

# **Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co. KG (The BBC Nile) [2022] FCAFC 171**

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## **Introduction**

On 12 October 2022, the Full Court of the Federal Court of Australia ('the Full Court') handed down its judgment in *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co. KG (The BBC Nile)* [2022] FCAFC 171. The Full Court's decision involved interpretation of the operation mandatory forum provisions of the *Carriage of Goods by Sea Act 1991* (Cth) ('COGSA 91') and their application to inter-State contracts of carriage. The decision clarifies:

- (i) that practical concerns about the effectiveness of international arbitration for a dispute involving the application of Australian law are not sufficient to ground an anti-suit injunction; and
- (ii) that the mandatory forum provisions of COGSA 91 only apply to contracts of carriage that depart from Australia to an overseas destination.

The relevant provisions of COGSA 91 are outlined below. The application of the amended Hague Rules in Schedule 1A ('the Australian Rules') is governed by section 10(1)(b)(ii) of COGSA 91 and Article 3(8) of the Australian Rules. Section 10 provides:

- (1) *The [Australian] Rules only apply to a contract of carriage of goods by sea that:*
  - a. *is made on or after the commencement of Schedule 1A and before the commencement of Part 3; and*
  - b. *is a contract:*
    - i. *to which, under Article 10 of the [Australian] Rules, those Rules apply; or*
    - ii. *subject to subsections (1A) and (2)—for the carriage of goods by sea from a port in Australia to another port in Australia [inter-State carriage]; or*
    - iii. *contained in or evidenced by a non-negotiated document (other than a bill of lading or similar documentation of title), being a contract that contains express provision to the effect that the [Australian] Rules are to govern the contract as if the document were a bill of lading...*
- (1A) *If a contract for the carriage of goods by sea referred to in subparagraph 10(1)(b)(ii) is contained in, or evidenced by, a consignment note, the [Australian] Rules apply to that contract only if paragraph 5 of Article 10 of those Rules so requires.*
- (2) *The [Australian] Rules do not apply in relation to the carriage of goods by sea from any port in any State or Territory in Australia to any other port in that State or Territory [intra-State carriage].*

Article 3(8) of the Australian Rules provides:

*Any clause, covenant, or agreement in a contract of carriage reliving 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 the convention, 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.*

The jurisdiction provision of COGSA 91 is contained in section 11, which provides:

- (1) *All parties to:*
  - (a) *a sea carriage document relating to the carriage of goods from any place in Australia to any place outside Australia; or*
  - (b) *a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii), relating to such a carriage of goods;**are taken to have intended to contract according to the laws in force at the place of shipment.*
- (2) *An agreement (whether made in Australia or elsewhere) has no effect so far as it purports to:*
  - (a) *preclude or limit the effect of subsection (1) in respect of a bill of lading or document mentioned in that subsection; or*
  - (b) *preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of a bill of lading or a document mentioned in subsection (1); or*

(c) preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of:

(i) a sea carriage document relating to the carriage of goods from any place outside Australia to any place in Australia; or

(ii) a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii) relating to such a carriage of goods.

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

## Facts

The background of the case was that, in December 2019, Carmichael Rail Network Pty Ltd ('Carmichael Rail') contracted with OneSteel Manufacturing Pty Ltd ('OneSteel') to purchase 21,647 tonnes of 60k head hardened steel rails.<sup>1</sup> The rails were to be shipped from OneSteel's facility in Whyalla, South Australia to Mackay, Queensland. The transport of the rails was organised by Norwest Group Logistics Pty Ltd ('NGL') on behalf of Carmichael Rail and, in June 2020, a booking note was executed by NGL and BBC Chartering Carriers GMBH & Co. KG ('BBC Chartering').

The rails were loaded onto the *BBC Nile* between 9 December and 17 December 2020 and, on the latter date, a bill of lading for 8,669 lengths of hardened steel rail was issued by BBC Chartering ('the BOL'). The *BBC Nile* arrived at Mackay on 24 December 2020. On 25 December 2020, the crew observed a collapse in hold 1 of the vessel. This collapse of the rails resulted in the goods no longer being compliant with the specifications necessary for railway construction. The damaged portion of the rails were subsequently sold as scrap metal.

On 2 August 2022, after several extensions of the time bar by agreement between the parties, BBC Chartering gave Carmichael Rail notice that it had commenced arbitral proceedings in London, in accordance with clause 4 of the BOL ('the London Arbitration'). On 12 August 2022, Carmichael Rail filed the anti-suit injunction application which was the subject of this decision ('CR's Application').

Carmichael Rail was granted an interim injunction on 16 August 2022 to restrain BBC Chartering from taking any further steps in the London Arbitration until CR's Application had been determined. On 31 August 2022, Allsop CJ directed that the proceeding be heard by the Full Court of the Federal Court of Australia in its original jurisdiction.<sup>2</sup> As part of the proceedings, BBC Chartering also filed an application for a stay of any Australian proceedings due to the London Arbitration under the *International Arbitration Act 1974* (Cth).

## Full Court's Decision

The Full Court, comprised of Rares, SC Derrington, and Stewart JJ, wrote unanimously in dismissing Carmichael Rail's application to permanently stay the London Arbitration. The Full Court rejected both of Carmichael Rail's reasons as to why the permanent stay should be granted and accepted BBC Chartering's application for a stay of the Australian proceedings.

### First Issue: Lessening of Liability?

First, Carmichael Rail argued that clause 4 of the BOL, which provided for a choice of law of English law and mandatory arbitration in London, was contrary to section 10 of COGSA 91 and Article 3(8) of the Australian Rules because there was "real potential" to lessen BBC Chartering's liability.<sup>3</sup>

Carmichael Rail pointed to three ways in which liability may be reduced by the London Arbitration. First, that a London arbitral tribunal ('the Tribunal') may consider that clause 3 of the BOL, a clause paramount, operates to only include Articles I-VIII of the Hague Rules, which would apply lower limitation of liability amounts for BBC Chartering. Secondly, the Tribunal may apply an English interpretation to the Australian Rules, particularly regarding the operation of Articles 3(1) and (2). Finally, Carmichael Rail were concerned that Australian law would need to be proved through evidence (rather than as a matter of argument) before a Tribunal, as opposed to a court versed in Australian law.

<sup>1</sup> *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co. KG (The BBC Nile)* [2022] FCAFC 171 [6].

<sup>2</sup> Pursuant to s 20(1A) of the *Federal Court of Australia Act 1976* (Cth).

<sup>3</sup> *The BBC Nile* (n 1) [17].

The Full Court dismissed each of these arguments in turn. The first argument was effectively dealt with by BBC Chartering providing an undertaking that the Australian Rules apply to the BOL. This rendered Carmichael Rail's arguments about the construction of clause 3 of the BOL futile because there was no real dispute between the parties about the construction of the clause.<sup>4</sup> The Full Court found it appropriate to make a declaration that the Australian Rules apply to the BOL and this declaration would be effective in the context of the London Arbitration, as an issue estoppel would be created to prevent BBC Chartering from resiling from its undertaking.<sup>5</sup>

Carmichael's second argument was that, despite the Tribunal applying the Australian Rules, it would nonetheless interpret the Australian Rules in accordance with English law. In particular, Carmichael Rail took issue with the terms of BBC Chartering's undertaking in that it provided that the Australian Rules "as *applied* under Australian law" apply to the BOL. Carmichael Rail contrasted this wording with an undertaking stating "that the Australian law *interpretation* of the Rules shall apply". The Full Court found that Carmichael Rail's contentions in this respect were "moot" due to BBC Chartering's admission and undertaking.<sup>6</sup>

The Full Court did provide some commentary on potentially relevant differences between Australian and English law, namely the scope of a carrier's responsibility, particularly with reference to FOIST clauses, and the burden of proof under Article 3(1).<sup>7</sup> However, the Full Court declined to "speculate" on whether particular factual findings would lead to a different result under either Australian or English law.

Finally, the Full Court shortly stated that the requirement to prove the content of Australian law in an international arbitration is not a matter at which Article 3(8) is directed. It outlined that the relative costs, and the party who bears the cost, are "simply not within the scope of Article 3(8)".<sup>8</sup>

### **Second Issue: Limiting of Jurisdiction?**

Carmichael Rail also argued that, due to section 11(2) of COGSA 91, the arbitration clause of the BOL was invalid. The Full Court identified that this proposition depended upon whether the carriage of inter-State goods under a bill of lading fell within the operation of section 11(2)(b).<sup>9</sup>

The key task for the Full Court was to construe the phrase "bill of lading" in section 11(2)(b). In undertaking this task, the Full Court comprehensively considered the legislative history of the provision. It traced the provision's origins from section 6 of the *Sea-Carriage of Goods Act 1904* (Cth) ('the 1904 Act'),<sup>10</sup> the Parliamentary debate around the 1904 Act before it was passed,<sup>11</sup> and the minor changes enacted in the *Sea-Carriage of Goods Act 1924* (Cth).<sup>12</sup> The Full Court concluded that "[n]othing in the materials leading to the enactment of COGSA 91, or the amendments to s 11 of that Act, discloses any legislative consideration that the parties to a sea carriage document, including a bill of lading, should be unable to contract out of the jurisdiction of Australian courts in respect of inter-State carriage of goods".<sup>13</sup>

While the Full Court lamented that the "omission seems inconsistent with the express provisions of s 11(2)(b) and (c)" and that "there is no evident rational as to why the Parliament enacted s 11 to exclude inter-State carriage of goods by sea",<sup>14</sup> it identified that an apparent oversight in legislative amendment likely caused the ambiguity in this case. The Full Court traced the amendments of section 11(1) in 1998 where the reference to "a bill of lading, or similar document of title" was changed to "a sea carriage document".<sup>15</sup> The term "sea carriage document" was an amendment designed to be a "compendious expression", as defined in the Australian Rules.<sup>16</sup> However, section 11(2) was not similarly amended to reflect the updated labels. Nonetheless, the Full Court found that the legislative intention to make the operation of section 11(2) subject to the definitional categories in section 11(1) was not subverted by this drafting oversight.<sup>17</sup>

<sup>4</sup> Ibid [25].

<sup>5</sup> Ibid [27].

<sup>6</sup> Ibid [31], [44].

<sup>7</sup> Ibid [32]-[42].

<sup>8</sup> Ibid [45].

<sup>9</sup> Ibid [49].

<sup>10</sup> Ibid [53]-[54].

<sup>11</sup> Ibid [55]-[61].

<sup>12</sup> Ibid [62].

<sup>13</sup> Ibid [64].

<sup>14</sup> Ibid [64], [65].

<sup>15</sup> Ibid [72].

<sup>16</sup> Ibid.

<sup>17</sup> Ibid [72]-[73].

The Full Court considered whether section 11(2)(b), on its face, could invalidate clause 4 of the BOL. After outlining the operation of section 11,<sup>18</sup> the Full Court rejected Carmichael Rail's argument that "bill of lading" in section 11(2)(b) should be read in its broadest form (i.e. to include any bill of lading with no geographical restrictions).<sup>19</sup> This conclusion was justified on the basis of the statutory interpretation already undertaken as well as several difficulties that would arise from such a broad interpretation of "bill of lading": (i) intra-State shipments being caught by section 11(2), (ii) bills of lading with no connection to Australia would be caught, (iii) the term "bill of lading" would be interpreted differently between sections 11(2)(a) and 11(2)(b), and (iv) the wide capture of bills of lading is different to all other aspects of the intended scheme under COGSA 91.<sup>20</sup>

The Full Court concluded that:<sup>21</sup>

*In short, it is abundantly clear that prior to the 1998 amendments, inter-State shipments were not caught by the invalidating provisions in relation to choice of law and jurisdiction; there is nothing to indicate any intention in those amendments to change that position; infelicitous leftover wording was created by the amendment of one subsection from referring to two types of documents to referring to one compendious type without amending two paragraphs of another subsection that refer to the first subsection. Resolving that infelicity by reading "bill of lading" unqualified by any route of carriage would create far more difficulty than it solves, and the infelicity is easily remedied by reading "a" preceding "document" in s 11(2)(a) and (b) as "other".*

Carmichael Rail also advanced an alternative argument that further words should be read into section 11(2)(b). Carmichael Rail's additions to the provision would have the effect of capturing inter-State carriage.<sup>22</sup> The key basis for this expanded reading of the provision was the Parliamentary debates prior to the 1904 Act, which indicated the Parliament was attempting to close a "loophole". However, the Full Court dismissed this argument due to the "loophole" concerning controlling shipowner's ability to contract out of liability, as opposed to ensuring Australian jurisdiction over all carriage by sea disputes.<sup>23</sup> Therefore, the Full Court declined to read any additional words into the impugned provision.<sup>24</sup>

### **Third Issue: Stay of Australian Proceedings?**

Finally, BBC Chartering applied for an order under section 7 of the *International Arbitration Act 1974* (Cth) for a stay of the whole of Carmichael Rail's claims against it. All the prerequisites in section 7 were satisfied, namely that both Carmichael Rail and BBC Chartering were parties to an arbitration agreement, the arbitration agreement is a foreign arbitration agreement, the dispute is capable of settlement by arbitration, and the arbitration agreement is valid.<sup>25</sup> Therefore, the Full Court was compelled to order the stay of the Australian proceedings.<sup>26</sup>

### **Comment**

The Full Court's decision in this case provides clarity around the circumstances in which Article 3(8) of the Australian Rules will be enlivened where an arbitration is on foot, as well as a welcome commentary on the legislative history and effect of section 11 of COGSA 91.

Carmichael Rail's concerns about the London Arbitration, namely around the application of the Australian Rules and Australian law, were dismissed as being largely irrelevant for the purposes of Article 3(8). In particular, Carmichael Rail's concerns around the interpretation of the clause paramount in the BOL and the unfamiliarity of the foreign arbitrators with Australian law were perhaps matters better dealt with in the drafting and negotiation stage of the BOL. Shippers of inter-State goods in Australia would be well advised to pay careful attention to the terms of carriage, as some of the important protections in COGSA 91 do not extend to such voyages.

The Full Court's decision will likely inform the current review of section 11 of COGSA 91 being undertaken by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts.<sup>27</sup> The discussion paper for this review was released in September 2022, a mere month before the Full Court handed

<sup>18</sup> Ibid [75]-[77].

<sup>19</sup> Ibid [84].

<sup>20</sup> Ibid [86]-[89].

<sup>21</sup> Ibid [90].

<sup>22</sup> Ibid [92]-[93].

<sup>23</sup> Ibid [98]-[99].

<sup>24</sup> Ibid [104].

<sup>25</sup> Ibid [108].

<sup>26</sup> Ibid [109].

<sup>27</sup> Department of Infrastructure, Transport, Regional Development, Communications and the Arts, 'Carriage of Goods by Sea Act 1991: Potential amendments to Section 11' (Discussion Paper, 19 September 2022).

down its decision in this case. The second ‘concern’ in the discussion paper is whether interstate voyages should be included within the ambit of section 11.

The Full Court’s lament about the unfortunate gap in the operation of section 11 undoubtedly supports the need for legislative amendment to either clarify that section 11(2)(b) only applies to shipments leaving Australia or extend the protection to inter-State shipments.