HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

BETWEEN:

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

and

BBC CHARTERING CARRIERS GMBH & CO KG
First Respondent

ONESTEEL MANUFACTURING PTY LTD
Second Respondent

FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Outline of propositions

2. ***Construction***: Article III(8) of the Australian Hague Rules (**AHR**) is to be interpreted consistently with general principles of treaty interpretation (and per s 9 of COGSA), including as set out in arts 31 and 32 of the VCLT. The construction begins with the ordinary meaning of the text (VCLT, art 31(1)), which refers to an existing state of affairs – a clause which is "*relieving*" or "*lessening*" liability – not a consequence that "*might*" arise depending on speculative risks (cf the chapeau to the appeal ground). For art III(8) to apply, the party relying on it must establish *as a fact* that a clause is relieving or lessening liability otherwise than as provided by the AHR. This construction is consistent with the reasons of the majority in *William Holyman* (1945) 73 CLR 622 at 629 (Latham CJ), 631 (Rich J), 632 (Starke J), 633-34 (Dixon J) and 641 (Williams J). It is also consistent with *Sky Reefer*, 515 US 528 at 534-35 (1996) and *The Hollandia* [1983] AC 565 at 574-75.

3. Whether a clause in fact relieves or lessens the relevant liability is determined when the clause in issue is being relied upon: *The Hollandia* at 575. That is why, for example, a benefit of insurance clause (which is expressly mentioned in art III(8)) necessarily relieves or lessens liability; if the clause is being relied upon, that is because the carrier is using it to reduce or avoid its liability. The same applies, for example, to clauses shortening the time limitation inconsistently with that provided in art III(6) of the AHR, which if being relied upon is because the shorter time period relieves a carrier from liability.

4. This construction is supported by the context of art III(8), including relevant rules of international law (VCLT, art 31(3)(c)). It is a well-established principle of international law that a party seeking to establish a fact bears the onus of proving it, and usually with "*conclusive*" evidence,[1] or a "*degree of certainty*",[2] where the alleged fact implicates important matters, such as seeking to invalidate an arbitration agreement despite international public policy favouring its enforcement and presumptive validity.[3] *Pacta sunt servanda* is also a fundamental principle of law, as recognised in the third preamble to the

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1 *Bosnian Genocide (Merits)* [2007] ICJ Rep 43 at 129 [209].
2 *Corfu Channel (Merits)* [1949] ICJ Rep 4 at 16-17.
3 See *TCL* (2013) 251 CLR 533 at [41]; *Dampskibsselskabet Norden A/S v Gladstone Civil Pty Ltd* (2013) 216 FCR 469 at [64]-[65]; *Mitsubishi*, 473 US 614 at 631 (1985).

VCLT itself, such that one would not lightly construe art III(8) as invalidating contractual obligations. Articles V-VII of the AHR evidence that the Rules do not seek to wholly undermine party autonomy, and arts IV(1) and IVA(1) reveal that, where the Rules seek to alter the usual allocation of burden of proof, they do so expressly.

5. Nor is there anything in the purpose of art III(8) that permits reading in "*might*" and shifting the burden to the carrier to prove that a clause does not relieve or lessen liability. The purpose of art III(8) is to prevent carriers, through standard-form contracts, avoiding or reducing their liability inconsistently with what is provided in the AHR. That concern only arises if the clause in question actually does that, not if there is a mere possibility that the clause *might* have that result depending on a range of unknown contingencies in the future.

6. A "*might*" test would extend the operation of art III(8) well beyond its intended reach. If the appellant's case were accepted, the consequence would be that any arbitration or forum selection clause would be invalid, because there will always be a risk (however remote) that a decisionmaker erroneously fails to apply the AHR or the choice of forum might create inconvenience that could influence settlement. The history of the Hague Rules confirms (VCLT, art 32) that such a construction of art III(8) was not intended.[4]

7. There is no authority that has adopted the appellant's "*might*" test for art III(8) of the Hague or Hague-Visby Rules. The cases either found that liability *would be* relieved or lessened as a fact (and usually due to the combination of a jurisdiction clause combined with a choice of law clause),[5] or concerned questions of staying local court proceedings without directly addressing the application of art III(8) (including in the Belgian cases relied upon).[6] Of the two authorities that have considered the application of art III(8) to arbitration agreements, both have found that such agreements are unaffected by the provision.[7]

8. ***Application***: On either construction of art III(8), the arbitration agreement does not, nor might it, relieve or lessen the liability of the carrier otherwise than in accordance with the AHR. The starting point is that the application of art III(8) to an arbitration agreement arises in the context of an application for a referral to arbitration under s 7 of the

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4 Sturley (ed), *Legislative History* (1990) vol 2 at 152, 416 and 421.
5 See *The Hollandia* [1983] AC 565 at 574; *Baghlaf* [1998] 2 Lloyd's LR 229 at 237; *The Regal Scout* (1983) 48 DLR (3d) 412 at [31]-[34]; *The "Epar"* [1984] SGHC 16 at [20]-[21]. See also *Akai* (1996) 188 CLR 418 at 446-47.
6 See *Baghlaf (No 2)* [2000] 1 Lloyd's Law Rep 1 at 5. See also *The Andhika Samyra* [1988] HKCFI 111 at p 4 and cf with p 8.
7 *Sky Reefer*, 515 US 528 (1995); *William Co v Chu Kong Agency Co Ltd* [1995] 2 HKLR 139.

International Arbitration Act (giving effect to art II of the NY Convention), and must be considered in light of the principles that apply to art II of that Convention (consistent also with VCLT, art 31(3)(c)). These principles are the international public policy in favour of upholding arbitration agreements, the presumptive validity of such agreements and the inappropriateness of predetermining how arbitrators resolve the substance of any dispute.[8]

9. An arbitration agreement is not *ex facie* invalid as it does not say anything about liability and is merely a mechanism for resolving claims. If liability was determined otherwise than in accordance with the AHR, that is not because of the arbitration agreement, but of something else (e.g., a choice of law). The invalidity of other clauses in a contract cannot form the basis for voiding the arbitration agreement, which is separate from the contract.[9]

10. Nor in the circumstances of this case does the arbitration agreement lessen liability, or even give rise to a risk of lessening liability, otherwise than in accordance with the AHR. There is no doubt that the arbitral tribunal will resolve the carrier's liability by applying the AHR. Both parties agree that those Rules govern and, in these circumstances, the tribunal must apply those Rules: *Arbitration Act 1996* (UK) s 46; see also UNCITRAL Model Law art 28. That would also be the result under the clause paramount (cf appeal ground (b)).

11. Nor does any risk of a lessening of liability arise from a so-called "*English*" interpretation (whatever that means; cf appeal ground (a)). The agreement will have the tribunal applying the AHR "*as applied under Australian law*", which necessarily includes being interpreted in accordance with Australian law. English decisions on the Hague-Visby Rules as implemented in England are not binding on any arbitral tribunal applying the AHR, even one seated in London. Those decisions will be treated by the tribunal in the same way as an Australian court. The appellant has also not demonstrated that there is any relevant difference between an "*English*" interpretation and an "*Australian*" interpretation.[10]

12. Any supposed expense or practical difficulty from arbitrating in London does not enliven art III(8) (cf appeal ground (c)). Article III(8) is not concerned with such matters, and there is no evidence on which to make findings (which would be contrary to s 39 of the *International Arbitration Act* anyway) as sought by the appellant.

Dated: 17 October 2023 **G J Nell SC**

[8] See *Francis Travel* (1996) 39 NSWLR 160 at 167; *Sky Reefer*, 515 US 528 at 540-41 (1995).
[9] *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at [349]-[360].
[10] See *Nikolay Malakhov* (1998) 44 NSWLR 371 at 380 and 414-15 and cf 387-88.