HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I: PUBLICATION

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

PART II: OUTLINE OF ORAL SUBMISSIONS

(1) How the issue arises

2. There are three ways in which enforcement of the arbitration clause might lessen the carrier's liability.

   a. ***First*** and foremost, the Tribunal might consider (quite correctly) that being seated in England and faced with a bill of lading purportedly governed by English law, it is *bound* to apply English law, including any English case law as to the proper interpretation of the Hague-Visby Rules. By contrast, a court hearing the matter in Australia would be required to give effect to the mandatory law of the forum (ie, s 8 of the Act), and thus to apply the Australian Hague-Visby Rules. While the *text* of the rules may be relevantly identical in both jurisdictions, the *interpretation* can and does sometimes vary between England and Australia; and one such issue where variance remains possible is as to the question of whether a carrier owes a non-delegable duty to ensure that the goods are properly loaded onto the vessel. In England, the answer to that question is settled: "no" (*Jindal Iron & Steel*). In Australia, the question

remains open, with the leading judicial and academic statements favouring "yes" (see AS[11]). Only in a court in Australia, mandatorily bound by s 8 to give effect to Australia's enactment of the Hague-Visby Rules, does the Appellant have the chance of contending successfully that a non-delegable duty exists. In England, the question has already been conclusively and bindingly determined; it does not.

b. ***Secondly***, the arbitral tribunal, may construe the clause paramount in the bill of lading as incorporating only arts I-VIII of the Hague Rules, which would reduce the carrier's liability to merely £100 per package (AS[10]).

c. ***Thirdly***, the expense and practical burden involved in litigating two related claims on opposite ends of the globe is apt to deter the Appellant from pursuing its arbitral claims, and to settle for less than it otherwise would.

3. These risks were treated by the FC as "speculative", "moot", and "academic" (FC [31], [31] and [43]). If that conclusion is right, then the shipper will always be the party to suffer in cases where there is doubt about the future. In other words, where uncertainty exists (as it usually does), the carrier will have the benefit of the doubt. That is the wrong approach to invalidity under art III(8). Instead, the shipper discharges its onus by showing that the clause, if enforced, *might* realistically lessen the carrier's liability.

4. Questions of invalidity of an arbitration clause should be determined when they are invoked. There is no warrant for an approach which declines to consider invalidity, or defers invalidity until post-award review (if any) on public policy grounds.

(2) The proper construction of Art III(8)

5. **Text.** The text is neutral. It does not expressly prescribe any standard of proof. Nor is it narrowly confined to English common law notions of "liability", the original and authentic French text instead invoking the broader concept of "responsabilité".

6. **Context.** Art III(8) is one of the very few pro-shipper rules in the Hague-Visby Rules. It is the *quid pro quo* for the many exemptions, rights, and caps on liability otherwise lavished on carriers under the Rules. To construe it narrowly would be to destroy the balance and the bargain that the Rules embody. Moreover, a contextual clue is found in art III(8) itself. It proscribes "benefit of insurance clauses"; and this it does for the avoidance of doubt, as the framers were "all quite clear that we mean to prohibit such a clause" (AS[25]). A benefit of insurance clause is a clause that *might* – not *will* –

lessen the carrier's liability. Whether it does so depends on whether the shipper's insurer agrees to indemnify the carrier. The delegates thus clearly did contemplate that art III(8) would invalidate clauses that *might* lessen the carrier's liability.

7. **Purpose.** The historical materials on purpose (AS [16]–[24]) are all quite clear. Art III(8) was designed to end the long winter of carriers using all kinds of creatively drafted clauses and "colourable devices" (AS[19]) to avoid paying compensation to shippers whose cargoes they had damaged, whether "directly or indirectly".

8. **Authorities**. Uniformity with other maritime nations is the goal in construing the Rules (AS[26]). The majority of maritime nations have construed the Rules consistently with the Appellant's construction: Australia (*Akai*), the United Kingdom (*The Hollandia*, *Baghlaf (No 2)*), Belgium (*SS Puerto Somoza, SS Germania, Afromar*), Hong Kong (*The Andhika Samyra, Milano Bridge*), Singapore (*The Epar*), Canada (*The Regal Scout*), and before *Sky Reefer*, the United States (*Indussa*). *Sky Reefer* is the outlier, but it has flawed reasoning and has amassed an impressive body of academic criticism for that. The dissent of Justice Stevens is to be preferred.

(3) BBC's counter-arguments

9. BBC contends that the difficulties identified by the Appellant are resolved by the undertaking and declaration. But as is apparently common ground, these will not be binding in the arbitration: s 33(1) of the *Civil Jurisdiction and Judgments Act 1982* (UK). Moreover, in any event, the undertaking only relates to "application", so BBC is free to submit to the Tribunal that the Tribunal is bound by the English law *interpretation* of the rules, notwithstanding that the text to be *applied* is that of the (relevantly identical) Australian HVR. BBC carefully chose not to offer an undertaking as interpretation even despite the Court's invitation to do so.

Dated: 17 October 2023

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