The High Court Weighs in on Article 3(8) of the Amended Hague Rules: *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* (2024) 98 ALJR 445; [2024] HCA 4

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Introduction

On 14 February 2024, the High Court of Australia handed down its judgment in *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG*.[1] The High Court's decision considered the correct construction of article 3(8) of the amended Hague Rules ('Australian Rules') contained within schedule 1A of the *Carriage of Goods by Sea Act 1991* (Cth) ('*COGSA*').

The High Court proceedings were an appeal from a unanimous decision of the Full Court of the Federal Court of Australia.[2] The High Court unanimously dismissed the appeal. The judgment:

(i) clarifies the standard of proof to be applied when considering whether art 3(8) has any effect on a given provision;
(ii) gives examples of both the type of evidence and the provisions that would satisfy the burden of proof;
(iii) reiterates the purposes of the Hague Rules and the importance of their interpretation on an internationally consistent basis; and
(iv) rebukes 'insular distrust' of foreign arbitration in the absence of any basis for establishing it.

The relevant provision of *COGSA*, namely art 3(8) of the Australian Rules, provides:

> 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*~~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.[3]

Facts

The key facts of the case were summarised by the High Court at [2] to [3]. The Full Court provided a more detailed overview of the facts, which is summarised below.

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.[4] 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

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[1] (2024) 98 ALJR 445 ('HCA Decision').
[2] *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* (2022) 295 FCR 81 (Rares, SC Derrington and Stewart JJ) ('Primary Decision'); see also Isaac Gill, '*Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG (The BBC Nile)* [2022] FCAFC 171' (2022) 36(2) *Australian and New Zealand Maritime Law Journal* 65.
[3] Emphasis and strikethrough in original.
[4] Primary Decision (n 2) 83 [6].

of the BOL ('London Arbitration'). On 12 August 2022, Carmichael Rail filed the anti-suit injunction application ('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. 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) ('BBC Chartering's Application').

The BOL relevantly provided at clauses 3 and 4:

> **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.
> …
> **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.[5]

FCA Full Court Decision

The Full Court dismissed CR's Application and allowed BBC Chartering's Application.[6] BBC Chartering had provided an undertaking that, for the purposes of the London Arbitration, the Australian Rules as applied under Australian law would apply to the BOL. Carmichael Rail suggested that BBC Chartering might still maintain an alternate position in the London Arbitration, such as the Hague Rules applying due to the clause paramount or the English interpretation of the Hague-Visby Rules being applicable. The Full Court's dismissal was primarily on the basis that the BBC Chartering's undertaking (and subsequent order by consent) negated any suggestion that they could maintain such a position in the London Arbitration.[7]

The terms of the undertaking given by BBC Chartering were:

> **UPON THE UNDERTAKING** of [BBC Chartering] by its Senior Counsel:
> A. not to take in the London arbitration any time bar defence that was not otherwise available to it as at 12 August 2022; and
> B. 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…[8]

The Full Court also made a declaration by consent on terms substantially similar to paragraph B of the undertaking.

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[5] Primary Decision (n 2) 84–5 [8].
[6] Primary Decision (n 2) 104 [110]–[112].
[7] For a more fulsome discussion of the Primary Decision, see Gill (n 2).
[8] See the unreported version of the Primary Decision: *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* [2022] FCAFC 171.

Carmichael Rail was granted special leave to appeal to the High Court only on the art 3(8) arguments; it was denied special leave in relation to its arguments concerning s 11 of *COGSA*.[9]

High Court Decision

The High Court, comprised of Gageler CJ, Gordon, Steward, Gleeson and Jagot JJ, wrote unanimously in dismissing Carmichael Rail's appeal from the Full Court's judgment.

Carmichael Rail's key contention, as it was before the Full Court, was that clause 4 of the BOL was void under art 3(8) of the Australian Rules because '"there existed a risk that [BBC Chartering's] liability would be relieved or lessened as a consequence of one or more of" three specified matters'.[10] The three matters Carmichael Rail pointed to were: (a) the risk that London arbitrators would apply an English interpretation of art 3(2) of the Hague-Visby Rules; (b) the risk that London Arbitrators would apply the clause paramount in clause 3 of the BOL and conclude that only arts 1–8 of the Hague Rules were incorporated into the BOL, as opposed to the Australian Rules, and, that this would result in a lower package limitation defence; and (c) there was 'expense and practical difficulty' in undertaking arbitration in London.[11]

The High Court summarised its own judgment at [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.

The High Court then detailed the relevant provisions of *COGSA*, the Australian Rules, the *International Arbitration Act*, the *Arbitration Act 1996* (UK) and the relevant BOL clauses.[12]

Article 3(8) of the Australian Rules

Standard of Proof

The central part of the High Court's reasoning was a consideration, and application, of the standard of proof to be applied under art 3(8) of the Australian Rules. The High Court stated that the relevant question for a court determining art 3(8)'s applicability is whether, in all the circumstances (which includes past, present and future circumstances), 'any clause relieves a carrier from liability or lessens such liability otherwise than as provided in the Australian Hague Rules'.[13]

Further, it was considered important that the dispute was occurring within the framework established by the *International Arbitration Act*. In particular, the operation of s 7(5) of that Act, in that it directs that a court 'shall not' stay proceedings if it 'finds' an arbitration agreement null and void, was critical.[14] The use of the word 'finds' was consistent with the application of the civil standard of proof (ie the balance of probabilities) and not with some lesser standard, as contended for by Carmichael Rail, involving a 'real risk', 'reasonably arguable', or a

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[9] Transcript of Proceedings, *Carmichael Rail Network Pty Ltd as Trustee for the Carmichael Rail Network Trust v BBC Chartering Carriers GmbH & Co KG* [2023] HCATrans 79.
[10] HCA Decision (n 1) 448–9 [6].
[11] Ibid.
[12] Ibid 449–51 [9]–[21].
[13] Ibid 451 [22].
[14] Ibid 451 [24].

'prima facie case'.[15] There was no basis for applying a lesser standard of proof. The High Court's conclusion in this regard was reinforced by reference to the *New York Convention*.[16]

The High Court then considered the text, context, purpose and authorities concerning art 3(8) of the Australian Rules and the relevant standard of proof.

Text

The language of art 3(8)—'relieving the carrier … from liability' or 'lessening such liability'—was contrasted with a formulation that a clause '*might* relieve a carrier from liability or *might* lessen such liability depending on future unknown and unpredictable possibilities'.[17] The High Court referenced the seminal authority of *Stag Line Ltd v Foscolo, Mango and Co Ltd* ('*Stag Line*')[18] concerning the necessity of uniform interpretation of international treaties according to 'broad principles of general acceptation'.[19] The *Vienna Convention on the Law of Treaties*[20] (1969), the 'full conviction' standard of civil law jurisdictions, as well as the 'preponderance of evidence' standard used in international tribunals, were cited in support of the principle that a standard of at least the preponderance of the evidence is applicable in determining questions arising under art 3(8).[21]

Context

Carmichael Rail also relied on the final sentence of art 3(8) to support the contention that it had some application in relation to 'future contingent possibilities (in contrast to future probabilities)'.[22] However, the High Court, after reviewing the *travaux préparatoires* of the Hague Rules,[23] found that the final sentence was merely a deeming provision for that particular type of clause (a benefit of insurance in favour of the carrier clause), rather than any general extension of the operation of art 3(8). Further, it was stated that the right created by such a clause was a 'presently existing right to claim indemnity', rather than some hypothetical lessening of the carrier's liability.[24]

Purpose

The High Court also made some useful, if uncontroversial, comments on the purpose of the Hague Rules. The judgment emphasised that the Hague Rules 'embody a compromise about the allocation of risk for cargo damage'[25] and that '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'.[26]

Concerning art 3(8) specifically and its operation in relation to choice of forum clauses, the High Court quoted with approval Lord Diplock's comments in *The Hollandia*.[27] There, Lord Diplock explained that:

> [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

[15] Ibid 451 [24]–[25], 452 [27].
[16] *1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).
[17] HCA Decision (n 1) 452 [28] (emphasis in original).
[18] [1932] AC 328, 350 (Lord McMillan).
[19] HCA Decision (n 1) 452 [29].
[20] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).
[21] HCA Decision (n 1) 452–3 [30]–[32].
[22] Ibid 453 [37].
[23] Ibid 453 [34]–[35], discussing Michael F Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* (Fred B Rothman, 1990) vol 2, 453, 471–2.
[24] HCA Decision (n 1) 453–4 [37].
[25] Ibid 454 [38].
[26] Ibid.
[27] [1983] 1 AC 565, 573, discussed in HCA Decision (n 1) 454 [39].

> 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.[28]

The High Court concluded that the purposes of the Hague Rules would be 'undermined' by construing art 3(8) as having operation in circumstances where the relevant facts were not admitted or proved.[29] It was opined that:

> 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.[30]

Authorities

The High Court considered several cases relied on in support of Carmichael Rail's arguments, including the *Akai* cases,[31] the *Baghlaf* cases[32] and two United States cases.[33]

The *Akai* cases did not support Carmichael Rail's contentions because the first *Akai* case was decided on the basis that 'an English court *would not apply*' the relevant statute.[34] The High Court dismissed the notion that the issues that plagued the second *Akai* case would apply in these circumstances, because of the undertaking given by BBC Chartering and the declaration made by the Full Court.[35]

The *Baghlaf* cases concerned English courts considering whether a choice of forum clause nominating Pakistan was void due to an unwaivable, statutory limitation period in Pakistan.[36] While rejecting Carmichael Rail's arguments, the High Court recognised that some provisions (including the Pakistan statutory limitation) which *ex faciebus* lessen liability would attract the operation of art 3(8).[37] This was on the basis to have an *ex facie* effect, the effect of the provision must be indisputable or manifestly apparent.[38]

The two United States cases were, on their face, conflicting. In *Indussa Corp v SS Ranborg* ('*Indussa*'),[39] the United States Court of Appeals decided, in obiter dicta, that a foreign form requirement that had a risk of lessening the carrier's liability was sufficient to void the relevant clause.[40] However, *Indussa* was disapproved by a majority of the United States Supreme Court ('US Supreme Court') in *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer* ('*Sky Reefer*').[41] The High Court's analysis of *Sky Reefer* was that:

> The [US Supreme] Court rejected jurisdictional parochialism and applied 'contemporary principles of international comity and commercial practice'. 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'. The [US Supreme] 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 [US Supreme] 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)'. In so concluding, the [US Supreme] 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 [US Supreme] Court's observation that, if satisfied that the

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[28] HCA Decision (n 1) 454 [39], quoting *The Hollandia* (n 27) 575 (emphasis added by HCA).
[29] HCA Decision (n 1) 454 [40].
[30] Ibid.
[31] *Akai Pty Ltd v People's Insurance Co Ltd (*1996) 188 CLR 418; *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90.
[32] *Baghlaf Al Zafer Factory Co BR for Industry Ltd v Pakistan National Shipping Co* [1998] 2 Lloyd's Rep 229; *Baghlaf Al Zafer Factory Co BR for Industry Ltd v Pakistan National Shipping Co [No 2]* [2000] 1 Lloyd's Rep 1.
[33] *Indussa Corp v SS Ranborg*, 377 F 2d 200 (1967) ('*Indussa'*); *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer*, 515 US 528 (1995) ('*Sky Reefer*').
[34] HCA Decision (n 1) 455 [43] (emphasis in original).
[35] Ibid 455 [44]–[45].
[36] Ibid 455–6 [46].
[37] Ibid 456 [47].
[38] Ibid.
[39] *Indussa* (n 33).
[40] Ibid 203–4. See also HCA Decision (n 1) 456 [49].
[41] *Sky Reefer* (n 33).

impugned provisions did operate as a prospective waiver of rights, it would have had no hesitation in applying art 3(8).[42]

Undertaking and Declaration

Carmichael Rail contended that the undertaking given by BBC Chartering before the Full Court was ineffective due to a lack of BBC Chartering assets in Australia to secure the undertaking and that the use of the word 'applied', instead of 'interpreted' in the phrase 'as applied under Australian law' (in relation to the Australian Rules), created ambiguity and the potential for the carrier's liability to be lessened.[43] The High Court dismissed both contentions on the basis that they involved speculation;[44] further, it was considered that (in relation to the second contention) the distinction between 'applied' and 'interpreted' was artificial and that only real risk was of '"rogue" arbitrators acting contrary to the agreement of the parties'.[45]

The High Court also confirmed that the undertaking and the declaration were relevant facts to be considered, despite occurring after BBC Chartering's election to commence the arbitration.[46] This finding accorded with Lord Diplock's position in *The Hollandia*, whereby the relevant time to ascertain the operation of art 3(8) is when a court is determining if art 3(8) applies.[47]

The High Court also brought to bear the failures of Carmichael Rail's case concerning a lack of proof. This was expressly noted in relation to the contentions that London arbitrators would disregard BBC Chartering's undertaking and that, if BBC Chartering did attempt to resile from the undertaking, there was a reason why Carmichael Rail could not re-enliven proceedings in Australia due to 'changed circumstances'.[48] Similarly, Carmichael Rail had not established, on the balance of probabilities, that the London arbitrators would enforce the clause paramount and apply the Hague Rules instead of the Australian Rules (contrary to the undertaking and declaration).[49] Finally, Carmichael Rail had also failed to establish that there would be a greater cost due to the expense and practical difficulty of conducting an arbitration in London.[50]

On the expense and practical difficulty point, the High Court doubted that there were meaningful criteria by which to judge when the increased costs contravened art 3(8).[51] The High Court also affirmed the Full Court's conclusion that where the costs of dispute resolution fall is not a relevant matter within the scope of art 3(8).[52]

As a tangential point, the High Court accepted BBC Chartering's submission that the operation of art 3(2) is not settled in Australian law and that the risks identified by Carmichael Rail were tied to a particular and arguable interpretation of art 3(2).[53]

Comment

The High Court's decision could be simply described as a clarification of the standard of proof. Carmichael Rail's true failing was, with respect, in its inability to positively establish any of the dangers that it perceived in the London arbitration. Of course, if those dangers did eventuate, this decision does not foreclose any further Australian litigation.

The interpretation given to art 3(8) by the High Court is patently consistent with the positions taken in the United Kingdom and the United States.[54] This consistency, as noted with the reference to *Stag Line*, is an important feature of international maritime treaties (and, indeed, other international treaties).

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[42] HCA Decision (n 1) 456–7 [50], citing *Sky Reefer* (n 33) 537, 539.
[43] HCA Decision (n 1) 457 [55].
[44] Ibid 457–8 [56]–[57].
[45] Ibid 457–8 [57]–[58].
[46] Ibid 458 [59].
[47] Ibid.
[48] Ibid 458 [61].
[49] Ibid 459 [65]–[67].
[50] Ibid 459–60 [69].
[51] Ibid.
[52] Ibid.
[53] Ibid 458–9 [63]–[64].
[54] See *The Hollandia* [1983] 1 AC 565; *Sky Reefer* (n 33), as discussed above.

The High Court's recognition that some foreign laws or provisions can contravene art 3(8) on an *ex facie* basis is also consequential. This means that clear cases of lessened liability for a carrier under foreign law should not be subject to an onerous burden of proof.

Despite the abolition of appeals from Australian courts to the Privy Council,[55] perhaps Carmichael Rail's lawyers will enjoy a trip to London after all.

[55] See *Australia Act 1986* (Cth) s 11. See generally Chief Justice Murray Gleeson, 'The Privy Council—An Australian Perspective' (Speech, Anglo-Australasian Lawyers Society, Commercial Bar Association, and Chancery Bar Association, 18 June 2008) https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_18jun08.pdf.