, "to admit in the London arbitration that the amended Hague Rules in Schedule 1A to the *Carriage of Goods by Sea Act 1991* (Cth) as applied under Australian law apply to the Bill of Lading No. WHYMAC01 dated 17 December 2020 and the plaintiff's claims against the first defendant thereunder, and to maintain that admission and position in the London arbitration". The Full Court also declared by consent as follows:

> "The amended Hague Rules in Schedule 1A to the *Carriage of Goods by Sea Act 1991* (Cth) as applied under Australian law apply to the Bill of Lading No. WHYMAC01 dated 17 December 2020 under which the plaintiff's goods were shipped on board the *BBC Nile* at Whyalla and to the plaintiff's claims against the first defendant thereunder."

6 This Court granted Carmichael special leave to appeal. Carmichael contends that the Full Court erred in holding that cl 4 of the bill of lading, the arbitration clause, is valid when, according to Carmichael, it ought to have been held void under Art 3(8) of the Australian Hague Rules[3] "on the basis that there existed a risk that [BBC's] liability would be relieved or lessened as a consequence of one or more of" three specified matters. Those matters are: (a) the risk that the London arbitrators will consider themselves bound to interpret Art 3(2) of the Hague-Visby Rules[4] as imposing a delegable responsibility on BBC in accordance with English law, in which event Carmichael would lose the chance of having Art 3(2) interpreted as imposing a non-delegable responsibility on BBC in accordance with Australian law; (b) the risk that the London arbitrators will

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2 *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Company KG (The BBC Nile)* (2022) 295 FCR 81.

3 See below concerning s 7(1) of the COGSA.

4 Meaning the Hague-Visby Rules as referred to in cl 3 of the bill of lading.

construe the clause paramount, cl 3 of the bill of lading, as incorporating only Arts 1 to 8 of the Hague Rules[5] rather than the Hague-Visby Rules under Australian law,[6] thereby substantially reducing the package limitation defence;[7] and (c) the expense and practical difficulty of requiring Carmichael to pursue its claim against BBC through arbitration in London.

7 For the following reasons the Full Court did not err in deciding that, in the circumstances (including the undertaking given by BBC and the declaration made by the Full Court), Carmichael had not established that the conduct of the arbitration, in accordance with cl 4 of the bill of lading, would be such as to lessen the liability of BBC other than as is provided for by the Australian Hague Rules.

8 Carmichael's appeal fails because: (a) for the purpose of deciding BBC's application for a stay (and, accordingly, Carmichael's application to restrain the continuation of the arbitration), Art 3(8) of the Australian Hague Rules, on its proper construction, operates on the ordinary civil standard of proof – on the balance of probabilities – and not on some lesser standard such as a mere possibility, a real risk, a reasonably arguable case, or a prima facie case; (b) Art 3(8) of the Australian Hague Rules is to be applied in the circumstances at the time the court decides their application, which, in this case, included (and includes) BBC's undertaking to, and the declaration made by, the Full Court; and (c) Carmichael has not proved on the balance of probabilities that cl 4 of the bill of lading relieves BBC from liability or lessens such liability within the meaning of Art 3(8) of the Australian Hague Rules. It should also be recorded that Carmichael would have failed in this appeal on any of the lesser standards of proof it posited; it is only if Art 3(8) is engaged by mere speculation that a carrier's liability might be lessened that Carmichael could succeed, but (as the Full Court correctly concluded) mere speculation of this kind is impermissible.

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5 Meaning the Hague Rules as referred to in cl 3 of the bill of lading.

6 Meaning the Australian Hague Rules.

7 Article 4(5) of the Hague Rules and Art 4(5) of the Australian Hague Rules contain different default limitations of value per package.

Statutory provisions

Carriage of Goods by Sea Act

9 Section 8 of the COGSA provides that, subject to s 10, the "amended Hague Rules" have the force of law in Australia. The "amended Hague Rules", by s 4(1) of the COGSA, has the meaning set out in s 7 of that Act. Section 7(1) provides that the "amended Hague Rules" consists of the text set out in Sch 1 to the COGSA, as modified in accordance with the Schedule of modifications referred to in s 7(2). Section 7(1) also provides that the "text set out in Schedule 1 (in its unmodified form) is the English translation of Articles 1 to 10 of the Brussels Convention, as amended by Articles 1 to 5 of the Visby Protocol and Article II of the SDR Protocol". By s 4(1), the "Brussels Convention" means "the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, done at Brussels on 25 August 1924"; the "Visby Protocol" means "the Protocol amending the Brussels Convention, done at Brussels on 23 February 1968"; and the "SDR Protocol" means "the Protocol amending the Brussels Convention, as amended by the Visby Protocol, done at Brussels on 21 December 1979".

10 Section 7(2) of the COGSA provides that regulations may amend the COGSA to add a Schedule of modifications that modifies the text set out in Sch 1 for specified purposes. Section 7(2) also provides that such "modifications do not actually amend the text set out in Schedule 1, however the text has effect for the purposes of this Act as if it were modified in accordance with the Schedule of modifications." Section 10 outlines the circumstances in which the amended Hague Rules (that is, the Australian Hague Rules) do or do not apply. None of the circumstances in which the amended Hague Rules will not apply are engaged in the present case.

11 Section 9 of the COGSA provides that:

> "In this Part and the amended Hague Rules, unless the contrary intention appears, a word or expression has the same meaning as it has in the Brussels Convention as amended by the Visby Protocol and the SDR Protocol."

12 As noted, Sch 1 to the COGSA contains the Hague-Visby Rules. Schedule 1A sets out the Australian Hague Rules.

Australian Hague Rules

13 Article 3(2) of the Australian Hague Rules provides that:

> "Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

14 By Art 1(a) of the Australian Hague Rules, a "[c]arrier" is defined to include "the owner or the charterer who enters into a contract of carriage with a shipper". By Art 1(b), "[c]ontract of carriage" is defined to mean a contract of carriage covered by a "sea carriage document". By Art 1(g), a "[s]ea carriage document" means, amongst other things, a bill of lading.

15 The full text of Art 3(8) of the Australian Hague Rules provides that:

> "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability."

International Arbitration Act

16 Section 7(2) of the *International Arbitration Act 1974* (Cth) ("the International Arbitration Act"), under which the Full Court granted the stay of Carmichael's proceeding in the Federal Court, relevantly provides that where proceedings instituted by a party to an arbitration agreement against another party to the agreement are pending in a court and the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration, "on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter".

17 Section 7(5) of the International Arbitration Act provides that "[a] court shall not make an order under subsection (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed."

18 The mandatory "shall" in s 7(2) reflects the objects of the International Arbitration Act, in particular in s 2D(a) and (b), to "facilitate international trade

and commerce by encouraging the use of arbitration as a method of resolving disputes" and to "facilitate the use of arbitration agreements made in relation to international trade and commerce", as well as the obligation in s 39(2) that in performing functions or exercising powers under that Act, the court must have regard to the objects of the Act, the fact that "arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes", and the fact that arbitral "awards are intended to provide certainty and finality". Section 7 also reflects the obligations in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("the New York Convention"), which entered into force in Australia on 24 June 1975.[8]

Arbitration Act 1996 (UK)

19 Section 46 of the *Arbitration Act 1996* (UK) ("the UK Arbitration Act") provides that:

> "(1) The arbitral tribunal shall decide the dispute –
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> (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or
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> (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.
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> (2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.
>
> (3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

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8 [1975] ATS 25.

The bill of lading

20 Clause 3 of the bill of lading is in these terms:

"**3. Liability under the Contract**

(a) Unless otherwise provided herein, the Hague Rules contained in the International Convention for the Unification of Certain Rules Relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this Contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply. In respect of shipments to which there are no such enactments compulsorily applicable, the terms of Articles I-VIII inclusive of said Convention shall apply. In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on 23rd February 1968 ('The Hague-Visby Rules') apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading. Where the Hague Rules or part of them or the Hague-Visby Rules apply to carriage under this contract, the applicable rules, or part of them, shall likewise apply to the period before loading and after discharge where the Carrier (or his agent) have custody or control of [the] cargo. Unless otherwise provided herein, the Carrier shall in no case be responsible for loss of or damage to deck cargo and/or live animals."

21 Clause 4 of the bill of lading provides:

"**4. Law and Jurisdiction**

Except as provided elsewhere herein, any dispute arising under or in connection with this Bill of Lading shall be referred to arbitration in London. The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) terms. The arbitration Tribunal is to consist of three arbitrators, one arbitrator to be appointed by each party and the two so appointed to appoint a third arbitrator. English law is to apply."

Article 3(8) – standard of proof

22 Article 3(8) of the Australian Hague Rules operates on any clause "relieving [a] carrier ... from liability" or "lessening such liability otherwise than as provided in these Rules". In deciding if Art 3(8) is engaged, a court must ask itself, at the time it is called upon to do so, in all the circumstances as found, whether any clause relieves a carrier from liability or lessens such liability otherwise than as provided

in the Australian Hague Rules. The circumstances as found may include past, present, and future circumstances. The relevant issue is the standard of proof a court is required to apply in finding past, present, and future circumstances.

23 That question is to be answered within the framework established by s 7(2) and (5) of the International Arbitration Act. This is because the impugned clause, cl 4 of the bill of lading, is an arbitration agreement and the proceeding in the Federal Court consists of Carmichael's originating application for damages and interlocutory application to restrain the arbitration, and BBC's interlocutory application to stay Carmichael's proceeding under s 7(2).

24 If, as is the case here, the parties to the proceeding are parties to an arbitration agreement and the proceeding involves the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration, s 7(2) of the International Arbitration Act provides that the court "shall" stay the proceedings. By s 7(5), however, the court "shall not" stay the proceedings if, relevantly, it "finds" the arbitration agreement null and void. Section 7(5) does not say that the court shall not stay the proceedings if it finds that the arbitration agreement *might* be null and void,[9] there is a *real risk* that the arbitration agreement is null and void, it is *reasonably arguable* that the arbitration agreement is null and void, or that there is a *prima facie case* that the arbitration agreement is null and void.

25 For an Australian court to "find" an arbitration agreement null and void under s 7(5) of the International Arbitration Act, it must be able to do so as a matter of law based on agreed, admitted, or proved facts. Consistently with s 140(1) of the *Evidence Act 1995* (Cth), facts are ordinarily to be proved in a civil proceeding on the balance of probabilities. This applies to the finding of past, present, and future facts. The interlocutory nature of an order under s 7(2) of the International Arbitration Act provides no reason for adopting a lesser standard of proof in making a finding under s 7(5). No less than an interlocutory anti-suit injunction, an order staying proceedings under s 7(2) "is effectively a final determination as to where the matter or some particular aspect of it is to be litigated".[10]

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9 cf *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282-283, quoting *Fernandez v Government of Singapore* [1971] 1 WLR 987 at 993-994; [1971] 2 All ER 691 at 696.

10 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 397.

26 This construction of s 7(5) of the International Arbitration Act, requiring a finding to be made on the ordinary civil standard of balance of probabilities, is reinforced by reference to Art II of the New York Convention. Article II(1) provides that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship". Article II(3), reflected in s 7(2) and (5) of the International Arbitration Act, provides that "[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it *finds* that the said agreement is null and void, inoperative or incapable of being performed".[11] The verb "finds" in Art II(3) assumes that, in accordance with customary international law, the burden of proof rests on the party asserting the fact that the arbitration agreement is void.[12] The Supreme Court of Canada, in considering Art II(3), approved the statement that "[i]f regard is had to the goal and purpose of the New York Convention, it will be concluded that where there is doubt, the interpreter should opt for the solution that tends to ensure that arbitration agreements are binding".[13] Carmichael's case reverses that position.

27 Contrary to Carmichael's submissions in this appeal, neither the text, context, or purpose of Art 3(8) of the Australian Hague Rules, nor any relevant authority, indicates that the Article is to be construed as if it incorporates some standard of proof such as a possibility, a real risk, a reasonably arguable case, or a prima facie case that a clause will or might relieve a carrier from liability or lessen such liability otherwise than as provided in the Australian Hague Rules.

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11 Emphasis added.

12 *Temple of Preah Vihear (Cambodia v Thailand)* [1962] ICJ Rep 6 at 15-16; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1984] ICJ Rep 392 at 437 [101]; *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161 at 189 [57].

13 *GreCon Dimter inc v JR Normand inc* [2005] 2 SCR 401 at 424 [43], quoting Bachand, "L'efficacité en droit québécois d'une convention d'arbitrage ou d'élection de for invoquée à l'encontre d'un appel en garantie" (2004) 83(2) *Canadian Bar Review* 515 at 541.

Text

28 The text of Art 3(8) is not neutral about the applicable standard of proof, as Carmichael would have it. Article 3(8) does not refer to a clause that *might* relieve a carrier from liability or *might* lessen such liability depending on future unknown and unpredictable possibilities (as opposed to future probabilities which, if found, are facts, even if they have not yet occurred). Nor does Art 3(8) use any other words indicating that, in construing the Article, a court may engage in speculation about future unknown and unpredictable circumstances.

29 Article 3(8) refers to a clause "relieving the carrier ... from liability" or "lessening such liability". Although by s 8 of the COGSA the Australian Hague Rules, including Art 3(8), have the force of law in Australia, the Australian Hague Rules "form part of an international convention which must come under the consideration of foreign as well as" Australian courts.[14] Accordingly, it is "desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation".[15]

30 The Australian Hague Rules also give effect to Australia's accession to the international instruments specified in s 7(1) of the COGSA and therefore are to be interpreted in accordance with the Vienna Convention on the Law of Treaties (1969)[16] ("the Vienna Convention"), including Art 31(1) that requires interpretation "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[17] Article 31(3)(c) of the Vienna Convention also requires construction of a treaty to

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14 *The Hollandia* [1983] 1 AC 565 at 572.

15 *Stag Line Ltd v Foscolo, Mango and Co Ltd* [1932] AC 328 at 350, quoted in *The Hollandia* [1983] 1 AC 565 at 572.

16 1155 UNTS 331.

17 Although the Vienna Convention post-dates the Hague-Visby Rules, it is declaratory of customary international law with respect to the interpretation of treaties: eg, *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2023) 275 CLR 292 at 316-317 [38]-[39].

take into account "[a]ny relevant rules of international law applicable in the relations between the parties".

31 In the common law world, the standard of proof for civil proceedings ("on the balance of probabilities" as now embodied in s 140(1) of the *Evidence Act*) emerged by the beginning of the 19th century in contradistinction to the criminal standard of proof of beyond reasonable doubt.[18] In civil or continental law systems, in contrast, there has traditionally been a single standard of proof, commonly formulated as the "full conviction" (or "personal conviction", or "near certainty") standard.[19] Further, the commonly applied standard of proof "in the context of international tribunals generally" is the "preponderance of evidence" standard (a standard at least as onerous as "on the balance of probabilities").[20]

32 The relevant point for present purposes is that, within this overarching conceptual context of the applicable standard of proof in civil proceedings, references to a clause "relieving" a carrier from liability or "lessening such liability" are to be understood as referring to facts able to be found in accordance with the requisite degree of confidence, at the least on the preponderance of the evidence. They are not to be understood as meaning some lesser standard, howsoever it might be formulated, still less mere speculation based on unknown and unpredictable future contingencies.

Context

33 The last sentence of Art 3(8), that a benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability, does not assist Carmichael's textual argument. This sentence is a deeming provision. It is deeming a clause under which a carrier may claim the benefit of a shipper's insurance of the goods to engage Art 3(8) whether or not it can be said

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18 See *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 360.

19 eg, Schweizer, "The civil standard of proof – what is it, actually?" (2016) 20(3) *International Journal of Evidence & Proof* 217; Clermont and Sherwin, "A Comparative View of Standards of Proof" (2002) 50(2) *American Journal of Comparative Law* 243.

20 Riddell and Plant, *Evidence before the International Court of Justice* (2009) at 124-126.

that such a clause is one "relieving the carrier ... from liability" or "lessening such liability".

34 Carmichael relied on the travaux préparatoires of the Hague Rules to support its contextual argument. The travaux record that a question was raised whether a benefit of insurance clause, explained to be a clause entitling a "shipowner having met [their] liability ... to take over any insurance the cargo owner may have effected on [their] cargo", was a clause within the meaning of Art 3(8). The travaux state that "[w]e are all quite clear that we mean to prohibit such a clause".[21] This, it must be said, indicates only that it was intended to deem such a clause to be within the scope of Art 3(8) and does not advance Carmichael's case.

35 A subsequent section of the travaux records Sir Norman Hill stating that a benefit of insurance clause was not one found in any British bills of lading but was "used very largely in the United States and ... very great exception has been taken [to it]". Mr Louis Franck then said that "as far as I am concerned and continental jurisprudence will be concerned, that clause would be considered as being void under paragraph 8, because it certainly is lessening and diminishing the liability which is on the shipowner". Mr Franck also said "[t]here is no doubt that the general principle would already cover it, but the observation ... was that as in the [United States] there has been doubt on that, we ought to apply the old saying: 'Things which go without saying go even better if you mention them', and that is the reason for it".[22]

36 If anything, this exposes the existence of real doubt about the status of a benefit of insurance clause under Art 3(8) – a clause unused in Britain, a source of very great exception (inferentially, to shippers/cargo owners) in the United States, and a clause accepted to lessen a carrier's (shipowner's) liability in continental countries – and the intention to remove that doubt by a deeming provision.

37 Further, Carmichael's argument – that, as a benefit of insurance clause is "intrinsically conditional" (in that whether the clause would lessen the carrier's liability depends on the carrier succeeding in obtaining an indemnity from the shipper's insurer), it means that Art 3(8) applies to future contingent possibilities

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21 Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* (1990), vol 2 at 453.

22 Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* (1990), vol 2 at 471-472.

(in contrast to future probabilities) – is misconceived. Mr Franck explained in the travaux that the reason such a clause was treated in continental law as lessening the carrier's (shipowner's) liability was the right it gave the carrier to seek indemnity from the shipper's (cargo owner's) insurer under a policy of insurance paid for by the shipper, not the carrier.[23] That is, the relevant right is a presently existing right to claim indemnity, the purpose and effect of which is to lessen the carrier's liability.

Purpose

38 It is not in question that the Hague Rules were developed and adopted because carriers (shipowners) enjoyed a far stronger bargaining position than shippers (cargo owners) which they had historically exploited.[24] Nor is it in doubt that courts ensure that the provisions of the Hague Rules are not avoided or evaded by "colourable devices".[25] That does not mean, however, that the Hague Rules are to be construed as liberally as possible in favour of shippers (cargo owners) and against carriers (shipowners). The Hague Rules embody a compromise about the allocation of risk for cargo damage. As s 3 of the COGSA records, the Act seeks to establish a regime of marine cargo liability that is "equitable". This is reflected in the Hague Rules themselves, which contain provisions benefiting both shippers (cargo owners) and carriers (shipowners). Further, they are intended to provide a transparent, certain, and predictable set of provisions which cannot be excluded by contract, as is apparent from the breadth of Art 2 ("under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth").

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23 Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* (1990), vol 2 at 472.

24 eg, *Australasian United Steam Navigation Co Ltd v Hiskens* (1914) 18 CLR 646 at 670; *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation, Berhad* (1998) 196 CLR 161 at 168-170 [11]-[14]; *The Hollandia* [1982] QB 872 at 881-882, 884, 886; *The Hollandia* [1983] 1 AC 565 at 572-573.

25 *The Hollandia* [1983] 1 AC 565 at 573.

39 This is supported, rather than denied, by Lord Diplock's reasoning in *The Hollandia*. In accepting that a choice-of-forum clause could engage Art 3(8), Lord Diplock explained:[26]

> "[I]t is, in my view, most consistent with the achievement of the purpose of the [*Carriage of Goods by Sea Act 1971* (UK)] that the time at which to ascertain whether a choice of forum clause will have an effect that is proscribed by article III, paragraph 8 should be when the condition subsequent is fulfilled and the carrier seeks to bring the clause into operation and to rely upon it. If the dispute is about duties and obligations of the carrier or ship that are referred to in that rule and *it is established as a fact (either by evidence or as in the instant case by the common agreement of the parties)* that the foreign court chosen as the exclusive forum *would apply* a domestic substantive law *which would result* in limiting the carrier's liability to a sum lower than that to which [they] would be entitled if article IV, paragraph 5 of the Hague-Visby Rules applied, then an English court is in my view commanded by the Act ... to treat the choice of forum clause as of no effect." (emphasis added)

40 Far from the purpose of the Hague Rules being advanced by construing Art 3(8) as engaged by facts not agreed, admitted, or proved to at least the ordinary civil standard of proof, the Hague Rules' purpose of providing a transparent, certain, and predictable set of provisions would be undermined. The spectrum of mere possibility and surmise is endless. A provision that is engaged by future unknown and unpredictable possibilities (as opposed to found future probabilities) is a provision without boundaries, is incapable of rational application, and would travel well beyond the balance struck in the allocation of the rights and liabilities as between carriers and shippers under the Hague Rules.

Authorities

41 The parties referred to many authorities in support of their competing contentions. No current authority supports Carmichael's case.

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26 [1983] 1 AC 565 at 575.

42 *Akai Pty Ltd v People's Insurance Co Ltd* ("*Akai [No 1]*")[27] does not assist Carmichael. In referring to *Agro Co of Canada Ltd v The "Regal Scout"*,[28] Toohey, Gaudron, and Gummow JJ in *Akai [No 1]* said that it "was held that a clause in a bill of lading which gave exclusive jurisdiction to a foreign court was void on proof that the foreign court would not impose liability on the carrier for negligent loss of or damage to the cargo".[29] The relevant words here are "on proof". *The "Regal Scout"* was decided on the basis of disputed expert evidence and by reference to the civil standard of proof (that is, as the law "would", not "might", apply). As Cattanach J also said, "I am obligated to accept the fact of Japanese law as it presently is and not as it may become at a future time".[30]

43 Further, Akai succeeded because the Court was satisfied that "an English court *would not apply* the [*Insurance Contracts Act 1984* (Cth)] as part of the lex causae",[31] with the consequence that Akai would lose the benefit of s 54 of the Act (advantageous to Akai), so that, under s 52 of that Act, the choice-of-forum clause was nullified. No risk-assessment based on future unknown and unpredictable possibilities (as opposed to findings of future probabilities) was undertaken. Rather, the approach of Lord Diplock in *The Hollandia* was applied.[32] Carmichael's submissions, referring to Akai's position that once it "asserted" a juridical advantage it was for the respondent to "show" that s 54 would be applied in the foreign forum, reflect Akai's arguments before the Court, not the reasoning of the Court.[33]

44 Carmichael's warning that the lesson of *Akai Pty Ltd v People's Insurance Co Ltd* ("*Akai [No 2]*")[34] should be heeded is misplaced. That case turned on the

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27 (1996) 188 CLR 418.

28 (1983) 148 DLR (3d) 412.

29 *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 446.

30 *Agro Co of Canada Ltd v The "Regal Scout"* (1983) 148 DLR (3d) 412 at 416.

31 *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 447 (emphasis added).

32 *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 446-448.

33 *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 445.

34 [1998] 1 Lloyd's Rep 90.

fact that the defendant had never submitted to the jurisdiction of any Australian court. As will be explained, the Full Court must have had that circumstance in mind as its reasoning places significant weight on BBC's undertaking, and its declaration, ensuring the same circumstance in *Akai [No 2]* cannot be repeated in this case.

45 Carmichael's attempted comparison between the operation of Art 3(8) of the Australian Hague Rules and the power to "grant an injunction to restrain a person from commencing or continuing foreign proceedings", enlivened if "the foreign proceedings ... interfere with or have a tendency to interfere with proceedings pending in that court",[35] must be rejected. There is no analogy available between a court construing and applying a provision voiding a clause and a court acting to protect its own processes and proceedings.

46 *Baghlaf Al Zafer Factory Co BR for Industry Ltd v Pakistan National Shipping Co [No 2]* ("*Baghlaf [No 2]*")[36] concerned a statutory limitation period that could not be waived in the foreign forum. In *Baghlaf Al Zafer Factory Co BR for Industry Ltd v Pakistan National Shipping Co* ("*Baghlaf [No 1]*"),[37] faced with a contract containing an exclusive-jurisdiction clause in favour of the courts of Pakistan, the Court of Appeal granted a stay of the proceedings in England on the basis of the defendants' undertaking to waive any time-bar in Pakistan.[38] A provision applying to the statutory limitation period in Pakistan, however, was not amenable to waiver on its face. While Carmichael, understandably, focused on Lord Justice Waller's statement in *Baghlaf [No 2]* that "the position is very unclear"[39] in respect of the provision applying in Pakistan, other statements disclose the reality of the circumstances confronting the Court of Appeal. Lord Justice Waller said that it had become "progressively more obvious that *it was*

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35 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 392.

36 [2000] 1 Lloyd's Rep 1.

37 [1998] 2 Lloyd's Rep 229.

38 *Baghlaf Al Zafer Factory Co BR for Industry Ltd v Pakistan National Shipping Co* [1998] 2 Lloyd's Rep 229 at 238.

39 *Baghlaf Al Zafer Factory Co BR for Industry Ltd v Pakistan National Shipping Co [No 2]* [2000] 1 Lloyd's Rep 1 at 5.

impossible to waive the limitation period in Pakistan",[40] in circumstances where the proceedings had been commenced within time in the United Kingdom. The defendants had also not denied the impossibility of waiver.[41] Further, the Pakistan court would have to resolve the issue and the plaintiff "would" (not might) "have an uphill struggle and ... would be by no means certain of success".[42] The question of enforcement of the exclusive-jurisdiction clause by the Court of Appeal was also ultimately one of discretion.[43] Critical to the exercise of that discretion was the fact that the applicable provision in Pakistan was not discretionary but would have to be applied by Pakistan's courts in accordance with its terms.[44]

47 In substance, *Baghlaf [No 2]* is an example of a provision which, as Lord Diplock put it in *The Hollandia*, "ex facie [on its face] ... purports to lessen the liability of the carriers for such loss or damage otherwise than is provided in the Hague-Visby Rules".[45] A provision which the foreign forum must apply and which ex facie relieves or lessens liability (in common with an admission, agreement, or proof) satisfies the civil standard of proof as to future probable events. This is because a provision can be described as having an ex facie effect only if it indisputably or manifestly does so.

48 Lord Diplock's observation in *The Hollandia* concerning the potential interaction between a choice-of-law and an arbitration clause during an arbitration[46] does not support Carmichael's case on the applicable standard of proof. The purported risk which Carmichael identified of an arbitration clause

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40 *Baghlaf Al Zafer Factory Co BR for Industry Ltd v Pakistan National Shipping Co [No 2]* [2000] 1 Lloyd's Rep 1 at 3 (emphasis added).

41 *Baghlaf Al Zafer Factory Co BR for Industry Ltd v Pakistan National Shipping Co [No 2]* [2000] 1 Lloyd's Rep 1 at 3.

42 *Baghlaf Al Zafer Factory Co BR for Industry Ltd v Pakistan National Shipping Co [No 2]* [2000] 1 Lloyd's Rep 1 at 5.

43 *Baghlaf Al Zafer Factory Co BR for Industry Ltd v Pakistan National Shipping Co [No 2]* [2000] 1 Lloyd's Rep 1 at 6.

44 *Baghlaf Al Zafer Factory Co BR for Industry Ltd v Pakistan National Shipping Co [No 2]* [2000] 1 Lloyd's Rep 1 at 6.

45 *The Hollandia* [1983] 1 AC 565 at 573. See also at 574.

46 See fn 26.

being valid one moment and void the next, depending on the conduct of the arbitration, does not mean that the party contending for a stay of proceedings must prove that there is no possibility of invalidity of the arbitration clause by operation of Art 3(8). Lord Diplock's primary point was that an arbitration clause is different from a choice-of-law clause because an arbitration clause leaves it "to the arbitrator to determine what is the 'proper law' of the contract in accordance with accepted principles of conflict of laws and then to apply that 'proper law' to the interpretation, and the validity of the contract and the mode of performance and the consequences of breaches of contract".[47]

49 In *Indussa Corp v SS Ranborg*,[48] the United States Court of Appeals identified a problem in forecasting the result of litigation in a foreign court where there was conflicting expert evidence about the substance and application of the foreign law.[49] The Court, in obiter dicta, said that "requiring trial abroad *might* lessen the carrier's liability since there could be no assurance that it would apply [the provisions] in the same way as would an American tribunal ... and § 3(8) can well be read as covering a potential and not simply a demonstrable lessening of liability".[50] The decision, however, depended on the Court's conclusion that "Congress meant to invalidate any contractual provision in a bill of lading for a shipment to or from the United States that would prevent cargo able to obtain jurisdiction over a carrier in an American court from having that court entertain the suit and apply the substantive rules Congress had prescribed".[51] Even then, the Court qualified this conclusion in a footnote saying "[o]ur ruling does not touch the question of arbitration clauses in bills of lading which require this to be held abroad. The validity of such a clause in a charter party, or in a bill of lading effectively incorporating such a clause in a charter party, has been frequently sustained".[52]

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47 *The Hollandia* [1983] 1 AC 565 at 576.

48 (1967) 377 F 2d 200.

49 *Indussa Corp v SS Ranborg* (1967) 377 F 2d 200 at 202.

50 *Indussa Corp v SS Ranborg* (1967) 377 F 2d 200 at 203-204 (emphasis in original).

51 *Indussa Corp v SS Ranborg* (1967) 377 F 2d 200 at 204.

52 *Indussa Corp v SS Ranborg* (1967) 377 F 2d 200 at 204, fn 4.

50 In any event, the United States Supreme Court disapproved *Indussa* in *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer*.[53] The Court (Stevens J dissenting) said that Art 3(8), by its terms, "establishes certain duties and obligations, separate and apart from the mechanisms for their enforcement".[54] Further, the Court said that "[i]f the question whether a provision lessens liability were answered by reference to the costs and inconvenience to the cargo owner [shipper], there would be no principled basis for distinguishing national from foreign arbitration clauses".[55] The Court rejected jurisdictional parochialism and applied "contemporary principles of international comity and commercial practice".[56] These principles weighed against "construing COGSA to nullify foreign arbitration clauses because of inconvenience to the plaintiff or insular distrust of the ability of foreign arbitrators to apply the law".[57] The Court could not determine, at the interlocutory stage, if Japanese law would apply and whether its application would or would not lessen the carrier's liability. The Court said that "mere speculation that the foreign arbitrators might apply Japanese law which, depending on the proper construction of COGSA, might reduce respondents' legal obligations, does not in and of itself lessen liability under COGSA § 3(8)".[58] In so concluding, the Court did take into account that US courts retained jurisdiction over the recognition of any arbitral award, but the ratio is that Art 3(8) does not operate by reference to possibilities. So much is apparent from the Court's observation that, if satisfied that the impugned provisions did operate as a prospective waiver of rights, it would have had no hesitation in applying Art 3(8).[59]

51 Carmichael also relied on academic criticism of *Sky Reefer* and support for the dissent of Stevens J. In the context of international trade and the competing interests of shippers (cargo owners) and carriers (shipowners), it would be surprising if *Sky Reefer* had not generated robust debate. That does not mean the decision lacks a principled foundation or is out of step with the approach in other

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53 (1995) 515 US 528.

54 *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer* (1995) 515 US 528 at 535.

55 *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer* (1995) 515 US 528 at 536.

56 *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer* (1995) 515 US 528 at 537.

57 *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer* (1995) 515 US 528 at 539.

58 *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer* (1995) 515 US 528 at 541.

59 *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer* (1995) 515 US 528 at 540.

jurisdictions. To the contrary, the approaches in *Sky Reefer* and *The Hollandia* are complementary.

52 Carmichael's reliance on Belgian authorities does not advance its case. The domestic law context in Belgium is different from that in Australia. The domestic law provision giving effect to Art 3(8), in Belgian law, means that "a jurisdiction clause in general ... can only be considered valid when the Belgian judiciary has the reasonable assurance that the foreign court ... will ... apply Article 91 of [Belgium's] Maritime Act, taking into account the shades of interpretation given to it by Belgian case law".[60]

53 Nor does Carmichael's reliance on single-judge decisions of other jurisdictions assist, several of which, in any event, primarily concern choice-of-forum provisions. Even then, Carmichael's characterisation of those cases as supporting its position is unpersuasive as the courts in each case appear to have applied a version of Lord Diplock's reasoning in *The Hollandia* on the basis that the foreign provisions, on their face, lessened the carrier's liability.[61]

54 It follows that Carmichael's submissions on the construction of Art 3(8) of the Australian Hague Rules must be rejected, including its submissions that once a shipper shows that a clause, if enforced, may *potentially* lessen the carrier's liability, then the clause is to be held void unless the carrier demonstrates that the risk will *not* eventuate.

The undertaking and declaration

55 Carmichael submitted that the undertaking and declaration did not assist BBC's case as: (a) BBC has no assets in Australia against which the undertaking may be enforced; and (b) the undertaking and declaration concern the application in the arbitration of the Australian Hague Rules as applied under Australian law

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60 *Insurers v Mamenic Line (SS Puerto Somoza)* [1961] Cour d'Appel de Bruxelles (9th Chamber) 313 at 320. See also, *Captain Tsakmakas v Boost Brothers (SS Germania)* [1963] Cour d'Appel de Bruxelles (9th Chamber) 129 at 130-131; *Afromar Inc* [1985] Cour de Cassation (1st Chamber) 632 at 634.

61 eg, *The owners of cargo lately laden on board the ship or vessel "Andhika Samyra" v The owners and/or demise charterers of the ships or vessels "Andhika Samyra"* (1989) 1 HKLR 198; *The "Epar"* [1983-1984] SLR(R) 545.

and not the application in the arbitration of the Australian Hague Rules as interpreted under Australian law.

56 Carmichael's first contention, that BBC has no assets in Australia against which the undertaking may be enforced, involves speculation that BBC, having given its undertaking to the Full Court, will, and will be permitted in the arbitration to, act contrary to its undertaking in the arbitration in some way. As explained above, that speculation is impermissible.

57 Carmichael's second contention, distinguishing between the Australian Hague Rules as applied and as interpreted under Australian law, also involves speculation. Senior counsel for BBC accepted, in the hearing of the appeal, that the undertaking meant that BBC undertook to admit in the arbitration that the Australian Hague Rules as applied and as interpreted under Australian law applied. To avoid any suggestion that BBC had not submitted to the jurisdiction of the Federal Court, the Full Court also made the declaration with the consent of BBC. Given this, Carmichael accepted in the hearing of the appeal that if its construction of the undertaking as excluding the Australian interpretation of Australian law was incorrect, the only risk to it was of "rogue" arbitrators acting contrary to the agreement of the parties and, thereby, contrary to s 46 of the UK Arbitration Act (discussed below). This exemplifies the "insular distrust" rightly eschewed in *Sky Reefer*.

58 The terms of the undertaking and declaration, to the effect that the Australian Hague Rules as applied under Australian law apply in the arbitration, bear only one possible meaning. The words "as applied" necessarily carry with them the meaning "as interpreted". The Australian Hague Rules cannot be applied under Australian law unless they are interpreted in accordance with Australian law.

59 The undertaking and declaration are facts relevant to the operation of Art 3(8). To the extent Carmichael submitted they could not be considered because they had come into existence only after BBC had relied on cl 4 of the bill of lading to commence the arbitration in London, the submission cannot be accepted. Lord Diplock's statement in *The Hollandia* that "the time at which to ascertain whether a choice of forum clause will have an effect that is proscribed by article III, paragraph 8 should be when ... the carrier seeks to bring the clause into operation and to rely upon it"[62] does not mean that, in this case, the Full Court was (or this Court is) confined to the facts as they existed at the time BBC commenced the arbitration in reliance on cl 4 of the bill of lading (that is, before the giving of

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62 *The Hollandia* [1983] 1 AC 565 at 575.

the undertaking and the making of the declaration). The facts are those admitted, agreed, or found (or those which are ex facie apparent) at the time the court is deciding if Art 3(8) is engaged or not.

60 The remoteness of Carmichael's concern about the efficacy of the undertaking and declaration is reinforced by s 46 of the UK Arbitration Act, the terms of which are set out above. It may be accepted that cl 4 of the bill of lading provides that "English law is to apply" in the arbitration. But the common position of Carmichael and BBC (including BBC by reason of the undertaking and declaration) is that the Australian Hague Rules as applied in Australia apply in the arbitration to Carmichael's claims against BBC. Neither party suggested any cogent reason why this would not constitute "the law chosen by the parties as applicable to the substance of the dispute" within the meaning of s 46(1)(a) of the UK Arbitration Act, superseding the choice of law in cl 4 of the bill of lading, and binding the arbitrators.[63] Therefore, no question of two leges causae arises in respect of the law applicable to the substance of the dispute.

61 Section 33(1)(b) of the *Civil Jurisdiction and Judgments Act 1982* (UK) does not suggest to the contrary. BBC did not merely ask the Full Court to "dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country" as set out in s 33(1)(b). BBC consented to the making of the declaration. On the face of it, s 33(1)(b) is inapplicable.[64] Carmichael did not prove or persuasively explain why the arbitrators would not treat BBC's consent to the declaration as evidence of BBC's irrevocable agreement with Carmichael as to the applicable law. Nor did Carmichael prove or persuasively explain why, if BBC attempted to resile from the terms of the declaration and that meant BBC's potential liability (on the balance of probabilities) would be relieved or lessened, Carmichael could not apply to the Federal Court of Australia to lift the stay of Carmichael's proceeding due to the changed circumstances.

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63 See *Dicey, Morris and Collins on the Conflict of Laws*, 16th ed (2022), vol 1 at 892-893 [16-050].

64 See also, as referred to in *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Company KG (The BBC Nile)* (2022) 295 FCR 81 at 88-89 [27], *Adams v Cape Industries Plc* [1990] Ch 433 at 461 and *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP* [2022] 2 Lloyd's Rep 169 at 177 [34].

Carmichael's three identified risks

Interpretation of Art 3(2)

62 For the reasons given above, the risk or possibility that the arbitrators might not treat the undertaking and the declaration by consent as BBC agreeing with Carmichael that Art 3(2) of the Australian Hague Rules as applied in Australia applies in the arbitration does not involve a lessening of BBC's liability within the meaning of Art 3(8). The risk falls far short of the arbitration involving, on the balance of probabilities, a lessening of BBC's liability other than as provided for in Art 3(2) of the Australian Hague Rules as applied in Australia.

63 In any event, as BBC submitted, the posited risk fails to recognise that the proper interpretation of Art 3(2) remains an open question under Australian law. In *Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor Ltd*,[65] Sheller JA, in obiter dicta, said that the US approach to Art 3(2) (that the carrier shall load and shall do it properly and carefully) may be preferable to the UK approach to Art 3(2)[66] (that the carrier "shall do whatever loading [the carrier] does properly and carefully"[67]). In *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc*,[68] the House of Lords held that the UK approach was correct, with the law being accurately stated in *Scrutton on Charterparties and Bills of Lading* as follows:[69]

> "The whole contract of carriage is subject to the Rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide. Thus, if the carrier has agreed to load, stow or discharge the cargo, [the carrier] must do so properly and carefully, subject to any protection which [the carrier] may enjoy under

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65 (1998) 44 NSWLR 371.

66 *Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor Ltd* (1998) 44 NSWLR 371 at 387-388.

67 *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402 at 417, quoted in *Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor Ltd* (1998) 44 NSWLR 371 at 387.

68 [2005] 1 WLR 1363; [2005] 1 All ER 175.

69 *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc* [2005] 1 WLR 1363 at 1369 [14]; [2005] 1 All ER 175 at 183, quoting *Scrutton on Charterparties and Bills of Lading*, 20th ed (1996) at 430-431.

Article IV. But the Rules do not invalidate an agreement transferring the responsibility for these operations to the shipper, charterer or consignee."

64 The position under Australian law remaining undecided, the risk to Carmichael is no different before the arbitrators or the Federal Court of Australia. In both circumstances, Carmichael may submit that the obiter dicta in *Nikolay Malakhov Shipping* should apply. There is no reason to speculate that the arbitrators would assume that Carmichael's submissions must be rejected because *Jindal Iron and Steel* is binding on them when the parties have agreed the law as applicable to the substance of the dispute. The arbitrators may reject Carmichael's submissions about Art 3(2), but so too might have the Federal Court of Australia. There is no lessening of BBC's liability within the meaning of Art 3(8) by reason of this risk.

Hague Rules Arts 1 to 8

65 The risk or possibility that the arbitrators might construe cl 3 of the bill of lading as applying only Arts 1 to 8 of the Hague Rules to the arbitration is also answered by the reasons above, as well as the undertaking and declaration.

66 Clause 3 of the bill of lading does not on its face require the arbitrators to apply only Arts 1 to 8 of the Hague Rules. Clause 3 provides that only Arts 1 to 8 of the Hague Rules apply if there are "no such enactments", meaning no enactment of the Hague Rules in the country of shipment (or, secondarily, the country of destination). If the country of shipment has enacted the Hague Rules then, on its face, cl 3 provides that those Rules "as enacted" are to apply. The point is that, in this case, it cannot be said that cl 3 on its face will be construed by the arbitrators as applying only Arts 1 to 8 of the Hague Rules. Nor has Carmichael, by evidence, proved that cl 3 would be so construed by (English) law binding on the arbitrators. BBC has also not agreed or admitted that cl 3 would be so construed. It therefore cannot be concluded that, on the balance of probabilities, cl 4, by requiring the dispute to be referred to arbitration in London and for English law to apply, relieves BBC from or lessens BBC's liability otherwise than in accordance with the Australian Hague Rules.

67 Further, and as explained above, the undertaking and declaration operate so that the Australian Hague Rules as applied in Australia apply in the arbitration to Carmichael's claims against BBC.

Expense and practical difficulty

68 The reasoning in *Sky Reefer*, that the costs and inconvenience of the shipper (cargo owner) in undertaking arbitration in another country do not provide a principled basis for determining any relieving or lessening of a carrier's liability,[70] is persuasive. Article 3(8) is directed to the carrier's liability being relieved or lessened "otherwise than as provided in these Rules". It is not directed to the mechanisms under which the Hague Rules may be enforced or the costs and burdens in seeking their enforcement.

69 Even if the expense to and "practical burden" on Carmichael might be greater by reason of the arbitration in London than it would be if, instead, Carmichael's proceeding in the Federal Court of Australia were permitted to proceed, there are no meaningful criteria by which it can be said that such greater cost in fact relieves or lessens BBC's liability otherwise than in accordance with the Australian Hague Rules. For example, what percentage cost increase will suffice before it can be said that liability is lessened or relieved? While Carmichael may choose to conduct two sets of proceedings, one against BBC in the arbitration and one against OneSteel in Australia, it may be inferred that Carmichael's choice will be informed by the returns it considers it could receive. The mere fact that this choice is available also does not mean that BBC's potential liability to Carmichael is relieved or lessened. The Full Court was correct to conclude that "[w]here the relative costs of dispute resolution fall are simply not within the scope of Art 3(8)".[71] Carmichael would have also failed on this ground for lack of proof of any greater cost being likely to be incurred by the parties complying with their contractual bargain in cl 4 of the bill of lading to arbitrate any disputes in London.

Conclusion and orders

70 The Full Court did not err in dismissing Carmichael's application to restrain the conduct of the arbitration and granting BBC's application that Carmichael's proceeding in the Federal Court of Australia be stayed, on the basis of the undertaking that BBC gave and the declaration the Full Court made by consent between Carmichael and BBC.

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70 *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer* (1995) 515 US 528 at 536.

71 *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Company KG (The BBC Nile)* (2022) 295 FCR 81 at 92 [45].

Gageler *CJ*
Gordon *J*
Steward *J*
Gleeson *J*
Jagot *J*

71 The orders which should be made are:

(1) The appeal be dismissed.

(2) The appellant pay the respondents' costs of the appeal.