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

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BBC CHARTERING CARRIERS GMBH & CO KG
First Respondent

ONESTEEL MANUFACTURING PTY LTD
Second Respondent

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FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of issues

2. In addition to the issue raised in Part II of the appellant's submissions (**AS**), the appeal also concerns whether the appellant has established that art III(8) of the amended Hague Rules (**Australian Rules**) as set out in sched 1A of the *Carriage of Goods by Sea Act 1991* (Cth) (**COGSA**) renders the arbitration agreement here "*null and void*".

Part III: Section 78B notice

3. The first respondent does not consider that any s 78B notice is required.

10 ## Part IV: Facts

4. Save that characterisation of the cause and damage of the cargo is a matter in dispute, the facts are as stated at AS [5]-[6]. The "*stay application*" (AS [6]) filed by the first respondent was an application under s 7 of the *International Arbitration Act 1974* (Cth) (**IAA**): see [2022] FCA 171 (**J**) at [2] (CAB 28). Although these proceedings concern an interstate voyage, the carrier has its place of business in Germany: ABFM 15.

Part V: Summary of argument

5. ***The appeal fails at the threshold***. This appeal should be dismissed whatever interpretation is given to art III(8) of the Australian Rules. That is because, even if art III(8) were to apply on only the "*potential*" of the arbitration agreement lessening the
20 carrier's liability (AS [8]), the appellant has manifestly failed to meet even this lower threshold.

No risk that the tribunal may not apply the Australian Rules (cf CAB 66 at [2](b))

6. The appellant firstly contends that there is a risk that an arbitral tribunal seated in London "*may*" construe the clause paramount in the bill of lading as not incorporating the relevant Australian Rules and instead may apply arts I-VIII of the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* (**Hague Rules**) and its lower package limitation: AS [10]. That, however, disregards both the appellant's contention that the bill of lading is subject to the Australian Rules (RBFM 10 [21]) and the first respondent's undertaking that it agrees that the Australian
30 Rules apply, which also formed a condition of the stay: CAB 57. The Full Court correctly recognised (J[25]-[26], CAB 35) that the interpretation of the clause paramount did not matter as it was agreed that the Australian Rules applied.

7. A tribunal seated in London is obliged, under s 46(1)(a) of the *Arbitration Act 1996* (UK), to decide the dispute in accordance with "*the law chosen by the parties as applicable to the substance of the dispute*". The same position applies in Australia (and much of the world)[1] under art 28 of the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**), given force of law by s 16 of the IAA. The arbitral tribunal will not, accordingly, need to consider which version of the Hague Rules applies to the bill of lading at issue, including on a proper construction of the clause paramount, because the parties to the arbitration are in agreement that the Australian Rules apply: J[25] (CAB 35). The risk postulated at AS [10] does not arise.[2]

10 8. Any lack of assets held by the first respondent in this jurisdiction is also irrelevant: cf AS [61]. The stay ordered by the Full Court was conditioned on the first respondent admitting that the Australian Rules apply in any arbitration: J[111] (CAB 56-57). If the first respondent resiled from that undertaking (and there is nothing in the evidence supporting any risk that it would, or that it would deny being bound by the Full Court's declaration), the stay will be lifted. This also renders moot the question as to whether the Full Court's declaration (CAB 58) would be enforced or recognised in the United Kingdom (a matter on which there was no evidence in any event): cf AS [64]-[65].

No risk that the tribunal will apply an English law interpretation (cf CAB 66 at [2](a))

9. The second ground on which the appellant both seeks to deploy art III(8) (AS [11])
20 and overcome the obvious consequence of the first respondent's undertaking (AS [62]-[63]) is the contention that the tribunal may not apply an "*Australian interpretation*" of the Australian Rules, but instead apply those Rules "*as interpreted under English law*". This contention is flawed for at least three reasons.

10. First, it ignores the terms of the undertaking and the condition on which the stay was ordered, which were that the Australian Rules "*as applied under Australian law*" will govern the bill of lading claims: CAB 57. That is, Australian law will govern the application of the Australian Rules in the arbitration. The Full Court was correct to find (J[30] CAB 36) that there is no difference between applying the Rules "*as applied under Australian law*" or "*as interpreted in Australia*": cf AS [62]-[63]. Contrary to

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[1] See, e.g., ***TCL** Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [13] (French CJ and Gageler J); Verbist et al, *ICC Arbitration in Practice* (2nd ed 2015) at 2; Blackaby et al, ***Redfern and Hunter** on International Arbitration* (7th ed 2023) at [3.111]-[3.114].

[2] As discussed below at [44], a tribunal may also have regard to the validity of the parties' choice or whether such choice is overridden by an applicable "*mandatory law*", but in this case the applicable mandatory law and the parties' choice is the same; all roads lead to the Australian Rules. The application of English law does not mandate the application of the Hague Rules or override the parties' agreement.

AS [11], English law does not require some other law or rules to be applied by an arbitral tribunal and a tribunal seated in London is not bound to follow English cases interpreting similar (or the same) provisions when the parties have agreed to a different applicable law.

11. Secondly, there is no such thing as an "*Australian interpretation*" of provisions such as art III(2) of the Australian Rules under Australian law: cf AS [11]. These provisions mirror those contained in the Hague Rules as amended by the 23 February 1968 and 21 December 1979 *Protocols Amending the Hague Rules* (**Hague-Visby Rules**). The Australian Rules, as applied by ss 8 and 10 of COGSA, give effect to Australia's accession to the Hague-Visby Rules,[3] and under s 9 of COGSA are to be interpreted in the same manner as the provisions of the Hague-Visby Rules. Under Australian law, accordingly, the Australian Rules are to be interpreted uniformly among all states party to the Hague-Visby Rules and consistently with general principles of treaty interpretation, including those customary international law principles within the *Vienna Convention on the Law of Treaties* (1969) (**VCLT**).[4]

12. As a matter of Australian law, the proper interpretation and application of art III(2) of the Australian Rules remains an open question: AS[11]. Accordingly, an Australian court will properly have regard to how English decisions have interpreted art III(2) of the Hague-Visby Rules in interpreting the equivalent in the Australian Rules, together with relevant decisions from any other contracting state and writings of esteemed jurists on the issue.[5] Such an exercise is demonstrated in the Full Court's reasons at J[33]-[40] (CAB 37-38). That exercise includes considering the dicta of Sheller JA in ***Nikolay Malakhov*** *Shipping Co Ltd v Seas Sapfor Ltd* (1998) 44 NSWLR 371 at 387-8. But as this was dicta and by one member of that Court only, no Australian judge would be bound to follow it. Rather, each of Sheller JA's dicta and the English decisions would have persuasive value and be properly considered by an Australian judge in determining the proper interpretation and application of art III(2). Precisely the same will occur before an arbitral tribunal seated in London applying, by agreement of the parties, Australian law to the application of the Australian Rules.

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[3] Australia's accession is recorded by the Belgium depository.

[4] *Kingdom of Spain v Infrastructure Services Luxembourg sàrl* (2023) 97 ALJR 276 at [38]-[39] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ); ***Great China*** *Metal Industries Co Ltd v Malaysian International Shipping Corporation, Berhad* (1998) 196 CLR 161 at [38] (Gaudron, Gummow and Hayne JJ), [71] (McHugh J) and [137] (Kirby J).

[5] Per art 38(1)(d) of the *Statute of the International Court of Justice*, which identifies the sources of international law: see *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 559 (Brennan J).

13. As the Full Court correctly recognised (J[41], CAB 39), what ultimately is the proper interpretation and application of art III(2) of the Australian Rules to the dispute in issue is a matter for the tribunal. The tribunal is not "*required*" to apply any English law interpretation of art III(2) and the appellant has lost neither the opportunity to persuade that tribunal to follow *Nikolay Malakhov* nor the chance of that case being applied: cf AS [11]. The approach of the tribunal will be the same as that of an Australian judge, so there cannot be any potential of the carrier's liability being lessened otherwise than in accordance with the Australian Rules. Whatever liability is found (if any) will be on the basis of the application of those Rules; art III(8) is never engaged.

10 14. It is also not to the point that one of the three arbitrators comprising the eventual tribunal in London was a judge on one of the English decisions considering art III(2): cf AS [63]. If that were a legitimate concern, the arbitral process has mechanisms to deal with the same.[6] It is not, in any event, a legitimate concern because an arbitrator will resolve the particular dispute before her in accordance with the applicable law and the submissions and evidence before the tribunal, not on the basis of a conclusion reached in another case.[7] Indeed, an ordinary observer would appreciate, in the context of an arbitrator who is a former judge, that "*judicial experience, by its nature, conditions the mind to independence of thought and impartiality of decision*".[8]

15. Thirdly, in accordance with the principles discussed further below from [35], a court
20 should not, in assessing whether an arbitration agreement is "*null and void*" within the meaning of s 7(5) of the IAA, make any assumptions that the arbitral tribunal will do anything other than resolve the dispute in accordance with the applicable law.

Expenses and practical burden are not captured by art III(8) (cf CAB 67 at [2](c))

16. The third ground on which the appellant contends that the arbitration agreement falls foul of art III(8) of the Australian Rules is an argument that, because of additional expenses or burdens with arbitrating in London, the agreement "*is apt to impede its pursuit of that claim, or at least to encourage it to settle for less*": AS [12].

17. There was no error in the Full Court's rejection of a similar argument advanced below (J [45] CAB 40; cf AS[13]), because art III(8) is directed not to the mechanisms under

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[6] See, e.g., *Arbitration Act 1996* (UK) s 24 (conferring the court with power to remove any arbitrator where "*circumstances exist that give rise to justifiable doubts as to his impartiality*").

[7] See *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* [2023] WASCA 88 at [69]-[70] and [184] (Quinlan CJ, Beech and Vaughan JJA).

[8] *Bolkiah v State of Brunei Darussalam (No 3)* [2007] UKPC 62 at [18] (Lord Bingham, quoting with approval from the Court of Appeal of Brunei).

which the Rules may be enforced or the costs and burdens in seeking their enforcement, but to whether the liability of the carrier is relieved or lessened "*for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in [art III] … otherwise than as provided in these Rules*".[9] Even in the context of exclusive jurisdiction clauses, a mere procedural advantage to litigating in the forum has never been sufficient to displace the clause.[10] That is *a fortiori* where an arbitration agreement is sought to be enforced and there is no discretion to refuse the same if a valid agreement exists.[11]

18. In any event, this contention suffers from the absence of any evidence below that establishes arbitrating in London would be more expensive or burdensome for the appellant, impede its pursuit of the claim or encourage it to settle for less. In this Court, all that the appellant seeks to rely upon are conclusory statements from a United States decision (AS [53]) that was subsequently overruled by its Supreme Court (see [46] below), and some US academic commentary (AS [54] and [59]), including the results of a survey of a small number of cases (only 34) containing anecdotal stories of a kind that could not possibly form the basis for a rational finding of fact by a court. The appellant points to no other decision or jurisdiction that supports this third ground.

19. Even if it were to be accepted that the requirement to arbitrate overseas for some claims might disincentivise pursuing the claim, that is not so in all cases. Here, the appellant's claim is for an amount that is far from trivial (AS [61]; ABFM 19) and it cannot be inferred that it would be disinclined to pursue this claim through arbitration in London or that doing so would in any way affect the amount for which it is willing to settle.[12]

20. There is also not even a basis for finding that arbitrating this dispute in London is more expensive or burdensome than in a court proceeding in Australia.[13] As discussed further below, the question of whether the arbitration agreement is "*null and void*" arises in the context of an application under s 7(2) of the IAA. Under ss 39(1) and (2)(b) of the IAA, the Court must consider that question having regard to "***the fact***

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[9] See *Vimar Seguros v Reaseguros, SA v M/V* ***Sky Reefer***, 515 US 528 at 534-36 (1995) and [46] below.

[10] *The Media* (1931) 41 Lloyd's Law Rep 80 at 82 (Lord Merivale); *Incitec Ltd v Alkimos Shipping Corp* (2004) 138 FCR 496 at 506 (Allsop J); *Australian Health and Nutrition Association Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419 at [101]-[102] (Bell P).

[11] See, e.g., *Haendler & Natermann GnbH v. Mr. Janos Paczy* [1981] 1 Lloyd's Rep 302 at 307, finding that impecuniosity and inability to pursue arbitration was not an exception to art II of the NY Convention.

[12] Nor can or should it be inferred or assumed that the costs of obtaining redress in the agreed venue "*will exert downward pressure on what the carrier would be likely to pay as a settlement*": cf AS[12].

[13] The appellant would also ordinarily be entitled to its costs if successful in an arbitration.

***that**: (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes* ...” (emphasis added).

21. The purpose of s 39, as explained in the Explanatory Memorandum to the Bill introducing the same,[14] was to respond to concerns “*raised consistently*” that “*courts did not have sufficient guidance when interpreting the Act – particularly with regard to the principles that underpin arbitration and the international aspect of the operation of the Act*”. It was included against a background of what had been perceived as an historical hostility of courts towards arbitration.[15] It would be contrary to s 39(2)(b) of the IAA for a court to find that a condition in s 7(5) is satisfied on account of a finding
10 that is contrary to the “*fact*” so deemed in s 39.

22. The matters that the appellant identifies as leading to a greater burden (AS [12]) are also wrong as a matter of arbitral law and practice. There is no requirement for the appellant to engage two teams of legal representatives; foreign lawyers are able to appear in international arbitrations in London, even if they are not admitted in England.[16] The appellant also does not need to engage any expert witnesses on Australian law, as it is not a “*foreign law*” or a question of fact in an international arbitration where Australian law governs an issue in dispute.[17] Arbitral tribunals are also not subject to specific rules of evidence,[18] and counsel are free to (and regularly do) make submissions on the law governing the dispute especially where, as here, the
20 relevant Australian law encompasses international and uniform rules. If the appellant still had any concerns, it could appoint an Australian lawyer (if not a former judge) as its chosen arbitrator: see LMAA Terms, art 8(b).

23. Even the fact of the arbitration being seated in London does not evidence additional expense or burden beyond court proceedings in Australia. Under the agreed arbitral rules, hearings can take place by video-conference or other media (LMAA Terms, art 15(c)), or even held (if convenient to all parties) in a place outside London: *Arbitration Act 1996* (UK), s 34(2). In disputes of this kind where witnesses are often located overseas (and on ships), travel costs are incurred wherever a proceeding is held.

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14 Explanatory Memorandum to the International Arbitration Amended Bill 2009 (Cth) at [177].

15 See *Raguz v Sullivan* (2001) 50 NSWLR 236 at [46] and [50] (Spigelman CJ and Mason P); ***Mitsubishi*** *Motor Corp v Soler Chrysler-Plymouth Inc*, 473 US 614 at 638 (1985).

16 *Arbitration Act 1996* (UK), s 36.

17 See *Redfern and Hunter* at [6.151]-[6.152].

18 See *Arbitration Act 1996* (UK), s 34(2)(f); London Maritime Arbitrators Association (**LMAA**) Terms 2021, art 15(a) (which are the relevant arbitral rules under the bill of lading: see ABFM 13, cl 4).

24. The fact that the appellant may also be required to participate in two different proceedings – an arbitration in London against the carrier and proceedings in Australia against the party contracted by the appellant to load the cargo onto the ship – is not something that lessens the liability of the carrier in any way nor is it a product of the arbitration agreement itself. It is a consequence of the mandatory stay under s 7(2) of the IAA and the appellant's choice to bring different claims against different parties. Two proceedings would arise even under an Australian arbitration agreement.

25. In sum, even if the appellant was correct on its construction of art III(8) of the Australian Rules, and all that was required to render an arbitration agreement void was to establish a "*potential*" that the relevant liability of the carrier "*might*" be lessened by that agreement, the appellant has failed to meet even this threshold on the only three grounds upon which it relies. The appeal should therefore be dismissed.

26. ***The proper construction of art III(8) of the Australian Rules***. The appeal becomes more unsustainable when one has regard to the proper construction of art III(8) of the Australian Rules. Contrary to AS [8], [30], [42] and [47] it is insufficient for a party seeking to rely on art III(8) to merely show that the carrier's liability "*might*" be lessened – at which point the burden shifts to the carrier to prove otherwise (and if it does not, the clause is void). The burden is instead on the party relying on art III(8) to establish as a fact that an arbitration agreement itself *would* relieve or lessen the carrier's liability otherwise than as provided in the Rules. Not even the appellant argues that this threshold is met here. For the reasons outlined below, an arbitration agreement would rarely (if ever) be found to meet this threshold.

The proper framework for considering the validity of an arbitration agreement

27. Because it is agreed that the Australian Rules apply to the bill of lading in issue, it is not necessary for this Court to resolve whether ss 8 and 10 of COGSA, read with art 10 of the Australian Rules, "*demand application … irrespective of the identity of the lex causae*".[19] However, it is of some importance that the question of the application of art III(8) of the Australian Rules to an arbitration agreement arises, as here, in the context of an application for a stay under s 7(2) of the IAA; the determination of that application in favour of the first respondent being fatal, in turn, to the appellant's separate application for an anti-arbitration injunction: see: J[1]-[2] (CAB 28).

[19] Cf *Akai* (1996) 188 CLR 418 at 436.

28. Section 7(2) of the IAA mandates that the Court stay its proceedings and refer a matter to arbitration when the conditions of ss 7(1) and (2) are met; the Court retains no discretion.[20] The only exception is where "*the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed*": s 7(5). The proper framework in which to analyse the application of art III(8) of the Australian Rules, accordingly, is whether that provision renders the arbitration agreement "*null and void*" within the meaning of s 7(5) of the IAA.

29. This also follows from ordinary principles of statutory and treaty interpretation. Each of s 7 of the IAA and art III(8) of the Australian Rules gives effect to Australia's obligations under an international instrument.[21] Each provision, accordingly, must be interpreted in light of the principles outlined at [11] above.

30. Relevantly, art 31(3)(c) of the VCLT requires any treaty to be interpreted with regard to "*any relevant rules of international law applicable in the relations between the parties*", which includes other treaties.[22] In circumstances where 172 of the 193 member states of the United Nations are parties to the NY Convention,[23] art III(8) needs to be interpreted having regard to states' obligations thereunder. Further, it is an accepted principle of international law that, when two treaty provisions operate on the same subject matter, priority should be given to the norm that is more specific.[24] On enforcing an arbitration agreement, art II of the NY Convention is the more specific norm, as it encompasses a "*code*" that establishes a "*common international approach*" to the question of the enforcement of arbitration agreements.[25]

31. There are, in turn, three important principles that arise from the obligations under art II of the NY Convention (and consequently s 7 of the IAA) and to which the appellant fails to have regard in its postulated interpretation of art III(8) of the Australian Rules.

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[20] *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 349-50 (Deane and Gaudron JJ); *DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd* [2022] WASCA 97 at [128].

[21] Section 7 of the IAA gives effect to Australia's obligations under art II of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (**NY Convention**). Article III(8) of the Australian Rules gives effect to the Hague-Visby Rules, as discussed at [11] above.

[22] See, e.g., ILC, *Fragmentation of international Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.702 (18 July 2006) at [18].

[23] See https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

[24] See, e.g., *Mavrommatis Palestine Concessions Case* [1924] PCIJ (ser A) No 2 at 31; *Beagle Channel Arbitration (Argentina v Chile)* (1977) 21 RIAA 53 at [39]; *Rudolf Gabriel* (C-96/00) [2002] ECR I-6384 at [35]-[36].

[25] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2017] 1 WLR 970 at [41] (Lord Mance JSC); ***GreCon** Dimter Inc v JR Normand Inc* [2005] 2 SCR 401 at [42]-[45]. See also *Lindo v NCL (Bahamas) Ltd*, 652 F 3d 1257 at 1285 (11th Cir, 2011); *Renusagar Power Co Ltd v General Electric Co*, AIR 1994 SC 860 at [35]-[37]; Born, *International Commercial Arbitration* (3rd ed 2021) at §1.04[A][1][c].

The first is that art II of the NY Convention gives effect to an international public policy that encourages the recognition and enforcement of arbitration agreements in international commercial contracts,[26] seen to be essential "*to the smooth working of international commerce*".[27] This policy counts against any interpretation of art III(8) of the Australian Rules that is antithetical to arbitration agreements in and of themselves, including a principle that would invalidate such agreements upon mere speculation that arbitration *might* lessen liability: cf AS [12].

32. The second principle, which is related to the first, is that there is a presumptive validity of arbitration agreements.[28] Article II(3) of the NY Convention requires a court of a contracting state to refer matters covered by an arbitration agreement to arbitration, "***unless** it finds that the said agreement is null and void, inoperative or incapable of being performed*" (emphasis added). The default position is that the arbitration agreement is to be enforced; it is only if the relevant exception is established that this is overridden. The same presumption is found in ss 7(2) and (5) of the IAA.

33. Consistent with that presumption, it is well-accepted that the burden is on a party resisting a referral to arbitration to establish that the agreement is "*null and void*".[29] The construction proffered by the appellant, which would have art III(8) render void an arbitration agreement upon a party merely asserting that it *might* lessen the carrier's liability and unless the other party proves otherwise (AS [8] and [30]), is wholly inconsistent with this principle. It is also inconsistent with the general principle at international law that a party seeking to establish a fact bears the burden of proving it.[30] As the Appellate Body of the World Trade Organisation has said, no "*system of judicial settlement could work if it incorporated the proposition that the mere assertion*

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[26] See, e.g., *TCL* (2013) 251 CLR 533 at [41] (Hayne, Crennan, Kiefel and Bell JJ); *Mitsubishi*, 473 US 614 at 631 (1985); *International Insurance Co v Caja Nacional De Ahorro y Seguro*, 293 F 3d 392 at 399 (7th Cir, 2002); *AT&T Mobility LLC v Concepcion*, 563 US 333 at 345-46 (2011).

[27] *TCL* (2013) 251 CLR 533 at [10] (French CJ and Gageler J, quoting ***Comandate** Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [193]).

[28] *The Rena K* [1979] QB 377 at 392-93; *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 3)* (1998) 86 FCR 374 at 393; *Joint Stock Company 'Aeroflot-Russian Airlines' v **Berezovsky*** [2013] 2 CLC 206 at 232 (Aikens LJ); *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 at [7]. See generally Paulsson, *The 1958 New York Convention in Action* (2016) at 64; Born, *International Commercial Arbitration* (3rd ed 2021) at §1.04[A][1][c][i].

[29] *Norfolk Island v SMEC Australia Pty Ltd* (2004) NFSC 1 at [100] (Beaumont CJ); *Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd* (2017) 52 VR 198 at [38] (Croft J); *Hancock Prospecting Pty Ltd v **Rinehart*** (2017) 257 FCR 442 at [141]-[144] (Allsop CJ, Besanko and O'Callaghan JJ); *Berezovsky* [2013] 2 CLC 206 at 231.

[30] See, e.g., *The Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ Rep 6 at 15-16; *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA) (Jurisdiction and Admissibility)* [1984] ICJ Rep 392 at 437 [101]; *Oil Platforms (Iran v USA) (Judgment)* [2003] ICJ Rep 161 at 189 [57].

of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof."[31]

34. A finding that an arbitration agreement is "*null and void*" within the meaning of art II of the NY Convention (and s 7(5) of the IAA) is also not one that is to be made lightly; it is limited "*to circumstances where it is commonly internationally recognised that the consequence of the vitiating consideration is to nullify or render void a contract, such as in the consequence of … **fundamental** policies*" (emphasis added).[32] As the Canadian Supreme Court has said, in light of the NY Convention's policy, "*where there is doubt, the [court] should opt for the solution that tends to ensure that arbitration agreements are binding*".[33]

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35. The <u>third</u> principle is that courts do not, when giving effect to art II of the NY Convention and statutory provisions enacting the same, predetermine how arbitrators are to resolve the merits of the dispute.[34] This was ultimately the principle applied by the Full Court below when finding that various matters as to the interpretation of the Australian Rules were matters for the Tribunal on which it was inappropriate for the Court to speculate: J [41] and [43] (CAB 39-40).

36. An application of this third principle is seen in *Mitsubishi*, 473 US 614 (1985). There, in finding that a claim under the US anti-trust statute was arbitrable, the Court rejected (at 634) an argument that arbitrators would "*pose too great a danger of innate hostility to the constraints on business conduct that antirust law imposes*" and, in a passage since quoted with approval by Gleeson CJ in *Francis Travel* (1996) 39 NSWLR 160 at 166, said (at 636-37) that there "*is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism*" or not "*decide that dispute in accord with the national law giving rise to the claim*".

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[31] *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WTO Doc WT/DS33/AB/R (25 April 1997) at p 14.

[32] *Rinehart* (2017) 257 FCR 442 at [381]. See also *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazoni v Lauro*, 712 F 2d 50 at 54 (3rd Cir, 1983); *Bautista v Star Cruises*, 396 F 3d 1289 at 1294-95 (11th Cir, 2005)

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

[34] ***Francis Travel*** *Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 166 (Gleeson CJ, Meagher and Sheller JJA agreeing); *Comandate* (2006) 157 FCR 45 at [245]; *TCL* (2013) 251 CLR 533 at [13]-[14]; *Sky Reefer*, 515 US 528 at 540-41 (1995).

37. In other words, when a court is applying art II of the NY Convention (via s 7 of the IAA), it is not appropriate to presume that an arbitral tribunal will ignore or misapply the Australian Rules when they are applicable. Rather, and as the Supreme Court went on to recognise in *Mitsubishi* (at 638), a tribunal's failure to do so would instead be a matter taken into account on any recognition or enforcement of an award. It may also be a basis for lifting a stay that had been previously ordered under s 7(2) of the IAA.[35] This is not an unusual or peculiar principle; it has been recognised in other contexts that there are problems with an Australian court sitting in judgment on the ability or willingness of other fora to accord justice in the particular case.[36]

10 38. When the application of art III(8) of the Australian Rules is considered in light of these principles, the appellant's contention that it operates to void an arbitration agreement on the mere "*potential*" that an arbitrator "*might*" resolve the dispute in a manner that lessens the relevant liability of a carrier (AS [8]) is unsustainable. It presumes the *invalidity* of an arbitration agreement whereas international law adopts the opposite, it shifts the burden away from the party relying on art III(8) contrary to ordinary principles and the burden allocation in s 7(5) of the IAA, and it presumes an arbitrator will resolve a dispute otherwise than in accordance with the Australian Rules contrary to the presumption that applies when considering a mandatory stay.

39. There is nothing in the text, context or purpose of art III(8) of the Australian Rules that 20 indicates an intention to override these core principles under the NY Convention to readily render arbitration agreements "*null and void*". And contrary to AS [8], it is not at all "*well-established*" that art III(8) is even capable of avoiding arbitration clauses. To the contrary, in none of the cases on which the appellant relies was art III(8) applied to render void an arbitration agreement. Even in *Indussa Corp v Ranborg*, 377 F 2d 200 (2nd Cir, 1967), a case since overruled (see [45] to [50] below) but on which the appellant places significant reliance (AS [50]-[54]), the Court expressly observed (at 204, n 4) that its findings did not affect arbitration clauses.[37]

40. When one considers the validity of the arbitration agreement in its proper context, it is difficult to conclude that an arbitration agreement in and of itself could ever fall foul 30 of art III(8) of the Australian Rules.

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35 Cf *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB) at [88]-[96] (Tugendhat J).

36 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 559 (Mason CJ, Deane, Dawson and Gaudron JJ); *Carnival Plc v Karpik (Ruby Princess)* (2022) 294 FCR 524 at [36] (Allsop CJ).

37 Albeit, until 1995, some US courts had applied *Indussa* to arbitration agreements: e.g., *State Establishment for Agricultural Product Trading v M/V Wesermunde*, 838 F 2d 1576 (11th Cir, 1988).

The text and context of art III(8)

41. This is consistent with the text of art III(8). On its text, what is rendered "*null and void*" are clauses "*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 [art III] or lessening such liability otherwise than as provided in these Rules*". These are not words of possibility, but of probability. They are directed not to clauses that "*might*" lessen liability, but to clauses that do. The language of art III(8) is not neutral: cf AS [15].

42. The text of art III(8) is also directed to clauses that effect a relieving or reduction of liability of a particular kind; the liability arising from negligence (etc) otherwise than as provided in the Rules.[38] An arbitration agreement, in turn, does not speak at all to the liability of the carrier such that, on its terms, art III(8) has no application to it.[39] This follows from how this Court construed art III(8) of the Hague Rules in ***William Holyman** & Sons Pty Ltd v Foy & Gibson Pty Ltd* (1945) 73 CLR 622. There, a majority found that a clause deeming the value of each package of goods to be £5 did not fall within art III(8) of the Hague Rules, because it was not itself directed to the liability of the carrier but instead concerned an agreed value for the goods.[40]

43. To the extent that any arbitration results in a lessening of liability otherwise than provided under the Rules, that would not be the product of the arbitration agreement itself, but of something in addition to the arbitration agreement, such as the existence of a choice of law clause that leads to arbitrators applying another law. Consistent with the well-recognised separability principle,[41] that would not then be a ground for finding the arbitration agreement itself "*null and void*", even if art III(8) made the choice of law clause void. And consistent with the principles discussed at [35] above, a court should not presume, in considering if the separate arbitration agreement is "*null and void*", that the arbitrators would nonetheless ignore the Australian Rules.

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[38] *The "Benarty"* [1984] 2 Lloyds Rep 244 at 250.

[39] See also *Maharani Woollen Mills Co v Anchor Line* [1927] 29 Lloyd's Law Rep 169 (Scrutton LJ, in rejecting an argument that art III(8) struck down a foreign arbitration clause in a bill of lading governed by English law: "*the liability of the carrier appears to me to remain exactly the same under the clause. The only difference is a question of procedure – where shall the law be enforced?*"); *Sky Reefer*, 515 US 528 at 537 (1995).

[40] (1945) 73 CLR 622 at 629 (Latham CJ), 631 (Rich J), 632 (Starke J), 633 (Dixon J) and 641 (Williams J), although the clause was instead found to be invalid under art IV(5) of the Hague Rules.

[41] *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 at [13] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

44. Indeed, in *The Hollandia* [1983] AC 565, Lord Diplock (at 576) distinguished an arbitration agreement from an exclusive jurisdiction clause that was coupled with a foreign choice of law clause. Contrary to AS [35], this was not on the basis of arbitrators finding the *arbitration* clause itself to be void, but rather His Lordship recognised that, in an arbitration, the *choice of law* clause may not exclude the application of the Hague-Visby Rules because arbitrators would not necessarily apply that clause if it were invalid under, for example, the law of the place of contracting. His Lordship's observations that arbitrators would more readily apply an applicable "*mandatory law*" of a place other than that specified in the choice of law clause is consistent with arbitral practice,[42] and the duty of arbitrators to issue an enforceable award.[43] A court, in contrast, is bound to apply its choice of law rules, which may not allow the application of what another jurisdiction considers to be a "*mandatory law*".

45. All of this is consistent with the approach taken by the United States Supreme Court in *Vimar Seguros y Reaseguros, SA v M/V **Sky Reefer***, 515 US 528 (1995). Unlike *The Hollandia*, *Sky Reefer* concerned a bill of lading that contained an arbitration agreement. The petitioner argued that §3(8) of the US COGSA (which applies art III(8)) invalidated the arbitration agreement because it increased the transaction costs of obtaining relief and there was a risk that the foreign arbitrators would not apply the US COGSA: at 533. The majority rejected both of those arguments.

46. As to the argument concerning increased transaction costs, the majority (at 534-35) overruled *Indussa* and found that the relevant lessening of liability to which §3(8) was directed was the specific liability imposed by the Act, not the mechanisms for enforcing that liability. At 536, the majority observed that if the application of the section was answered by reference to the costs and inconvenience for the cargo owner, there was no reason in principle why it would not then apply to domestic forum clauses as well, leading to an "*unwieldy*" situation in which courts had to "*tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier*", all of which was "*unsupported by the terms or policy of the statute*". The same analysis equally applies to art III(8): see [16]-[24] above.

47. As to the argument of the risk that the foreign arbitrators may not apply the US COGSA, the majority said (at 537) that such an argument "*must give way to*

[42] See Born, *International Commercial Arbitration* (3rd ed 2021) at §19[B][3] and fn 499 and the authorities collected therein; *Redfern and Hunter* at [3.118]-[3.121] and [3.140]-[3.154].

[43] See generally Günther Horvarth, "The Duty of the Tribunal to Render an Enforceable Award" (2001) 18 *Journal of International Arbitration* 135.

contemporary principles of international comity and commercial practice" and, applying *Mitsubishi* (among other cases), found (at 538-40) that the NY Convention cautioned against courts readily interpreting legislation in a manner that would violate arbitration agreements. This was especially when, on an application for a stay of proceedings, it was premature to make any findings as to what law arbitrators might apply. The majority found (at 540-41) that, in the first instance, it was a matter for the arbitrators to determine what law applies and the relevant provisions of the *Federal Arbitration Act* (implementing art II of the NY Convention) mandated the stay. If the arbitrators failed to apply the US COGSA and in a way that lessened the liability of
10 the carrier contrary to COGSA, the majority (at 540-41) indicated that any award of the arbitrators would not then be enforceable in the United States and the court (which, notwithstanding the stay, retains jurisdiction) could deal with the matter accordingly.

48. The appellant's criticisms of *Sky Reefer* (AS [55]-[59]) are misplaced. First, the suggestion that *Sky Reefer* adopted a "*substance/procedure*" distinction that had been rejected in *The Hollandia* is not correct. In *The Hollandia* [1983] AC 565, Lord Diplock (at 574-75) did not say anything at all as to whether mere increased costs in litigating in the chosen forum were capable of engaging art III(8). What his Lordship rejected was the argument that a forum jurisdiction clause is *always* valid because it only prescribes the procedure by which disputes are to be resolved. The reason for
20 rejecting this argument was not because of a rejection of the kind of analysis adopted in *Sky Reefer*, but because in that case giving effect to the exclusive jurisdiction clause, when combined with the choice of law clause, "***would** have the effect*" (emphasis added) of allowing the shipowner to lessen its liability. That was because it was "*established as a fact*" that the chosen forum "***would** apply*" (emphasis added) a domestic law that was more favourable to the shipowner than the Hague Rules.

49. Lord Diplock's reasoning in *The Hollandia* is wholly *in*consistent with a construction of art III(8) that operates on mere possibilities or speculation alone. His Lordship accepted (at 574) that a foreign jurisdiction clause was not *ex facie* invalid and only became so in certain circumstances when it "*would*" lead to a situation where the
30 carrier's liability was lessened: cf AS [67]. His Lordship's use of "*would*" and reference to the lessening effect being "*established as a fact*" (either by evidence or the common agreement of the parties (as acknowledged at AS [32] n 44)) assume that art III(8) operates on probabilities rather than possibilities. The circumstances in which

that probability can arise for exclusive jurisdiction clauses are not circumstances that arise with respect to arbitration agreements, for the reasons addressed at [35] and [43].

50. The appellant's attempt (at AS [56]) to distinguish *Sky Reefer*, on the basis that the Federal Court's scope or opportunity for reviewing an award is limited, misconstrues that case. The ability of a court to review a foreign award in the United States is just as limited; both countries give effect to the provisions of the NY Convention and there is no ability in either country to appeal an award.[44] What the Supreme Court referred to (at 540) as the "*subsequent opportunity for review*" was the fact that any arbitral award that was the product of a refusal to apply the US COGSA would likely be refused recognition and enforcement on public policy grounds. That, in turn, would mean that the existence of the award was no impediment to the court – which had retained jurisdiction and only stayed its proceedings (see at 541) – from itself resolving the dispute that had been the subject of an unrecognised award. That is why an arbitration agreement cannot *ex facie* be invalid under art III(8), because it does not itself operate in a way that lessens the carrier's liability nor, contrary to AS [66], could it operate in a way that ultimately succeeds in lessening liability.

51. The express inclusion of "*benefit of insurance*" clauses in art III(8) does not support the appellant's construction either. As Lord Diplock noted in *The Hollandia* [1983] AC 565 at 575,[45] the question of whether a clause falls foul of art III(8) is determined in the circumstances where the shipowner seeks to rely upon that clause. If a shipowner seeks to rely upon a benefit of insurance clause, it does so in order to reduce (or remove) its liability by claiming against the cargo owner's insurer. Contrary to AS [25], there is nothing speculative or conditional about that clause; when the clause applies its purpose and effect is to lessen the carrier's liability and it falls squarely within the text of art III(8). When an arbitration agreement is relied upon, however, that has no bearing on the liability of the carrier, especially when (as here) the parties have agreed for the tribunal to apply the Australian Rules.

Purpose and history

52. The first respondent's construction of art III(8) is also consistent with the object and purpose of the Australian Rules. These Rules, like the Hague Rules more generally, embody a compromise as to the allocation of risk for cargo damage in a context where

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[44] See IAA, s 8; *Federal Arbitration Act*, 9 USC §§9-11 and 201.
[45] See also *Akai* (1996) 188 CLR 418 at 446.

carriers had (until legislative intervention) increasingly exempted all liability in standard-form bills of lading.[46] Article III(8) forms part of an overall bargain struck under which carriers were subject to certain liabilities that could not be excluded by contract, but they could also benefit from various defences and limitations.[47] In other words, art III(8)'s purpose is to protect that part of the compromise imposing liability on carriers by voiding clauses that *do* relieve or lessen the liability allocated to the carrier in the Rules. It does not seek to confer any wider benefit on shippers.

53. Thus, and contrary to AS [24], there is no warrant for giving art III(8) such a broad reading that it confers shippers with the power to avoid whatever contractual term that subsequently displeases them on a mere assertion that the term "*might*" lessen a carrier's relevant liability. If art III(8) sought to adopt a lesser burden of proof than that which ordinarily applies at international law, it would do so expressly: cf, e.g., arts IV(1) and IVA(1).[48] Other provisions of the Rules also make clear that they do not seek to unduly interfere with party autonomy beyond the allocation of risk in arts III and IV: see arts VI-VII.

54. Further, the history of the Hague Rules indicates that art III(8) never intended to restrict party autonomy as to the venue in which any disputes are to be determined. The Rules themselves were drafted and then adopted against a background of domestic legislation around the world that had, through provisions in *pari materia* to what had become the Hague Rules, addressed exculpatory clauses in bills of lading, including with provisions near-identical to art III(8).[49] Some of those statutes, such as s 6 of the *Sea-Carriage of Goods Act 1904* (Cth), expressly voided clauses that sought to apply a foreign law or select foreign courts for certain shipments. The Canadian statute included such a provision,[50] and despite that Act being the principal model for the Hague Rules,[51] an equivalent provision was not then included in the Rules.

55. That was a deliberate choice. When proposals were advanced to include within the Hague Rules certain provisions dealing with which courts would have jurisdiction, they were met "*with a great deal of opposition*", including on grounds that it was "*not*

46 See *Great China* (1998) 196 CLR 161 at [10]-[16] (Gaudron, Gummow and Hayne JJ).

47 *Ontario Bus Industries Ltd v The Federal Calumet* [1992] 1 FC 245 at 258 (Strayer J).

48 See also *Great China* (1998) 196 CLR 161 at [22] (Gaudron, Gummow and Hayne JJ).

49 See, e.g., 46 USC App §§ 190-196 (1893) (the *Harter Act*); *Sea-Carriage of Goods Act 1904* (Cth); *Carriage of Goods Act 1901* (Can); *Shipping and Seaman Act 1908* (NZ), ss 293-304.

50 *Carriage of Goods Act 1901* (Can), s 5.

51 Studley (ed), *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Prèparatoires of the Hague Rules* (1990) (***Legislative History***), vol 1 at 8. See also, e.g., at 187-88.

the business of an Association of lawyers" to tell businesspeople where to resolve their disputes,[52] and fears that it would lead to states jockeying for exclusive jurisdiction.[53] It could not have been the purpose of art III(8), in light of this history, to then have a presumptive effect of invalidating jurisdiction clauses (including arbitration agreements) on speculative bases that such clauses "*might*" lessen a carrier's liability.

56. That art III(8) does not have this effect is also clear from the legislative history of COGSA itself. When the Hague Rules were enacted in Australia through the passing of the Sea-Carriage of Goods Bill 1924 (Cth), the legislature adopted the same provision that had existed in the 1904 Act and which invalidated certain choice of law and jurisdiction clauses, but it also extended that provision to cover both inbound and outbound shipments. In explaining the reasoning for this, the Second Reading speech observed that "*[a]t present the ship-owner can only be sued abroad in his own courts, but the proposal in the bill will give the Australian importer redress in our own courts*".[54] Implicit in that statement was a recognition that art III(8) of the Hague Rules did not itself prevent the enforcement of exclusive jurisdiction clauses, which required a separate provision dealing with such clauses. The same point was made when s 11 of COGSA was introduced.[55] These provisions never extended to interstate shipments.

57. The appellant's submissions at AS [66]-[67] also prove too much, as they demonstrate how inapposite and unworkable their construction is. On their construction, a raft of clauses may be struck down on a mere hypothetical possibility that, depending on circumstances sometime in the future, the clause might operate in a way that lessens the carrier's liability, even though in many cases that may never occur. Their construction would have the effect of rendering void every arbitration agreement or every jurisdiction clause (even one that selects the courts of Australia) because there is always the hypothetical possibility that a decision maker might make an error and decide that the Australian Rules do not apply. On its plain terms, art III(8) only seeks to invalidate clauses that *do* relieve or lessen liability and that is the question a decision-maker must determine. The appellant, in any event, misreads *The Hollandia* (cf AS [67]) as Lord Diplock found (at 574-75) that the exclusive jurisdiction clause

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52 Ibid, vol 2 at 416 and 421.
53 Ibid, vol 2 at 152.
54 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 1924 at 3353 (Mr Pratten).
55 Commonwealth, *Parliamentary Debates*, Senate, 14 August 1991 at 300 (Senator Tate).

in issue would be valid in some circumstances but not others; it depended upon the dispute. Here, the dispute is one where all parties agree that the Australian Rules apply.

Case law does not support the appellant's construction

58. The appellant's construction of art III(8) of the Australian Rules is also not supported by case law, either from Australia or elsewhere. Indeed, and as noted earlier, none of the cases relied upon by the appellant found that an arbitration agreement was "*null and void*" within the meaning of art II of the NY Convention by reason of art III(8). The one case that considered this issue – *Sky Reefer* – is against the appellant.

59. Starting with *Akai* (1996) 188 CLR 418, this case did not concern art III(8). While the majority had regard (at 446-47) to cases considering the equivalent of art III(8), they observed that in such cases jurisdiction clauses were held void "*on proof that the foreign court would not impose liability*", not on mere possibilities. In considering the operation of s 52 of the *Insurance Contracts Act 1984* (Cth), the majority in *Akai* also did not (cf AS [29]-[30]) adopt an approach that permitted a party to simply assert that a forum clause would deprive it of a juridical advantage and then shift the burden to the other party to prove otherwise. The quoted passaged at AS [29] was in the context of considering whether there were "*strong reasons*" to not enforce an otherwise valid exclusive jurisdiction clause. These principles, and the approach referred to in AS [31], are inapplicable to an arbitration agreement where there is no such discretion left to the Court under s 7 of the IAA.

60. Further, the majority's statement in the quoted passage at AS [29] followed an earlier finding (at 444) that, in the absence of any expert evidence on English law, the presumption applied that English courts would use the same choice of law rules as Australian courts. It was this presumption that the respondent bore the onus to disprove. Absent evidence on English law, the majority found (at 445) that the presumed choice of law rules had the result that an English court "*would apply*" English law to the exclusion of s 54 of the Australian statute. That was why the Court considered that there was a juridical advantage with the proceedings remaining in Australia; it did not simply accept a mere assertion by the appellant of that fact. When the majority came to consider s 52 of the *Insurance Contracts Act* (at 447-48), their Honours found that the section applied because of their earlier finding (at 445) that "*English courts would apply*" (not "*might*" apply) English law.

61. As to the English authorities, *The Hollandia*, as observed at [49] above, is contrary to a speculative test of the kind advanced by the appellant (cf AS [35]), and distinguished

the position of arbitration agreements. The case of *Baghlaf Al Zafer Factor Co v Pakistan National Shipping Co (No 2)* [2000] 1 Lloyd's Law Rep 1 also does not assist the appellant: cf AS[32]-[34]. The case did not concern any application of art III(8); nor did the Court find that the exclusive jurisdiction clause in issue was void. The uncertainty there concerned an undertaking to waive an expired time bar, and it was a case as to whether a stay of English proceedings in pursuance of an exclusive jurisdiction clause should be lifted when new circumstances came to light that would have led the Court to exercise its discretion differently. None of this is relevant to art III(8) nor to the enforcement of an arbitration agreement where no discretion exists.

10 62. The Belgian cases on which the appellant relies (AS [36]-[39]) are similarly inapt. The cases do not concern arbitration agreements and appear to be based on a Belgian law principle that, as a matter of public policy, Belgian courts can retain jurisdiction unless there is sufficient certainty that a foreign court will apply an "*imperative*" Belgian law. None of these cases suggest that this is required of art III(8) itself and without understanding the bases on which the principles discussed in these cases arise, great caution should be exercised in drawing any support therefrom. Indeed, Belgian law appears to have had a notorious history with unusual interference in contractual forum or arbitration clauses,[56] the European Court of Justice has found that the principles applied in these cases are inconsistent in certain circumstances with applicable

20 international conventions,[57] and the Belgian Court of Cassation has overturned a similar principle that had operated with respect to a Belgium distributor statute, finding that the approach to retaining jurisdiction was inconsistent with arbitration law and with Belgium's international obligations concerning choice of law clauses.[58]

63. The Hong Kong and Singapore cases (AS [40]-[47]) do not support the appellant's construction, not only because they were not concerned with arbitration agreements, but also because in each case it was found as a fact that enforcing the jurisdiction clause *would* lead to the application of a different law that lessened the carrier's liability.[59] Nor do those cases support the last sentence of AS [42] or the submission at AS[47]. In Hong Kong, in fact, it was found in *William Co v Chu Kong Agency Co Ltd* [1995]

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[56] See, e.g., Brekoulakis et al, *Achieving the Arbitration Dream* (2023) at 14-15.

[57] *Tilly Russ and Ernest Russ v NV Haven* (C 71/83) [1984] ECR 2418.

[58] See *Thibelo BV v Stölzle-Oberglas GmbH*, C.21.0325.N (7 April 2023), summarised in Van Bael & Bellis, (2023) 23(5) *VBB on Belgian Business Law* 1 at 4-5, and available (in Dutch) at: https://juportal.be/JUPORTAwork/ECLI:BE:CASS:2023:ARR.20230407.1N.6_NL.pdf.

[59] *The "Epar"* [1984] SGHC 16 at [20]-[21] ("*it is not seriously in doubt that …*"); *The Andhika Samyra* [1988] HKCFI 111 at p 8 ("*On the evidence before me, it is manifestly the case …*").

2 HKLR 139 at [51]-[55] that art III(8) did not void arbitration agreements, because the court was instead bound to apply art 8 of the Model Law (which mirrors art II of the NY Convention), and whether the arbitrators would apply a different law that lessened liability was a matter for the arbitrators (and thereby not to be assumed).

64. As to Canada (AS [48]), *The Regal Scout* (1983) 48 DLR (3d) 412 does not support art III(8) invalidating an arbitration agreement on the possibility only of a different law applying to lessen liability. It was instead found (at [31] and [34]) as a fact in that case that a Japanese court *would* apply a law that removed the shipowner's liability entirely. As for the United States (AS [50]-[59]), the position is that set out in *Sky Reefer*, which overruled the case on which the appellant relies, is inconsistent with the appellant's construction,[60] is wholly consistent with the construction advanced by the respondent, and reflects the proper approach a court should take to the application of art III(8) of the Australian Rules in light of Australia's obligations under art II of the NY Convention (as given effect in s 7 of the IAA).

65. The construction of art III(8) advanced by the appellant is, accordingly, unsupported by any authority applying the Hague-Visby Rules and is inconsistent with: (a) the text of art III(8) read in its context; (b) the international context in which art III(8) operates; (c) general principles of international law, including those concerning the burden of proof and those arising under the NY Convention; (d) the policy and operation of s 7 of the IAA; (e) the construction of art III(8) adopted by this Court in *William Holyman* (1945) 73 CLR 622; and (f) the approach to art III(8) that has been taken by courts in the United States, the United Kingdom, Hong Kong and Singapore. The appellant's construction is to be rejected and the appeal should be dismissed with costs.

Part VI: Estimate of time required

66. The respondent estimates that it will require half a day for oral argument.

Dated: 25 August 2023

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[60] *Sky Reefer*, 515 US 528 at 541 (1995) ("*mere speculation … does not in and of itself lessen liability*").

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

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

and

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BBC CHARTERING CARRIERS GMBH & CO KG
First Respondent

ONESTEEL MANUFACTURING PTY LTD
Second Respondent

ANNEXURE TO THE SUBMISSIONS OF THE FIRST RESPONDENT

No.	Description	Version	Provisions
Commonwealth statutory provisions			
1.	*Carriage of Goods by Sea Act 1991*	Current (Compilation No 11, 23 August 2017 – present)	7-11, scheds 1 and 1A
2.	*International Arbitration Act 1974*	Current (Compilation No 14, 18 February 2022 – present)	7, 16, 39, scheds 1 and 2
3.	*Sea-Carriage of Goods Act 1904*	As made (No 14 of 1904)	
4.	Sea-Carriage of Goods Bill 1924	As introduced (1 August 1904)	
International statutory provisions			
5.	*Arbitration Act 1996* (UK)	Current	24, 34, 36, 46
6.	*Carriage of Goods Act 1901* (Can)	As made (1901)	
7.	*Federal Arbitration Act*, 9 USC §1	As at 15 August 1990 (15 August 1990 – 3 March 2022)	9-11, 201
8.	*Harter* Act, 46 USC App § 190	As made (1893)	190-196
9.	*Shipping and Seaman Act 1908* (NZ)	As made (No 178 of 1908)	293-304

No.	Description	Version	Provisions
	International instruments		
10.	*Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958)	As made	Art II
11.	*International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* (1924)	As made	
12.	*Protocol amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* (1968)	As made	
13.	*Protocol amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, as amended by the Protocol of 23 February 1968* (1979)	As made	
14.	*Statute of the International Court of Justice* (1945)	As made	
15.	*Vienna Convention on the Law of Treaties* (1969)	As made	Arts 31-33