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Frank Stuart Dethridge Memorial Address

NOT A LAND GIRT BY BEACH AND THE IMPORTANCE OF SEEING MARITIME LAW AS THE LAW OF AN ACTIVITY

The Hon James Allsop AC

It is a great honour to be asked to deliver this address in memory of a great and influential maritime lawyer, and on a second occasion. I thank the Association for the invitation and the honour.

In 2006, I spoke about international commercial law, maritime law and dispute resolution and the place of Australia and New Zealand in the Asia Pacific region in coming years. I will touch on some parts of what I then said. I wish to emphasise some themes which bear reinforcement because of their importance, in particular to the administration of justice, both curial and arbitral, and to the coherent development of maritime law.

The enjoyment of being here in this room is that I will feel your understanding of what I am seeking to say. That so many Australian lawyers, including judges, would find this discussion esoteric or antiquarian, when in fact it is human and practically real and important to the nation, is the living testament to the consequences of the failure to appreciate the significance of the Admiralty and maritime grant in s 76(iii). For so many Australians, including Australian Governments and judges, it is as if we are not a land girt by sea, but a land girt by beach. But we are not. We are girt by sea. Hence, part of the title to this address.

Initially, I had intended today to deal in detail with Australia's constitutional structure and its impediments to a coherent and cohesive body of national maritime law. I have written and spoken a number of times about the similarity, indeed the almost identity, of the words of section 76(iii) of the *Australian Constitution* and the relevant part of article III section 2 of the *United States Constitution*.[1] The subject is fascinating. I will limit myself to a few comments as a preface to my subject today.

Full appreciation of the divergent courses of United States and Australian authority from almost identical words in the two Constitutions, and any hope of a future High Court rectifying the position require a recognition of the historical differences between the two federations: the United States, the new federal Republic, self-aware of its independence wrenched from the hands of a great Imperial power, aware, as an Atlantic-facing maritime power, of the constitutional, national and international importance of maritime law as something distinct and apart from the common law, and, as the 19th and 20th centuries progressed, alive to the need for coherent national regulation of the great inland trading waterways of the American continent; Australia, a new federal compact of subordinated quasi-colonial status, not independent, with maritime affairs being the domain of the superior Imperial world maritime behemoth until the physical and financial catastrophes of the two World Wars and decolonisation thereafter.

By 1911, there was a clear body of United States Supreme Court jurisprudence which stated that, although article I had not enumerated Admiralty and maritime law as a subject upon which Congress was empowered to legislate, that power must exist in Congress if article III section 2 gave Federal Judges and the Supreme Court authority to hear such cases and to develop and shape the general maritime law of the United States in so doing. The anticipation[2] that such clear United States authority would be followed[3] was the basis for early maritime legislation

[1] Richard Cooper Lecture, 6 September 2006; FS Dethridge Memorial Address, 28 September 2006; William Tetley Lecture, 2009; 'Maritime Law—The Nature and Importance of its International Character' (2009–2010) *34 Tulane Maritime Law Journal* 555 (also published in (2010) 84 *Australian Law Journal* 681; 'The Influence of the United State on Admiralty Law in Australia' (Speech, USMLA and MLAANZ Fall Meeting 2–7 December 2011. See also *Samson Maritime Pty Ltd v Aucote* (2014) 229 FCR 125, 136 [29] (Full Court).

[2] See Harrison Moore, *The Constitution of the Commonwealth of Australia* (Legal Books, first published 1910, 1997) 562.

[3] *D'Emden v Pedder* (1904) 1 CLR 91, 113.

not limited by the terms of sections 51(i) and 98. This basis was rejected in *The Kalibia*[4] with a casual, almost contemptuous, brutality stiffened by deference, indeed expressed subservience, to Imperial authority over the subject matter of maritime law.[5] Since Australia has become an independent nation state, no serious attempt has been made to challenge *The Kalibia*, notwithstanding the clearest of hints by Gummow J in his commanding judgment at first instance in *The Shin Kobe Maru*[6] and the passing of the Australia Acts.

The limits of reliance upon sections 51(i) and 98 as the basis for a coherent maritime legislative regime are well-known,[7] though with external affairs, the corporations power and other powers a palimpsest has been created. The opportunity of coherent national authority over maritime law beyond the low watermark given in 1975 by the *Seas and Submerged Lands Act Case*[8] died with the Commonwealth giving back the coastal waters to three miles to the states.[9]

The consequences of this approach to the *Constitution* were not limited to the technical reach of national power. It has affected how Admiralty and maritime law has been and is conceived and appreciated in Australia, compared to the United States. In the United States, maritime law was entwined with Admiralty and maritime jurisdiction as a constitutional conception. Its coherence and separate character were thus recognised as undeniable and assured. In Australia, no such appreciation of the relationship between jurisdiction and a body of law exists, in large part because of a lack of appreciation of the distinctiveness and separate coherence of maritime law that I will discuss today.

I will discuss the nature of maritime law, why it is different, and why it is so important to the administration of justice in this field to recognise its difference and its historical and contemporary sources: not merely as a matter of legal history, but as part of the coherent and stable development of the law and of the Australian legal system in this field.

The *Admiralty Act 1988* (Cth) was the product of a truly remarkable Law Reform Commission report. Amongst its other achievements, it placed Admiralty and maritime jurisdiction firmly within the cradle of federal jurisdiction and the grant of Commonwealth (viz national) Parliamentary authority in s 76(iii). This is its proper place: the jurisdiction of the nation and of national Courts. The importance of this foundation is that it placed it within the power of Parliament to create a national shipping court. Australia had been served well by state supreme courts before 1988 in administering the less than simple colonial Admiralty jurisdiction. The skill of state Judges saw the profession bring its work to the supreme courts even after 1988.

With the move of Sheppard J to the Federal Court, the disruption from the dissolution of the Soviet Union and economic difficulties in the 1990s in the shipping industry, the often intense work of arrests came to the Federal Court under his experienced hand. Upon his departure, however, Judges with little or no experience in the field of maritime law and shipping had to be trained up. This was not always an easy experience, for bench or bar.

When I arrived at the Federal Court in May 2001, I was aware of the growing dissatisfaction within the profession at the patchiness of specialised maritime and shipping knowledge and experience in the Court and the diffuse spread of the limited volume of work intentionally randomly, amongst dockets of judges around the country. There were some deeply experienced maritime lawyers, most especially the late Richard Cooper: a master of maritime law. But, as I came to learn, the work was diffusely spread among Judges, preventing development of judicial experience even in those (not all) with an interest in the subject. Too often, difficult cases of arrest or carriage of goods or charterparties would fall to Judges who would sometimes ask: What is so special about maritime law that permits arrest? Or what is the difference between a voyage charter and a time charter? Patience, at times, wore thin.

There was a very strong feeling in the Court in the early years of this century that every Judge of the Court had some judicial right to hear cases in all aspects of the Court's jurisdiction. As a junior Judge I never subscribed to this theory. It is a sentiment that has not died out. It is wrong. There is no personal right to hear cases. It is a duty to serve.

[4] *SS Kalibia v Wilson* (1910) 11 CLR 689.
[5] See S Derrington and M White, *Australian Maritime Law* (Federation Press, 4th ed, 2020) 30–1.
[6] (1991) 32 FCR 78, 86–7.
[7] Australian Law Reform Commission, *Civil Admiralty Jurisdiction*, (Report no 33, 23 November 1986) 49–50.
[8] *New South Wales v Commonwealth* (1975) 135 CLR 337.
[9] See M White, *Australian Off-Shore Laws* (Federation Press, 2009).

In late 2003 or early 2004, leading members of the Admiralty profession in Sydney took matters into their own hands. They formed a delegation to Chief Justice Spigelman. They explained to him that the Federal Court was not dealing with the jurisdiction in a satisfactory way. They asked him to give the profession two Admiralty Judges, so designated. They said that they did not care what experience in Admiralty matters those judges had at the moment. They, the profession, would train them through the experience of the cases to be filed in the Supreme Court.

The profession had not wanted much: just consistent treatment by a small cohort of judges to manage the not large volume of work, judges who could display, with confidence, their skill over, and knowledge of, a special branch of the law, so necessary in the light of the fact that the subject, often in urgent interlocutory applications, was the seaborne commerce of the nation involving ships and cargo sometimes worth tens or hundreds of millions of dollars.

To say that Chief Justice Spigelman was pleased would be a significant understatement. When I next saw him, he looked like the cat that had swallowed the cream, as well he might. A formal announcement with the profession was made by the new Admiralty Judges—Justices Palmer and Nicholas—of the new arrangements, and of the reasons for them. Thereafter, work, at least in the New South Wales District Registry, flowed into the Supreme Court, at least for a time. Some of us on the Court, saw this (as it was) as a deep and public humiliation of a national superior court which could have been, and should have been, Australia's National Shipping Court.

This humiliation spurred Justice Cooper and I to draft a National Admiralty Arrangement whereby *any* shipping or shipping related matter (including, for example, employment law, seafarers' compensation and judicial review proceedings) would be heard by a group of thirteen designated Admiralty and maritime Judges and the Chief Justice: at first instance and on appeal. There were to be at least two Judges in each Registry so that an arrest anywhere around the country could always be managed by a local Judge, though there were to be four in Sydney and three in Melbourne because of the somewhat greater volume of the work in those Registries. This draft arrangement was put to the Chief Justice who agreed to put it to the Judges at the next Judges' meeting. Tragically, before that occurred, Justice Cooper passed away. The suggested new arrangement however was approved at the next Judges' Meeting in early 2005.

A shipping website was set up and intensive maritime and shipping education which had been begun the previous year continued. This education was of Judges, Registrars and Marshals with the particular assistance of (then) Professor Derrington and Professor Edgar Gold, a former master mariner on the Zim Line and a Queen's Counsel from Canada, Captain Mike Bozier and Captain Ken Ross. Marshals' workshops were reinvigorated, and the Marshal's Handbook was brought up to date and developed. Memoranda of understanding were entered into with port and maritime authorities around the country.

The Court by mid to late 2005 had become a true National Shipping Court with developing skill, expertise and enthusiasm from Registrars, Marshals and Judges.

The work returned to the Court.

It is the Judges' and the profession's responsibility to ensure that such a national structure remains in existence. Never again should the profession be required to abandon the Court because it is not meeting the needs of the shipping community and the Australian people. The Admiralty and maritime Judges of the Court and the profession should remember this history.

A national maritime court, preferably nestled in a court of broader jurisdiction, such as the Federal Court, to avoid isolation and sterility, is important, and it is necessary. It is not a piece of vanity. But why is it necessary? It is not just a question of good or convenient judicial administration. It is necessary because such a court deals with the lifeblood of world trade: seaborne commerce by reference to a body of law, distinct from the general terrene law, with its sources in international and maritime activity.

This country, with its continental size and vast coastline from the Pacific to the Indian Oceans, from the Tropics, Asia and Melanesia to the expanses of the Southern Ocean that lead to Antarctica, with its vast maritime task of maritime safety and surveillance and of the transport of exported commodities, has the capacity to be the home of maritime legal expertise and dispute resolution and it is important to its ultimate well-being that it becomes so.

A national maritime court is also necessary because **maritime law is a distinct branch of the law** rooted in maritime and international activity. It is not, at root and in source, the law of a place or a society. It is the law of

maritime activity and of seafaring commerce. The great Professor Wigmore in his beautiful work *A Panorama of the World's Legal Systems*[10] placed it as one of sixteen legal systems in the world. This is not antiquarian fancy; it is legal reality. Wigmore recognised that maritime law was not the law of a place or of a people—from shared communal existence, shaped by place and climate, in which there will be commonalities with, and differences from, other national laws that are studied by the comparative lawyer. Ultimately, laws of societies grow from the roots of the group and of the place. Comparative law can be seen as linking these different trees growing from the earth of separate peoples and places. Maritime law is quite different. It is the law of maritime activity and of the humans who engage in it across the world. The metaphor of its manifestation in national law is the rising of the national spring from the common underlying stream of principle below.

Let us pause here for a moment. What do I mean by **a distinct branch of the law**? I will begin my explanation and exploration by a diversion which will give you an appropriate frame of reference for thinking.

In 1970, the Parliament of New South Wales legislated for Judicature Act reform, bringing together the separate Equity and Common Law Courts into the Supreme Court.[11] Whether it has been the intellectual power of the authors of Australia's leading text on Equity, or the quality of the High Court's Equity jurisprudence in the Mason High Court, or deeper societal reasons in the development of the law, in Australia, equitable doctrines and principles have remained vibrantly independent from the common law including in commercial law, their growth rudely strong to meet contemporaneous social and commercial problems.

When Lord Diplock, speaking in 1978 for a bench of Law Lords with not one Chancery lawyer in *United Scientific Holdings Ltd v Burnley Borough Council* ('*United Scientific*'),[12] declared the effect of the 1873 Act to have 'fused' the substantive and adjectival law of Common Law and Equity, a vigorous debate began, involving the repudiation of this as a form of legal heresy. The trenchancy of the views in *Meagher, Gummow and Lehane* (of whatever edition) are well-known. Heresy, wherever it occurred, was exposed without mercy.

I do not wish to enter the fray of that campaign. But it is beyond question that Equity has survived and lives **as a branch of the law**, auxiliary to, concurrent with and at times exclusive of the common law. It has different roots, different informing themes and a different manner of application;[13] yet, of course, it is part of and intertwined with the whole Australian general law, or, depending on the context in the use of the expression,[14] part of the one common law (that is general or judge-made law) in and of Australia. Just so with maritime law.

Why do I refer to Lord Diplock in *United Scientific* in 1978 and the Fusion Fallacy debates? Because, immediately after declaring the fusion of the substantive and adjectival law of Common Law and Equity, Lord Diplock continued, '[a]s well as those [substantive and adjectival laws] administered by Courts of Admiralty, Probate and Matrimonial Causes.'[15] The defence of Equity, is the defence of Admiralty and maritime law.

In fact, six years earlier, in *The Tojo Maru*,[16] Lord Diplock, in an earlier battle in his war with Lord Denning, had sought to stamp out, as antiquarian, the separateness of maritime law, and arguably its sources.

I do not wish to begin a second front of the Fusion Fallacy Wars; nor is this the place to essay the full significance of these views of Lord Diplock in *The Tojo Maru* and *United Scientific* on English maritime law, though the potential for harm can be seen in *The Indian Grace*[17] and its astonishing abandonment of over a century of Admiralty principle. I do, however, wish to challenge the legitimacy of any approach to the development of maritime legal doctrine which fails to accord maritime law a degree of particularity and separate coherence drawn principally from its maritime sources and its international or transnational and maritime character. The proper recognition of maritime law's international and maritime sources and character, influenced by international principle, practice, organisational authority (public and private), and conventions, by marine factors, by the civil law, and by equity and fair treatment affects: the framing of national law, the formulation of legal doctrine, the framing and interpretation of international conventions, the regulation and administration of maritime affairs, and the resolution of maritime disputes.

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[10] JH Wigmore, *A Panorama of the World's Legal System* (St Paul West Publishing, 1928) vols 1–3.
[11] See *Supreme Court Act 1970* (NSW); *Law Reform (Law and Equity) Act 1972* (NSW). See generally *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (any ed) ch 2.
[12] [1978] AC 904 ('*United Scientific*').
[13] See *The Juliana* (1822) 2 Dods 504, 522; 165 ER 1560, 1567, discussed in *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113, 118–9 and in *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 268 [271] (Allsop CJ).
[14] Such as in s 80 of the *Judiciary Act 1903* (Cth).
[15] *United Scientific* (n 12) 925.
[16] *[No 2]* [1972] AC 242 ('*The Tojo Maru*').
[17] *[No 2]* [1998] AC 878 ('*The Indian Grace*').

Perhaps it is best to begin with what maritime law is not, at least now. It is not a supra-national legal system or body of law binding on nation states. That was made clear in England by Lord Diplock in *The Tojo Maru* and in Australia by a High Court led by Gleeson CJ in *Blunden v Commonwealth* ('*Blunden*').[18] I will return to both cases later. Both stand for the proposition, fully articulated (though in a more nuanced way) by the United States Supreme Court in the 19th and 20th centuries[19] that there is no supra-national binding maritime law. But that is not the end of the matter, nor is it the present point. It is important in Australia to appreciate that *Blunden* does not, however, stand for the proposition that maritime law is not **a distinct branch of the law** with its sources in a separate internationally recognised body of maritime principles rooted in common activity of merchants and seafarers over centuries informed by custom, convention, equity and fairness.

A little history is necessary, not to amuse the antiquarian streak in those who have it, but to remind us of the sources of this law we practise. Maitland, the most brilliant of English legal historians, said of legal history, '[t]oday we study the day before yesterday, in order that yesterday may not paralyse today, and that today may not paralyse tomorrow.'[20]

Wigmore, in his *Panorama*, and others have referred to the binding customs and laws governing maritime and trading activity from the Egyptians, the Rhodians, the Greeks and Romans, the Codes of the City States of Amalfi, of Venice and of Genoa, the Laws of Oleron, The Black Book of the Admiralty and the Wisby and Hansa Sea Laws. All were expressed as the customs and laws of the sea, not of princes. There was a consistency, even unity, in evolution as a distinct and continuous body of maritime law.[21]

Lord Mansfield in the 18th century referred to maritime law as not the law of a particular country but the general law of nations.[22] One of the great judicial architects of the New Republic of the United States, Chief Justice John Marshall, in 1828 explained the adoption by the *United States Constitution* of the (living) general maritime law.[23] This view was reinforced throughout the 19th and 20th centuries in the US Supreme Court in cases such as *The Lottawanna*[24] in 1874 and *Lauritzen v Larsen*[25] in 1953, and in the Circuit Courts of Appeals in the 1980s and 1990s in such cases as *Schiffahartsgesellschaft Leonhardt v A Bottacchi SA de Navigacion*[26] and *RMS Titanic Inc v Haver*.[27]

The English jurists of the Admiralty Court often referred to the general maritime law.[28] That this was a discussion about the separateness or distinctiveness of maritime principles and sources, not the existence of a separate supra-national binding law, was made clear by Mr Justice Willes speaking for the Court in 1865 in *Lloyd v Guibert*.[29] I do not wish to repeat what I have said on other occasions,[30] except to say that it is essential to appreciate that maritime law, as part of the general law, has its own sources and springs for development and that it is not necessarily tied to the principles determined by the common law for non-maritime contexts and problems.[31]

Some examples will suffice for present purposes.

In 1959, in *Kermarec v Compagnie General Transatlantique*[32] the United States Supreme Court refused to apply existing common law rules of occupier's liability in respect of a visitor to a ship. A ship owner had a duty to exercise reasonable care for all on board.

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[18] *Blunden v Commonwealth* (2003) 218 CLR 330 ('*Blunden*').
[19] *The Lottawanna*, 88 US 558 (1874); *Southern Pacific v Jensen*, 244 US 205 (1917). For other cases see the *Tulane Maritime Law Journal* article above (n 1) 559–61.
[20] FW Maitland, 'A Survey of a Century' in ed HAL Fisher, *The Collected Papers of Frederic William Maitland* (Cambridge University Press) vol 3, 438–9.
[21] Wigmore (n 10) vol 3, 902–6.
[22] *Luke v Lyde* (1759) 2 Burr 882, 887; 97 ER 614, 617.
[23] *American Insurance Co v 356 Bales of Cotton*, 26 US 511, 545–6 (1828).
[24] 88 US 558 (1874).
[25] 345 US 571, 581–2 (1953).
[26] 773 F 2d 1528, 1531–2 (11th Cir, 1985).
[27] 171 F 3d 943, 960–4 (4th Cir, 1999).
[28] See the cases discussed in the *Tulane Maritime Law Journal* article above (n 1).
[29] (1865) 6 B & S 100, 134, 136; 122 ER 1134, 1146–7.
[30] See the articles above (n 1).
[31] *The Sam Hawk* (2016) 246 FCR 337, 361 [84] (Allsop CJ and Edelman J).
[32] 358 US 625, 630–2 (1959).

In 2009, the New South Wales Court of Appeal in *CSL Australia v Formosa*[33] used *Kermarec* and other cases to elucidate the content of the duty of care (a legal question) in a maritime or shipping context:[34]

> [A] working commercial ship such as *Iron Chieftain* is not merely an inanimate structure … a ship is a chattel, but is not any ordinary chattel. It is a working technical and commercial enterprise which is engaged in activity that has inherent danger to those on board, to the environment and to her surroundings. It is comprised of various interconnected bodies of machinery, operated by different people, some crew and some from on-shore when berthed. Safety, both for those working on board and others (along with the welfare of the environment) is a constant and underlying maritime theme …[35]

In 1946, in *The Tolten*[36] Scott LJ in deciding upon the scope of English Admiralty *in rem* jurisdiction in an allision case, by reference to what he saw as the general maritime law, rejected the application of the usual non-maritime rule of private international law that only the relevant foreign court of the situs of the land (the damaged wharf structure) had authority to deal with questions of foreign land and of the tort of damage to the foreign land. The English court hearing the *in rem* suit could do so.

Similarly, in 2005, in *The Cape Morton*[37] the Full Court of the Federal Court refused to apply the non-maritime rule of private international law that the law to govern the legal incidents of a sale transaction of a chattel was that of the situs of the chattel at the time of sale. The maritime considerations attending the registration, flagging and working of ships militated in favour of the law of the flag governing the assignment of property in, and title to, the ship.

The authority of the master on board a ship is also governed by particularly maritime considerations.[38] The master is in charge of a ship, not a bus.

The maritime lien is a unique and separate creature of the maritime law.[39] It is a part of a worldwide maritime security regime built on (variously) the operative arrest conventions, the action *in rem*, the statutory maritime lien, the remedy of attachment, the maritime lien proper arising from maritime activity (though varying in scope in different jurisdictions) all supported by prompt and efficient insurance for claims by P&I Clubs, by which regime maritime creditors gain access to maritime assets outside insolvency,[40] turning the water of unsecured maritime claims into the wine of security of payment from maritime assets.

The weakening, indeed potential undermining, of the efficacy of the English law-derived version of this regime based on a limited variety of the maritime lien and the duality of the *in rem* action built on the procedural theory by the decision in *The Indian Grace* epitomises, perhaps, the grave dangers of the decoupling of contemporary maritime law from its maritime roots and from an understanding of the practical operation of maritime commerce.

Salvage is another example. The principles of salvage developed as a distinct and coherent body of law common to all seafaring countries, albeit with differences in approach to reward and assistance and of the place of the success of the assistance, which differences were settled by the 1910 Convention.[41] Salvage is perhaps the epitome of the separate coherence of maritime law drawn from marine considerations and international principle. The differences between countries before 1910 involved, but were not limited by, the legal conception of the bargain and contract law. They contained elements closely related to and reflecting conceptions of restitution and unjust enrichment but were not governed by them. The right to a salvage award springs from ancient maritime principle of justice and public maritime policy. Story called it a mixture of private rights and public policy. It is not explained by common law principles of contract or quasi-contract, or restitution or unjust enrichment, or dictated by notions of payment for work done or services performed, although none of these notions is foreign to it. It was a *sui generis* right springing from maritime law as a reward for work or success which encompasses many considerations, including risk, danger, skill, the value of any saving and the expenditure involved, and public policy. This history tells us that the modern sources of principle are not, and should not be taken as, the law of

[33] (2009) 235 FLR 273.
[34] See ibid, especially 287 [64]–[65].
[35] Ibid 287 [64].
[36] [1946] P 135.
[37] (2005) 43 FCR 43, 79–80 [142]–[148].
[38] See the cases referred to in footnote 89 from the USMLA speech referred to above (n 1).
[39] See *The Sam Hawk* (n 31) 352 [48].
[40] Ibid 351–63 [39]–[92]. See DJ Atard et al, *The IMLI Manual of International Maritime Law* (Oxford University Press, 2016) vol 2, ch 6.
[41] *Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea*, opened for signature 23 September 1910 (entered into force 1 March 1913).

contract or the law of unjust enrichment as applied generally in non-maritime contexts. To do so would be to deny, as antiquarian, salvage's international and maritime sources and so risk a lack of coherence of modern maritime law with its origins and risk making salvage law dependent upon parochially national non-maritime jurisprudence in some taxonomy of abstraction forming the elements of a cause of action for unjust enrichment or the demands of general contract law. This does not involve reverting two or three centuries to a separate Admiralty Court and an entirely separate maritime law: far from it. It is to suggest that coherent doctrinal development of maritime law as part of the general law requires the recognition of its international or transnational and maritime sources, related to, but distinct from, the other great sources of the legal fabric: common law, equity, statute, and civilian codes.

Let me now come to *The Tojo Maru*. This was a salvage case. *Tojo Maru* was by today's standards a small tanker (25,104 gt, 43,695 dwt, 692ft loa and 95ft in beam). She was three years old at the time of the events in 1965. She was laden with 267,639 barrels of crude oil. Just after loading at Mena al Ahmadi in Kuwait, she collided with another vessel causing extensive damage to a fuel tank. The engine room was flooded. The professional salvors had two of their tugs on salvage station in the Persian Gulf. After acceptance of their services a party of eight including a chief diver, Mr Vis, with gear, were sent from Holland. The salvage plan was to stop leaks from the fuel tank into the engine room, pump out the engine room, construct a steel patch over the wound on the side of the vessel to make her watertight, discharge the cargo and tow the vessel to a repair port. After the cargo was pumped off, the plan was to put the various tanks adjacent to the gash and the necessary patch to the side plating into ballast because she was not (after the oil was taken off) free of gas. Then, with water behind, the patch could be attached. The chief diver, however, negligently and contrary to orders, used a bolt gun to attach the patch before ballasting was effected. This caused explosions within the ship and substantial damage.

The question was whether the negligence of the salvors was a factor only to go in reduction or elimination of any reward, notwithstanding that benefit was given in the salvage overall; or whether the salvors obtained a reward, but were required to set off against it a responsibility for negligence based on the imposition of a duty of care for the damage caused in a form of cross claim. The issues were complicated by the operation of the relevant limitation of liability provisions should the salvors be independently liable for the consequence of the negligent salvage works.

At first instance, Wilmer LJ sitting as a Judge in Admiralty, allowed the shipowner's counter claim which exceeded the assessed remuneration and permitted the salvors to limit their liability, but only to the outstanding balance.

Ultimately, the House of Lords, in overturning the Court of Appeal and upholding Willmer LJ's orders, said that, by reference to Admiralty cases, the salvors were subject to a duty of care and were open to be found independently liable. The Court of Appeal had analysed those cases differently, to deny a duty of care. It is not that analysis of principle in the Admiralty cases upon which I wish to dwell. Rather, it is the approach to maritime law as a body of law upon which I wish to make some remarks.

In the argument in the Court of Appeal[42] Mr Ackner QC for the salvors strongly pressed the distinction and separateness of maritime law, referring to *The Gaetano and Maria*[43] and other cases and submitted that it is not the common law that was applicable. Michael Kerr QC for shipowners stressed the change brought about by the 1873 *Judicature Act*.

Lord Denning distinguished the common law from maritime law, which he called (perhaps with an unwise flourish) 'the maritime law of the world'. For which phrase he cited *The Gaetano and Maria*. It is important to understand the passage cited from the judgment of Brett LJ in that case, which was:

> Now the first question raised on the argument before us was what is the law which is administered in an English Court of Admiralty, whether it is English law, or whether it is that which is called the common maritime law, which is not the law of England alone, but the law of all maritime countries. About that question I have not the smallest doubt. Every Court of Admiralty is a Court of the country in which it sits and to which it belongs. The law which is administered in the Admiralty Court of England is the English maritime law. It is not the ordinary municipal law of a country, but it is the law which the English Court of Admiralty either by act of Parliament or by reiterated decisions and traditions and principles has adopted as the English maritime law; and about that I cannot conceive that there is any doubt. … this case must be determined by the general maritime law as administered in England—that is in other words by the English maritime law.[44]

[42] *[No 2]* [1970] P 21.
[43] (1882) 7 PD 137.
[44] Ibid 143.

Thus Lord Denning, notwithstanding the flourish of expression later pounced upon by Lord Diplock, was clearly identifying the international *source* of *English* maritime law, being a separate body of principle from the common law, though both being part of English law. Lord Denning said '[w]e should, therefore, eschew our common law notions and seek for the principles of maritime law.'[45] By this he was saying that English maritime law (drawn from maritime and international sources) rather than the common law was to be examined. He was not saying that there was an international maritime law as a super-imposed law superior to the law of England. Lord Denning then referred to the liberal encouragement of salvors. He concluded that while the conduct of the salvors could reduce their reward, they were not liable on a duty of care at common law. He said, 'that long line of cases represents the maritime law of England and of the world on this subject'.[46] Again, in refuting some contrary cases, he said, '[t]he Court of Appeal [in other cases] had their eyes too firmly fixed on the English common law; whereas they should have regard to the English maritime law, which is quite different.'[47]

Lord Justice Salmon likewise referred[48] to the maritime law, saying 'I agree with the Master of the Rolls that maritime law differs in many striking respects from the common law and that we must not allow ourselves to be influenced by the latter.' Lord Justice Karminski agreed with Lord Denning.

Off to the House of Lords. Mr Darling QC with Mr Evans for the salvors (in submissions that would have passed muster in *Meagher, Gummow and Lehane*) put that the *Judicature Act* wrought changes to procedure only, not substantive law, and that the maritime law of England applied, which may not be the same as the common law.

An international maritime law binding of its own force was never agued.

Lord Reid accepted the existence of the maritime law of England. He disagreed with the Court of Appeal as to what the cases in Admiralty said that was. He said, '[t]he maritime law of England has a long history. It differed in many respects from the common law…' [49] Neither Lord Morris nor Viscount Dilhorne expressed a view about the separateness of maritime law, though both reached their view by analysing the Admiralty cases to like effect as Lord Reid's analysis. Lord Pearson said that the case was covered by the common law of contract 'unless excluded by some special Admiralty rule'.[50] He agreed with the analysis of the other law Lords that there was no such rule in Admiralty.

It is Lord Diplock's speech that is of greater significance for present purposes. It could perhaps be put to one side as the *obiter* of the junior Law Lord, were it not for his Lordship's stature, for the use of part of his speech in *Blunden* and for his Lordship's leading role in *United Scientific* six years later. Lord Diplock commenced his speech with a passage that attacked the basis of the existence of maritime law as a separate supra-imposed system of law, saying:

> What has been suggested, however, is that the 'proper law' of the contract is not the internal municipal law of England but the 'maritime law of the world'. This contention gains some support from a passage in the judgment of Lord Denning MR … Outside the special field of 'prize' in times of hostilities there is no 'maritime law of the world' as distinct from the internal municipal laws of its constituent sovereign states, that is capable of giving rise to rights or liabilities enforceable in English courts. Because of the nature of its subject matter and its historic derivation from sources common to many maritime nations, the internal municipal laws of different states relating to what happens on the seas may show greater similarity to one another than is to be found in laws relating to what happens upon land. But the fact that the consequences of applying to the same facts the internal municipal laws of different sovereign states would be to give rise to similar legal rights and liabilities should not mislead us into supposing that those rights to liabilities are derived from a 'maritime law of the world' and not from the internal municipal law of a particular sovereign state.[51]

It needs to be said at the outset that the above was to misrepresent what Lord Denning had said. Lord Denning's reference to *The Gaetano and Maria* could not have been clearer: there was a separate (English) Admiralty rule drawn from international and maritime sources. He did not say, and it was not put to the Court of Appeal in

[45] *The Tojo Maru [No 2]* [1970] P 21, 62.
[46] Ibid 64.
[47] Ibid 65.
[48] Ibid 71.
[49] *The Tojo Maru* (n 16) 267.
[50] Ibid 289.
[51] Ibid 290–1.

argument, that there was a supra-national binding international maritime law. However, Lord Diplock then went on to direct himself to the more subtle point as to whether the English maritime law was, or can be conceived of as, a branch of English law. He continued in the second passage:

> The reference by Lord Denning MR to 'the maritime law of the world' cannot, I think, have been intended to do more than to point in vivid fashion to the distinction between the law which before 1875 had been administered in the Court of Admiralty and that which had been administered in the courts of common law (and equity). The reference was followed by citation of a sentence from a passage in the judgment of Brett LJ in *The Gaetano and Maria* which was directed to repudiating the notion that the Court of Admiralty applied 'the law of all maritime countries'.
>
> It is this supposed continuing dichotomy between two rival systems of law said to be still applicable in the Supreme Court of Judicature which underlies the ratio decidendi of all the judgments of the Court of Appeal. It has, in my view, led to error. It is well to remind ourselves in this as in any branch of the law that prior to the Judicature Act of 1875 [sic 1873] the development of what then became a comprehensive system of English law administered by one High Court of general jurisdiction had been accomplished by separate courts of common law, of Chancery, or Admiralty and ecclesiastical courts.[52]

In these last two paragraphs Lord Diplock directed himself to the separate coherence of maritime law. Implicit in these statements and explicit six years later in *United Scientific*[53] is the absorption of English maritime law (and Equity) into the common law. One consequence of these words of Lord Diplock is that a rejection, or at least a tendency to rejection, can be seen of the international sources of English maritime law as a separate body of law coherently interrelating with and drawing from other parts of English law, but also drawing life from international and maritime sources. That was a profound statement if made. There can be no doubt that the Judicature Acts merged procedure and created one body of Courts. But those Courts then administered in their Divisions the English general law drawn from the streams of equity, common law, and maritime law. Those laws no longer were administered by separate judicial institutions. At times in the coherent judicial development of doctrine, they drew upon each other for life and growth. But the bodies of law coming from intellectually several sources and fulfilling several purposes maintained their coherence in development. That coherence in development sprang from an understanding by practitioners and Judges of the sources of Equity, of the sources of common law, and of the sources of maritime law.

The strength of those sources was no better stated than by Justice Jackson in *Lauritzen v Larsen*[54] in the United States Supreme Court in 1953 in a case about the proper construction of the *Jones Act* and whether or not it applied to a foreign seafarer on board a foreign ship injured while the ship was in New York harbour, whose relationship with the ship and shipowner was entirely framed by articles of employment the proper law of which was the same nationality as the flag of the ship and his citizenship. Justice Jackson said:

> But the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea. Hence, courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality. It has the force of law not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but by acceptance from common consent of civilised communities of rules designed to foster amicable and workable commercial relations.
>
> International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own. Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of the contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority.[55]

[52] Ibid 291 (citations omitted).
[53] [1978] AC 904, 924–5.
[54] 345 US 571 (1953).
[55] Ibid 581–2.

If I may say, with the utmost respect, it was the misrepresentation of what Lord Denning said, the false brutality of the asserted consequences of the 1873 *Supreme Court of Judicature Act* (later further enunciated in *United Scientific*), and the unsubtle failure to recognise the nuanced importance of the continuing vitality of separate streams of law from separate historical and contemporary roots continuing in a stream of contemporary law that makes the speech of Lord Diplock in *The Tojo Maru* so damaging. It is to be recognised that no other Law Lord took that view. In particular, not the great Lord Reid. Today is not the occasion to assess any damage to English maritime law that was sustained long-term by this. But the risks of these views can be seen by two examples: the shallow justification for the result (a result that was more than defensible) reached by the majority led by Lord Diplock in *The Halcyon Isle*[56] and the deeply problematic decision in *The Indian Grace*. Neither Lord Diplock (for the majority) in *The Halcyon* Isle nor Lord Steyn (speaking for the House of Lords) in *The Indian Grace* engaged with the place of the maritime lien in its narrow form recognised under English law (and its derivatives in so many other countries) in a maritime security regime founded on the procedural theory designed for its very functioning upon the dual nature of the *in rem* action built on the (very helpful and necessary fiction) of the action against the ship and the accompanying statutory lien, being distinct from the action *in personam*. Each complemented the other and to introduce foreign liens into the English regime or to abandon the useful fiction of the *in rem* action against the ship would upset and disturb the efficacy and stable operation and priorities of the regime which underpinned the provision of credit in shipping on a daily basis.[57]

Well, what of Australia? *Blunden* concerned the deadly disaster of the collision between HMAS *Voyager* and HMAS *Melbourne* on 10 February 1964. In an introductory passage dealing with the reach of the common law below the low watermark the (strong) plurality (Gleeson CJ, Gummow, Hayne and Heydon JJ) stated the following:

> That body of common law includes what sometimes has been called the general principles of maritime law or the maritime law of the world. The point was explained, with particular reference to England, by Lord Diplock in *The Tojo Maru*.[58]

Their Honours then cited the first passage from Lord Diplock set out above commencing, '[o]utside the special field of "prize"' to 'and not from the internal municipal law of a particular sovereign state.' This was the relatively unobjectionable part of Lord Diplock's judgment where his Lordship (raising a straw man by the misstatement of Lord Denning's reasoning) said that there was no independent superimposed law upon sovereign states. So much can be accepted.

The importance of this passage in *Blunden* for Australia is that it did not cite the more radical statements of Lord Diplock in the second passage above that contained the notion of fusion more clearly enunciated six years later in *United Scientific*, and, even more importantly, nestled in footnote 39, which referred to the first (unobjectionable) passage of Lord Diplock from *The Tojo Maru*, was a reference to the United States Supreme Court decision of *Moragne v States Marine Lines Inc*.[59] This reference is no accident, one would have thought, since Justice Gummow was in this plurality. Justice Gummow (one of the authors of *Meagher, Gummow and Lehane*) had written the scholarly first instance decision in *The Shin Kobe Maru*[60] which reflected a deep familiarity with United States maritime law and the intertwined relationship between Admiralty and maritime jurisdiction and law at the heart of article III section 2. This footnote can be seen to give approval only to the first part of Lord Diplock's speech in *The Tojo Maru*, and also to give approval to what was said in *Moragne v States Marine Lines Inc* at the pages to which reference was made. From these references, especially the latter, the judgment in *Blunden* is not a rejection, but a clear recognition and acceptance, of the separate sources and stream and international character of maritime law, by the specific adoption of the pages from *Moragne v States Marine Lines Inc* which included the following:

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[56] [1981] AC 221.
[57] See generally the discussion of *The Indian Grace* in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2016) 157 FCR 45 and the discussion in *The Sam Hawk* leading to the same result as in *The Halcyon Isle,* but founded on an exposition of maritime law principles without the false distraction of the simplistic substance/procedure distinction in respect of the maritime conception of the lien carrying unique and sui generis features of substance AND procedure at its heart. I recognise that other views than expressed by the majority in *The Sam Hawk* are available: see the views of Rares J in dissent on this point. The point for today is a different one. It should be noted, however, that the use of the phrase 'the general maritime law' has not died out in England. Mr Justice Brandon in *The Unique Mariner [No 2]* [1979] 1 Lloyd's Rep 37 used the phrase in his illuminating discussion in that case.
[58] *Blunden* (n 18) 337 [13].
[59] 398 US 375, 386–8 (1970).
[60] (1991) 32 FCR 78.

> Maritime law had always, in this country as in England, been a thing apart from the common law. It was to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages. These factors suggest that there might have been no anomaly in adoption of a different rule to govern maritime relations, and that the common law rule, criticised as unjust in its own domain, might wisely have been rejected as incompatible with the law of the sea.[61]

This does not reflect a super-imposed external force on a domestic legal system. It recognises the distinctiveness and the international and maritime sources of maritime law and its distinctiveness, when necessary, through the history of maritime law and through the contemporary necessities of maritime life and commerce.

Not to be able to see this reflects a stunted view of law governed only by terrene circumstances; a view that all law is of a place, both in its sovereign character and in its source and nature.

For millennia, shipping has connected different peoples across the international community. It continues to do so. Virtually every aspect of shipping has a transnational and multi-jurisdictional character, from the ownership, financing, insurance, management, operation and crewing of the ship, to the ownership, carriage and sale of cargo, and to the constant international movement of the vessel. Whilst modern sea carriage and modern maritime commerce have great technical complexity, the problems that they throw up have changed little over time: danger at sea, the risk of the venture, collision, cargo damage, general average, the duty to assist, salvage, the commercial mechanics to limit risk, to provide for credit, and the tendency to exploit the weakness of seafarers. Maritime law and the law of maritime commerce is shaped by such forces. This coherence of a different body of sources of law brings forth the demand for the legal system (national and a-national, curial and arbitral) to accommodate the demands of the subject: first, a recognition of this separate coherence bound to international and maritime sources and activity; secondly, a recognition of the need to be familiar with maritime activity; thirdly, a recognition of the potential for different doctrinal development of maritime from non-maritime law, not because of antiquarian separation, but from the practical demands of maritime activity and commerce in the present.

As the number of maritime disputes resolved in arbitral and judicial centres around the world grows, the importance of the survival of the recognition of the international character of maritime law grows. English law and the law of legal systems derived from it has and have a unique place in the resolution of international maritime disputes. This is so because of factors that include the clarity and open adaptability of English common law (in the sense of the general law). It is of the greatest importance that these strengths continue by the development of doctrine through the sources that produced such clarity and adaptability.

Maritime law should not be viewed as antiquarian, but as vibrantly contemporaneous. It should not be viewed as just a part of a fabric of national law drawing its principles only from domestic sources of constituent conception such as contracts and unjust enrichment. It should be viewed as the national manifestation of a common heritage of principle drawing its content from such maritime and international sources as are appropriate to maintain its place as part of the regulation of rights and duties for international sea-borne activity and commerce reflecting, where possible, common principle. As such it should aim, as Justice Jackson said in *Lauritzen v Larsen*, for stability and order through considerations of comity, reciprocity and connection with common interests, and as Scott LJ said in *The Tolten*, for uniformity or harmony of sea law throughout the world as important for the welfare of maritime commerce.

To deny maritime law's international and maritime character as a branch of the law and its international and maritime sources (historical and contemporary) in the development of its principle, is ultimately to deprive it of the source of its coherence and to make provincial what is international, and non-marine what is marine, to the long-term detriment of those whose law it is.

Therefore, for the future of shipping, not only should it be recognised that is both convenient and necessary for judges skilled and versed in maritime law to hear maritime cases, but also that it is both convenient and necessary to appreciate the distinctiveness of the character and sources of maritime law that may lead to the separate and distinct development of rules for maritime relations conformable with the coherent development of legal principle.

[61] *Moragne v States Marine Lines Inc*, 398 US 375, 397–8 (1970) (citations omitted).

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

Isaac Gill*

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.

[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

[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

[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).

[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.

Who Pays the Pirates?: *Herculito Maritime Ltd v Gunvor International BV* [2024] Bus LR 580; [2024] UKSC 2

Daniel Jackson•

Introduction

In *Herculito Maritime Ltd v Gunvor International BV*[1] the Supreme Court of the United Kingdom considered insurance funds and the incorporation of charterparty terms into bills of lading in a striking factual context. The matter ultimately at issue was: who pays the ransom for freeing a ship that had been seized by Somali pirates?

Facts and Procedural History

The *MT Polar* was captured by pirates on 30 October 2010 in the Gulf of Aden on a voyage from St Petersburg to Singapore laden with a cargo of fuel oil. She was released ten months later after the shipowner paid a random of US$7,700,000.[2] Most of the cargo was intact.[3] The Gulf of Aden is a 'High Risk Area' for the purpose of marine insurance. The shipowner had taken out Kidnap and Ransom insurance before entering the area.[4] The shipowner declared general average.[5] The ransom formed a major part of what was claimed.[6] The general average adjustment concluded that the cargo interests should pay US$4,829,393.22.[7]

The cargo interests contended that they were not liable for the ransom payment.[8] This claim was upheld by a panel of arbitrators (Timothy Young QC, Dominic Kendrick QC and Simon Gault).[9] However, this decision was overturned on appeal by Sir Nigel Teare in the Admiralty Court.[10] The Court of Appeal (Peter Jackson and Males LJJ and Sir Patrick Elias), in a judgment delivered by Males LJ, dismissed the cargo interests' appeal.[11] The cargo interests appealed again to the Supreme Court. Their appeal was dismissed in a judgment delivered by Lord Hamblen (with whom Lord Hodge, Lord Leggatt, Lady Rose and Lord Richards agreed).

Contractual Provisions

The case turned on the interpretation of the voyage charterparty and the bills of lading. The charterparty contained a Gulf of Aden clause.[12] The third paragraph of this clause stated:

> Any additional insurance premia (including, but not limited to, those in respect of H&M, crew, P&I kidnap risks and ransoms), crew bonuses (which to be in accordance with the international standard) shall be for chrtrs account. Max USD40,000 for charterer's account for any additional insurance premium except for crew bonus which to be max USD20,000 for charterers account.[13]

The charter also contained a war risks clause, which 'provided that any additional premia payable in respect of war risks incurred by reason of the vessel trading to excluded areas not covered by the shipowner's basic war risk insurance were to be for charterer's account'.[14]

Clause 39 of the BPVOY 4 standard form of tanker voyage charterparty was incorporated into the charterparty and was to the following effect:

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[1] *Herculito Maritime Ltd v Gunvor International BV* [2024] Bus LR 580; [2024] UKSC 2 ('Supreme Court Decision').
[2] Ibid [1].
[3] Ibid [12].
[4] Ibid [9].
[5] Ibid [13].
[6] Ibid [2].
[7] Ibid [14]. At [2] Lord Hamblen said that the figure was US$5,914,560.75, but this appears to be an error as it is inconsistent with the figures in the lower court judgments as well as with that given at [14]. All the other figures are in agreement.
[8] Ibid [15].
[9] Ibid [5].
[10] *Herculito Maritime Ltd v Gunvor International BV* [2020] EWHC 3318 (Comm); [2021] 1 Lloyd's Rep 150 ('Trial Decision').
[11] *Herculito Maritime Ltd v Gunvor International BV* [2021] EWCA Civ 1828; [2022] 1 Lloyd's Rep 375 ('Court of Appeal Decision').
[12] Supreme Court Decision (n 1) [16].
[13] Ibid [17].
[14] Ibid [18].

(i) Pursuant to clause 39.2 the Owners were entitled to cancel the charter if, at any time before the vessel commences loading, it is considered that performance of the contract of carriage may expose the vessel to war risks.
(ii) Pursuant to clause 39.3, the Owners were not required to continue to load or to sign bills of lading or to proceed or continue on a voyage where it appeared that the vessel may be exposed to war risks. If it should so appear the Owners were entitled to request the Charterers to nominate a safe port for the discharge of the cargo. If within 48 hours the Charterers failed to nominate such a port, Owners were entitled to discharge the cargo at any safe port of their choice in complete fulfilment of their obligations under the charter. The extra expenses of such discharge were payable by the Charterers.
(iii) Pursuant to clause 39.4, if, at any stage of the voyage, it appeared that the vessel may be exposed to war risks on any part of the route and there is another longer route to the discharge port, Owners were entitled to give notice to Charterers that this route should be taken. The extra expenses of such route, if the extra distance exceeded 100 miles, were payable by the Charterers.
(iv) Pursuant to clause 39.5, the Owners were at liberty to comply with the orders of identified third parties.
(v) Pursuant to clause 39.6, anything done or not done in compliance with the clause shall not be a deviation.[15]

There were six bills of lading for the various cargo.[16] All had words of incorporation stating that they were 'pursuant and subject to all terms and conditions, liberties and exceptions as per TANKER VOYAGE CHARTER PARTY indicated hereunder, including provisions overleaf'.[17] One bill of lading also stated: '[a]ll terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause are herein incorporated.'[18] The bills of lading provided: '[b]y taking delivery of the cargo the Consignee shall make himself liable for unpaid freight, deadfreight, demurrage and other charges.'[19] All the bills of lading contained 'general average clauses' providing for general average to be settled in accordance with the York-Antwerp Rules 1974 (or the 1994 Rules in the case of one bill of lading).[20]

The Insurance Fund Issue

Parties to a contract may agree that particular loss or damage will be covered by insurance, rather than the other party.[21] In a shipping context this is known as an 'insurance fund' or 'insurance code'.[22] An insurance fund was held to exist in relation to a demise charter by the Supreme Court in *The Ocean Victory*[23] and in relation to a time charter by the House of Lords in *The Evia [No 2]*.[24] But this was the first case where there was an insurance fund in a voyage charter.

Lord Hamblen drew several propositions from *The Ocean Victory*.

- '[W]hether or not the parties have agreed an insurance code or fund is a matter of construction of the contract … It is the necessary consequence of the contractual scheme which has been agreed rather than of any express words which have been used. As such, it is akin to a necessarily implied term and involves a similarly high threshold.'[25]
- '[J]oint names insurance is clearly a powerful factor in favour of there being an insurance code or fund', but it is not decisive.[26]
- There is no prima facie position that 'where a contract requires a party to that contract to insure should be that the parties have agreed to look to the insurers for indemnification rather than to each other.'[27]

In *The Evia [No 2]*, Lord Roskill identified four features of the time charter which supported his conclusion that there was an insurance fund.

[15] Ibid [19], citing Trial Decision (n 10) [9].
[16] Supreme Court Decision (n 1) [21].
[17] Ibid [22].
[18] Ibid [23].
[19] Ibid [25].
[20] Ibid [26].
[21] Ibid [29].
[22] Ibid [30].
[23] *Gard Marine and Energy Ltd v China National Chartering Co Ltd* [2017] UKSC 35 ('*The Ocean Victory*').
[24] *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes* [1983] 1 AC 736 ('*The Evia [No 2]*').
[25] Supreme Court Decision (n 1) [37].
[26] Ibid [40].
[27] Ibid [41]–[42].

> First, clause 21 (A) gives the owners an unqualified right to refuse to accept orders for the ship to go or to continue to any place or on any voyage or to be used in any service which will subject her to any of the dangers to which this sub-clause refers. Secondly, under clause 21 (B) the owners can, in the circumstances there prescribed, insure the ship and charge the premiums to the time charterers. Thirdly, notwithstanding the off-hire clause (clause 11 (A)) the ship is to stay on-hire in the circumstances predicated in clause 21 (B) (2). Fourthly, whereas clause 2 bears the rubric 'trade', clause 21 bears the rubric 'war' and it is permissible to consider these rubrics when construing these various clauses.[28]

Lord Roskill also observed that the charterers paid the insurance premia and it would be a 'remarkable result' if they obtained no benefit from it.[29] But Lord Hamblen said that other cases 'make it very clear that the mere fact that charterers pay an extra insurance premium is not enough to create an insurance code or fund.'[30]

Lord Hamblen stated that several general considerations were relevant when considering whether there was an insurance fund in this case.

(1) General average is a common law right, albeit one regulated by the contract. For the shipowner to be held to have given up such a valuable right in relation to well-known kidnap and ransom risks requires a clear agreement to that effect.
(2) To establish that the parties have agreed an insurance code or fund it has to be shown that this is a necessary consequence of what has been agreed—that is a high threshold.
(3) This is not a case of joint names insurance.
(4) There is no principle exempting charterers from liability for their breaches of contract or in general average merely on the ground that they have directly or indirectly provided the funds whereby the owners insured themselves against the relevant loss or damage.[31]

The cargo interests submitted that the clause in this case was materially indistinguishable from that in *The Evia [No 2]*. They argued that the shipowner had sweeping rights to cancel or substantially vary the performance of the charter in the event of war risks,[32] but Lord Hamblen stated:

> [a]gainst the background of that specially agreed contractual regime for the known piracy risks of transiting the Gulf of Aden I do not consider that it would have been open to the shipowner to contend that such risks were 'war risks' for the purposes of clause 39. Having agreed the vessel's route and the terms upon which the Gulf of Aden would be transited neither the shipowner nor the master could then turn round and say that they had changed their mind and were no longer willing to take on the known piracy risk of transiting the Gulf of Aden on the terms agreed. If different war risks materialised in the Gulf of Aden or there was a change in the nature of the piracy risk, or a change in its degree sufficient to make it qualitatively different, then it may be that clause 39 could be relied upon, but not if there was no change in risk. In the present case there is no suggestion or finding that the piracy risk changed at any time from that known and contemplated at the time that the charter was agreed.[33]

As such, unlike in *The Evia [No 2]*, 'the shipowner did not have an "unqualified right" or "absolute veto" under clause 39 in relation to the transit of the Gulf of Aden'.[34]

Lord Hamblen thought that the charterers' obligations to pay an additional war risk premium was a less powerful factor in this case because it did not involve joint insurance.[35] In response to a submission based on Lord Roskill's 'remarkable result' language,[36] Lord Hamblen said

> this was premised upon [Lord Roskill's] conclusion that (1) the charterers would otherwise obtain no benefit from the payment of the additional premium and (2) they would do so in circumstances where

[28] *The Evia [No 2]* (n 24) 766B–C.
[29] Ibid 766D–E.
[30] Supreme Court Decision (n 1) [48], citing *St Vincent Shipping Co Ltd v Bock, Godeffroy & Co* [1980] 2 Lloyd's Rep 95 ('*The Helen Miller*'); *D/S Idaho v Colossus Maritime SA* [1984] 1 Lloyd's Rep 385 ('*The Concordia Fjord*'); *Pearl Carriers Inc v Japan Line Ltd* [1993] 1 Lloyd's Rep 508 ('*The Chemical Venture*').
[31] Supreme Court Decision (n 1) [57] (citations omitted).
[32] Ibid [59].
[33] Ibid [62].
[34] Ibid [68].
[35] Ibid [69].
[36] See *The Evia [No 2]* (n 24) 766D–F.

> they were undertaking a significant additional burden (in relation to the disapplication of the off-hire clause). For the reasons given above, neither consideration applies here. The charterer obtains the significant benefit of being entitled to transit the Gulf of Aden on the terms specially agreed notwithstanding the wide rights which would otherwise arise under clause 39. Further, there is no obligation assumed by the charterer equivalent to that in relation to hire under clause 21(B) of the Baltime form.[37]

His Lordship concluded that the terms of the charter were materially different from that in *The Evia [No 2]* and that case should be distinguished.[38] Lord Hamblen cautioned against following *The Evia [No 2]* in cases involving differently worded charters. His Lordship gave several reasons for this.

> (1) English commercial law in general and shipping law in particular recognises the importance of certainty and predictability and fosters it so far as it can.
> (2) Leaving aside cases of joint insurance such as *The Ocean Victory*, the search for an insurance code or fund in a charterparty necessarily introduces uncertainty. No express code or fund has been established and it is a question of seeking to infer it from a consideration of the charterparty terms as a whole. This is a difficult exercise which is likely to require the input of lawyers, if not arbitration or mediation.
> (3) If parties wish to provide that there be no right of recovery or subrogation in respect of loss or damage covered by insurance that can be easily stated—as clause 13 of the Barecon 89 form illustrates.
> (4) The practical difficulties which may arise are illustrated by a consideration of the position of insurers. Whether or not they are to have rights of subrogation is likely to be material to their rating of the risk as it increases the risk of loss borne by them. Disclosure may, however, give rise to difficult issues. For example, it may be very unclear whether the subrogation position is known to the insured in circumstances where it all depends upon implications to be drawn from the terms of the charter. Similarly, if disclosure is sought to be met by providing a copy of the charter, whether that is full and fair disclosure must be questionable in circumstances where it says nothing expressly about subrogation rights. If no effective insurance cover were provided then issues would arise as to whether in such a case there is any code, and difficult questions might also arise if the insurance did not fully cover the losses suffered by the shipowner.[39]

Incorporation into the Bills of Lading

While the resolution of the first issue meant that the cargo interests' appeal must fail, Lord Hamblen went on to consider further issues related to whether the insurance fund was incorporated into the bills of lading. He did so on the assumed basis that there was an insurance fund.[40] Lord Hamblen quoted with approval the summary of the law on the incorporation of charterparty terms into bills of lading contained in *Scrutton on Charterparties and Bills of Lading*:

> (1) The incorporating clause in the bill of lading must be construed in order to see whether it is wide enough to bring about a prima facie incorporation of the relevant term. General words of incorporation will be effective to incorporate only those terms of the charterparty which relate to the shipment, carriage or discharge of the cargo or the payment of freight. Which of those terms are incorporated into the bill depends on the width of the incorporating provision. Where specific words of incorporation are used, they are effective to bring about a prima facie incorporation even if the term in question does not relate to shipment, carriage or discharge, and even if some degree of manipulation is required. Further, on the modern approach, specific words of incorporation in the bill of lading may be sufficient to incorporate a term in the charterparty which it was clearly intended to incorporate, even if the term does not literally fall within the incorporating words, if it is clear that something has gone wrong with the language. Where the intention is doubtful, the court will not hold that the term is incorporated. If the incorporating clause in the bill of lading is not wide enough of its own to bring about a prima facie incorporation of the relevant term, then (semble) it will not be permissible to have regard to the terms of the charterparty in order to effect an incorporation which would otherwise fail.
> (2) If it is found that the incorporating clause is wide enough to effect a prima facie incorporation, the term which is sought to be incorporated must be examined to see whether it makes sense in the

[37] Supreme Court Decision (n 1) [72].
[38] Ibid [73].
[39] Ibid [74].
[40] Ibid [75].

context of the bill of lading; if it does not, it must be rejected. This process should be performed intelligently and not mechanically, and must not be allowed to produce a result which flouts common sense. Where the term relates to shipment, carriage or delivery, some degree of manipulation is permissible to make its words fit the bill of lading, but not where the term relates to other matters. Where the intention to incorporate a specific clause is particularly clear, a greater degree of manipulation will be permitted.

(3) Where there is an incorporation which is prima facie effective, the term in question must be examined to see whether it is consistent with the express terms of the bill. If it is not, it will be rejected, although terms of the charterparty which are not incorporated for this reason may nevertheless negate the implication of terms which might otherwise be implied into the bill of lading.[41]

His Lordship endorsed Males LJ's statement in the Court of Appeal judgment that these steps 'should not be too rigidly applied' and that conclusions reached at each stage of the process were provisional.[42]

Lord Hamblen made several general comments on incorporation of charterparty terms.

- '[W]hat matters are the incorporating words in the bill of lading, not provisions relating to incorporation which may be found in the charter. If the incorporating clause in the bill of lading is not sufficient to incorporate the provision in question, then that is the end of the inquiry.'[43]
- The rule 'that general words of incorporation only incorporate provisions of the charter which are "germane" to the shipment, carriage and delivery of the goods, or the payment of freight, under the bill of lading … excludes ancillary agreements such as an arbitration clause or a jurisdiction clause', as well as 'provisions which are inapplicable in the bill of lading context (such as provisions which relate to the approach voyage or to matters after the completion of discharge) and provisions which make no sense in the bill of lading context (such as provisions relating to hire if the relevant charterparty is a time charter)'.[44]
- '[W]here specific words of incorporation are used a degree of manipulation of the relevant clause in the charterparty will be appropriate so as to give effect to the parties' expressed intention'.[45]
- '[W]here general words of incorporation are used some degree of manipulation may be permissible of terms which directly relate to shipment, carriage and delivery of the cargo, or the payment of freight, in order to make the wording fit the bill of lading but there is no rule of construction to this effect'.[46]

Lord Hamblen also rejected the suggestion, which was not pressed in oral submissions, that the case law on this subject was 'dated' and should be updated in light of modern case law on contractual interpretation.[47]

His Lordship considered that the bill of lading did incorporate the parts of the war clauses relating to insurance, as they 'relate to the route to be taken by the vessel and therefore are directly relevant to the carriage'.[48] It could not be intended that the liberties given to the shipowner relating to war risks were incorporated, but not provisions that limited or qualified them: 'The intention must surely be to incorporate the entirety of the relevant contractual regime set out in the charter rather than to do so partially or incompletely.'[49] The whole of the Gulf of Aden clause and the War Risk clause, including the charterer's obligation to pay insurance, were therefore incorporated into the bills of lading.[50]

However, Lord Hamblen rejected the argument that, if an insurance fund existed, the shipowner would be precluded from claiming against the bill of lading holders for losses covered by the insurance fund. The obligation to pay the insurance premia was on the charterer, not the bill of lading holders. As they had not paid for the insurance, it would not be a 'remarkable result' for the shipowner to be able to claim against them.[51]

[41] Ibid [77], quoting David Foxton et al, *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell, 24th ed, 2020) [6-016]–[6-018].
[42] Supreme Court Decision (n 1) [78], quoting Court of Appeal Decision (n 11) [34].
[43] Supreme Court Decision (n 1) [81].
[44] Ibid [82]–[84].
[45] Ibid [85].
[46] Ibid [86].
[47] Ibid [87].
[48] Ibid [89].
[49] Ibid.
[50] Ibid.
[51] Ibid [93].

His Lordship concluded that there was no basis to manipulate the wording of the bills of lading to make the holders of the bills lading liable for the insurance premia. It was not 'necessary to do so in order to make the wording fit the bill of lading'.[52] Indeed there were reasons against doing this.

> If the holders of the bills of lading are liable to pay the insurance premia the basis of that liability vis a vis the shipowner and each other is wholly unclear. Is each bill of lading holder liable for the full premia? If not, is its liability proportionate and, if so, is it proportionate to the quantity of the cargo covered by the bill of lading or its value? If a bill of lading holder pays the insurance premia what are its recourse rights against other bill of lading holders and how are they to be enforced? All of these issues arise in the context of putative bill of lading holders who might be a holder for different parcels of cargo for different lengths of time and only for a period if the cargo is traded afloat.[53]

Comment

The Supreme Court clearly wanted to confine the application of insurance fund doctrine in the interests of commercial certainty. Insurance funds seem unlikely to be found to exist, at least in the shipping context, outside cases of joint names' insurance. Lord Hamblen stressed the high threshold of an insurance fund being a necessary implication of the agreed terms of the charterparty.

His Lordship also stated that there needed to be 'clear agreement' that the shipowner was giving up the valuable right of general average.[54] Presumably he did not mean express agreement by this, as the insurance fund doctrine is one of necessary implication. Rather he was emphasising the degree of clarity required for a necessary implication.

While *The Evia [No 2]* was distinguished rather than overruled, Lord Hamblen was unmistakably sceptical of it. The caution against relying on it in cases of clauses with different wording effectively confines it to its facts. Unless a charterparty is truly indistinguishable in wording from that in *The Evia [No 2]*, an argument based on it is unlikely to succeed.

The Supreme Court's treatment of the war risk clause in relation to the risk of piracy in the Gulf of Aden is of particular interest given the volatile global situation. It seems reasonable to say that when a risk has been specifically contemplated and provided for in the charterparty, as the risk of piracy was in the Gulf of Aden clause, the shipowner cannot rely on a general war risk clause to refuse to undertake that risk. This is simply the result of reading the clauses together, so the one clause does not undermine the other and the intention of the parties is not frustrated.

However, the position is less clear when there is a change in the risk after the charterparty was entered into. Lord Hamblen acknowledged the possibility that the position might be different in this situation but appeared to envisage a high bar for this: 'a change in the nature of the piracy risk, or a change in its degree sufficient to make it qualitatively different'.[55]

It is not clear what a risk being 'qualitatively different' means or just how much it must increase in order to meet this threshold. It would seem simpler to say that, where there is a material increase in risk, the shipowner's rights under the war risk clause are applicable. This would be a principled approach where the war risk clause cannot be relied upon in relation to existing risks that have been specifically provided for but can be relied on if the risk becomes materially greater than when it was provided for in the charterparty.

What a change in the nature, as opposed to the degree, of the piracy risk means could also be open to argument. This might apply if, for instance, a risk to the life of the crew from piracy emerged that had not previous existed. Presumably a risk to life is of a different nature to a risk to property.

Lord Hamblen confirmed that, when considering whether charterparty terms are incorporated in the bill of lading, it is the wording of the bill of lading, not the charterparty, that is relevant. Generally speaking, this must be correct. Terms from one contractual document can only be incorporated in another contractual document if the latter document incorporates them, not because the former document envisages their interpretation. However, that the

[52] Ibid [97].
[53] Ibid [98].
[54] Ibid [57].
[55] Ibid [62].

charterparty envisages incorporation might be relevant if the words of the bill of lading are ambiguous, as it could be seen as part of the surrounding context.

Lord Hamblen's rejection of any suggestion of modernising the case law on incorporation of charterparty terms is consistent with his emphasis on certainty: he quoted Bingham LJ's dictum from *The Federal Bulker* that 'it is preferable that the law should be clear, certain and well understood than that it should be perfect.'[56] But his Lordship is also correct that the doctrine is not a technical or rigid one. Indeed, its acknowledgement of the permissibility of 'manipulation' of terms in the charterparty to fit the bill of lading is consistent with the modern contextual and purposive approach to contractual interpretation.

Overall, the Supreme Court's judgment prioritises commercial certainty and restricts the application of the insurance fund doctrine outside the context of joint names' insurance.

[56] Ibid [87], quoting *Federal Bulk Carriers Inc v C Itoh & Co Ltd* [1989] 1 Lloyd's Rep 103, 105 (Court of Appeal) ('*The Federal Bulker*').

Beware the Long Arm of the Australian Consumer Law: *Karpik v Carnival Plc* (2023) 98 ALJR 45; [2023] HCA 39

James Pisko*

The High Court's recent unanimous judgment in *Karpik v Carnival Plc* ('*Karpik*')[1] is a reminder to Australian maritime lawyers of the reach of the *Australian Consumer Law* ('*ACL*').[2] The appeal concerned a Canadian man who had entered a contract outside of Australia that was subject to United States ('US') terms and conditions. The contract also contained a US exclusive jurisdiction clause and a class action waiver clause. Nevertheless, because the contract was for a ticket on an ocean cruise, departing from and arriving in Sydney, this was sufficient for the *ACL* to apply in part. The effect of this application was to invalidate the class action waiver clause as unfair and to tip the balance against the exclusive jurisdiction clause such that Australian courts would not issue a stay of proceedings in favour of US litigation. The long arm of the *ACL* may be seen as the price of carrying on business in Australia. In this case note, I discuss the reasoning of the case, its implications and offer suggestions about how contracts might be altered to avoid similar outcomes.

Facts

The case involved the cruise ship *Ruby Princess*, a name that may be familiar to many Australians through its role in the unfolding of the COVID-19 pandemic in early 2020.[3] The ship departed Sydney on 8 March 2020 with a relatively full load of 2,600 passengers and 1,100 crew for a 13-day return cruise to New Zealand.[4] The cruise was cut short when several passengers became ill, and the *Ruby Princess* returned to Sydney on 19 March. Ms Karpik[5] and her husband were among those passengers who contracted COVID-19 and became ill. Subsequently, Ms Karpik began representative proceedings in the Federal Court in tort and under the *ACL*.

The appeal before the High Court was limited in scope, and for those casually following this litigation in the Federal Courts there might be some disappointment as to the issues covered. Notably, this was not an appeal from Justice Stewart's lengthy 1059-paragraph judgment handed down on 25 October 2023.[6] Instead, it arose from the relatively terse 397-paragraph judgment of the Full Court of the Federal Court regarding an interlocutory application.[7] Different passengers had purchased their tickets in different fora. Mr Ho, a Canadian, was one of the 700-odd passengers whose contract included the US terms (the 'US subgroup') and who was taking part in the Australian representative proceedings. Carnival's subsidiary, Princess Cruise Lines Ltd ('Princess'), sought a stay against the US subgroup in the Federal Court. By the time the case had worked its way to the High Court the parties had accepted that Mr Ho's contract had incorporated US terms and conditions.[8]

There were four issues being considered by the High Court.[9] First, what was the extraterritorial application of *ACL* pt 2-3 in relation to Mr Ho's contract. Secondly, assuming that the *ACL* applied, whether the class action waiver clause was unfair under pt 2-3 and thus void. Thirdly, and alternatively, whether the class action waiver clause was unenforceable under the pt IVA of the *Federal Court of Australia Act 1976* (Cth), dealing with representative proceedings. Fourthly, whether there were strong reasons for not enforcing the exclusive jurisdiction clause. This case note touches on the first, second and fourth issues.

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[1] (2023) 98 ALJR 45; [2023] HCA 39 ('*Karpik*').
[2] *Competition and Consumer Act 2010* (Cth) sch 2 ('*ACL*').
[3] See, eg, Eleanore Ainge Roy and Ben Doherty, 'Have Australia and New Zealand Stopped Covid-19 in its Tracks?', *The Guardian* (online, 9 April 2020) <https://www.theguardian.com/world/2020/apr/09/have-australia-new-zealand-stopped-covid-19-in-its-tracks-coronavirus>.
[4] *Karpik v Carnival Plc* [2023] FCA 1280, [1].
[5] Referred to as 'Mrs Karpik' in the trial judgment, but as 'Ms Karpik' by the High Court.
[6] *Karpik v Carnival Plc* [2023] FCA 1280.
[7] *Carnival Plc v Karpik* (2022) 294 FCR 524.
[8] *Karpik* (n 1) [4].
[9] Ibid [6].

Legal Issues

Extra-Territorial Application of Pt 2-3 on Unfair Contract Terms

As a preliminary matter, the High Court's analysis began by addressing the '"presumption" against extraterritoriality'.[10] Such a presumption might be described as a rule

> that an enactment describing acts, matters or things in general words, so that, if restrained by no consideration lying outside its expressed meaning, its intended application would be universal, is to be read as confined to what, according to the rules of international law administered or recognized in our Courts, it is within the province of our law to affect or control.[11]

The presumption against extraterritoriality was reduced by the High Court to 'an interpretive principle only.[12] Such a principle has 'little or no role to play' where a 'statute expressly departs' from 'common expectations that Parliament's concern with the subject matter is limited to matters within its territory'.[13] In this instance, there was such an express departure, not within the text of part 2-3, but elsewhere in the enactment.

The trial judge had held that *ACL* pt 2-3 (including s 23 which voids unfair contract terms) applied to Mr Ho's contract by reasons of s 5(1) of the *Competition and Consumer Act 2010* (Cth) ('*CCA*').[14] The Full Court did not decide this issue. The High Court largely agreed with the trial judge, their analysis of extraterritoriality taking up the largest part of the unanimous judgment.[15] Here are the relevant parts of s 5(1):

> **5 Extended application of this Act to conduct outside Australia**
>
> (1) Each of the following provisions:
> …
> (c) the Australian Consumer Law (other than Part 5-3);
> …
> extends to the engaging in conduct outside Australia by:
> (g) bodies corporate incorporated or carrying on business within Australia …

The *ACL* is contained as a schedule (sch 2) within the *CCA*. *CCA* Section 131(1) also makes clear that the *ACL* 'applies as a law of the Commonwealth to the *conduct* of corporations' (emphasis added). 'Engaging in conduct' is defined in *CCA* s 4(2)(a) as 'including the making of … a contract'.

In the High Court, there was no dispute regarding Princess 'carrying on business within Australia' (recall the cruise in question departed from and arrived at Sydney).[16] Nor was there any question that Mr Ho's contract (the 'conduct') was made outside Australia. Therefore, on the plain wording of s 5(1), this contract was 'conduct' to which the *ACL* extended. Furthermore, the High Court supported this conclusion with purposive—the *ACL* is consumer protection legislation—and consequentialist analyses—pt 2-3 will only apply to consumer (and small business) standard form contracts, which often involve an imbalance of bargaining power. There was 'nothing irrational' in extending its operations to foreign corporations that choose to carry on business in Australia.[17]

Princess argued that applying s 5(1) to *ACL* s 23 would lead 'to absurd and capricious results, capturing all relevant contracts with foreign corporations, even if they have no connection with Australia, on the happenstance that the corporation does some other business in Australia'.[18] A hypothetical was given in oral arguments: would a European car manufacturer that sells cars in Australia be subject to pt 2-3 in relation to its sales to *other* European countries?[19] The High Court rejected the concern raised by this hypothetical, reasoning that 'the absence of a

[10] Ibid [19].
[11] Ibid [22], quoting *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 601.
[12] *Karpik* (n 1) [19].
[13] Ibid.
[14] This was obiter dictum, as the trial judge also held that the US terms and conditions were not properly incorporated in the first place: *Karpik* (n 1) [7].
[15] Ibid [18]–[50].
[16] Ibid [42].
[17] Ibid [39]–[41].
[18] Carnival Plc, 'Respondent's Outline of Oral Submissions', Submission in *Karpik v Carnival Plc*, S25/2023, 3 August 2023, [2].
[19] *Karpik* (n 1) [50].

connection beyond the extraterritorial operation' of pt 2-3 would leave open for a respondent to request a stay of proceedings on the grounds of an inappropriate forum.[20]

Unfairness of the Class Action Clause

Mr Ho's contract contained a class action waiver clause, cl 15(C):

> **Waiver of Class Action:**
> This passage contract provides for the exclusive resolution of disputes through individual legal action on your own behalf instead of through any class or representative action. Even if the applicable law provides otherwise, you agree that any arbitration or lawsuit against carrier whatsoever shall be litigated by you individually and not as a member of any class or part of a class or representative action, and you expressly agree to waive any law entitling you to participate in a class action.[21]

For *ACL* pt 2-3 to apply requires a *consumer contract* that is a *standard form contract* and a term that is *unfair*.[22] Only the final point, whether the term was unfair, was examined in any detail in the judgment. Clause 15(C) was unfair because: it caused a *significant imbalance* in the parties' rights; it was not reasonably necessary to protect the *legitimate interests* of Princess; it would cause *detriment* to Mr Ho is applied or relied on; and it was not *transparent*.

The significant imbalance existed as the clause was 'one-way'. It only prevented Mr Ho from class actions, not Princess.[23] The High Court acknowledged that such clauses do not 'impede or affect the *existence*' of an individual right to sue, but had the *effect* of 'preventing or discouraging passengers from vindicating their legal rights', particularly given that the ticket price ($1,796.17 Canadian Dollars) made it not 'economically viable' to do so.[24]

The legitimate interest analysis was aided by the statutory presumption that a term is not reasonably necessary unless proven otherwise by the party seeking to rely on the term.[25] The Court rejected the argument that Princess might be pressured into 'settling questionable claims' that, because these claims could be aggregated as a class action, might create 'even a small chance of devastating loss'.[26]

The detriment in question was being 'denied the benefits' of the Australian class action provisions.[27] Detriment was not limited to 'financial detriment'. There was no requirement for 'significant detriment'.

Finally, cl 15(C) was not transparent, not because it was not legible, but because it was not presented clearly and made readily available.[28] Instead, the clause could only be viewed *after* the contract was entered into, by clicking on a booking confirmation email, signing into a webpage and then being pointed towards one of three different contracts. The Court did not address whether it was 'expressed in reasonably plain language'.[29]

Test for Exercising a Stay

Perhaps most relevant to the field of maritime law was the discussion of whether to exercise the discretion to stay the Australian proceedings in the face of an exclusive jurisdiction clause. The High Court did little to expound the legal test of when to stay proceedings. There merely cited *Akai Pty Ltd v People's Insurance Co Ltd* ('*Akai*'),[30] stating '[i]n the absence of strong countervailing reasons, proceedings will be stayed in the face of' a foreign exclusive jurisdiction clause.[31] This exclusive jurisdiction clause, cl 15(B), stated:

> **Claims for Injury, Illness or Death:**
> All claims or disputes involving Emotional Harm, bodily injury, illness to or death of any Guest whatsoever, including without limitation those arising out of or relating to this Passage Contract or Your

[20] Ibid.
[21] Ibid [16] .This specific clause was in all capital letters in the contract.
[22] *ACL* (n 2) s 23(1); *Karpik* (n 1) [26].
[23] *Karpik* (n 1) [53].
[24] Ibid [54].
[25] *ACL* (n 2) s 24(4).
[26] *Karpik* (n 1) [56].
[27] Ibid [57]. Such Australian provisions provided a benefit notwithstanding the choice of US law.
[28] Ibid [58].
[29] *ACL* (n 2) s 24(3)(a).
[30] (1996) 188 CLR 418, 428–9 (Dawson and McHugh JJ), 445 (Toohey, Gaudron and Gummow JJ) ('*Akai*').
[31] *Karpik* (n 1) [66].

> Cruise, shall be litigated in and before the United States District Courts for the Central District of California in Los Angeles … to the exclusion of the courts of any other country, state, city, municipality, county or locale. You consent to jurisdiction and waive any objection that may be available to any such action being brought in such courts.[32]

At this point, the Court had already concluded that the class action clause was unfair, and thus was not available for Princess to rely on to support a stay.[33] In fact, that the class action clause might be upheld in US litigation acted as a 'strong countervailing reason not to enforce the exclusive jurisdiction clause', as Mr Ho would be deprived of a juridical advantage (being party to the class action) by US litigation.

A second reason to exercise the discretion to stay proceedings was to avoid fracturing the litigation. Staying the litigation would force the US subgroup to 'commence individual proceedings in the United States when essentially identical claims' would be heard in Australian courts. This would 'run the risk of producing conflicting outcomes in different courts with the attendant risk of bringing the administration of justice into disrepute'.[34]

Comments

Before going any further, although it was not discussed in the judgment, maritime lawyers should be reminded of *ACL* s 28 (also contained within pt 2-3 on unfair terms).

> **28 Contracts to which this Part does not apply**
>
> (1) This Part does not apply to:
> (a) a contract of marine salvage or towage; or
> (b) a charterparty of a ship; or
> (c) a contract for the carriage of goods by ship.

This provision, along with the s 23 requirement of a consumer contract, cabins the relevance of the unfairness analysis in this judgment to a small portion of maritime law. That said, these limitations only apply to pt 2-3, and provide no protection from the other parts of the *ACL*. Part 3-2 which relates to consumer guarantees, for example, is not affected by s 28.

Unfair Contract Terms

Although an extended reach of pt 2-3, even to contracts that apply foreign law, may seem unreasonable, the High Court saw it as matching Parliament's intention. 'Parliament is prescribing that a corporation that does business in Australia should be required, if it uses standard terms in a consumer or small business contract, to meet Australian norms of fairness, irrespective of whether the standard terms are in a contract made in Australia or one made overseas.'[35] The long arm of the *ACL* may be seen as the price of carrying on business in Australia.

Of course, to be made void by pt 2-3 a term must still be unfair. The High Court's analysis left open the possibility that different facts might lead to different conclusions regarding the *significant imbalance* and *transparency* elements of the unfairness test. In this sense, *Karpik* should not be seen as authority that all class action waiver clauses will be held unfair. The Court made express reference to how cl 15(C) was stated to be '"for the benefit of the Carrier and certain third party beneficiaries"'.[36] The clause only put restrictions on passengers and 'in no way restrict[ed] the options of the carrier'. One wonders how the court would interpret a class action waiver clause that applied to *both* parties. Such a clause would legally restrict a carrier and would not be 'one-way'. Giving up the benefit of class action might do little to alter a carrier's litigation strategy and as such could be an easy concession. A second suggestion would be to improve the transparency of the term and to have it be more readily available before contract entry.[37] An improvement in transparency, however, is less assured of success than addressing the imbalance in rights. This is because the wording of *ACL* s 24 appears to make *significant imbalance* an independent and necessary criterion, whereas *transparency*—despite being mandatory to consider—is not a discrete criterion.

[32] Ibid [15]. Curiously, unlike cl 15(C), this was not in all capital letters.
[33] Ibid [68].
[34] Ibid [69].
[35] Ibid [41].
[36] Ibid [53], quoting cl 15 of the contract
[37] The clause being in all capital letters apparently did nothing to improve its transparency.

Stays for Exclusive Jurisdiction Clause

The High Court refused the stay the Australian proceedings because of two 'strong countervailing reasons' argued by Karpik. First, the 'strong juridical advantage' of remaining in the class action in Australia as opposed to going it alone in the US. Secondly, the fracturing of the litigation. Regarding the first reason, *ACL* s 23 results in an unfair clause being 'void'. It is notable that this voidness did not prevent the clause from still being considered in the arguments against a stay. This is, perhaps, the kind of ambiguity Justice Windeyer had in mind when he wrote, '[t]he word "void" has never been an easy word'.[38] Section 23 does not render a clause so void as to be a nullity, such that it cannot be subsequently considered at all. Regarding the second reason, I question how 'strong' the disincentive was of potentially fracturing the litigation, particularly where that litigation involves different contracts subjected to different laws by the agreement of the parties.[39] The 'risk of producing conflicting outcomes in different courts' appears far less problematic if those courts are applying different laws. As such, this reason struggles to satisfy the test from *Akai*, which puts the burden on the party requesting the stay to prove 'strong cause'[40] or 'strong reasons'[41] against it. 'The policy of the law' is 'that the parties who have made a contract should be kept to it'.[42] That is, unless Australian law deems it unfair.

[38] *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432, 459.
[39] *Karpik* (n 1) [69].
[40] *Akai* (n 30) 428–9 (Dawson and McHugh JJ).
[41] Ibid 445 (Toohey, Gaudron and Gummow JJ).
[42] Ibid.